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## BOOK REVIEWS

### FIXING STATUTORY INTERPRETATION

JUDGING STATUTES. By Robert A. Katzmann. New York, N.Y.: Oxford University Press. 2014. Pp. xi, 171. \$24.95.

*Reviewed by Brett M. Kavanaugh\**

Statutory interpretation has improved dramatically over the last generation, thanks to the extraordinary influence of Justice Scalia.<sup>1</sup> Statutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls.<sup>2</sup> The text of the law is the law. As Justice Kagan recently stated, “we’re all textualists now.”<sup>3</sup> By emphasizing the centrality of the words of the statute, Justice Scalia brought about a massive and enduring change in American law.

But more work remains. As Justice Scalia’s separate opinions in recent years suggest, certain aspects of statutory interpretation are still troubling.<sup>4</sup> In my view, one primary problem stands out. Several substantive principles of interpretation — such as constitutional avoidance, use of legislative history, and *Chevron* — depend on an initial determination of whether a text is clear or ambiguous. But judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way.

The upshot is that judges sometimes decide (or appear to decide) high-profile and important statutory cases not by using settled, agreed-upon rules of the road, but instead by selectively picking from among

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<sup>1</sup> See e.g., Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:09 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<http://perma.cc/3BCF-FEFR>] (explaining that “the primary reason” Justice Scalia will “go down as one of the most important, most historic figures in the Court” is that he “taught everybody how to do statutory interpretation differently”). For an early description of the “new textualism,” see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

<sup>2</sup> See Kagan, *supra* note 1, at 8:28 (“I think we’re all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.”).

<sup>3</sup> *Id.* For an excellent discussion of the distinction between textualists and purposivists, see John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

<sup>4</sup> The Court often still divides in statutory interpretation cases. See *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting); *Bond v. United States*, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring in the judgment); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting); see also *Yates v. United States*, 135 S. Ct. 1074, 1090 (2015) (Kagan, J., dissenting).

a wealth of canons of construction.<sup>5</sup> Those decisions leave the bar and the public understandably skeptical that courts are really acting as neutral, impartial umpires in certain statutory interpretation cases.<sup>6</sup>

The need for better rules of the road is underscored by a recent book written by Robert Katzmann, the very distinguished Chief Judge of the Second Circuit. I know Chief Judge Katzmann from our service together on the Judicial Branch Committee of the Judicial Conference, where he served for many years as Chairman by appointment of the Chief Justice. Chief Judge Katzmann is one of America's finest judges and a true role model for me and many others, both in how he approaches his job and in how he seeks to improve the system of justice.

His new book *Judging Statutes* is a pleasure to read. It is succinct and educational. Chief Judge Katzmann's goal is to show that various tools of statutory interpretation, especially legislative history, can enhance judges' understanding of statutory meaning and allow them "to be faithful to the work of the people's representatives memorialized in statutory language" (p. 105).

As would be natural with any two judges on a topic of this kind, I agree with some parts of Chief Judge Katzmann's book and not with others. But even where I disagree, I have learned a great deal.

Every judge, lawyer, law professor, and law student who interprets statutes — which is to say every judge, lawyer, law professor, and law student — should read this book carefully. To paraphrase Justice Frankfurter: read the book, read the book, read the book.<sup>7</sup>

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<sup>5</sup> This criticism has been prevalent at least since Professor Karl Llewellyn's famous discussion of "dueling canons" in Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). But my proposed solutions are largely new, as far as I know.

<sup>6</sup> See, e.g., Richard A. Posner, Response, *Comment on Professor Gluck's "Imperfect Statutes, Imperfect Courts,"* 129 HARV. L. REV. F. 11, 11 (2015) ("I daresay that some judges (and Justices) some of the time actually use these [statutory interpretation] approaches and these tools (other than as window dressing), and that more think they are using them but aren't really. But I think that most of the time statutory interpretation is better described as creation or completion than as interpretation and that politics and consequences are the major drivers of the outcome."). In many *constitutional* cases, much of the public and bar has long since moved from skepticism to disbelief that judges act as neutral, impartial umpires. I do not agree with that view, but I understand it. That, however, is a topic for another day. Today is about *statutory* interpretation, and about how judges can counter that skepticism.

<sup>7</sup> Cf. HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (recounting how Justice Frankfurter's three rules of statutory interpretation were to "(1) [r]ead the statute; (2) read the statute; (3) read the statute!"). And while you are at it, read the recent book by Justice Scalia and Professor Bryan Garner as well. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012). And read the prodigious academic work of Professors John Manning, Bill Eskridge, and Abbe Gluck, among many others. Then you will have a multifaceted picture of some of the problems and difficulties of statutory interpretation today, and benefit from the thoughts of some of our most brilliant analysts and theorists of statutory interpretation.

*Judging Statutes* has caused me to think even more deeply about statutory interpretation and about what judges should be trying to achieve when we confront statutory cases. For me, one overarching goal is to make judging a neutral, impartial process in all cases — not just statutory interpretation cases. Like cases should be treated alike by judges of all ideological and philosophical stripes, regardless of the subject matter and regardless of the identity of the parties to the case.

To be sure, some may conceive of judging more as a partisan or policymaking exercise in which judges should or necessarily must bring their policy and philosophical predilections to bear on the text at hand.

I disagree with that vision of the federal judge in our constitutional system. 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.<sup>8</sup> 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 legal disputes would not often vary based solely on the backgrounds, political affiliations, or policy views of judges.

In my view, this goal is not merely personal preference but a constitutional mandate in a separation of powers system. Article I assigns Congress, along with the President, the power to make laws.<sup>9</sup> Article III grants the courts the “judicial Power”<sup>10</sup> to interpret those laws in individual “Cases” and “Controversies.”<sup>11</sup> When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature’s Article I power.

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

To be candid, it is probably not possible in *all* cases, depending on the nature of the legal inquiry. After all, on occasion the relevant constitutional or statutory provision may actually *require* the judge to consider policy and perform a common law–like function.<sup>12</sup>

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<sup>8</sup> THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment . . .”).

<sup>9</sup> U.S. CONST. art. I, § 7.

<sup>10</sup> *Id.* art. III, § 1.

<sup>11</sup> *Id.* art. III, § 2.

<sup>12</sup> To take one example, we should not expect all judges to agree on whether a particular kind of search is “reasonable” under the Fourth Amendment. U.S. CONST. amend. IV; *see, e.g.*, *Riley v. California*, 134 S. Ct. 2473 (2014). Or what evidentiary privileges should be recognized “in the light of reason and experience.” FED. R. EVID. 501; *see, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). Or whether attorney’s fees are in “the interest of justice.” 15 U.S.C. § 2072(a) (2012). Or what constitutes a “restraint of trade.” 15 U.S.C. § 1 (2012). Cases such as those, where the judicial inquiry requires determination of what is reasonable or appropriate, are less a matter of pure interpretation than of common law–like judging.

But in most statutory cases, the issue is one of interpretation.<sup>13</sup> To assist the interpretive process, judges over time have devised many semantic and substantive canons of construction — what we might refer to collectively as the interpretive rules of the road. To make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them *in advance* as we can. Doing so would make the rules more predictable in application. In other words, if we could achieve more agreement ahead of time on the rules of the road, there would be many fewer disputed calls in actual cases. That in turn would be enormously beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary.

With that objective in mind, I will advance one overarching argument in this Book Review. A number of canons of statutory interpretation 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, evenhanded way, courts 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 relevant substantive canons — for example, the absurdity doctrine.

To be clear, I fully appreciate that disputed calls will always arise in statutory interpretation. Figuring out the best reading of the statute 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, as I see it, 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's just too hard, some might argue. Statutory interpretation is an inherently complex process, they say. It's all politics anyway, others contend. I have heard the excuses. I'm not buying it. In my view, it is a mistake to think that the current mess in statutory interpretation is somehow the natural and unalterable order of things. Put simply, we

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<sup>13</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION 13–14 (Amy Gutmann ed., 1997).

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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.

### I. THE KATZMANN THESIS AND SOME RESPONSES

In *Judging Statutes*, Chief Judge Katzmann's basic themes are straightforward: courts should understand Congress better, should interpret statutory text in light of Congress's purpose in enacting the particular statute, and, in particular, should rely on committee reports and other legislative history to try to divine Congress's purpose (pp. 9–10).

#### A. *Understanding Congress Better and the Role of Committee Reports*

Chief Judge Katzmann stands on very firm ground when he suggests that “[h]aving a basic understanding of legislative lawmaking can only better prepare judges to undertake their interpretive responsibilities” (p. 22). For judges to unpack a statute in a particular case, it is important to understand how the law came together. Oftentimes, for example, courts will confront a statute that has been amended multiple times over multiple years. Or a particular phrase in a statute may have been added in conference. As I see it, by understanding the legislative process, judges will better appreciate that legislation is a compromise with many competing purposes and cross-currents, that there will be redundancies, and that Congress may not always be consistent in its choice of terminology, among other things.

Chief Judge Katzmann describes the lawmaking process in some detail (pp. 11–22). He rightly explains that the central problem confronting Members of Congress is too much “pressure — such as the pressures of the permanent campaign for reelection, raising funds, balancing work in Washington and time in the district, balancing committee and floor work in an environment of increasing polarization, and balancing work and family responsibilities” (p. 17).<sup>14</sup> That pressure is “now more intense than in the past” (p. 17). Those demands “reduce opportunities for reflection and deliberation” (p. 18). As Chief Judge Katzmann points out, Members cannot possibly read every word of every bill, much less understand all the effects of each bill (p. 18).

To mitigate this problem, Members rely heavily on congressional committees (p. 19). Those committees are staffed by numerous aides who assist the Members in their work. Legislators and their staffs educate themselves about bills by reading the materials produced by the committees that drafted and approved the proposed legislation (p. 19).

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<sup>14</sup> Internal footnote omitted.

Chief Judge Katzmann's point here is that Congress usually operates on a kind of internal delegation system. In essence, the job of drafting legislation is often farmed out to subgroups of Congress. Those subgroups draft the precise language. The Members who vote on the bill do not read the end product, but instead often rely on the committee reports, or on their staffs who in turn rely on the committee reports (pp. 19–20).<sup>15</sup>

Chief Judge Katzmann's larger interpretive point is that judges who understand this process better should and will recognize the importance of committee reports in the actual legislative process (p. 22). Chief Judge Katzmann refers often to the concept of "authoritative" legislative history (pp. 29, 38, 54, 75, 85, 102–03), by which he primarily means the committee reports that form the basis on which other Members determine how to vote on a bill. Although Chief Judge Katzmann acknowledges that "[l]egislative history is not the law" (p. 38), he says that committee reports are often "authoritative" guides to understanding the meaning of the law. If Members vote based on what is in the committee reports rather than what is in the text, he wonders, aren't judges required to pay attention to the committee reports as well (p. 22)?

Chief Judge Katzmann asks a good and appropriate question. Of course, a good and appropriate response, as Professor John Manning has persuasively explained, is that the committee report is not an authoritative guide to determining the meaning of a law under our Constitution.<sup>16</sup> Instead, the statute's text as passed by Congress and signed by the President (or passed by two-thirds of both Houses over the President's veto) is the law. Congress could easily include the relevant committee report (or key portions thereof) as a background section of the statute on which Congress is voting. In other words, if there is some key point in the committee report, there is an easy solution to make sure it is "authoritative": vote on it when voting on the statute. As Justice Kagan recently said of committee reports: "It's not what Congress passed, right? If they want to pass a committee report, they can go pass a committee report. They can incorporate a committee report into the legislation if they want to. You know, they didn't do that."<sup>17</sup> Chief Judge Katzmann never addresses that possibility,

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<sup>15</sup> In my view, Congress may not constitutionally disclaim responsibility for the precise statutory text. Even if subgroups of Congress draft the language, the final language is the law. That is true even when Members of Congress vote on the law without reading the law (as they often do).

<sup>16</sup> See John F. Manning, *Why Does Congress Vote on Some Texts but Not Others?*, 51 *TULSA L. REV.* 559 (2016) (reviewing ROBERT KATZMANN, *JUDGING STATUTES* (2014)).

