

FEDERAL COURTS, PRACTICE & PROCEDURE
SYMPOSIUM: JUSTICE SCALIA AND
THE FEDERAL COURTS

KEYNOTE ADDRESS: TWO CHALLENGES FOR THE
JUDGE AS UMPIRE: STATUTORY AMBIGUITY
AND CONSTITUTIONAL EXCEPTIONS

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I am honored to be back at Notre Dame Law School. This is one of the very best law schools in the United States. I love coming here. I thank the *Law Review* for hosting this symposium in honor of Justice Scalia. I am grateful to Professor Barrett for the generous introduction and for her outstanding scholarship and teaching at this law school. She is an inspiration to her students and an inspiration to me. I thank my many friends on the faculty for being here. I want to single out my longtime friend and colleague Bill Kelley. We have worked together on many challenging assignments in the past. He is a special person and a great teacher, scholar, and lawyer. I am proud to be his friend.

I am Catholic. This university holds a special place in the hearts and minds of most American Catholics, and it represents the best of the Catholic educational tradition. That tradition is one that emphasizes service—caring for the poor, the neglected, the vulnerable. It lives out the Gospel of Matthew and teaches that your most important duty is to take care of the least of your brothers and sisters. At the same time, this university's tradition is one of inclusiveness, of welcoming people of all faiths and beliefs. And the tradition is one of teaching and learning, always probing and studying and thinking about how to make our country and our world a better place.

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When I received the invitation to be here, I will admit that I glanced at the schedules for both the women's and men's basketball teams and hoped I might be able to catch a game. Alas, no home games this week. I recall that my very first trip to Notre Dame was almost exactly thirty years ago to the day to watch Notre Dame play against then-number-one North Carolina in men's basketball. I was here with a bunch of my Georgetown Prep high school friends who went to Notre Dame. Notre Dame upset North Carolina, and it was a raucous scene and a wild weekend. Fortunately, there was no social media back then.

Just a couple of nights ago, Neil Gorsuch was nominated to the Supreme Court. Neil and I actually went to high school together at Georgetown Prep. I was two years ahead of him. And then we clerked together the same year for Justice Kennedy and got to know each other very well. We worked together in the Bush Administration, and we both became judges in 2006. We serve together now on the Appellate Rules Committee of the Judicial Conference, and were coauthors along with Bryan Garner and several other judges of a book on precedent.¹ Don't try to read that book all at once is my only piece of advice. So I know Neil Gorsuch well and have known him seemingly forever. He is a good friend. He is kind, funny, hard working, and brilliant. He's a great writer and independent. With his smarts, his character, and his understanding of life and law, I firmly believe he will be one of the great Justices in Supreme Court history, like a Jackson or a Scalia. Watching him the other night, I felt immensely and overwhelmingly proud of him. And proud of Georgetown Prep, I might add.

Neil was of course nominated to replace Justice Scalia, for whom we are gathered here. I do not want to overstate my relationship with Justice Scalia. But I loved the guy. For starters, he was always so funny when I saw him at dinners or legal events or anywhere. He had a magnificent wit and put everyone at ease. But beyond that, Justice Scalia was and remains a judicial hero and role model to many throughout America. He thought carefully about his principles, he articulated those principles, and he stood up for those principles. As a judge, he did not buckle to political or academic pressure from the right or the left. He was fiercely independent.

For many decades, moreover, he tirelessly and at substantial financial sacrifice devoted himself to public service, teaching, and lecturing. We all benefited from that. If you asked him to do something, he said yes if there was any way he could possibly do it. He was anywhere and everywhere, from the Red Mass, to far-flung legal conferences around the world, to classes at law schools, to the annual Friendly Sons dinner on St. Patrick's Day (and you might be aware, he was not Irish). He wanted to give back. He was a great example for public servants and teachers.

He loved his wife and family. He was a man of faith. And he really was a man for others. He inspired me to try to do more and to do better in all

1 BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016).

facets of my life, and I hope he inspires all of us to do the same. I miss him personally and professionally.

