

KEYNOTE ADDRESS

REMARKS AT NOTRE DAME LAW SCHOOL

*Brett M. Kavanaugh**

During the Notre Dame Law Review’s 2023 Federal Courts Symposium, students and faculty gathered in the McCartan Courtroom in Eck Hall for a conversation with Justice Kavanaugh. Dean G. Marcus Cole moderated and fielded questions from attendees. Highlights from the event, adapted for print, are reproduced below. Questions and responses have been lightly edited for readability and clarity. Questions are presented in bold, followed by Justice Kavanaugh’s responses.

First, I want to welcome Justice Kavanaugh. You’re always welcome here at Notre Dame, and we’re always excited to have you here. Thank you for coming.

Thank you, Dean Cole, for having me, and thank you for the introduction. It’s wonderful to be back at Notre Dame. This is one of the finest law schools in America, with a spectacular faculty and wonderful students. It’s great to be back for this Symposium, which Professor Barrett started—I guess student Barrett started—when she was on the *Law Review* herself.

I was here for the symposia in 2014 and 2017. I was introduced in 2017 by Professor Barrett when I was on the D.C. Circuit. I’m confident that neither of us had any idea what was to happen to the two of us over the next few years. And it’s wonderful to be her colleague. What a great representative of Notre Dame Law School and of Notre Dame. She is a great friend and spectacular judge and colleague.

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* Associate Justice, Supreme Court of the United States. These remarks are adapted from a conversation held at the *Notre Dame Law Review’s* 2023 Federal Courts Symposium on “The History and the Administrative Procedure Act and Judicial Review,” which took place on January 23, 2023, at Notre Dame Law School. The remarks are lightly edited for readability and clarity.

Being back at Notre Dame, I've hit it all in the last twenty-four hours. I came in, and I think I've hit the Notre Dame experience: I went to the women's basketball game yesterday—which is a great team; I went to the 10:00 PM Mass in Pangborn Hall last night; and then today's Symposium. It reflects Notre Dame: academic excellence, the spiritual foundation, the Catholic tradition of service to others, and the school spirit reflected in the sports program. So in twenty-four hours, I feel like I'm touching it all. Thank you for having me again, Dean Cole, thank you for everything you are doing to lead this fantastic law school. I appreciate all that you've done.

The breaking news on CNN this morning was that the Court was issuing opinions for the first time in three months. There was all kinds of speculation as to the delay and why it's taken so long to issue their opinion. Could you comment on the news of the day?

Well, we're off and running. We issued an opinion by Justice Barrett today. I am confident they'll all be out by the end of June. So I don't think anyone needs to worry. [AUDIENCE LAUGHTER]

I don't view that as news. It's just coincidence of which mix of cases were in October and November. And I don't think it's—they'll be out by the end of June. They'll be out, and we're off and running today.

Does your decision to stop at using traditional tools of statutory interpretation in *American Hospital Association v. Becerra* return to the letter of *Chevron v. Natural Resources Defense Council, Inc.* or reject its spirit?

Great question about *Chevron*.¹ *Chevron* is, of course, the case at the heart of administrative law scholarship and decisionmaking over many decades now. And I think there are two ways to look at *Chevron* and two ways it's applied. This is going to get into the weeds, but we're at an administrative law conference. You're either a footnote-nine *Chevron* person, or you're a non-footnote-nine *Chevron* person. I'm a footnote-nine *Chevron* person. Footnote nine in *Chevron* says that you apply all the traditional tools of statutory construction to try to resolve any ambiguity in the statute.²

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

2 *Id.* at 843 n.9 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” (citations omitted)).

And the way I've applied it for twelve years on the D.C. Circuit and now on the Supreme Court is once you apply all the traditional tools of statutory construction, you get an answer. At least unless it's a term in the statute like "reasonable" or "appropriate" or "feasible," in which case, that's actually more of a *State Farm*³ issue (to really get in the weeds of administrative law). And so, I think *American Hospital*⁴ and other cases reflect the way I've applied the doctrine, which is: use the tools of statutory construction to resolve ambiguities. And when you do that, you usually get an answer. If it's a term like "reasonable" or "feasible" or "appropriate," then that's a question of, "Did the agency act within the authority granted to it by Congress?" In other words, was it reasonable and reasonably explained? And you're a little more deferential in that realm.