<sup>17</sup> Kagan, *supra* note 1, at 32:10.

which, to my mind, leaves something of a hole in his concept of “authoritative” legislative history.<sup>18</sup>

Moreover, as many courts have noted over the years, committee reports are not necessarily reliable guides to the meaning of the text. That is especially true when the statutory text represents a compromise among competing interests, as it so often does. Committee reports often may represent an effort by one side to shape future interpretation of the text by judges and executive branch officials, rather than simply a neutral and dispassionate guide to the intended meaning of the terms in the statutory text.<sup>19</sup>

There are at least two possible explanations for why Congress does not vote on committee reports. First, Congress might not vote on committee reports (or even on key parts of committee reports) because Congress thinks a vote is unnecessary.<sup>20</sup> But if courts tell Congress that voting on those reports is necessary, or at least necessary if Congress wants those reports to be considered authoritative by courts, then Congress could readily decide whether and when to vote on those reports.<sup>21</sup> Easy enough. That approach would satisfy the camps of both Justice Scalia and Chief Judge Katzmann, a win-win if ever there was one. Alternatively, Congress may not vote on the reports because it might not approve the reports if they came up for a vote.<sup>22</sup> Of course, that possibility just proves the point for opponents of using committee reports in the interpretation of statutes.<sup>23</sup> It is hard to consider something “authoritative” if it was not voted on and may actually have been voted *down* if it had been voted on.<sup>24</sup>

The bottom line is this: if Congress could — but chooses not to — include certain committee reports (or important parts thereof) in the statute, on what legal basis can a court treat the unvoted-on legislative history as “authoritative”?

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<sup>18</sup> Later in the book, Chief Judge Katzmann sidesteps this issue: “When Congress passes a law, it can be said to incorporate the materials that it, or at least the law’s principal sponsors (and others who worked to secure enactment), deem useful in interpreting the law” (p. 48). But the passive voice reveals the problem with this assertion. It “can be said” by whom? Congress has not said so, even though it easily could.

<sup>19</sup> See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568–69 (2005); *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment); see also Eskridge, *supra* note 1, at 684–90; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

<sup>20</sup> See Manning, *supra* note 16, at 566–67.

<sup>21</sup> Indeed, as Manning points out, this potential explanation seems even odder given the rise of textualism in the last three decades. He rightly emphasizes “Congress’s continued failure to put legislative history to a vote three decades into a textualist campaign that has put legislative history on uncertain footing in the Supreme Court.” *Id.* at 562.

<sup>22</sup> See *id.* at 562, 567–68.

<sup>23</sup> See *id.* at 568–70.

<sup>24</sup> *Id.* at 568–69.

### B. *The President*

In his description of the legislative process, Chief Judge Katzmann does not talk much about a critical player: the President.<sup>25</sup> The President and his or her staff play an essential role in the legislative process. Indeed, the President is the “Legislator in Chief” in some ways — given that no legislation can pass without the President’s approval, unless two-thirds of both Houses override a veto.<sup>26</sup> Moreover, the President often jumpstarts the legislative process on a particular subject through speeches or meetings with congressional leaders. The Framers envisioned the President playing such a role when they required that “[h]e shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”<sup>27</sup> A newly elected President will seek to shape the legislative agenda to advance his or her campaign proposals.<sup>28</sup> And Presidents use the State of the Union address — and the bully pulpit more generally — to push for legislation to address particular problems.

Lawyers, academics, and judges too often treat legislation as a one-body process (“the Congress”) or a two-body process (“the House and Senate”). But formally and functionally, it is actually a three-body process: the House, the Senate, and the President. Any theory of statutory interpretation that seeks to account for the realities of the legislative process — as Chief Judge Katzmann’s does — must likewise take full account of the realities of the President’s role in the legislative process.<sup>29</sup>

Given that the President and the White House staff are not necessarily aware of the committee reports, and given that Members of Congress in one House may not be aware of reports from the other House, I think it is difficult to call those reports “authoritative” in any

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<sup>25</sup> The relevant chapter is revealingly titled “Congress and the Lawmaking Process” (p. 11).

<sup>26</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>27</sup> *Id.* art. II, § 3.

<sup>28</sup> For example, the No Child Left Behind Act and the Patient Protection and Affordable Care Act each addressed a central priority of Presidents George W. Bush and Barack Obama, respectively — and each was passed in the first fifteen months of their respective administrations.

<sup>29</sup> It is also true, as those of us who have been involved in the legislative process could explain, that interest groups and other affected parties play a role in the legislative process by, for example, originating language and signing off on language. Will the Chamber of Commerce go for this? What do the unions think? Is the NRA okay with this? What does the Brady Campaign say? Is NRDC good with this version? Has Pharma blessed this? Will Heritage score this bill? What does CAP say? To live in the world of legislative process — at either end of Pennsylvania Avenue — is to live with these questions. This action, which is absolutely critical to the reality of the legislative process, is rarely reflected in committee reports. Or sometimes it may be reflected in a skewed way, as when a lobbyist manages to land in a committee report some language that the lobbyist could not get into the actual statutory text. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

formal or functional sense. Chief Judge Katzmann seems to realize this problem because he suggests forwarding committee reports to the President before the President signs the bill (p. 102). But is a President supposed to veto a bill because of some comment made by one committee of one House? And if the President does not exercise the veto power, does that make a comment by one committee of one House an authoritative guide to the statutory text?

*C. How Committee Reports Signal Agencies*

After examining the lawmaking process, Chief Judge Katzmann describes how executive and independent agencies interpret enacted statutes (pp. 23–28). Agencies must interpret statutes, both in order to issue rules and in order to determine whether to bring an enforcement action against someone who may have violated the law.

In this realm, as Chief Judge Katzmann points out, committee reports can be particularly important signals to the agencies. Members of Congress have many tools at their disposal to put pressure on agency officials. Those tools include appropriations, oversight hearings, confirmation hearings, and even phone calls and letters from Members to agency officials (pp. 24–25). The committee reports likewise serve as a signal to agency officials about how to exercise their rulemaking and enforcement discretion (p. 26).

Chief Judge Katzmann's observation here is extremely important and too often overlooked. Committee reports may and do legitimately influence agency conduct in exercising the discretion granted to them by the statutory text. Indeed, to the extent a statute grants discretion to an agency — and Members of Congress want to influence how that discretion is exercised (as they are permitted to do) — committee reports are actually a far more transparent tool than some of the alternatives, such as phone calls to agency officials threatening to cut appropriations if discretion is not exercised in a certain way. Suppose, for example, that a statute grants an agency that oversees mergers the discretion to adopt rules that ensure fair competition. A committee report that identifies the level of permissible concentration in an industry is more transparent than a later phone call from the committee chair to the agency head in which the committee chair says a particular merger is problematic. (Of course, an agency should feel free legally, albeit perhaps not politically, to ignore both kinds of signals.) Anyone who says *courts* should pay less attention to committee reports must nonetheless acknowledge that committee reports may serve an important and legitimate purpose for the executive and independent agencies that must implement the statutes and exercise any discretion granted them by statute.

That reality, no doubt, is one reason why Congress keeps producing committee reports even as courts have relied less and less on legislative

history over time. Agencies rely on those reports in the same way they might rely on other informal signals from Congress. So Congress has an appropriate reason and an incentive to keep producing the reports.

#### D. Courts and Legislative History

After analyzing agencies' reliance on legislative history, Chief Judge Katzmann turns to judicial interpretation of statutes (pp. 29–54). This chapter is the meat of the book. Chief Judge Katzmann's overriding point is that courts should use legislative history — in particular, committee reports — to interpret statutes (p. 31).

Chief Judge Katzmann correctly acknowledges that “[l]egislative history is not the law” (p. 38). But he adds that legislative history “can help us understand what the law means” (p. 38).

To understand Chief Judge Katzmann's point, it is important at the outset to appreciate that there are two primary uses of legislative history:

- (1) Use legislative history to resolve ambiguities in the text.
- (2) Use legislative history to override the clear text when following the text would contradict Congress's apparent intent. This proposition is also known as the *Holy Trinity*<sup>30</sup> principle.

Chief Judge Katzmann quite clearly advocates for the first use of legislative history, saying that judges should use legislative history whenever they are faced with an ambiguous text. Many judges nominally agree with that proposition, although Justice Scalia did not. But there are real debates over how quickly one should find ambiguity — much more on that point later — and whether legislative history ever really changes the outcome the judge otherwise would have reached.<sup>31</sup>

The second use of legislative history is far more controversial. It reflects a kind of broad “mistake canon” associated with the old 1892 *Holy Trinity* case. In *Holy Trinity*, as Chief Judge Katzmann explains (p. 32), the Supreme Court departed from the clear text of an immigration statute based on the legislative history and “spirit” of the law.<sup>32</sup> Importantly, *Holy Trinity* used legislative history not simply to determine the meaning of an *ambiguous* text, but instead to override the meaning of otherwise *clear* text on the theory that the text must reflect

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<sup>30</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

<sup>31</sup> See Kagan, *supra* note 1, at 25:06 (describing most treatments of legislative history at the Supreme Court as “icing on a cake already frosted”); see also *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting) (“And legislative history, for those who care about it, puts extra icing on a cake already frosted.”).

<sup>32</sup> See *Holy Trinity*, 143 U.S. at 461.

a mistake.<sup>33</sup> The basic idea is that the Court did not think Congress meant what it said — that the text was in part a mistake.

Even though *Holy Trinity* has never expressly been overruled, its mode of using legislative history to override clear text is rarely used in modern Supreme Court decisions.<sup>34</sup> The modern rule, as the Supreme Court has repeated often, is that clear text controls even in the face of contrary legislative history.

Does Chief Judge Katzmann agree? It's not entirely clear. Chief Judge Katzmann says that “[w]hen a statute is unambiguous, resorting to legislative history is *generally* not necessary; in that circumstance, the inquiry ordinarily ends” (p. 48).<sup>35</sup> But the word “generally” may be an important caveat. And when Chief Judge Katzmann describes several cases he's decided, he seems to indicate that legislative history may be used to override the meaning of *clear* statutory language, and not just to interpret ambiguous statutory language.<sup>36</sup> And that's *Holy Trinity* in a nutshell.

If he were advancing a return to *Holy Trinity*, then Chief Judge Katzmann would be mounting a critique of the heart of textualism. As the Supreme Court now says, when the text is clear, judicial inquiry is at an end. In what some have described as “the bad old days” before Justice Scalia,<sup>37</sup> that was not the rule.<sup>38</sup>

But perhaps I am reading too much into what Chief Judge Katzmann says. He may simply be making the narrower (and less controversial) claim that legislative history should be used to resolve ambiguities.

<sup>33</sup> See *id.* at 458–59, 463–65.

<sup>34</sup> See, e.g., *Allapattah*, 545 U.S. at 568 (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“As in any case of statutory construction, our analysis begins with ‘the language of the statute.’ And where the statutory language provides a clear answer, it ends there as well.” (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992))). For an argument that the Roberts Court is resurrecting *Holy Trinity*, see Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407 (2015).

<sup>35</sup> Emphasis has been added.

<sup>36</sup> See *infra* section I.E, pp. 2129–33.

<sup>37</sup> Paul Clement, Opinion, *Arguing Before Justice Scalia*, N.Y. TIMES (Feb. 17, 2016), <http://www.nytimes.com/2016/02/17/opinion/arguing-before-justice-scalia.html> (“A few years back, during oral argument, Justice Antonin Scalia asked me when I thought ‘the bad old days’ — when the Supreme Court routinely looked beyond the text of statutes — had ended? I said, ‘The bad old days ended when you got on the court, Mr. Justice Scalia.’”); see also *Transcript of Oral Argument at 46, CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (No. 06-1431).

<sup>38</sup> *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. *Absent a clearly expressed legislative intention to the contrary*, that language must ordinarily be regarded as conclusive.” (emphasis added)).

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In any event, after finishing with legislative history, Chief Judge Katzmann turns to the canons of statutory construction (pp. 50–54). Chief Judge Katzmann says that many canons may “fail to reflect the reality of the legislative process” (p. 52). I agree. But his solution is not to try to fix the canons (as I would do<sup>39</sup>). Instead, Chief Judge Katzmann offers canon failure as another reason to use legislative history. But I am not sure that his proposed solution follows from the problem. If the problem is the canons, then we should revise the canons.

### E. Case Examples

After setting out his doctrinal framework, Chief Judge Katzmann walks us through a few cases that he has decided on the Second Circuit, and that the Supreme Court subsequently reviewed (pp. 55–91). This chapter is an especially illuminating part of *Judging Statutes*. I appreciate Chief Judge Katzmann’s willingness to elucidate his own thinking in such a candid and educational way.

Chief Judge Katzmann begins the section with an important statement:

Most judges, in my experience, are neither wholly textualists nor wholly purposivists (that is, seekers of purpose). Purposivists tend not to go beyond the words of an unambiguous statute; at times, textualists look to purposes and extratextual sources such as dictionaries. What sets the two apart is a difference in emphasis and the tools they employ to find meaning. (p. 55)

This passage is important, and I have two reactions to it. First, in my view, another critical difference between textualists and purposivists is that, for a variety of reasons, textualists tend to find language to be clear rather than ambiguous more readily than purposivists do. One need look no further than the statements of the archetypal textualist, Justice Scalia, for confirmation of this point.<sup>40</sup> As a result, textualists tend to resort less often to ambiguity-dependent canons and tools of construction such as constitutional avoidance, legislative history, and *Chevron*. Second, textualists look to legislative history only infrequently, and even then only to resolve cases of true statutory ambiguity. They never use legislative history to depart from

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<sup>39</sup> See *infra* Part III, pp. 2159–62.