What did Justice Scalia stand for as a judge? It's not complicated, but it is profound. The judge's job is to interpret the law, not to make the law or make policy. So read the words of the statute as written. Read the text of the Constitution as written, mindful of history and tradition. The Constitution is a document of majestic specificity defining governmental structure, individual rights, and the role of a judge. Remember that the structural provisions of the Constitution—the separation of powers and federalism—are not mere matters of etiquette or architecture, but are essential to protecting individual liberty. Justice Scalia's memorable dissent in *Morrison v. Olson* is of course the best example of that.² Remember that courts have a critical role, when a party has standing, in enforcing those separation of powers and federalism limits. For judges, Justice Scalia would say, don't make up new constitutional rights that are not in the text of the Constitution. But don't shy away from enforcing constitutional rights that are in the text of the Constitution. Changing the Constitution is necessary at times, but it is to be done by the people through the amendment process. Changing policy within constitutional bounds is for the legislatures.

That's about it. Simple but profound. And it made a lot of converts.

But more work remains. I want to touch on two aspects of Justice Scalia's jurisprudence and the Court's jurisprudence: statutory interpretation and constitutional interpretation. And I am going to explain how uncertainty in certain aspects of statutory and constitutional interpretation is affecting the Court, and the vision of the Court that the American people hold.

Justice Scalia described the rule of law as a law of rules. He believed in clear rules that would lead to predictable results and constrain judicial discretion. As John Manning has said, one of the defining features of the Scalia jurisprudence is to set forth rules and principles that were not balancing tests that could be used by judges to make it up as they go along.³ In Justice Scalia's book *A Matter of Interpretation*, he explained that federal judges are not common-law judges and should not be making policy-laden judgments.⁴ Along the same lines, Chief Justice Roberts has famously articulated the vision of the judge as umpire, which captures the same basic point in a catchy sports metaphor.

I believe very deeply in those visions of the rule of law as a law of rules, and of the judge as umpire. By that, I mean a neutral, impartial judiciary that decides cases based on settled principles without regard to policy preferences or political allegiances or which party is on which side in a particular case. When we watch a Notre Dame-Michigan game, we do not ask whether

2 See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

3 See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017).

4 ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

the referees are Irish fans or Wolverines fans. Yet when we watch the Supreme Court, too many Americans think the decision is pre-baked based on the party of the President who appointed the Justices or the policy preferences of the Justices. That bothers me, and I have been thinking about the causes of that, and whether there are at least some modest cures for that.

Let me talk first about statutes.⁵ Statutory interpretation has improved dramatically over the last generation, thanks largely to Justice Scalia. Justice Scalia brought about a massive and enduring change in statutory interpretation. Text matters. The text of a law is the law. As Justice Kagan recently stated, “we’re all textualists now.”⁶ When the text is clear, the Court says, follow the text unless the text is absurd or unless the text is overridden by some clear statement canon of interpretation. That is a neutral principle: It is not pro-business or pro-labor, pro-manufacturer or pro-environment, pro-plaintiff or pro-defendant. And Justice Scalia is largely to thank for that.

But statutory interpretation is still troublingly imprecise and uncertain in many cases.

Here’s my biggest problem. Several substantive canons of statutory interpretation, such as constitutional avoidance, legislative history, and *Chevron*, depend on an initial determination of whether the text is clear or ambiguous. But how do courts know when a statute is clear or ambiguous? In other words, how much clarity is sufficient to call a statute clear and end the case? Quite simply, there is no good or predictable way for judges to do this. Judges go back and forth. One judge will say it is clear. Another judge will say, “No, it’s ambiguous.” Neither judge can convince the other. Why not? The answer is that there is no right answer.

There are two separate problems here.

First, how much clarity is enough? Sixty-forty? Eighty-twenty? Who knows.

Second, let’s imagine we can agree on eighty-twenty. How do we apply that? How do we know whether and when a statute is eighty percent clear?

The simple and troubling truth is that there is no definitive guide for determining whether statutory language is clear or ambiguous. As Professor Ward Farnsworth has written, judgments about ambiguity are dangerous “because they are easily biased by strong policy preferences.”⁷

Does this really matter in the real world of judicial decisionmaking? Yes. I am here to tell you that it matters in a huge way in many cases of critical importance to the Nation. And it matters in a way that threatens the vision of the judge as umpire.