So I view our job, as the Chief Justice famously said, like being an umpire, like being a referee.⁵ Our job is always to think about our place in the separation of powers, but to police the line between the executive and Congress, and to make sure that the executive is not exceeding the boundaries set by Congress. I don't think we should be too aggressive or too deferential. I think we should just try to do what footnote nine of *Chevron* instructed us to do: to use the traditional tools of statutory construction, figure out the best reading of the statute, and figure out then whether the executive crossed that.

And the key to being a good judge—one key—is to be consistent and to apply that method no matter who the parties are, no matter which administration it is, and no matter what the issue is, whether that's an environmental issue, labor issue, immigration issue, what have you, and to try to be consistent over time.

There are non-footnote-nine *Chevron* judges who I think look at a statute and say, "That's complicated. I'm deferring to the agency." That's a simplistic overstatement, but that's the kind of the philosophy I think you sometimes hear associated with *Chevron*. But to me, from day one on the D.C. Circuit, that's never been the way I've approached it or I've taken footnote nine.

Related to that, on *Auer* deference,⁶ a similar doctrine for interpretation of regulations, in a case called *Kisor* a few years ago, we

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

4 *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022).

5 *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.").

6 *See Auer v. Robbins*, 519 U.S. 452 (1997).

emphasized footnote nine from *Chevron* by analogy and emphasized that you should really try to resolve the ambiguities in the regulation using the traditional tools of interpretation, as well.⁷ So I guess that means I don't think *Chevron* plays much of a role in a lot of cases.

Along those lines, with regard to *Chevron*, the Court has been reticent to cite *Chevron* recently. If there's a reason, why is that?

Well, I think we cited footnote nine. [AUDIENCE LAUGHTER] I think the judges on the Court have recognized that the first thing you do is make an effort at resolving a statute's ambiguity. Every statute has some, at least. We don't get easy cases. So every case we get is going to have some confusion in the drafting, a mistake in the drafting, ambiguity, compromise in the legislation, etc. that we have to resolve, or at least interpret. And I think all the judges realize that we don't just throw up our hands at the start. We go through the process of trying to resolve it using the traditional tools. And some judges might stop short of where I would, but I would use all the traditional tools and try to figure out the best meaning of the statute. And that's why I don't think it's been really used in the way some people think it applies.

Speaking of ambiguity, in *West Virginia v. EPA*, the Court applied the Major Questions Doctrine without explicitly finding that the statute was ambiguous. Does the doctrine require ambiguity?

So I think the way the Major Questions Doctrine, as I understand it has been applied (and I wrote about it on the D.C. Circuit), it did not start with *West Virginia v. EPA*.⁸ It started long before. You could start it with *The Benzene Case* in the 1980s.⁹ It is a simple principle. And I know there's—particularly in the academy—a fair amount of criticism of the principle; I understand that. But I think it's a principle rooted in common sense and one that's rooted in the Court's case law. And it's a clear statement rule: before we allow an agency to resolve some major question—and let's bracket the fact that there's going to be debate about what qualifies as a truly major question (perhaps some massive new regulation, or some critically expensive, new regulation)—that Congress has clearly delegated that authority to the agency. And I think it's rooted in a couple ideas: constitutional values and our own ideas and understanding—from each of our own

7 *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citing *Chevron*, 467 U.S. at 843 n.9).

8 142 S. Ct. 2587 (2022).

9 *Indus. Union Dep't v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607 (1980).

experiences—about how Congress operates. So both of those, I think, inform the Major Questions Doctrine.

And the idea is Congress doesn't ordinarily "hide elephants in mouseholes." You've heard that phrase a lot if you've read our cases.¹⁰ In other words, provide some massive new authorization in some ancillary provision, or some provision that's vaguely worded. And I think we've also been very leery of okaying some massive new regulation that's based on a very old statute that was vaguely worded, when the Congress that enacted that statute couldn't possibly have been thinking about the issue or the thing that the agency has done.

And we think that's rooted, again, both in constitutional values and also in our understanding of how Congress operates. It's within a tradition, in my view, consistent with other plain statement and clear statement rules that the Court applies, that I think coexist with textualism and are part of what I think is proper statutory interpretation.

For example: the presumption of *mens rea*. A lot of times statutes—criminal statutes—don't require any *mens rea*. Do we just say no *mens rea* is required? Of course not. I'm very vigilant about that, as are my colleagues. We don't assume Congress meant to incarcerate people or to allow people to be convicted if they didn't have the requisite mental state.