<sup>40</sup> See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a ‘strict constructionist’ of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.”); see also Kagan, *supra* note 1, at 56:54 (noting differences between her and Justice Scalia over “the quickness with which we find ambiguity”).

otherwise clear statutory text (the *Holy Trinity* approach<sup>41</sup>), whereas some purposivists sometimes seem to do so, at least subtly.

Chief Judge Katzmann then proceeds through three cases as examples of his jurisprudence and theory.

In *Raila v. United States*,<sup>42</sup> the plaintiff slipped on a package that a postal worker had left at her door.<sup>43</sup> The plaintiff filed suit against the United States under the Federal Tort Claims Act.<sup>44</sup> But that statute exempted “[a]ny claim arising out of the . . . negligent transmission of letters or postal matter.”<sup>45</sup>

Writing for his Second Circuit panel, Chief Judge Katzmann explained that the statute was ambiguous as applied to the facts.<sup>46</sup> Relying primarily on its assessment of the broad statutory purposes — including the purpose of allowing plaintiffs to recover when injured by federal officials except in certain circumstances — the court held that the plaintiff’s claim was not exempt and did not involve the transmission of letters.<sup>47</sup>

By a 7-1 vote, with Justice Kennedy writing, the Supreme Court agreed with the Second Circuit’s conclusion, but the Supreme Court relied on more textualist and canon-based reasoning.<sup>48</sup> The Supreme Court reasoned that the phrase “negligent transmission of letters or postal matter” in its ordinary meaning refers to mail that fails to arrive, arrives late, arrives at the wrong address, or is damaged.<sup>49</sup>

As I see it, this case, while interesting, does not show us too much. The Supreme Court did not need to (and did not) go much beyond what was the best reading of the statutory text.<sup>50</sup> And given that negligent transmission of the mail is not usually understood as tripping someone with the mail, that was the beginning and end of it for the Supreme Court.

The second case, *United States v. Gayle*,<sup>51</sup> concerned a provision of the Gun Control Act of 1968<sup>52</sup> that prohibited the possession of fire-

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<sup>41</sup> See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”).

<sup>42</sup> 355 F.3d 118 (2d Cir. 2004).

<sup>43</sup> *Id.* at 119.

<sup>44</sup> 28 U.S.C. §§ 1346(b), 2671–80 (2012).

<sup>45</sup> *Id.* § 2680(b).

<sup>46</sup> *Raila*, 355 F.3d at 120 (“The meaning of the words ‘negligent transmission’ is not self-evident.”).

<sup>47</sup> *Id.* at 121–23.

<sup>48</sup> See *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

<sup>49</sup> See *id.* at 486–87, 489.

<sup>50</sup> The Supreme Court also applied the *noscitur a sociis* semantic canon. See *id.* at 486–87. It does not appear that the canon did much independent work in that case, however.

<sup>51</sup> 342 F.3d 89 (2d Cir. 2003).

<sup>52</sup> Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.).

arms by anyone who had been “convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.”<sup>53</sup> The controversy there involved people who had been convicted in a foreign court rather than an American court.<sup>54</sup> Were they covered by this statute?<sup>55</sup>

The Second Circuit concluded that “in any court” did not include foreign courts.<sup>56</sup> According to Chief Judge Katzmann, the phrase “in any court” was “ambiguous” (p. 74).<sup>57</sup> The panel therefore turned to the legislative history and concluded that the Senate Report “unmistakably contemplated felonies, for purposes of the Gun Control Act, to include only convictions in federal and state courts” of the United States.<sup>58</sup>

The Supreme Court came to the same conclusion by a 5–3 vote, with an opinion written by Justice Breyer.<sup>59</sup> Importantly, however, the Supreme Court never said that the phrase “in any court” was ambiguous.<sup>60</sup> Instead, the Court relied partly on a variation of a substantive canon of construction: the presumption against extraterritorial application.<sup>61</sup> The Court concluded that domestically oriented statutes should apply only domestically in the absence of contrary signals from Congress.<sup>62</sup>

Justice Thomas, joined by Justices Scalia and Kennedy, dissented.<sup>63</sup> He would have held that “any court” means “any court.”<sup>64</sup> He said that the presumption against extraterritoriality had no application in this context.<sup>65</sup> In response to the Court’s use of legislative history, Justice Thomas also explained that he read the provision’s drafting history — in which the original draft that specified any felony conviction in

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<sup>53</sup> 18 U.S.C. § 922(g)(1) (2000).

<sup>54</sup> *Gayle*, 342 F.3d at 90.

<sup>55</sup> Of course, in a case like this, the Government should have to prove that the defendant *knew* that he was ineligible to possess firearms — for example, by notice provided to him by the Government. See *United States v. Burwell*, 690 F.3d 500, 529 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (“The presumption of mens rea applies to each element of the offense.”); see also *United States v. Moore*, 612 F.3d 698, 704 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

<sup>56</sup> See *Gayle*, 342 F.3d at 90.

<sup>57</sup> See also *id.* at 90, 92–93. The Second Circuit also noted that certain federal and state offenses were excluded from the list of predicate offenses. The Second Circuit thought it odd that Congress would exclude federal and state offenses, but not foreign offenses of the same character. *Id.* at 93.

<sup>58</sup> *Id.* at 94.

<sup>59</sup> See *Small v. United States*, 544 U.S. 385, 387 (2005). Chief Justice Rehnquist took no part in the decision.

<sup>60</sup> See *Small*, 544 U.S. 385.

<sup>61</sup> See *id.* at 388–91.

<sup>62</sup> See *id.* at 390–91.

<sup>63</sup> *Id.* at 394 (Thomas, J., dissenting).

<sup>64</sup> *Id.* at 395.

<sup>65</sup> *Id.* at 399–401.

a “Federal” or “State” court was replaced by the phrase “any court” — to confirm his reading of the text.<sup>66</sup>

In terms of the statutory text alone, Justice Thomas’s dissent for himself and Justices Scalia and Kennedy is more persuasive than the majority opinion of the Supreme Court. That said, the majority opinion did illustrate how substantive canons of interpretation — there, the presumption against extraterritoriality — can play an important role in statutory interpretation by sometimes overriding the best interpretation of even clear text. Importantly, none of the eight Justices said the phrase “in any court” was ambiguous.

The last case discussed by Chief Judge Katzmann, *Murphy v. Arlington Central School District Board of Education*,<sup>67</sup> is perhaps the most important and intriguing of the three in order to understand his point of view. The relevant statute — the Individuals with Disabilities Education Act<sup>68</sup> (IDEA) — allowed the court to award “reasonable attorneys’ fees as part of the costs” to prevailing plaintiffs.<sup>69</sup> The question was whether this statute allowed the award of the costs of expert witnesses and consultants.<sup>70</sup> Importantly, the legislative history (in particular, a committee report) suggested that the answer to that question was yes, even though the statutory language supplied no indication that the statute meant to cover the costs of expert witnesses and consultants. In essence, this was a classic *Holy Trinity* case. What Congress said in the statutory text did not appear to square with what Congress meant to say, at least if the committee report could be said to authoritatively reflect Congress’s intent.

The Second Circuit acknowledged that the text of the statute did not encompass these expert witness fees.<sup>71</sup> But the court nonetheless read the legislative history and the larger purposes of the statute to contemplate fee awards for expert witnesses and consultants.<sup>72</sup> As the Second Circuit noted, the committee report stated that the conferees intended the term “reasonable attorneys’ fees as part of the costs” to encompass expert witness fees.<sup>73</sup>

The Supreme Court reversed, concluding that the phrase “reasonable attorneys’ fees as part of the costs” did not encompass expert witness fees.<sup>74</sup> The decision was 6–3 and written by Justice

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<sup>66</sup> *Id.* at 406–07.

<sup>67</sup> 402 F.3d 332 (2d. Cir. 2005), *rev’d*, 548 U.S. 291 (2006).

<sup>68</sup> 20 U.S.C. §§ 1400–1482 (2012).

<sup>69</sup> *Id.* § 1415(i)(3)(B).

<sup>70</sup> *Murphy*, 402 F.3d at 333.

<sup>71</sup> *See id.* at 336.

<sup>72</sup> *See id.* at 336–38.

<sup>73</sup> *See id.* at 336–37 (citing H.R. REP. NO. 99-687, at 5 (1986) (Conf. Rep.)).

<sup>74</sup> *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 293–94 (2006).

Alito.<sup>75</sup> The Court expressly rejected the notion that legislative history could defeat an unambiguous text.<sup>76</sup> In doing so, the Court once again rejected the *Holy Trinity* principle.<sup>77</sup> The Court also noted that the IDEA was enacted under the Spending Clause, meaning that States would be required to pay only if the Act provided “clear notice” that expert witness fees were covered, which the Act did not.<sup>78</sup>

In dissent, Justice Breyer adopted a *Holy Trinity*-style approach. He criticized the majority’s refusal to prioritize the legislative history over the text in this instance. “By disregarding a clear statement in a legislative Report,” he wrote, “the majority opinion has reached a result that no Member of Congress expected or overtly desired.”<sup>79</sup>

#### F. Improving Congress’s Drafting of Statutes

In the final pages of his book, Chief Judge Katzmann promotes ideas for improving mutual understanding between the legislature and the courts (pp. 92–103). Although he correctly says that it would be “fanciful” to think that Congress could do away entirely with ambiguity in laws, he points out that there are nevertheless several ways Congress could help clarify legislative meaning (p. 93).

First, Chief Judge Katzmann suggests that “legislators and their staffs should make greater use of the skilled legislative drafters in their offices of legislative counsel” (p. 93). These offices could maintain a checklist of common issues, including statutes of limitations, private rights of action, preemption, and effective dates (p. 93). I agree fully with this excellent suggestion.

Chief Judge Katzmann also suggests that Congress formally adopt a series of default rules that become effective when the legislative branch has not dealt with a particular issue in a statute (p. 94). For example, Congress could enact a default statute of limitations (p. 94). Again, this is a great idea.<sup>80</sup>

Chief Judge Katzmann also says that Congress should be more ready and willing to fix statutes when mistakes become apparent in later court cases (pp. 94–102). Again, I agree, although I am always quick to stress that it is much harder to enact statutes than it is to block them. For a court to say that Congress can fix a statute if it does not like the result is *not* a neutral principle in our separation of

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<sup>75</sup> *Id.* at 293. Justice Alito wrote for a five-Justice majority, and Justice Ginsburg concurred in part and concurred in the judgment. *Id.*

<sup>76</sup> *Id.* at 296–97, 304.

<sup>77</sup> *See id.*; *see also infra* notes 190–195 and accompanying text.

<sup>78</sup> *See Murphy*, 548 U.S. at 295–98.

<sup>79</sup> *See id.* at 324 (Breyer, J., dissenting).

<sup>80</sup> *Cf.* Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 158–60 (1992). *See generally* EINER ELHAUGE, STATUTORY DEFAULT RULES (2008).

powers scheme because it is very difficult for Congress to correct a mistaken statutory decision.<sup>81</sup> The backdrop of possible congressional correction is not a good reason for courts to do anything but their level best to decide the case correctly in the first place.

Chief Judge Katzmann also argues for making legislative history more reliable (pp. 102–03). For example, he asks that the floor managers of a bill indicate which legislative reports count as authoritative (p. 102). To my mind, however, this suggestion quite elegantly reveals one of the concerns with legislative history. Legislative history is not authoritative — at least in a formal sense — because Congress does not vote on it. Allowing the floor managers (a tiny fraction of the Members of Congress necessary to pass the law) to designate particular documents as “authoritative” does not solve that problem. As I mentioned earlier, there’s an easy solution to that problem: put the key committee or conference reports (or at least the key provisions of them) into the statute itself and have the Members of Congress vote on it.<sup>82</sup> Then it would be both formally and functionally authoritative. In my view, implementing that proposal would be more effective and far more acceptable to all judges than what Chief Judge Katzmann proposes here.

## II. MY THESIS: ELIMINATING OR REDUCING THRESHOLD DETERMINATIONS OF CLARITY VERSUS AMBIGUITY

Chief Judge Katzmann’s book should trigger more introspection and debate about statutory interpretation by judges, scholars, and practitioners. It has certainly done so for me. Chief Judge Katzmann has pushed me to think even more deeply about some of these issues than I had before. Of course, he is not to blame for where my thinking has led me.

Chief Judge Katzmann’s discussion of using legislative history to resolve ambiguities triggers my first big question: how do we determine whether the text of a statute is clear or ambiguous?

### *A. Judges Have Trouble Determining Whether a Statute Is Clear or Ambiguous*

In recent years, the Supreme Court has often repeated a critical principle: when the text of the statute is clear, the court does not resort

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<sup>81</sup> As Judge Easterbrook nicely put it before he took the bench: “There are a hundred ways in which a bill can die even though there is no opposition to it.” Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 538 (1983).