5 I wrote at length to explain this point about statutory interpretation in my review of Chief Judge Katzmann’s book. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

6 *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 8:28, HARV. L. TODAY (NOV. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation>.

7 Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 290 (2010).

Consider the constitutional avoidance canon, which was at issue in cases such as *Wisconsin Right to Life* and perhaps most famously *NFIB v. Sebelius*.⁸ In *NFIB*, the whole issue of whether the Affordable Care Act's individual mandate would survive came down to the constitutional avoidance doctrine. Was the statute's reference to a penalty sufficiently ambiguous that it could be considered a tax and therefore avoid unconstitutionality under the Taxing Clause? The four dissenters said that the statute was not ambiguous. Chief Justice Roberts said that the statute was ambiguous. And on that question, the fate of the individual mandate and the healthcare law was decided.

Or consider legislative history. Now, some judges never or rarely use legislative history in part because it is akin to picking out your friends at a party.⁹ But many judges use legislative history, although they hasten to add that they use it only when a statute is ambiguous. That, indeed, is what the Supreme Court typically says as well. But think about the problem this causes. All it takes to pick out your friends—that is, to interpret the statute in a way that leads to a better policy outcome—is to find the statute ambiguous. That creates a huge incentive for judges to find statutes ambiguous. If there is no coherent way to determine whether a statute is clear or ambiguous, that is a problem for the goal of neutral statutory interpretation.

Third, consider the *Chevron* doctrine. We see this doctrine all the time on my court with cases involving the huge agencies: EPA, the FCC, the SEC, and the like. *Chevron* tells us that we must defer to an agency's reasonable interpretation of a statute if the statute is ambiguous.¹⁰ To begin with, the *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes. I saw this firsthand when I worked in the White House, and I see it now from the other side as a judge. But think about what this means in real cases in courts. Say you have a really important agency rule that is being challenged before a three-judge panel. The question is whether the agency rule is authorized under the implementing statute. One judge says that the statute is clear and the agency loses. Two other judges say that the statute is ambiguous, so they defer to the agency even though they may agree with the first judge on what is the best reading of the statute. The result is that the agency wins, even though none of the three judges thought that the agency had the better reading of the statute.

The legality of a major agency rule may—and in my experience on many occasions does—turn not on whether the judges think the agency's interpretation of the statute is the best interpretation, but rather on whether the

8 *NFIB v. Sebelius*, 567 U.S. 519 (2012); *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

9 See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (“Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”).

10 See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

statute is ambiguous. That is true even though there is no real objective guide for determining whether a statute is ambiguous.

I should note, parenthetically, that there is a separate concern about *Chevron* as famously expressed by Judge Gorsuch. He said the doctrine is flawed ab initio because the Administrative Procedure Act says that courts should decide questions of law in administrative law cases of this sort.¹¹ But that's not my issue for today. My issue today is the ambiguity trigger.

So what's the solution to the ambiguity trigger for these various canons? I am not entirely sure, to be candid. I suppose some snarky people might say that Congress should not write ambiguous statutes. But the limits of language are such that that is an impossible goal to achieve in all cases, to state the obvious. We cannot eliminate all ambiguity in statutes.

But we can stop using ambiguity as the trigger for applying these canons of statutory interpretation. In my view, judges should strive to find the best reading of the statute, based on the words, context, and appropriate semantic canons of construction. To be sure, judges may deviate from the best reading if there are any applicable plain statement rules—such as the presumption against extraterritoriality or the presumption that statutes do not eliminate mens rea requirements. Judges may also apply the absurdity canon. But otherwise, courts should go with the best reading of the statute.

For example, instead of applying the constitutional avoidance canon in its current form, courts would determine the best reading of the statute. If that reading is unconstitutional, then the court would say as much and ordinarily sever that provision of the law from the remainder of the statute.