Same with the presumption against retroactivity. We apply that very vigorously as well in civil cases: the assumption that Congress didn't mean to make illegal what you did yesterday, when at the time you did it, it was legal. The presumption—that's one way to describe it at least—the presumption against retroactivity. We will require a clear statement.

Likewise with the presumption against extraterritorial application of statutes. Again, reflecting constitutional values and our assumption of how Congress operates, we don't presume a statute's meant to apply to conduct committed abroad, unless Congress has clearly stated that. So there are a variety of well-rooted clear statement rules in statutory interpretation that I think are entirely proper, that Congress relies on, that Congress assumes, and—from my experience in the White House and working with Congress on legislation (and the philosophy of "the courts will clean this up" is a little too prevalent, I realized)—they do rely on the Court's principles and this backdrop. And I think the Major Questions Doctrine, the clear statement rule, fits in with those other clear statement rules and reflects, to my mind, common sense and reflects, to my mind, constitutional values. I wrote at length about

10 See, e.g., *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

that on the D.C. Circuit, and think the *West Virginia* case (obviously I joined the majority opinion) was correctly decided.

In writing his dissent to the denial of certiorari in *Buffington v. McDonough*, Justice Gorsuch wrote that *Chevron* doctrine should be reconsidered.¹¹ In your answers to the previous questions, you've suggested that you are essentially a Justice who applies *Chevron*. Is there daylight between you and Justice Gorsuch?

Well, I'm not going to preview future cases on that. I think the way I described *Chevron* was probably different than some people use the term *Chevron*. In other words, applying footnote nine means you apply the traditional tools of statutory construction, and when those don't resolve it, it's usually because it's a term that's more of a *State Farm* issue than a *Chevron* issue—again, to get back into the weeds of that.

Justice Gorsuch and I, we've known each other since we were fourteen years old. We went to high school together; we clerked together. We thought it was a big coincidence we were clerking together for Justice Kennedy. And we said, "Isn't this crazy? We're both clerks here and went to the same high school." And that turned out to be a pretty minor coincidence compared to today. [AUDIENCE LAUGHTER]

I've been friends with him a long time, and he's a great judge. When I was here in 2017, it was a few days after he was nominated. And I do remember then-Professor Barrett introduced me, and I started by speaking about Justice Gorsuch and how proud I was that he was nominated. I gave my prediction then that he would be a great Justice in the tradition of a Jackson or Scalia, and I continue with that prediction, even on those occasions where we disagree. Although, again, I'm not going to respond specifically to the future, but my description of *Chevron*, I'm not sure mine is that much different from his.

11 *Buffington v. McDonough*, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

Since you raised your relationship with Justice Gorsuch and your education, what is the role of Catholic education in shaping both your legal perspective and Justice Gorsuch's? Do you see any challenges to Catholic education today that are coming to the surface?

Well, I think on the first part of that, I went to Catholic school from first grade through twelfth grade. It was an important part of my life. My best friends in the world are still those people that I knew then and that I still rely on. One of my best friends from high school just texted me five minutes ago, "Are you at Notre Dame?" because he went to Notre Dame.

I think the values I learned there do inform for me. One of the things you think about when you are on the Supreme Court (at least that I think about) is that I want to be good at the job. I want to be as good as I possibly can. It's an awesome responsibility. It's a great honor. But I think more about the responsibility and whatever my potential is, how can I reach that and be as good as I possibly can?

I think about the adjectives that you want people to use to describe you. I talked to students about that. And I think I go back to the foundation for my Catholic education. For example, my Latin teacher Father Byrne. I don't remember a ton of Latin, I will concede, but I do remember when he told us, "Be prepared. Be prepared. You can't go wrong as you go along if you are prepared." So that's forty years later, I got that down pat. I guess we were not always fully prepared, but that turns out really important to being a good judge. Be prepared. Be well prepared. You want the lawyers walking out of the courtroom to say, "He was well prepared."

I think about my English teacher, Chris Abell, and reading *To Kill a Mockingbird*. I have the version in my office that he taught us, and on the inside cover, in my handwriting from back then, is written the phrase "Stand in someone else's shoes." And that's what he taught us was the lesson of *To Kill a Mockingbird*. I think to be a good judge (and to be a good person), it's important to understand other people's perspectives. When you're on our Court, you need to be thinking about the 330 million people in this country who have a lot of differences on a lot of big issues. And even if you try, you're not going to please all the people all the time (to state the obvious). But to try to understand their perspectives, to try to make sure they realize that you're at least listening to them. And I think about that lesson I got from my Catholic education, from Chris Abell: standing in someone else's shoes. I try to reflect that in my opinions, that I understand the arguments from both sides. I try to reflect that at oral argument. I do not believe in pouncing on the attorneys at oral argument. I don't believe in being too harsh on the attorneys at oral argument. I try to

avoid that. I'm sure I slip and fall short. But that's the goal. And I think constantly about standing in someone else's shoes and trying to understand their perspective.