<sup>82</sup> See *supra* notes 16–24 and accompanying text. See generally Manning, *supra* note 16.

to legislative history.<sup>83</sup> Likewise, when the text of the statute is clear, a court should not turn to other principles of statutory interpretation such as the constitutional avoidance canon or *Chevron* deference. Chief Judge Katzmann himself notes this point many times.<sup>84</sup>

Under the structure of our Constitution, Congress and the President — not the courts — together possess the authority and responsibility to legislate.<sup>85</sup> As a result, clear statutes are to be followed. Statutory texts are not just common law principles or aspirations to be shaped and applied as judges think reasonable.<sup>86</sup> This tenet — adhere to the text — is neutral as a matter of politics and policy. The statutory text may be pro-business or pro-labor, pro-development or pro-environment, pro-bank or pro-consumer. Regardless, judges should follow clear 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) rely on the legislative history to resolve textual ambiguity; and (3) in cases of textual ambiguity, defer to an executive agency's reasonable interpretation of a statute, also known as *Chevron* deference.<sup>87</sup>

All of these canons, however, depend on a problematic threshold dichotomy.<sup>88</sup> Courts may resort to the canons only if the statute is not

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<sup>83</sup> See, e.g., *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“[W]here the statutory language provides a clear answer, [our analysis] ends there . . .”).

<sup>84</sup> As Chief Judge Katzmann recognizes, in most cases “the interpretive problem arises because the statute is ambiguous” (p. 30). For if the statute is unambiguous, then “the inquiry for a court generally ends with an examination of the words of the statute” (p. 29). But, Chief Judge Katzmann continues, “[w]hen the text is ambiguous, a court is to provide the meaning that the legislature intended. In that circumstance, the judge gleans the purpose and policy underlying the legislation and deduces the outcome most consistent with those purposes” (pp. 31–32). In doing so, he argues, the court should rely on legislative history, particularly “authoritative” committee reports (p. 38).

<sup>85</sup> See, e.g., Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989).

<sup>86</sup> See *id.*

<sup>87</sup> A number of other canons also depend on a threshold finding of ambiguity, such as the rule of lenity and the *Charming Betsy* canon. I do not address all such canons in this Book Review. In any event, as I say in the text, each ambiguity-dependent canon should be independently evaluated. I am not proposing a one-size-fits-all solution.

<sup>88</sup> Chief Judge Katzmann does not address this threshold dichotomy, even though he highlights its significance. He frames the choice judges face in interpreting statutes in this way: “Should the judge confine herself to the text even when the language is ambiguous? Should the judge, in seeking to make sense of an ambiguity or vagueness, go behind the text of the statute to legislative materials, and if so, to which ones?” (p. 3). Buried in this question, however, is the critical threshold question of whether the statute is ambiguous in the first place.

Chief Judge Katzmann does not directly engage this question. In fact, few do, at least in any detailed way. Professor Ward Farnsworth probably has done so best. See Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL

clear but rather is ambiguous.<sup>89</sup> 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 beyond which courts may resort to the constitutional avoidance canon, legislative history, or *Chevron* deference. In my experience, judges will often go back and forth arguing over this point. One judge will say that the statute is clear, and that should be the end of it. The other judge will respond that 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.<sup>90</sup> That’s because there is no right answer.

It turns out that there are at least two separate problems facing those disagreeing judges.<sup>91</sup>

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ANALYSIS 257 (2010); see also Re, *supra* note 34; Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791 (2010); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859 (2004); Note, “How Clear Is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687 (2005); cf. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 171 (2d ed. 2013) (“Another concern here is just how one defines or determines ‘ambiguity’ in the statute’s semantic meaning.”); Susannah Landes Foster, Note, *When Clarity Means Ambiguity: An Examination of Statutory Interpretation at the Environmental Protection Agency*, 96 GEO. L.J. 1347, 1362 (2008) (“A fair question is how agencies should figure out when Congress has been clear.”).

<sup>89</sup> See Solan, *supra* note 88, at 861 (“Part of the problem is that the law has only two ways to characterize the clarity of a legal text: It is either plain or it is ambiguous. The determination is important. Whether the text is a statute, a contract, or an insurance policy, once a court finds the language to be plain, it will typically refrain from engaging in a variety of contextually-based interpretive practices.”); see also *id.* at 862.

<sup>90</sup> See Farnsworth et al., *supra* note 88, at 276.

<sup>91</sup> Of course, this analysis makes two assumptions.

First, it assumes that judges can agree on the meaning of “clarity” and “ambiguity” in the first place. But as a number of scholars have pointed out, there are many — and conflicting — definitions of these two terms. See, e.g., WILLIAM D. POPKIN, *A DICTIONARY OF STATUTORY INTERPRETATION* 11 (2007) (observing that “[a]mbiguity” is ambiguous,” and then providing three different definitions); Farnsworth et al., *supra* note 88, at 258 (distinguishing between external and internal judgments about ambiguity); Slocum, *supra* note 88, at 799–802; Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 171–72 (2002) (distinguishing between lexical ambiguity and syntactic ambiguity); see also Solan, *supra* note 88, at 859 (“The problem, perhaps ironically, is that the concept of *ambiguity* is itself perniciously ambiguous.”). To complicate things even further, different definitions of ambiguity can lead to different outcomes. See Farnsworth et al., *supra* note 88, at 271 (“[D]ifferent ways of asking about ambiguity produce different conclusions about its existence.”).

Second, it assumes that the line dividing ambiguity from clarity remains the same across (and within) all doctrines. In other words, this analysis assumes that the level of ambiguity necessary for moving to step two of *Chevron* is the same level of ambiguity required before a court may consult legislative history. But who knows whether that’s true? In fact, in some cases, the Supreme Court has implied a different clarity versus ambiguity threshold for certain doctrines.

First, judges must decide how much clarity is needed to call a statute clear.<sup>92</sup> If the statute is 60-40 in one direction, is that enough to call it clear? How about 80-20? Who knows?

Second, let's 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 clear in one direction. Even if we say that 80-20 is the necessary level of clear, how do we then apply that 80-20 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.<sup>93</sup> 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.<sup>94</sup>

I tend to be a judge who finds clarity more readily than some of my colleagues but perhaps a little less readily than others.<sup>95</sup> In practice, I probably apply something approaching a 65-35 rule. In other words, if the interpretation is at least 65-35 clear, then I will call it clear and reject reliance on ambiguity-dependent canons. I think a few of my colleagues apply more of 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.<sup>96</sup> By contrast, I have other colleagues who appear to apply a 55-

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*See, e.g.,* Chapman v. United States, 500 U.S. 453, 463 (1991) (describing the rule of lenity as triggered by "grievous ambiguity" (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974))). Some scholars have even suggested tailoring the clarity versus ambiguity threshold not only to doctrines, but also to individual cases within a single doctrine. *See, e.g.,* Note, *supra* 88, at 1699-703 (suggesting that *Chevron's* step one inquiry could be calibrated based on the type of delegation and agency at issue).

<sup>92</sup> *See* Slocum, *supra* note 88, at 808 (noting "the lack of consensus regarding the probabilistic threshold an interpretation must meet in order to render a statutory provision unambiguous"); Note, *supra* 88, at 1698; *see also* Kagan, *supra* note 1, at 58:20 ("Some people think things are clear in circumstances in which other people think there's still a lot of question marks.").

<sup>93</sup> *See* Farnsworth et al., *supra* note 88, at 276 (noting that there are no legal standards for ambiguity, and there is "no way to falsify a judge's claim one way or the other").

<sup>94</sup> *See id.* ("[I]mpressionistic judgments are doing important work.").

<sup>95</sup> For an example of conflicting thresholds at work, *see* *Northeast Hospital Corp. v. Sebelius*, 657 F.3d 1 (D.C. Cir. 2011). In that case, the majority found the Medicare statute ambiguous as to whether a hospital patient who "receives Medicare benefits under Medicare Part C for a particular 'patient day[]' is . . . also 'entitled' for that same 'patient day' to Medicare benefits under Medicare Part A." *Id.* at 18 (Kavanaugh, J., concurring in the judgment); *see also id.* at 11 (majority opinion). The majority admitted the difficulties in the agency's position, but chose to defer to the agency under *Chevron* because it was "faced with two inconsistent sets of statutory provisions." *Id.* at 11. In contrast, I found the statute clear and declined to defer to the agency. *Id.* at 18 (Kavanaugh, J., concurring in the judgment).

<sup>96</sup> Judge Silberman explains that:

[E]ven assuming one is scrupulously honest in reading a statute thoroughly and looking carefully at its linguistic structure, legitimate ambiguities, which give room for differing good-faith interpretations, more often than not appear in our cases. If a case is resolved at the first step of *Chevron*, one must assume a situation where either a petitioner has brought a particularly weak case to the court of appeals, or the agency is sailing directly against a focused legislative wind. Neither eventuality occurs very often. Litigation is

45 rule. If the statute is at least 55-45 clear, that's good enough to call it clear.<sup>97</sup>

Who is right in that debate? Who knows? No case or canon of interpretation says that my 65-35 approach or my colleagues' 90-10 or 55-45 approach is the correct one (or even a better one). Of course, even if my colleagues and I could agree on 65-35, for example, as the appropriate trigger, we would still have to figure out whether the text in question surmounts that 65-35 threshold. And that itself is a difficult task for different judges to conduct neutrally, impartially, and predictably.

The simple and 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."<sup>98</sup> Professor Ward Farnsworth has elaborated persuasively on that point, arguing that "[t]here are no rules or clear agreements among judges about just how to decide whether a text is ambiguous."<sup>99</sup> 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. It may be that the holders of some theories are more likely to answer that question one way rather than another, but the theories themselves are incapable of generating answers.<sup>100</sup>

That conceptual problem opens the door to a more practical concern. "[J]udgments about ambiguity . . . are dangerous," Farnsworth concludes, "because they are easily biased by strong policy preferences that the makers of the judgments hold."<sup>101</sup> Because judgments about

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expensive for private parties and agencies are rarely so cavalier in interpreting their statutes.

Laurence H. Silberman, Chevron — *The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 826 (1990).

<sup>97</sup> Justice Scalia self-identified into this camp. See Scalia, *supra* note 40, at 521.

<sup>98</sup> *United States v. Turkette*, 452 U.S. 576, 580 (1981).

<sup>99</sup> Farnsworth et al., *supra* note 88, at 273; see also *id.* at 275 ("[T]here is 'no errorless test' (indeed, there is no strictly *legal* test at all) for deciding whether a text is clear. Again, there are theories that say what to do *when* a statute is ambiguous, but there are no theories that help determine *whether* a statute is ambiguous, as by offering metrics for measuring its clarity or standards that the clarity must meet.").

<sup>100</sup> *Id.* at 274 (emphasis omitted) (footnote omitted); see also Slocum, *supra* note 88, at 795 ("[T]he selection of interpretive tools to provide contextual evidence of ambiguity, the persuasive force to give each interpretive tool, and the point at which the interpretive tools are deemed not to signal a correct meaning are, among other related issues, entirely matters of judicial judgment.").

<sup>101</sup> Farnsworth et al., *supra* note 88, at 290; see also *id.* at 271 ("[S]imple judgments of ambiguity create a substantial risk of bias from policy preferences that the makers of the judgments hold. When respondents are asked how ambiguous a statute seems or whether two proposed readings of it are plausible, their judgments about the answers tend to follow the strength of their preferences about the outcome as a matter of policy: the more strongly they prefer one reading over the other,

clarity versus ambiguity turn on little more than a judge's instincts, it is harder for judges to ensure that they are separating their policy views from what the law requires of them.<sup>102</sup> And it's not simply a matter of judges trying hard enough: policy preferences can seep into ambiguity determinations in subconscious ways.<sup>103</sup> As a practical matter, judges don't 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*.<sup>104</sup> When we practice law, we look for the ambiguity when defending a criminal defendant, a corporate client, an agency, or even a President. What may look clear to everyone else, lawyers argue, is actually not so clear. Maybe it is good that we do this as lawyers (although I am not so sure because I think it leads some lawyers to green-light clients to do things that they should not do). But it is one reason that many people hate lawyers.<sup>105</sup> And it can be pernicious when we bring that instinct onto the bench and employ it to make statutory interpretation much more difficult and unpredictable than it can and should be.<sup>106</sup>

The problem of difficult clarity versus ambiguity determinations would not be quite as significant if the issue affected cases only on the margins. But the outcome of many cases turns on the initial — and

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the more likely they are to say that the statute is unambiguous or that only one reading of the text is plausible.”).

<sup>102</sup> See *id.* at 276 (“Perhaps this is not surprising; in the absence of any legal test to guide one’s thought process about clarity, one’s own strong views about policy might be a natural or at any rate an inevitable place to go for guidance.”).