As to legislative history, it would be used primarily to help identify absurdities but otherwise would play a relatively limited role. It bears mention that legislative history already plays a relatively limited role in statutory interpretation. As Justice Kagan stated two years ago, legislative history is usually icing on a cake already frosted.¹²

For *Chevron*, courts would simply determine the best reading of the statute. Courts would no longer defer to agency interpretations of statutes. This would help keep agencies within statutory bounds and help prevent a runaway executive branch that exploits ambiguities in governing statutes to pursue its broad policy aims, even in situations where Congress has not enacted legislation embodying those policies.

All of that said, *Chevron* makes sense in certain circumstances, usually when it merges with the *State Farm* doctrine.¹³ For example, Congress might assign an agency to prevent utilities from charging “unreasonable” rates. In such a case, what counts as “unreasonable” amounts to a policy decision. So courts should be hesitant to second-guess that decision. In that circumstance, Congress has assigned the decision to an executive branch agency

11 See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

12 *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting).

13 See *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

that makes the policy decision. So the courts should stay out of it for the most part. But *Chevron* has not been limited to those kinds of cases. As of now, *Chevron* is the default rule for all statutes and all agencies.

To sum up on statutes, as of now, determinations of ambiguity dominate statutory interpretation in a way that few people realize. Indeed, even judges seem unaware at times of how fundamental an issue this is. The problem is that there is no objective or determinate way to figure out whether something is ambiguous. This is a major problem for the Scalia vision of constraining the discretion of judges and for the corresponding Roberts vision of the judge as umpire. We have a culture of searching for ambiguity instead of a culture of searching for the best reading of the law. By eliminating that threshold ambiguity trigger in the ways I have described, we can transform from a culture of ambiguity to a culture of law.

Let me turn now to the Constitution.

There is often a debate about originalism versus living constitutionalism. Justice Scalia famously promoted originalism. Originalism is akin to textualism, but it takes account of the fact that the meaning of a word might have changed from the time of enactment to today. When that has occurred, the meaning at the time of enactment controls. But the debate over originalism matters mostly when we are talking about interpreting a provision of the Constitution for the first time. That's not where most big constitutional controversies are erupting at the Supreme Court these days.

Rather, a big debate at the Supreme Court—and the area most in need of help in living up to the vision of judge as umpire—is how to analyze and define implicit *exceptions* to constitutional rights when the Court applies its preexisting precedents that have already interpreted various constitutional provisions.

Two terminology caveats at the outset.

First, don't get hung up on the word "exceptions." Whether you call them exceptions to a right or the contours of a right is irrelevant to my point.

Second, don't get sidetracked by what you think about the underlying right. You may think the Supreme Court erred when it held that the Second Amendment protects an individual right to gun ownership or when it held that the Fourteenth Amendment protects an individual right to abortion. Don't let that sidetrack you from the analysis to follow.

How do we determine the exceptions to constitutional rights?

One possibility, of course, would be that there are no exceptions to constitutional rights unless those exceptions are specified in the constitutional text. That absolutist view was sometimes associated with Justice Hugo Black and the First Amendment.

But that approach does not really work in the wake of incorporation. Let me explain that point.

Take the First Amendment's protection of freedom of speech. As ratified in 1791, the First Amendment applied only against the federal government. The First Amendment, and the Bill of Rights more generally, did not protect liberty against state governments. The Bill of Rights thus preserved

and even enhanced states' rights to regulate. Therefore, the states could regulate speech and ban libel. Because the states could regulate speech, the federal government did not need to do so. As a result, from 1791 to at least 1868, the First Amendment could have been absolute as applied against the federal government.

After 1868, of course, the Fourteenth Amendment was in place. That Amendment incorporated many of the rights in the Bill of Rights against the state governments as well as against the federal government.¹⁴

So one might ask: After incorporation, why not still say that the First Amendment, for example, is absolute against the state governments as well as against the federal government?

The short answer is that taking that absolutist approach would be all but impossible. No exceptions would mean no libel laws and no defamation laws. Threats and incitements would be protected under the First Amendment. Traditional state restrictions on speech could be wiped away if the rights were absolute and incorporated such that they applied against both federal and state governments. And no one was prepared to do that, and no Justice has ever advocated such an approach, as far as I know. Indeed, even Justice Scalia—the foremost textualist and originalist—did not hold that view. No one—and I mean no one, not even Justice Black—articulates that view of the First Amendment.