Then lastly on Catholic education, one of the things that my music teacher Gary Daum taught us was "Be not afraid." And that's really important to be a judge. Be not afraid. Be not afraid to do the right thing. Be not afraid to adhere to your principles. Know that you're going to get criticized. I worked for President Bush for five and a half years; I saw him take a ton of abuse. And he was always optimistic and positive and a great lesson for me of being not afraid.

I watch a ton of sports too. And both my high school daughters play sports. And by analogy to the referee or umpire, you know you're going to take a lot as a judge, but just go to a game and watch all the abuse the referees take from the parents! Sometimes I think to myself, "Who would want to do that job, being a referee?" It's just unbelievable the things that are said in high school gyms to referees. You have to have a thick skin. And it's very similar in that sense: you have to be able to do the right thing, to make the call that's going to sometimes draw some negative reaction from the crowd. And that's the same thing as a judge.

So those lessons I learned in Catholic school, I think still ground me today and when I come into the office in the morning. And more broadly, the ethos at Notre Dame reflects what I learned as well. The motto at my Jesuit high school was "Men for Others" (an all-boys school), and I've tried throughout my life—I've devoted almost all my career to public service—to serving others through my job. And also, I realized that's not just enough. I've consistently volunteered at serving meals for the homeless with Catholic Charities. That's an important part of my life too, of constantly trying to live up to that ethos of service.

And I guess by that long answer, the answer is a lot of what I learned in Catholic school still informs—not my jurisprudence (I don't want to confuse the issue)—but just how I try to treat other people and how I can think of my role in public service.

To follow up on that, there's been criticism in the press and elsewhere that we as Catholics are overrepresented on the Court. I was wondering if your Catholic background and your Catholic education shapes your relationship with your colleagues on the Court?

Well, not jurisprudentially; again, it does not reflect that. It does reflect how I've tried to deal with litigants and my colleagues, and that's one of the things I think it's important for the students to know here, because you read about the Court. One of the things you adjust to

when you get on the Court is that you just spend an enormous amount of time with these eight other people, and only with these eight other people. You eat lunch with them after every oral argument and conference. If you do the math, that's about sixty-five lunches a year, with just them. Imagine picking eight other people at random and saying, "We're going to have lunch not once, but sixty-five times this year." That's a lot of lunch. [AUDIENCE LAUGHTER]

And you can't talk about work at lunch, so you talk about the things that you would talk about with your friends. You talk about your kids, you talk about movies, you talk about books, you talk about war stories (again and again). You know, when Justice Breyer comes, you talk about things you don't know anything about. [AUDIENCE LAUGHTER] Meaning I don't know anything about—he knows a lot about a lot of things.

And you become through those lunches, friends. And my experience with the Court in my four and a half years and at this moment, is that there are great relations among all nine Justices, both personally and professionally. We only get tough cases, and we disagree on some of those (I think that's more nuanced than sometimes is portrayed, and I'll get into that), but we work well together, and we get along well together. So we have those lunches; we have conference once a week for two and a half or three hours, just the nine of us in a room.

At oral argument, it's not like the court of appeals where you sit in panels of three, and you might be sitting with different judges and might not sit with a particular judge for six months. At the Court, it's every oral argument. The same folks. You get to know each other really well and to respect your colleagues and to understand them. My goal is to treat them with respect. And as friends, when they disagree, to understand—like I said, to "stand in their shoes"—why we disagree on an issue and know that there are some things you're just going to disagree on and are not going to be able to find common ground. But you move on to the next case and maintain your great respect for your colleague who has a different view on a different case.