<sup>103</sup> See, e.g., Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19–26 (2011). In his study, Farnsworth found that judgments about ambiguity were not affected by policy preferences when respondents were asked “whether ordinary readers of English would be likely to agree on the best reading of the statute in that case.” Farnsworth et al., *supra* note 88, at 272. But as noted earlier, courts have not distinguished doctrinally between different definitions of ambiguity in a way that might prevent policy preferences from influencing ambiguity determinations. See *supra* note 91.

<sup>104</sup> RICHARD MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE* (1999).

<sup>105</sup> Cf. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act. 4, sc. 2, l. 71 (Roger Warren ed., Oxford University Press 2002) (1591) (“The first thing we do, let’s kill all the lawyers.”).

<sup>106</sup> See Silberman, *supra* note 96, at 826 (“[V]irtually any phrase can be rendered ambiguous if a judge tries hard enough.”); cf. CLARK M. NEILY III, *TERMS OF ENGAGEMENT* 115 (2013) (noting critically that “lawyers are trained to find ambiguity in *anything*”).

often incoherent — dichotomy between ambiguity and clarity. As Farnsworth correctly notes: “Determinations of ambiguity are the linchpin of statutory interpretation.”<sup>107</sup>

As a result, there can be serious incentives and pressures — often subconscious — for judges to find textual ambiguity or clarity in certain cases.<sup>108</sup> For example, a judge may find that the answer provided by the legislative history accords better with the judge’s sense of reason, justice, or policy. In that situation, the judge is subtly incentivized to categorize the statute as ambiguous in order to create more room to reach a result in line with what the judge thinks is a better, more reasonable policy outcome. Conversely, the judge may conclude that the interpretation offered by an agency does not accord with the judge’s sense of reason, justice, or policy. In that case, the judge may avoid *Chevron* deference simply by finding a sufficient degree of clarity in the statute at the outset. (Once again, keep in mind that no one has told courts, or could meaningfully tell courts, how much clarity is enough to call a text clear rather than ambiguous for these purposes.)

Moreover, once judges make the key move of finding text ambiguous, then they can take full advantage of the large shed of ambiguity-dependent tools and canons. And because there is no neutral method to evaluate whether a text is clear or ambiguous, that initial move is a surprisingly easy one for judges to make.<sup>109</sup> As Farnsworth explains, “[t]he ‘magic wand of ipse dixit’ is the standard tool for deciding such matters.”<sup>110</sup>

A number of important Supreme Court decisions have implicated the clarity versus ambiguity problem. For example, consider some of the cases that have turned on the constitutional avoidance canon in the recent past: the *NFIB* healthcare case,<sup>111</sup> the *NAMUDNO* voting rights case,<sup>112</sup> and the *Wisconsin Right to Life* campaign finance

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<sup>107</sup> Farnsworth et al., *supra* note 88, at 257.

<sup>108</sup> See *id.* at 281 (“[H]ow a statute gets interpreted in the end, or *who* does the interpreting, will often depend on *whether* it is found ambiguous at the outset.”); see also Solan, *supra* note 88, at 865 (“[C]ourts themselves may not be sincere when they hold that the language of a statute is clear. For example, a judge may believe that language is susceptible to a number of interpretations, but say it is clear anyway in order to avoid triggering an interpretive doctrine that would lead to a result that she considers unjust in a particular case. When interpretive doctrine pushes judges toward putting more rhetorical weight on the language than they may feel is just in a particular case, it would not be surprising to find that they write insincerely about language in order to reach a result they believe is fair.” (footnote omitted)).

<sup>109</sup> See Slocum, *supra* note 88, at 809 (arguing that the concept of “statutory ambiguity” is “an inherently subjective interpretation that is highly amenable to judicial manipulation”).

<sup>110</sup> Farnsworth et al., *supra* note 88, at 276 (quoting *United States v. Yermian*, 468 U.S. 63, 77 (1984) (Rehnquist, J., dissenting)).

<sup>111</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>112</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

case.<sup>113</sup> 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 the Court could resort to the constitutional avoidance canon. If the statute was clear, then there would be no warrant for using the constitutional avoidance canon. All of these cases were extraordinarily important, and all were decided on the basis of a necessarily difficult evaluation of whether the text was clear or ambiguous.

Or consider the cases that have turned on *Chevron* deference. As Justice Scalia explained twenty-five 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.”<sup>114</sup> And, in fact, the Court has skirmished over exactly this terrain numerous times in the last twenty-five years, including in cases such as *Michigan v. EPA*,<sup>115</sup> *Scialabba v. Cuellar de Osorio*,<sup>116</sup> *EPA v. EME Homer City Generation, L.P.*,<sup>117</sup> *Massachusetts v. EPA*,<sup>118</sup> *FDA v. Brown & Williamson Tobacco Corp.*,<sup>119</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>120</sup> and *MCI Telecommunications Corp. v. AT&T Co.*<sup>121</sup>

A good example of the importance of the threshold ambiguity determination is *MCI*. There, the Court considered two provisions of the Communications Act of 1934.<sup>122</sup> The first provision — section 203(a) — required communications common carriers to file tariff schedules with the Federal Communications Commission (FCC).<sup>123</sup> The second provision — section 203(b) — granted the FCC the power to “modify” any requirement of the first provision.<sup>124</sup> The question before the Supreme Court was deceptively simple: does the power to “modify” any requirement of the first provision include the power “to make tariff filing optional for all nondominant long-distance carriers,” as the FCC claimed?<sup>125</sup>

In trying to answer this question, the Court divided over whether the statute was ambiguous. Led by Justice Scalia, the majority stated

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<sup>113</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

<sup>114</sup> See Scalia, *supra* note 40, at 520–21.

<sup>115</sup> 135 S. Ct. 2699 (2015).

<sup>116</sup> 134 S. Ct. 2191 (2014).

<sup>117</sup> 134 S. Ct. 1584 (2014).

<sup>118</sup> 549 U.S. 497 (2007).

<sup>119</sup> 529 U.S. 120 (2000).

<sup>120</sup> 515 U.S. 687 (1995).

<sup>121</sup> 512 U.S. 218 (1994).

<sup>122</sup> Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

<sup>123</sup> 47 U.S.C. § 203(a) (1988).

<sup>124</sup> *Id.* § 203(b)(2).

<sup>125</sup> *MCI*, 512 U.S. at 220.

that it had “not the slightest doubt” that the statute did not allow the FCC to make tariff filing optional for a broad category of common carriers.<sup>126</sup> In dissent, Justice Stevens disagreed vehemently.<sup>127</sup> In his view, the statute “plainly confer[red] at least some discretion to modify the general rule that carriers file tariffs.”<sup>128</sup> By casting aside the traditional “ample leeway” extended to the agency, he argued, the majority had seized on “a rigid literalism that deprives the FCC of the flexibility Congress meant it to have.”<sup>129</sup>

In that case, eight Justices came to two different answers about *whether* the statute was clear or ambiguous. That outcome will hardly reassure those who wish to keep the clarity versus ambiguity question as part of statutory interpretation. And *MCI* represents only one of many cases in which the Supreme Court has wrestled with determinations of ambiguity, to say nothing of the vast number of cases confronting the lower courts.

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 is almost inevitable.

Of course, in characterizing some of these decisions as examples of the problem, I am not in any way suggesting that the judges who authored them acted in an improper or political manner. To the contrary: most judges apply the doctrine as faithfully as possible. But too much of current statutory interpretation revolves around personally instinctive assessments of clarity versus ambiguity, as these cases amply show. It is difficult to make these assessments in a neutral, even-handed way, or for different judges to reach the same assessments consistently. And even if judges could make threshold findings of ambiguity in a neutral way, they still would have trouble convincing the public that they were acting impartially. It is all but impossible to communicate clarity versus ambiguity determinations in a reasoned and accountable way — especially when those determinations lead di-

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<sup>126</sup> *Id.* at 228.

<sup>127</sup> Justice Stevens was joined by Justices Blackmun and Souter. Justice O’Connor took no part in the consideration or decision of the case.

<sup>128</sup> *MCI*, 512 U.S. at 239 (Stevens, J., dissenting).

<sup>129</sup> *Id.* at 235. Although Justice Stevens did not describe the statute as “ambiguous,” he stated that the agency was entitled to deference under *Chevron*. *Id.* at 245. That implies that he found the statute ambiguous; otherwise, deference under step two of *Chevron* would not have been warranted.

rectly to the results in controversial cases.<sup>130</sup> Perhaps unsurprisingly, then, over time a number of Supreme Court Justices have expressed frustration with the difficulty — and arbitrariness — of the threshold inquiry.<sup>131</sup>

This kind of decisionmaking threatens to undermine the stability of the law and the neutrality (actual and perceived) of the judiciary.<sup>132</sup> After nearly a decade on the bench, I have a firm 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 here should not be misunderstood. Statutes will always have many ambiguities. That is the nature of language, including Congress's language. We cannot eliminate or avoid ambiguities, or wish them away. Chief Judge Katzmann puts it well: "it is unreasonable to expect Congress to anticipate all interpretive questions that

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<sup>130</sup> As Farnsworth illustrates colorfully: "If one person says that both proposed readings of a statute seem plausible, and a colleague disagrees, finding one reading too strained, what is there to do about it but for each to stamp his foot?" Farnsworth et al., *supra* note 88, at 276.

<sup>131</sup> See, e.g., *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.) ("[The rule of lenity] provides little more than atmospheric, since it leaves open the crucial question — almost invariably present — of how much ambiguousness constitutes an ambiguity."); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) ("Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted."); *United States v. Yermian*, 468 U.S. 63, 77–78 (1984) (Rehnquist, J., dissenting) ("Although 'there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language' in a statute, the Court's reasoning here amounts to little more than simply pointing to the ambiguous phrases and proclaiming them clear. In my view, it is quite impossible to tell which phrases the terms 'knowingly and willfully' modify, and the magic wand of *ipse dixit* does nothing to resolve that ambiguity." (first quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)); Kagan, *supra* note 1, at 56:25 (noting disagreements between the Justices about the presence or absence of ambiguity); Scalia, *supra* note 40, at 520–21.

<sup>132</sup> See Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 59 (2010) ("[W]ithout guidance to help judges understand the threshold inquiry into ambiguity that is supposed to constrain them, the benefits of curbing judicial discretion vanish. Detached from the help of any extrinsic aids, textual analysis and debating whether something is ambiguous may promote even more unbridled judicial decision by intuition."); cf. Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) ("[W]e should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat — an acknowledgment that we have passed the point where 'law,' properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired."). Although Justice Scalia was condemning judicial tests based on balancing or a totality of the circumstances, his criticism applies even more strongly to judicial tests based on nothing more than a judge's unguided intuition.

may present themselves in the future,” particularly when Congress operates under strict “time pressures” (p. 47).

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. 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.

*B. Judges Should Determine the Best Reading of the Statute, Not Whether It Is Clear or Ambiguous*

What is the solution? To be perfectly candid, I’m not sure at this point. But to start, perhaps we can try to examine ways to reduce reliance on the question of clarity versus ambiguity in the enterprise of statutory interpretation without sacrificing some of the rules of statutory interpretation that have helped structure the task. Here’s 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.

Instead, 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.<sup>133</sup> Second, once judges have arrived at the best reading of the text, they can apply — openly and honestly — any substantive canons (such as plain statement rules or the absurdity doctrine) that may justify departure from the text.<sup>134</sup> 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.

How do judges determine the “best reading” of a statutory text under the first step of my proposed approach? Courts should try to read statutes as ordinary users of the English language might read and understand them. That inquiry is informed by both the words of the statute and conventional understandings of how words are generally used by English speakers. Thus, the “best reading” of a statutory text

<sup>133</sup> For more on the semantic canons of construction, see *infra* Part III, pp. 2159–62.

<sup>134</sup> The plain statement and absurdity rules tell us that the best reading of the statutory text does not control in certain circumstances. But those rules, as I envision them, do not require that judges make an initial determination of clarity versus ambiguity. See *infra* section II.B.4, pp. 2154–56; section II.C, pp. 2156–59.

depends on (1) the words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons, which at the end of the day are simply a fancy way of referring to the general rules by which we understand the English language.

To be sure, determining the best reading of the statute is not always easy. But we have tools to perform the task and communicate it to the parties and 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?<sup>135</sup>

But given that several existing canons depend on a threshold determination of ambiguity, wouldn't this proposed approach work a significant change in certain aspects of statutory interpretation? Not necessarily. It depends on which canons we end up discarding. Importantly, moreover, this is not an all-or-nothing proposal: we could re-fashion some ambiguity-dependent canons but not others depending on the values at stake with particular canons.<sup>136</sup>

Let's take a look at a few of those canons.

1. *The Constitutional Avoidance Canon.* — Under the constitutional avoidance canon, judges must 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.<sup>137</sup> For the canon to be triggered, however, there must be ambiguity in the statute.<sup>138</sup>

The canon is based on a theory of judicial restraint. Under this theory, courts should avoid wading into difficult constitutional questions or holding statutes unconstitutional if they can reasonably avoid doing so. That reluctance is said to have the additional effect of showing respect for Congress by assuming that it would not have wanted to legislate across a constitutional line.