So what does that mean? It means that there are exceptions to constitutional rights. But how do we determine what the exceptions are? And there it is. That's the battleground. That's the difficulty. That's the threat to the rule of law as a law of rules. That's the threat to the judge as umpire.

No one doubts that there is an expansive right to free speech protected against both federal and state governments. But what regulations of speech are still permissible?

Eventually, when faced with that question in the 1950s and thereafter, the Supreme Court came to adopt various tiers of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review. These tests were used and continue to be used to decide whether a law may be upheld even though it affects or infringes the individual right in question. Depending on which test is employed, the Court asks whether the regulation serves a compelling governmental interest or an important governmental interest or a legitimate governmental interest. And then the Court asks whether the regulation is necessary or narrowly tailored or substantially related or reasonably tailored to that interest.

If nothing else, I want to underscore that the compelling interest/important interest/strict scrutiny/intermediate scrutiny formulations are rather indeterminate. Those verbal formulations require judges to balance a

14 See *McDonald v. City of Chi.*, 561 U.S. 742, 763 (2010) (“While [total incorporation] was never adopted, the Court eventually moved in that direction by initiating what has been called a process of ‘selective incorporation,’ *i.e.*, the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.” (citations omitted)).

variety of hard-to-measure factors. On one hand, judges must evaluate the strength of the government's interest in the regulation. On the other hand, judges must evaluate how big a burden the regulation places on the relevant right. But those verbal formulations offer little principled guidance for making either determination, much less for weighing the two sides against one another. Those formulations are sometimes empty of real, determinate, objective meaning. At most, they are a mood-setter, but they don't tell us in the end whether to uphold a state ban on semiautomatic rifles or a particular state regulation of doctors who perform abortions or a law that proscribes or limits expenditures in support of political candidates.

Yet those formulations are ubiquitous in constitutional law. We see them in First Amendment cases, Second Amendment cases, Fourteenth Amendment abortion cases, Fourteenth Amendment affirmative action cases, and in several other areas. Indeed, some statutes have borrowed this terminology—most notably, the Religious Freedom Restoration Act.¹⁵ These are some of the most disputed and controversial areas in law, yet we do not have objective guideposts that can give us neutral ways to decide these cases.

It's sometimes as if you were asked to umpire a baseball game, and you asked the Commissioner of Baseball whether the bottom of the strike zone was at the knees or at the hips, and you were told that it was up to you.

These verbal formulations are challenging because judges have no objective way of deciding whether an interest is "compelling" or "important" without making a judgment about the desirability of that interest. Nor do they have an objective way of deciding whether legislation is sufficiently tailored to that interest without making a judgment about how well the legislation aligns with the state's goals. These verbal formulations therefore do not constrain or guide judges in meaningful or predictable ways. They put judges in the position of making judgment calls that inevitably seem rooted in policy, not law.

What is really going on with these tests, it appears, is old-fashioned common-law judging. This may be unavoidable, as I will explain. But we should be under no illusions that this is not what's happening when those tests are being applied.

To be sure, the hallmark of common-law judging is that legal tests, however difficult to apply in the abstract, acquire meaning as courts apply them with greater frequency. Precedent develops over time, and precedent allows judges to develop the meaning of phrases like "compelling interest" or "narrowly tailored" in particular areas. Nonetheless, across much of constitutional law, the Supreme Court's precedents do not necessarily lead to

15 See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)); see also 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

predictable results. Why? In part because judges do not all look at the same factors when deciding the scope of constitutional exceptions.

What factors is the Court really looking at when it uses these tests and decides the scope of constitutional exceptions? What is informing the Court's common-law judging in these areas? It seems that there are at least three factors that the Justices are examining. But not all the Justices are looking at the same factors in individual cases or across cases.