When I got there, Ruth Ginsburg and Steve Breyer were on the Court and were amazing colleagues in welcoming me. At least for me—and I think for all of us, probably—you walk in and want to try to fit in. You want to make sure you're doing things the right way and make sure that your colleagues think you're doing things the right way. Ruth Ginsburg and Steve Breyer couldn't have been better at welcoming me to the Court. Justice Ginsburg would publicly talk about me a lot during my first term. She didn't have to do that, and she did it. I'll never forget that. It was very meaningful to me what she said. I remember about six weeks into the job, there happened to be

a 5–4 case where she was the senior Justice in the majority and I was with her on the majority, the *Apple Inc. v. Pepper*¹² case, and she pulled me aside after conference and said, “I want you to write the majority opinion.” And I thought, “Welcome to the NFL.” And I remember I immediately got back to the office and called Justice Kagan, who was my de facto etiquette advisor. I said, “Did I say the right thing? I said yes to Justice Ginsburg.” She said, “Yes, you said the right thing.” And then she added, “Just get it out quickly. Ruth likes speed.” And I did so. But that was a great honor and a great moment for me, as well as the things she said publicly.

Steve Breyer’s just an amazing colleague, as well, always trying to reach consensus, always positive, always optimistic, always friendly, always trying to reach out from his Senate experience to understand each other’s perspectives. And a great role model for me.

We miss him, but we have two great new colleagues: Amy Barrett, of course—not so new anymore—whom I was friends with before, and who is an amazing person. I described her at the welcome dinner we have at the Court. The newest Justice gets a welcome dinner from the previous newest Justice, so Ashley and I threw the welcome dinner for Justice Barrett and all the colleagues and spouses, and I gave the toast. One of the things I said about her was that she was an “unusually good person.” And I think that sums up a lot about her. She’s just an excellent colleague at oral argument, her opinions, her thoughtfulness, her dedication, how well prepared she is.

And now we have Ketanji Jackson. Remember my thing about “Be prepared”? She is fully prepared. Thoroughly prepared. That’s the number one thing that I mentioned that I think makes a good judge, and she’s off to a great start. And I’ve known her for a while—not as well as I knew Justice Barrett—but I’ve known her for a while, too. And she’s thoroughly prepared and hit the ground running. It’s great to have new colleagues. We miss Justice Ginsburg, of course, and Justice Breyer. But there’s turnover, and it’s wonderful to have two new colleagues who, in my judgment, fit in well with the group.

Speaking of your colleagues: when you’re writing judicial opinions, who are you considering as your relevant audience? Is it your colleagues? Is it the lower courts, the legal academy, or the public at large? Who are you focused on when you’re writing an opinion?

All the above. Let me take it in order.

When you’re writing an opinion, first of all—maybe consistent with something I just said—I want the losing party (this can be hard)

to understand why I disagreed with them. And they're going to not be happy with the decision, by definition, but I want them to read it and say, "Okay, well, they at least treated our arguments with respect and fairly." So that's number one. I think over time, that systemically, if you treat that party well at oral argument and that party well in the opinion, over time, that builds respect for what we're doing and for the rule of law. So that's one.

Two, the lower courts are going to have to apply this. I was a D.C. Circuit judge for twelve years. I remember saying, "What does this footnote mean? What are they doing?" So I try to avoid writing footnotes or text in my opinions that are going to cause the lower courts to be confused and to not understand.

Now, nine people have to come together—or at least five—and so there are going to be compromises. Sometimes there may be deliberate fuzziness in opinions. But I try to bring clarity to the opinions for the lower courts. Clarity is an important value in opinions also for the affected parties, the businesses, the agencies, the government parties, and others who have to order their businesses, their affairs, and their regulations around what we say.

To the American public who is interested in reading it, I want it to be understandable and clear, and as clear as I can make it for people who are going to want to know what we're doing and why we're doing it.

And so it's a lot of different audiences, writing an opinion like that. It's hard work. And writing generally is hard. For the students here, I like to say there are no good writers; there are only good rewriters. You have to rewrite and rewrite and rewrite and think about all the holes in it.

I was with Justice Scalia on a panel one time, actually in Germany, and the European judges were fawning (as they should have been) over Justice Scalia and saying, "Oh, you're a wonderful writer, Justice Scalia. You must love writing." And in his typical way, he looked at them and said, "I hate writing! Writing is hard. It hurts. It's agony. It's painful. Physically painful!" I thought to myself about Justice Scalia, "Oh, thank God." He is one of the greatest writers who ever served on the Supreme Court, and for him to say that, I think that underscores that it's hard work to try to write an opinion with clarity that people are going to respect. But you keep at it, and keep at it, and keep at it.