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<sup>135</sup> See Slocum, *supra* note 88, at 837 (“Ultimately, though, the ambiguity-elevating aspect of *Chevron* places unnecessary emphasis on a purely subjective and discretionary standard and is incongruent with the realities of statutory interpretation.”).

<sup>136</sup> To take one example, I do not have a firm idea about how to handle the rule of lenity. Of course, the Supreme Court seems to be very uncertain about the rule of lenity, too. Compare, e.g., *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014) (refusing to apply the rule of lenity because any statutory ambiguity was resolved by “context, structure, history, and purpose”), with, e.g., *id.* at 2280–82 (Scalia, J., dissenting) (criticizing “the majority’s miserly approach,” *id.* at 2281).

<sup>137</sup> See *Gomez v. United States*, 490 U.S. 858, 864 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.”); see also SCALIA & GARNER, *supra* note 7, at 247–51.

<sup>138</sup> For a discussion, see MANNING & STEPHENSON, *supra* note 88, at 257–59 (setting out two competing approaches to the idea of statutory “ambiguity” in the context of the avoidance canon).

Of course, one initial problem with this doctrine is that Congress may have wanted to legislate right up to the constitutional line but didn't know where it was and trusted the courts to make sure Congress did not unintentionally cross the line.<sup>139</sup> So constitutional avoidance can sometimes look more like judicial abdication — a failure to confront the constitutional question raised by the statute as written — than judicial restraint. Another problem is that the doctrine can be invoked when there are mere *questions* of unconstitutionality rather than actual unconstitutionality.<sup>140</sup> 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.

Over the years, for these and other reasons, many critics have advocated scaling back the constitutional avoidance canon, at least as applied to cases involving constitutional questions as opposed to actual unconstitutionality.<sup>141</sup> For instance, Judge Easterbrook has described “the canon of construing statutes to avoid constitutional doubt” as “wholly illegitimate.”<sup>142</sup> Noting that constitutional “doubt is pervasive,” he explains that the constitutional avoidance canon “acts as a roving commission to rewrite statutes to taste.”<sup>143</sup> As a result, the canon “is simultaneously unfaithful to the statutory text and an affront to *both* of the political branches.”<sup>144</sup> Likewise, Judge Posner criticizes the canon for “creat[ing] a judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself.”<sup>145</sup> Along with the many other critics of the constitutional avoidance canon, Judges Easterbrook and Posner have made strong cases in my view.

Apart from (or 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*.<sup>146</sup> In analyzing that case, it is perhaps important to underscore something

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<sup>139</sup> See Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983).

<sup>140</sup> See *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 481 (1989) (Kennedy, J., concurring in the judgment) (“The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute.”).

<sup>141</sup> See, e.g., Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2127–29 (2015); FRIENDLY, *supra* note 7, at 209–12; Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405–06 (2002); Posner, *supra* note 139, at 815–16.

<sup>142</sup> Easterbrook, *supra* note 141, at 1405.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1406.

<sup>145</sup> Posner, *supra* note 139, at 816.

<sup>146</sup> 132 S. Ct. 2566 (2012).

that seems to be overlooked by almost all observers, even those who should know better. The Chief Justice *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.<sup>147</sup> They agreed about the scope of the Taxing Clause.<sup>148</sup> And they agreed that the individual mandate provision was best read to impose a legal mandate rather than a tax.<sup>149</sup> 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* that 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.<sup>150</sup>

Consider that for a moment. For all that has been written about the *NFIB* case (and in particular about Chief Justice Roberts's role), 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 an 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 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 debate whether the Chief Justice or the four dissenters had the better argument about the clarity or ambiguity of the statutory provision in question. 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, im-

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<sup>147</sup> See *id.* at 2593 (opinion of Roberts, C.J.) (rejecting the Commerce Clause and Necessary and Proper Clause arguments and citing the dissent in accord).

<sup>148</sup> Compare *id.* at 2600 (majority opinion) (“Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more.”), with *id.* at 2651 (joint dissent) (describing the difference between taxes and penalties).

<sup>149</sup> Compare *id.* at 2600 (opinion of Roberts, C.J.) (“[T]he statute reads more naturally as a command to buy insurance than as a tax . . .”), with *id.* at 2652 (joint dissent) (“So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is.”).

<sup>150</sup> Compare *id.* at 2594 (opinion of Roberts, C.J.) (holding it was “fairly possible” to interpret the individual mandate as a tax (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))), with *id.* at 2651 (joint dissent) (arguing that “there is simply no way, ‘without doing violence to the fair meaning of the words used,’ of interpreting the individual mandate as a tax (quoting *Grenada Cty. Supervisors v. Brogden*, 112 U.S. 261, 269 (1884))).

partial, or predictable way. A case of this magnitude should not turn on such a question, but that is what the canon of constitutional avoidance required, which is why those five Justices were all compelled to confront and analyze it. (The other four Justices — Justices Ginsburg, Breyer, Sotomayor, and Kagan — would have upheld the provision under the Commerce Clause; they had no occasion to delve into the Taxing Clause and the constitutional avoidance canon.)

If the constitutional avoidance canon were jettisoned, 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 that reading turned out to be unconstitutional, then judges could say as much and determine the appropriate remedy by applying proper severability principles.

Of course, severability principles are their own separate mess. As currently framed, severability doctrine requires the judge to sever the offending provision from the statute, to strike down the entire statute, or to perform some other surgery. In deciding among this menu of options, the court must in part assess what Congress would have wanted and whether the statute would be workable without the offending provision.<sup>151</sup>

But how can the court determine what Congress would have wanted? For instance, in the *NFIB* case, the dissenters tried to determine whether Congress would have enacted the health care law without the provisions the dissenters deemed unconstitutional.<sup>152</sup> They said no. But how can we know? Is that really what then-Speaker of the House Nancy Pelosi, then-Senate Majority Leader Harry Reid, President Barack Obama, and all the Members of Congress who voted *for* the bill, would have wanted? Is this even the right question to be asking?

Courts can reform principles of severability as well. For instance, courts might institute a new default rule: sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute.<sup>153</sup> This default rule has the benefit of stopping judges from trying to guess what Congress would have wanted, an inherently suspect exercise.<sup>154</sup> And it has the additional benefit of telling Congress what to expect.

Regarding *NFIB*, some contend that at least the narrowest version of the severability principle could have led to the same bottom line (eliminating the legal mandate but keeping the tax penalties on those

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<sup>151</sup> See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

<sup>152</sup> See *NFIB*, 132 S. Ct. at 2668–76 (joint dissent).

<sup>153</sup> This is what the Supreme Court did in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). See *id.* at 508–10.

<sup>154</sup> See generally John F. Manning, Essay, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911 (2015).

who fail to have insurance).<sup>155</sup> Others disagree with that notion. I take no position here on how severability could have been applied in that case, which is an extraordinarily difficult question in its own right.

In any event, for all the reasons mentioned above, it may be worth trading off increased reliance on severability principles in exchange for decreased reliance on clarity versus ambiguity determinations in invoking the constitutional avoidance doctrine.

2. *Legislative History.* — A second ambiguity-dependent “canon” is the principle — on which Chief Judge Katzmann focuses his book — that we construe ambiguous statutes in light of the statute’s legislative history.<sup>156</sup>

As I discussed earlier, many have criticized the use of legislative history on 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 too often reflect an effort 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 intended. Moreover, legislative history is often conflicting because of different floor statements, reports, and the like. From the courts’ perspective, using legislative history can therefore be like “looking over a crowd and picking out your friends.”<sup>157</sup>

I find yet another major problem with legislative history: the clarity versus ambiguity trigger for resorting to legislative history means that the decision whether to resort to legislative history is often indeterminate. The indeterminacy of the trigger greatly exacerbates the problems with the use of legislative history. As a judge, if all you need to “pick out your friends” — that is, to pick out the result that you find 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’s pretty obvious as a matter of both common sense and human psychology. If judges are given a gray area with no guideposts about how to decide in that gray area (how to decide clarity versus ambigu-

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<sup>155</sup> For an exploration of this argument, see Joseph Fishkin, *Sever Everything but the Exhortation*, BALKINIZATION (Apr. 1, 2012, 4:33 AM), <http://balkin.blogspot.com/2012/04/sever-everything-but-exhortation.html> [<http://perma.cc/2QLW-QHFG>].

<sup>156</sup> See *supra* section I.D, pp. 2127–29. Of course, some textualists follow Justice Scalia’s example and do not accept legislative history even when interpreting ambiguous statutes.

<sup>157</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983), in turn borrowing Judge Leventhal’s “memorable phrase”).

ty), we should expect that they will end up with what they deem the most reasonable policy outcome.

In a world without initial determinations of ambiguity, judges would instead decide on the best reading of the statute.<sup>158</sup> In that world, legislative history would be largely limited to helping answer the question of whether the literal reading of the statute produces an absurdity, as discussed below.<sup>159</sup> 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.

3. *Chevron Deference*. — Under *Chevron*, courts uphold an agency's reading of a statute — even if not the best reading — so long as the statute is ambiguous and the agency's reading is at least reasonable.<sup>160</sup> This statutory interpretation principle is probably the one I encounter most as a judge on the D.C. Circuit.

*Chevron* has been criticized for many reasons. To begin with, it has no basis in the Administrative Procedure Act.<sup>161</sup> So *Chevron* itself is an atextual invention by courts. In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch. Moreover, the question of when to apply *Chevron* has become its own separate difficulty, as exemplified in cases such as *Mead*,<sup>162</sup> *City of Arlington*,<sup>163</sup> and *King v. Burwell*.<sup>164</sup>

In that regard, it is important to understand how *Chevron* affects the Executive Branch. From my more than five years of experience at the White House, I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints. My colleague Judge Tatel has lamented that agencies in both Republican and Democratic administrations too

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<sup>158</sup> Under the “best reading” inquiry, the question is only how the words would be read by an ordinary user of the English language. That’s why textualists rely on dictionaries. Dictionaries may not provide authoritative, binding interpretations of the language of a statute, but they do tell courts something about how the ordinary user of the English language might understand that statutory language. In contrast, legislative history explains only what some Members of Congress *intended* to say, as opposed to what they actually said in the statutory text.

<sup>159</sup> There may be other uses of legislative history that might not depend on an initial finding of ambiguity, such as providing evidence of the ordinary usage of a term, or showing the problem Congress was attempting to address. Even if there are other uses, we should try to sideline the threshold clarity versus ambiguity determination to the extent we can.

<sup>160</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

<sup>161</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). In fact, if anything, *Chevron* seems to flout the language of the Act. The Act makes clear that “the reviewing court” — not the agency — “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706 (2012).

<sup>162</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

<sup>163</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013).

<sup>164</sup> 135 S. Ct. 2480, 2488–89 (2015).

often pursue policy at the expense of law.<sup>165</sup> He makes a good point. As I see it, however, that will always happen because Presidents run for office on policy agendas and it is often difficult to get those agendas through Congress. So it is no surprise that Presidents and agencies often will do whatever they can within existing statutes. And with *Chevron* in the mix, that inherent aggressiveness is amped up significantly. I think some academics fail to fully grasp the reality of how this works. We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope (a philosophy that, I should note, seems present in the administrations of both political parties). After all, an executive branch decisionmaker might theorize, “If we can just convince a court that the statutory provision is ambiguous, then our interpretation of the statute should pass muster as reasonable. And we can achieve an important policy goal if our interpretation of the statute is accepted. And isn’t just about every statute ambiguous in some fashion or another? Let’s go for it.” Executive branch agencies often think they can take a particular action unless it is *clearly forbidden*.

Stated simply, we should not unduly blame the executive branch agencies for doing what our doctrine has encouraged them to do.

But when the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency’s legal interpretation is not the best, yet that interpretation carries the force of law. Amazing.

Perhaps in response to all of these criticisms, the Supreme Court itself has been reining in *Chevron* in the last few years. In one of its most significant recent pronouncements, *King v. Burwell*, the Court said that *Chevron* does not apply in cases involving “question[s] of deep ‘economic and political significance.’”<sup>166</sup> And *Chevron* does not apply at all unless “Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>167</sup> These cases suggest some serious concern at the

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<sup>165</sup> David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2 (2010) (“[I]n both Republican and Democratic administrations, I have too often seen agencies failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes and to follow principles of administrative law. In such cases, it looks for all the world like agencies choose their policy first and then later seek to defend its legality.”).

<sup>166</sup> See *King*, 135 S. Ct. at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

<sup>167</sup> *Mead*, 533 U.S. at 226–27.