Some Justices place heavy reliance on history and tradition, sometimes leavened with contemporary practice, when assessing exceptions to constitutional rights. If a claimed exception to a constitutional right has an historical pedigree or is very common—think libel laws or obscenity laws—then the regulation will be upheld. But otherwise, no exceptions. Justice Scalia relied very heavily on history and tradition when determining whether a particular regulation could be upheld even though it affected a constitutional right. You see that quite clearly in Part III of his *Heller* opinion,¹⁶ and you see it in many of his First Amendment free speech opinions over the years, such as *Republican Party of Minnesota v. White*.¹⁷

Some Justices tilt toward liberty at least in some cases, meaning that they will be very reluctant to recognize an exception to a constitutional right unless it is absolutely essential. Justice Kennedy often relies on liberty as a guide in cases of claimed constitutional exceptions. (To be clear, I am referring here to liberty in the sense of freedom from government regulation.)

Some Justices tilt toward judicial restraint or deference, meaning that they often will be very reluctant to overturn the legislature's regulation if it is reasonable. In determining whether the regulation is reasonable, they will evaluate whether the benefits outweigh the costs. Justice Breyer is perhaps the Justice most associated with this approach. He often relies on restraint and deference as guides in cases of claimed constitutional exceptions.

Let's look at a few examples. In discussing examples, let me be clear and state the obvious: I am necessarily speaking generally, and each one of these areas of the law has lots of nuances. I am simplifying for analysis purposes—and no doubt oversimplifying.

Take the First Amendment and campaign finance. You have the right to free speech, and that includes of course the right to advocate for a particular candidate or policy. But we have exceptions to the First Amendment for libel, defamation, threats, obscenity, and the like. Should there be an exception for campaign finance regulation?

The Court generally allows regulation of campaign contributions. But the Court generally does not allow regulation of campaign expenditures. The case articulating that divide was of course the 1976 decision in *Buckley v. Valeo*.¹⁸

16 See *District of Columbia v. Heller*, 554 U.S. 570, 626–28 (2008).

17 536 U.S. 765 (2002).

18 424 U.S. 1 (1976) (per curiam).

In recent years, the big expenditures case is *Citizens United*.¹⁹ That case applied the compelling governmental interest test. And perhaps not surprisingly, we see Justice Kennedy writing the majority opinion tilting toward liberty and the dissent emphasizing deference to the reasonable judgment of the legislature.²⁰

Who's right? Well, that depends on what test you think the Court should apply to assess constitutional exceptions, and then how you would apply that test to this particular issue. But I am not surprised there is such disagreement on this issue, because the test employed—compelling interest—is inherently a common-law test. And common-law tests almost by definition call on judges to assess whether they think the law is important enough to uphold in light of the larger values at stake.

Consider next the Fourteenth Amendment and abortion. The Supreme Court said in *Roe v. Wade* that there was a right to abortion in certain circumstances.²¹ But that has raised a follow-on issue that has come up again and again in the years since *Roe*. What regulations of abortion are permissible? Informed consent, waiting periods, partial-birth bans, doctor licensing, parental notice, and the like. What is the answer—and more importantly for present purposes, what is the nature of the test we should use to figure out the answer?

Since 1992, the Court has settled on an undue burden test.²² That test is very much a common-law kind of test. Does the law burden the woman's right? And if so, is that burden "undue"? The word "undue" calls for a classic assessment of the pros and cons of the regulation in question. And not surprisingly, that is how Justice Breyer articulated the test in the most recent abortion case, *Whole Woman's Health*.²³

Consider also the Fourteenth Amendment and affirmative action. The Court has recognized a basic equal protection right not to be treated differently by the government on account of your race. But there is a longstanding exception for affirmative action, at least in the realm of higher education. But how do we determine whether a particular affirmative action program passes muster or not? We see the Court battling over strict scrutiny or intermediate scrutiny—and then battling over exactly what constitutes a compelling enough interest for purposes of strict scrutiny. In *Bakke* and post-*Bakke* cases, the Court found that ensuring diversity is a compelling interest but remedying the effects of past societal racial discrimination is not a compelling interest.²⁴ In those cases, the Court also battles over whether the affirmative action program is narrowly tailored to promote the state's interest in

19 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

20 Compare *id.* at 349–62, and *id.* at 371–72, with *id.* at 394–96 (Stevens, J., dissenting).

21 See *Roe v. Wade*, 410 U.S. 113 (1973).

22 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

23 See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

24 See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see also, e.g., *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016); *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

ensuring diversity. On what basis is the Court making those decisions? Is there something in the text of the Constitution that tells us one is good enough and the other is not good enough? Not really. Again, this is common-law judging to define the contours of the exception to the constitutional right.