But I don't have just one audience in mind. I know people sometimes say, "You're writing for A." I think you're writing for A, B, C, D, E, F, et cetera. A lot of different audiences. And you have to keep them all in mind, I think, when you're writing the opinion. I try to do that in my opinions as best I can.

Justice Kennedy is a role model for me in so many ways. I clerked for him, and he's a role model on how he conducted himself as a Justice and how he wrote his opinions. If you ask yourself, "What's the harshest thing Justice Kennedy wrote an opinion in his thirty years?" that's a very short conversation, because there really is not anything. I am sure I fall short of this, but my goal is to try to be like that and show respect for the other judges and the other parties. And I try to do the best I can on that. Again, sure I fall short, but I try to constantly live up to that standard that Justice Kennedy set, while at the same time appealing to or trying to think about the audiences that I mentioned to you.

Returning to administrative law: Do you think the “arbitrary and capricious” doctrine has changed since *State Farm*? Or do you think it’s applied consistently in the same way?

I think it's usually applied pretty consistently. I've had a formulation that I used on the D.C. Circuit and have now used in Supreme Court opinions, that agency action under the *State Farm* standard must be “reasonable” and “reasonably explained.”¹³ And I think that formulation captures what we're looking for in agency action under the *State Farm* standard.

I've also emphasized, as has the Court, that that should be applied deferentially. In the context of *State Farm*, we're just looking at the policy determinations within the law and within the delegation granted by Congress to make sure the policy determination—the choice made by the agency—is reasonable and reasonably explained. And within that realm, I have a strict divide between *law* and *policy*. With footnote nine in *Chevron*, I already mentioned where I come down on law. On policy, I think we need to be quite deferential. And I think the Court generally is. I did disagree in the DACA repeal case. I thought that agency had given a sufficiently reasonable and thorough explanation.¹⁴ There was a dispute about whether you consider both agency explanations or only the earlier one.¹⁵ It's probably too in the weeds, even for this. But as a general matter, I think it is consistently applied with deference to the agency, just to make sure they haven't done

13 See, e.g., *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (first citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009)); and then citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Cytori Therapeutics, Inc. v. FDA*, 715 F.3d 922, 926 (D.C. Cir. 2013) (citing *State Farm*, 463 U.S. 29).

14 See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1933 (2020) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

15 See *id.*

something completely off the rails and to make sure they've explained something sufficiently.

A really common—I won't say tactic—but common result on the D.C. Circuit for the years I was there was, if you thought there was some question about it, you just remanded to the agency for additional explanation, which led to a whole debate about remand with or without vacatur, which I know is also a subject of some debate. But in any event, “deferentially applied,” “reasonable,” and “reasonably explained.” And I think it's pretty consistently applied.

But I think it is risky, because I think it's easy to say, “I don't like the policy, and therefore I think it's unreasonable.” And you have to be careful. You have to guard against that as a judge if you're being an honest, consistent, fair judge. I think one of the ways you test yourself on this—and I tried to do this all the time—is when you get it, when you get an agency case, when you get any kind of case, you say, “What if all the parties were flipped here? Would I be doing the exact same thing?” And you have to be able to answer that question “Yes.” You have to be able to look yourself in the mirror and say, “Yes, I would be doing the exact same thing if everyone was flipped in this situation.” And that's the test. And you have to look inside yourself. That is, again, like the umpire. When people are yelling at refs in basketball games, in my experience, one of the most common things that is yelled is, “You didn't call it that way down there! Be consistent.” As a judge, you need to be consistent as well and make sure you're doing that. There's a little bit of a risk because of the fuzziness of *State Farm*. And sometimes I disagreed on the D.C. Circuit—and I think everyone was well motivated—but that's the risk in it. At its core, I think it's pretty good.

Since you're using sports analogies, do you think your concurrence in *NCAA v. Alston* could cover fields and bodies beyond college football, for example, like law journals, or the *Notre Dame Law Review*?

Whew. Definitely not going to get into that. I will say about *NCAA v. Alston*, if you asked me, “You've been on the Court four years. What's your favorite opinion, the opinion you like the most?” It would be no surprise that *NCAA v. Alston*, my concurrence in that,¹⁶ would be right at the top of my list. Probably also the *Flowers v. Mississippi* majority opinion¹⁷ and my *Ramos v. Louisiana* concurrence¹⁸ are the ones that I look back on so far, and say, “You know, I think I made a contribution

16 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring).

17 139 S. Ct. 2228 (2019).