Supreme Court about the reach of *Chevron*.<sup>168</sup> And *King v. Burwell* in particular raises two significant questions that the Supreme Court will presumably have to confront soon: First, how major must the questions be for *Chevron* not to apply? Second, if *Chevron* is inappropriate for cases involving major questions, why is it still appropriate for cases involving less major but still important questions?

All of that said, *Chevron* makes a lot of sense in certain circumstances. It affords agencies discretion over how to exercise authority delegated to them by Congress. For example, Congress might assign an agency to issue rules to prevent companies from dumping “unreasonable” levels of certain pollutants. In such a case, what rises to the level of “unreasonable” is a policy decision. So courts should be leery of second-guessing that decision. The theory is that Congress delegates the decision to an executive branch agency that makes the policy decision, and that the courts should stay out of it for the most part. That all makes a great deal of sense and, in some ways, represents the proper conjunction of the *Chevron* and *State Farm* doctrines.<sup>169</sup>

But *Chevron* has not been limited to those kinds of cases.<sup>170</sup> It can also apply whenever a statute is ambiguous. In a case where a statute is deemed ambiguous, a court will defer to an agency’s authoritative reading, at least so long as the agency’s reading is reasonable.<sup>171</sup>

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 (if clear) to step two (if ambiguous) of *Chevron* is not determinate because it depends on the threshold clarity versus ambiguity determination.<sup>172</sup> 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.”<sup>173</sup>

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<sup>168</sup> See also, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (raising “serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes” under *Chevron*); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring in the judgment) (stressing the conflict between *Chevron* deference and the APA and raising the possibility of “uproot[ing]” *Chevron*, *id.* at 1212); *Christensen v. Harris County*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting) (advocating for application of *Chevron* on a case-by-case basis within the broader *Skidmore* framework).

<sup>169</sup> Cf. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>170</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>171</sup> *Id.*

<sup>172</sup> See *Slocum*, *supra* note 88, at 794 (“Under *Chevron*, the concept of ambiguity is therefore central to whether an agency’s interpretation of a statute that it administers will receive judicial deference, but the determination of ambiguity by the judiciary is entirely standardless and discretionary.”). Step one also suffers from reliance on legislative history to determine whether there is an ambiguity in the first instance. See *Chevron*, 467 U.S. at 843 n.9, 851–53; *supra* section II.B.2, pp. 2149–50.

<sup>173</sup> See *Scalia*, *supra* note 40, at 520.

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

Think about 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. But one judge believes that the statute is ambiguous, so that judge would nonetheless uphold the agency's interpretation even though it is not the best interpretation. The other two judges say that the statute is sufficiently clear, so those judges strike down the agency's interpretation. That simple threshold determination of clarity versus ambiguity may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like. And yet there is no particularly principled guide for making that clarity versus ambiguity decision, and no good way for judges to find neutral principles on which to debate and decide that question.<sup>174</sup>

This state of affairs is unsettling. As I stated above, my goal is to help make statutory 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 objective is hard to achieve — at least in many cases — if the threshold trigger for *Chevron* deference to the agency is ambiguity.<sup>175</sup>

What's the solution?

To begin with, courts should still defer to agencies in cases involving statutes using broad and open-ended terms like “reasonable,” “appropriate,” “feasible,” or “practicable.” In those cases, courts should say that the agency may choose among reasonable options allowed by

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<sup>174</sup> See Slocum, *supra* note 88, at 795 (“Thus, the *Chevron* doctrine’s reliance on explicit ambiguity conclusions to determine whether an agency’s interpretation will receive deference has elevated the importance of a concept that is subjective, discretionary, typically addressed through conclusory statements, and, not surprisingly, a source of considerable disagreement among members of the Court.”).

<sup>175</sup> Indeed, it seems that courts have allowed this problem to arise in far more cases than the *Chevron* Court itself intended. After all, footnote 9 of *Chevron* told us explicitly that we should employ all the “traditional tools of statutory construction” to resolve any statutory ambiguity *before* we defer to an agency. *Chevron*, 467 U.S. at 843 n.9. Of course, when we employ those tools of interpretation, we often resolve the ambiguity and thereby get an answer. So in those cases, we would not have to defer to the agency at all. Therefore, if we took *Chevron* footnote 9 at face value, fewer cases would get to *Chevron* step two in the first place.

the text of the statute.<sup>176</sup> In those circumstances, courts should be careful not to unduly second-guess the agency's choice of regulation.<sup>177</sup> Courts should defer to the agency, just as they do when conducting deferential arbitrary and capricious review under the related reasoned decisionmaking principle of *State Farm*.<sup>178</sup> This very important principle sometimes gets lost: a judge can engage in appropriately rigorous scrutiny of an agency's statutory interpretation and simultaneously be very deferential to an agency's policy choices within the discretion granted to it by the statute.<sup>179</sup>

But 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 manner in most cases.

In short, 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 the initial clarity versus ambiguity decision. Here too, we need to consider eliminating that inquiry as the threshold trigger.

4. *Some Ambiguity-Dependent Principles of Interpretation Should Be Applied as Plain Statement Rules.* — The clarity versus ambiguity issue also arises with several substantive canons of interpretation that are now framed as presumptions. For example, we presume that statutes do not apply extraterritorially.<sup>180</sup> We presume that statutes do not effectuate implied repeals of other statutes.<sup>181</sup> We presume that stat-

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<sup>176</sup> See Silberman, *supra* note 96, at 825 (“Finding a specific congressional intent is particularly unlikely if the agency is applying statutory language that calls for an administrative judgment, such as what is ‘feasible’ or ‘probable.’”).

<sup>177</sup> Excessive delegation may be another problem (at least for some) in these examples. But that issue is beyond the scope of this Book Review.

<sup>178</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Application of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable — so much so that, on occasion, the courts’ arbitrary-and-capricious review itself appears arbitrary and capricious.”).

<sup>179</sup> Of course, agencies must still make *reasonable* choices. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (holding that EPA interpreted the Clean Air Act unreasonably when it deemed cost irrelevant to the decision to regulate power plants).

<sup>180</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“[U]nless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic conditions.’” (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))); *Arabian Am. Oil Co.*, 499 U.S. at 248 (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949))); see also SCALIA & GARNER, *supra* note 7, at 268–72.

<sup>181</sup> *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001) (“The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard

utes do not eliminate mens rea requirements.<sup>182</sup> And we presume that statutes do not apply retroactively.<sup>183</sup>

Some of these presumptions implicitly rest on an initial finding of ambiguity. In essence, if the statutory text is ambiguous, then courts should interpret the statute not to apply extraterritorially, not to effectuate an implied repeal, not to eliminate a mens rea requirement, or not to apply retroactively, for example.

Other presumptions are framed as plain statement rules that apply even when a statute is otherwise clear.<sup>184</sup> For example, we will presume that a statute does not directly alter the federal-state balance unless Congress expressly states as much.<sup>185</sup>

Whereas ambiguity-dependent presumptions can be overcome by clear text, presumptions framed as plain statement rules require something more: they demand language directly stating Congress's intent to wade into the area encompassed by the plain statement rule.<sup>186</sup> As a result, plain statement rules do not turn on a finding of clarity versus ambiguity; rather, they turn on whether the statute includes an express statement overcoming the default rule against a certain reading.

With the ambiguity-dependent presumptions, it is again problematic to let the clarity versus ambiguity determination resolve the fate of a

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for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue." (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996)); see also SCALIA & GARNER, *supra* note 7, at 327–33.

<sup>182</sup> *Staples v. United States*, 511 U.S. 600, 606 (1994) (“[W]e have stated that offenses that require no *mens rea* generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.” (citation omitted)).

<sup>183</sup> *U.S. Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (“The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.”); see also SCALIA & GARNER, *supra* note 7, at 261–65.

<sup>184</sup> See John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406–07 (2010) (defining clear statement rules as rules insisting “that Congress speak with unusual clarity when it wishes to effect a result that, although constitutional, would disturb a constitutionally inspired value,” *id.* at 407). Plain statement rules are also sometimes known as clear statement rules.

<sup>185</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“[I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” (alteration in original) (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989))).

<sup>186</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–12 (1992) (noting that the Court’s “super-strong clear statement rules” relating to federalism “can be rebutted only through” text that is both “unambiguous” and “targeted at the specific problem,” *id.* at 612). For a good overview of some prominent plain statement rules, see Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 825 (2005); see also Manning, *supra* note 184, at 406–17.

case. But what's the solution here? Some of the presumptions are already fashioned as plain statement rules. In my view, the solution to the clarity versus ambiguity conundrum in this context is either to apply the presumption in question as a plain statement rule, or to eliminate it entirely. In other words, if some constitutional or quasi-constitutional value is sufficiently important that we will presume that Congress did not mean to abrogate that value, then we should require Congress to speak directly to that issue in order to overcome it — whether it be extraterritorial application, repeal of a prior statute, mens rea, or retroactive application, among many others.

A separate problem is determining which constitutional or quasi-constitutional values justify a presumption or plain statement rule. That topic is hotly disputed but is beyond the scope of this Book Review.<sup>187</sup>

Putting aside transition questions,<sup>188</sup> this change would be easy to accomplish and would lead to far more predictability in the application of these presumptions in particular cases. It would also promote the kind of mutual understanding between courts and Congress that Chief Judge Katzmann rightly encourages. Indeed, the Supreme Court has seemingly been moving toward a plain-statement-like understanding of many of these presumptions already.<sup>189</sup>

### C. *Off-Ramps from the Text: The “Mistake” and Absurdity Canons*

What if a statute as written would produce an objectively absurd outcome? Or what if a statute as written says something that we are nearly certain that Congress did not mean — in other words, that the statutory text reflects a mistake?

To start, it's important to distinguish between the absurdity doctrine and the idea of a mistake.

The absurdity doctrine counsels that a statute should not be interpreted to produce an objectively absurd result.<sup>190</sup> At least in the abstract, this is a sound principle, although the alleged absurdity must

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<sup>187</sup> For example, I am on record as rejecting the so-called *Charming Betsy* presumption. See *Al-Bihani v. Obama*, 619 F.3d 1, 32–36 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

<sup>188</sup> Perhaps courts could adopt this change only for statutes enacted after the date on which the court announces the shift to a plain statement rule.

<sup>189</sup> See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 278 (2010) (Stevens, J., concurring in the judgment) (accusing the majority of seeking “to transform the presumption [against extraterritoriality] from a flexible rule of thumb into something more like a clear statement rule”).

<sup>190</sup> See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202–03 (1819) (Marshall, C.J.) (“[I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”).

surmount a high bar to be truly absurd.<sup>191</sup> After all, one person's reasonableness may be another person's absurdity. Or one person may think that an idea is bad but not absurd whereas another person may think it absurd. Interestingly, in determining whether a statute produces an absurd result, even Justice Scalia agreed that judges may look to legislative history.<sup>192</sup> Why? Legislative history may defeat an absurdity argument by demonstrating that some Members of Congress actually meant to legislate the result that the judge otherwise may think is absurd. And if Congress meant to legislate the result, that result cannot be absurd.

The mistake notion is more uncertain. It rests on a communications phenomenon that all of us confront on a daily basis. Someone might tell you, "you said X." And you might reply, "that's not what I meant." Or your child might say: "You asked me to do X, but I assumed you meant Y, so I did Y." These kinds of "mistakes" or divergences between what someone says and what someone means happen all the time. So too with Congress.

But is there a "mistake" principle in statutory interpretation? Do courts have the power to correct Congress's "mistakes"? The answer is yes, but only up to a limited point — that limited point being drafting errors, sometimes known as scrivener's errors.<sup>193</sup> All agree that those kinds of mistakes may be corrected by a court. Justice Scalia recently described the doctrine in this way: "Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake."<sup>194</sup>

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<sup>191</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

<sup>192</sup> See SCALIA & GARNER, *supra* note 7, at 388 ("[L]egislative history can be consulted to refute attempted application of the absurdity doctrine — to establish that it is indeed thinkable that a particular word or phrase should mean precisely what it says. For to establish thinkability (so to speak), just as to establish linguistic usage, one does not have to make the implausible leap of attributing the quoted statement to the entire legislature. It suffices that a single presumably rational legislator, or a single presumably rational committee, viewed the allegedly absurd result with equanimity."); see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring in the judgment).

<sup>193</sup> A scrivener's error is "an obvious mistake in the *transcription* of the legislature's policies into words." MANNING & STEPHENSON, *supra* note 88, at 93. It applies "where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 20 (Amy Gutmann ed., 1997). The scrivener's error doctrine is used to correct spelling errors, wrongly numbered cross-references, and the like rather than to rewrite substantive law because it fails to align with perceived congressional intent. See MANNING & STEPHENSON, *supra* note 88, at 93–101.

<sup>194</sup> *King v. Burwell*, 135 S. Ct. 2480, 2504–05 (2015) (Scalia, J., dissenting); see also *id.* at 2505 (describing the doctrine as applying to "misprint[s]," "slip[s] of the pen," and "technical mistake[s] in transcribing" a statute rather than "substantive mistake[s] in designing . . . the law").