The last area I will mention is the Second Amendment and guns. *Heller* says you have an individual right to possess certain guns.²⁵ And for present purposes, just take that as a given even if you happen to disagree with *Heller* on that point. The battleground issue now is what exceptions are there to that right.

Interestingly, Part III of Justice Scalia's majority opinion in *Heller* pre-identified a number of exceptions based on history and tradition. He noted for the Court that dangerous and unusual weapons such as machine guns (that is, fully automatic as opposed to semiautomatic guns) had been banned for a long time. He noted that guns had been banned in public buildings.²⁶ Again, Justice Scalia (as I read him) seemed to rely on history and tradition to define the category of permitted exceptions.

Justice Breyer by contrast wrote a separate opinion to say that exceptions to the right should be determined on the basis of reasonableness.²⁷ This was another example of Justice Breyer's common-law approach with an emphasis on judicial restraint and deference to the legislature.

The litigation in the lower courts since *Heller* has centered on which gun regulations are constitutional and which gun regulations are unconstitutional.²⁸ Not surprisingly, this has played out as a battle over whether strict scrutiny or intermediate scrutiny applies. Must the regulations serve a compelling interest or merely an important interest? As I have stated, I view much of that debate as a smokescreen that is disguising basic common-law balancing and deciding what is reasonable versus what is unreasonable, what is important versus what is not as important.

And in this context in particular, I view *Heller* as having already told us that the content of exceptions to the Second Amendment right is not to be assessed based on strict scrutiny or intermediate scrutiny. Rather, the exceptions are to be assessed by reference to history and tradition. I wrote an opinion to that effect, although I am the first to acknowledge that most other lower-court judges have disagreed.²⁹ The issue has not returned yet to the Supreme Court. To be determined.

In all of these examples, what I want to emphasize is that the exceptions here are ultimately a product of common-law-like judging, with different Jus-

25 See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

26 See *id.* at 626–28.

27 See *id.* at 689–91 (Breyer, J., dissenting).

28 See, e.g., *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc); *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015); *United States v. Bryant*, 711 F.3d 364 (2d Cir. 2013); *United States v. Marzarella*, 614 F.3d 85 (3d Cir. 2010).

29 See *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

tices emphasizing different factors: history and tradition, liberty, and judicial restraint and deference to the legislature being three critical factors that compete for primacy of place in different areas of the Supreme Court's jurisprudence articulating exceptions to constitutional rights.

So where are we in terms of constitutional decisionmaking on these major cases? Many controversial decisions in constitutional law are about the exceptions. We analyze those cases under the rubric of tests such as compelling or important interests, or strict or intermediate scrutiny, or undue burden, which are often question begging. My concern is that these vague and amorphous tests can at times be antithetical to impartial judging and to the vision of the judge as umpire. We see various factors fight for dominance in these cases: history, liberty, and restraint/deference being three of the most prominent. But there are no guideposts for which factors apply in which cases. No wonder those cases end up being 5-4 and dividing along lines that seem predictable to the public.

At the moment, I do not have a solution to this concern. Requiring judges to focus on history and tradition, as Justice Scalia suggested, might establish a much clearer strike zone for these "exceptions" cases. But regardless of what the solution may be, I think we should square up to the problem.

* * *

In sum, Justice Scalia believed in the rule of law as a law of rules. Chief Justice Roberts similarly wants judges to be umpires, which ordinarily entails judges applying a settled legal principle to a particular set of facts.

I agree with that vision of the judiciary. But there are two major impediments in current jurisprudence to achieving that vision of the judge as umpire. The first is the ambiguity trigger in statutory interpretation. The second is the amorphous tests employed in cases involving claimed constitutional exceptions.

I do not have all the answers to those problems. But we should identify and study these issues. Inspired by Justice Scalia's longstanding efforts to improve the law, we all must continue to pursue the ideal of a neutral, impartial judiciary. Thank you.