But beyond technical drafting mistakes, there appears to be no broader mistake canon, where the courts can conclude that Congress did not mean to say what it said. That's what *Holy Trinity* allowed but what the Supreme Court now rejects.<sup>195</sup>

So what happens then when courts confront statutory text that is not what they think Congress meant to say but where the mistake is not akin to a drafting error? One answer — the answer that appears to correspond to current doctrine — is that courts may merely identify the apparent mistake, and then it is up to Congress to correct it. After all, Congress routinely passes technical corrections bills after it passes any major legislation.<sup>196</sup>

Of course, this discussion brings us right to *King v. Burwell*, one of the most interesting statutory interpretation cases in recent years. The question presented was whether tax credits available to people who purchased health insurance on exchanges “established by the State” also were available to those who purchased insurance on exchanges established by the Federal Government, even though the statute did not say as much.<sup>197</sup> Some said that the Members of Congress who voted for the bill meant (or would have meant, had they noticed it) to include federally established exchanges in the relevant provision. Under this theory, in other words, Congress did not say in the statute what at least those who voted for and signed the Patient Protection and Affordable Care Act<sup>198</sup> likely meant to say.<sup>199</sup> But in resolving the case, the Supreme Court decided against *explicitly* using a kind of mistake canon — perhaps because doing so would resurrect a form of the now-disfavored *Holy Trinity* doctrine.

But the Court nonetheless ruled for the Government and seemed *implicitly* to employ a mistake canon. The Court reasoned: “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a

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<sup>195</sup> See *supra* note 34 and accompanying text. Of course, the idea of “congressional intent” is inherently problematic to begin with. See generally Manning, *supra* note 154.

<sup>196</sup> See, e.g., New Mexico Navajo Water Settlement Technical Corrections Act, Pub. L. No. 114-57, 129 Stat. 528 (2015) (making technical corrections to the Navajo water rights settlement in New Mexico); Office of Compliance Administrative and Technical Corrections Act of 2015, Pub. L. No. 114-6, 129 Stat. 81 (making administrative and technical corrections to the Congressional Accountability Act of 1995); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (making technical corrections to the Immigration and Nationality Act).

<sup>197</sup> *King*, 135 S. Ct. at 2487.

<sup>198</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>199</sup> For an account of “where the four words at issue came from,” see Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 76–79 (2015).

way that is consistent with the former, and avoids the latter.”<sup>200</sup> The Court appeared to suggest that the overall plan and context of the law showed that the words in question did not *mean* what they *said*. The Court stated: “But when read in context, ‘with a view to [its] place in the overall statutory scheme,’ the meaning of the phrase ‘established by the State’ is not so clear.”<sup>201</sup> The Court used the term “ambiguous” to describe the law, but I think the Court was describing more of a mistake rather than ambiguity in any traditional sense.

It’s not my place here to say whether *King v. Burwell* was right or wrong in its outcome. That’s not relevant for present purposes and beyond the scope of this Book Review. But I think the question of whether it was right or wrong depends on what one thinks about a mistake canon — that is, a narrower form of *Holy Trinity* — that does not allow resort to legislative history but does allow courts to look at the overall Act and adopt what they conclude Congress *meant* rather than what Congress *said*.<sup>202</sup>

In the wake of *King*, a separate issue going forward for statutory interpretation and an issue more central to my focus in this Book Review is that the *King v. Burwell* Court’s calling the “established by the State” language ambiguous — rather than directly addressing the appropriate role of the Court in dealing with Congress’s apparent mistakes — may have broader repercussions. As I have explained, many canons depend on a finding of clarity versus ambiguity. That threshold inquiry is already indeterminate. Because the phrase “established by the State” was deemed ambiguous, one can imagine that some judges may find fewer statutes “clear” because the statutory language in question is no less ambiguous than the phrase “established by the State” was in *King*. We will see.

### III. REVISING THE PROBLEMATIC SEMANTIC CANONS

There is another set of canons of interpretation that judges apply when interpreting statutes. These are known as semantic canons. These canons help judges determine the best reading of the statutory text.

Semantic canons are generally designed to reflect the meaning that people, including Members of Congress, ordinarily intend to communi-

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<sup>200</sup> *King*, 135 S. Ct. at 2496.

<sup>201</sup> *Id.* at 2490 (alteration in original) (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), then quoting 26 U.S.C. §§ 36B(b)–(c) (2012)).

<sup>202</sup> *Cf. id.* at 2504–05 (Scalia, J., dissenting) (“Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. . . . [T]he Court does not pretend that there is any such indication of a drafting error on the face of [the statute].”); *Re, supra* note 34, at 413–15.

cate with their choice of words.<sup>203</sup> But some semantic canons do not accomplish this mission very well, and some require judges to make difficult policy judgments that they are ill-equipped to make. It seems to me that we ought to shed semantic canons that fall into these categories. There is much to be written on this topic, but to keep this Book Review from turning (even more) into a book of its own, I will sketch out just a few preliminary thoughts.

#### A. *The Ejusdem Generis Canon*

The ejusdem generis canon tells us to interpret a general term at the end of a series of specific terms to be of like character as the specific terms.<sup>204</sup> So when a statute says “no dogs, cats, or other animals allowed in the park,” we are told that we should read “other animals” to mean “other animals like dogs and cats.”

That does not make a whole lot of sense to me. Why not read “other animals” to mean “other animals”? It seems to me that we have to be wary of adding implicit limitations to statutes that the statutes’ drafters did not see fit to add.<sup>205</sup> If legislators want to keep out animals like dogs and cats, then they should enact a statute that states “no dogs, cats, or other *similar* animals allowed in the park.” That’s easy enough going forward, at least putting aside the not-so-easy question of transition rules in how we are to interpret statutes passed before any shift in interpretive methods.<sup>206</sup>

The more fundamental problem with ejusdem generis, for present purposes, is that it requires judges to come up with their own sense of the connective tissue that binds the terms in the statute.<sup>207</sup> Judges

<sup>203</sup> See MANNING & STEPHENSON, *supra* note 88, at 202 (“Some of these canons are ‘semantic’ (or ‘linguistic’ or ‘syntactic’): They are generalizations about how the English language is conventionally used and understood, which judges may use to ‘decode’ statutory terms. The use of semantic canons can therefore be understood simply as a form of textual analysis.”); cf. Kagan, *supra* note 1, at 35:42 (“I think of [semantic canons] usually as guides to reading language sensibly . . . Rather than go and memorize fifty canons, it’s helpful to have an intuitive feel for how language works and how the people who write things think that language works. And the canons are often just ways of formalizing those intuitions, those correct intuitions, about how people use language.”).

<sup>204</sup> See SCALIA & GARNER, *supra* note 7, at 199 (“Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*).”).

<sup>205</sup> Cf. *id.* (explaining how the “principle of *ejusdem generis* . . . implies the addition of *similar* after the word *other*”).

<sup>206</sup> Critics have attacked the ejusdem generis canon from many different perspectives. See, e.g., EDWARD BEAL, *CARDINAL RULES OF LEGAL INTERPRETATION* 65–66 (A.E. Randall ed., 3d ed. 1924); REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 233–34 (1975); Llewellyn, *supra* note 5, at 405.

<sup>207</sup> Cf. SCALIA & GARNER, *supra* note 7, at 207 (“What sets *ejusdem generis* apart from the other canons — and makes it unpopular with many commentators — is its indeterminacy. The doctrine does not specify that the court must identify the genus that is at the lowest possible level

must first determine what characteristic makes “dogs” and “cats” similar, and then apply that characteristic as an implied limitation on “other animals.” This is a very indeterminate task for judges. Justice Kagan highlighted this problem in her brilliant dissent in *Yates v. United States*,<sup>208</sup> a case involving an obstruction of justice statute where the majority relied on the ejusdem generis canon.<sup>209</sup> As she noted in that case: “[Ejusdem generis] require[s] identifying a common trait that links all the words in a statutory phrase.”<sup>210</sup> Commenting on the case, she explained:

The canon says you need a common denominator. But what is that common denominator? Is the common denominator things that preserve information? Or in the context of an evidence tampering statute, is the common denominator things that provide information to an investigator, things that tell an investigator, say something to an investigator about what the crime is?<sup>211</sup>

Justice Kagan illustrates well the problem with the canon. Judges should not be in the position of trying to devise the connective tissue or common denominator. I would consider tossing the ejusdem generis canon into the pile of fancy-sounding canons that warrant little weight in modern statutory interpretation.

### B. *The Anti-redundancy Canon*

Judges say that we should not interpret statutes to be redundant.<sup>212</sup> But humans speak redundantly all the time, and it turns out that Congress may do so as well.<sup>213</sup> Congress might do so inadvertently. Or Congress might do so intentionally in order to, in Shakespeare’s words,

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of generality. The court has broad latitude in determining how much or how little is embraced by the general term.”)

<sup>208</sup> 135 S. Ct. 1074 (2015).

<sup>209</sup> See *id.* at 1086–87.

<sup>210</sup> *Id.* at 1097 (Kagan, J., dissenting).

<sup>211</sup> Kagan, *supra* note 1, at 46:17.

<sup>212</sup> See SCALIA & GARNER, *supra* note 7, at 174 (“If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”); see also *id.* at 174–79.

<sup>213</sup> See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 933–36 (2013). Despite supporting the canon, Justice Scalia and Professor Garner admit this commonsensical point. They write that the canon “cannot always be dispositive because (as with most canons) the underlying proposition is not *invariably* true. Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.” SCALIA & GARNER, *supra* note 7, at 176–77.

make “double sure.”<sup>214</sup> Either way, statutes often have redundancies, whether unintended or intended.

The anti-redundancy canon nonetheless tells us to bend the statute to avoid redundancies, at least to the extent we reasonably can. But if one statute says “No dogs in the park” and another one says “No animals in the park,” I believe we should generally assume that the drafter wanted no animals in the park and *really* wanted to make sure that there were no dogs in the park. The anti-redundancy canon instead would have judges try to find some meaning of “animals” that excludes dogs and thereby avoids the redundancy. Such an exercise is little more than policymaking and, in my view, often quite wrongheaded.

We need to be much more cautious when invoking the anti-redundancy canon. Our North Star should always be determining the best reading of the actual words of the statute.

### C. *The Consistent Usage Canon*

Third, and relatedly, judges are told to presume that Congress uses terms consistently: where Congress uses the same term twice, it should be interpreted to mean the same thing, and where Congress uses different terms, they should be interpreted to mean different things.<sup>215</sup>

Superficially, that presumption seems commonsensical, and in the right context it is well advised. But in certain cases, judges turn this commonsense observation about human language into an ironclad rule. Those judges will never allow the same word to mean different things in different places in a statute, no matter how much the context suggests otherwise. Of course, that rigidity is inappropriate — in documents as complex and sprawling as statutes, oftentimes authors will use the same term to mean different things in different places.

Similarly, if two different terms are normally synonyms, requiring them to be interpreted differently makes little sense. For example, sometimes people say “street” and sometimes they say “road,” as in “he lives down the street, but she lives at the other end of the road.” Those different words were not intended to communicate any different meaning. For that reason, I would caution against unnaturally reading synonyms to have different meanings. When judges hew too closely to this presumption, they may ditch the best reading of a statute and instead improperly invent one of their own.

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<sup>214</sup> WILLIAM SHAKESPEARE, *MACBETH* act 4, sc. 1, l. 105 (Stephen Orgel ed., Penguin Books 2000) (1623).

<sup>215</sup> See SCALIA & GARNER, *supra* note 7, at 170 (“A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.”).

## CONCLUSION

Suppose that courts decided to try the suggestions made in this Book Review. Where would that leave us? Likely with the following two-step approach:

First, find the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any appropriate semantic canons.

Second, apply any applicable plain statement rules, and ensure that the interpretation is not absurd.

Would this two-step process lead every set of judges to reach the same answer in every case? Of course not. But I believe it would produce a more stable and predictable body of statutory jurisprudence than we have now. It would sideline the clarity versus ambiguity determination that is so critical now, but also so indeterminate. This new approach would enhance the rule of law and the appearance of neutral, evenhanded justice.

Regardless of whether you go down that road and whatever your views on statutory interpretation, please read Chief Judge Katzmann's book *Judging Statutes*. And after reading it, do not stop thinking. Instead, use it as a springboard to start reflecting more deeply on the state of statutory interpretation. In my view, we have made enormous progress, thanks largely to Justice Scalia. But as he himself explained so well, the current state of affairs is still not always a pretty picture. I have sketched out some thoughts here to provoke discussion. Some of these may be good ideas; others may be not as good. I am not wedded to any of them at this point. But I am confident that we can do better in interpreting statutes. Prompted by Justice Scalia's brilliant life and career, and by Chief Judge Katzmann's excellent book, we should all strive to do better. That much is clear.