18 140 S. Ct. 1390, 1410–20 (2020) (Kavanaugh, J., concurring in part).

with those cases, and I think I did a reasonably decent job in those cases.”

The concurrence in *NCAA v. Alston* I thought was important to say because I was concerned—this’ll probably be a question, but why do you write concurrences? I always ask myself the same question: is this really worth it? And I’ve got a good book of unpublished opinions sitting out there that I’ve thrown away as not being worth it. In *Alston*, that one I thought it was worth it because I thought there was a risk that you could read the majority opinion and think, “Well, everything else is hunky-dory.” And I did not think that, in terms of the restrictions on student athletes, given the reasoning in the majority opinion. I thought that needed to be said, and I thought it needed to be said clearly and directly and succinctly. It’s five pages, but I put a lot of time into exactly how to phrase the things that are there. And I just thought, when a group of organizations is coming together and making a lot of money and agreeing to suppress the money that goes to the people who are the actual athletes generating all the money—many of whom are from low-income families, many of whom are African American—that there’s something really quite wrong with that picture, both legally and otherwise. And I thought it was important to say that in the NCAA case.

A lot of your fellow Justices worked for the federal government in the executive branch. Does that shape the way or inform your jurisprudence in cases like *West Virginia v. EPA*?

Two things on that. First, I think we have a pretty good diversity of professional experiences currently represented on the Court: public defender, prosecutor, people who have worked in the different branches of the government, people who have had backgrounds as trial judges and as appellate judges. It’s never perfect. You never can cover everything in terms of professional experiences. But I think we have a pretty good range of experiences represented among the nine of us right now. And we are geographically diverse as well. This wasn’t the case even a few years ago, in terms of where people come from. Justice Jackson from Miami, Justice Barrett from Louisiana, the Chief from Indiana, Justice Gorsuch from Colorado. I don’t help the cause on that; I’m from D.C. But anyway, that’s good, too. Because I think a lot of where you grew up through age eighteen informs a lot of who you are and your understanding of different parts of the country, which I think is important, again, when we’re thinking about 330 million Americans.

So then, for me, my White House experience for five and a half years is really quite central to my thinking about a lot of topics. I

worked for two and a half years in the Counsel's Office and three years as Staff Secretary. For those who don't know what that position is, you're the clearinghouse for the paper that goes to the President (the draft speeches, the policy memos, etc.), and you farm them out to make sure the President's getting a good product that represents consensus views. And if there's disagreement, then those disagreements are flagged, so no one can get their own paper into the president, without going through you. It's a very important role that is kind of like refereeing. And it was good preparation for being a judge to referee disputes among policy advisors to the President, including the Secretary of Defense, the CIA, and some heavy hitters, to put it mildly. And that was an important job. But one through which I've learned so much from President Bush personally, but also traveling the world with him, whether we were in Afghanistan, Russia, China, Buckingham Palace, or the Vatican, to see the world, to see the country with him, and to see the demands that are placed on the President.

I think being a Justice on our Court is a difficult position, and I think being a member of Congress is a difficult position, but I think those things pale in comparison to the difficulty of being President, no matter who's President. I saw firsthand for three years with President Bush the enormous responsibility that you have. It starts every morning with the national security briefing and ends every night with thinking about—at least at that time, but still—potential terrorist attacks on the country and knowing that if something bad happens, it's going to be all on that one person's shoulders. He came into the Oval Office on September 12, 2001, and essentially said, "This will not happen again." And everything he did for the next seven and a half years, in my judgment, was motivated—well-motivated—by "This will not happen again," including some controversial decisions for which he took a lot of criticism, but I think it was all motivated by his understanding of the central importance of the presidency and his role in protecting America. I learned a lot about the presidency, which informs, I think, my understanding of national security policy. Congress has an important role—I'm not saying that they do not. But my experience informs my understanding of the President's role, the nature of the presidency, and the decisions the President has to make.

I also saw separately how the agency process works, and that may inform a little bit of my understanding of administrative law. But when you run for President and you're in the snow in Iowa or New Hampshire, you're not going out there and saying, "I'm running for President so I can get in there and follow that statute exactly." Instead you're saying, "I'm going to go reform immigration law and health care law, environmental policy. And I'm going to go in there and do

X, Y, and Z on that.” And then you get into office, and it’s hard to get things through Congress. And then there’s a lot of pressure put on the agencies to try to do as much as they can to achieve the President’s goals. This is a completely bipartisan phenomenon that I’m describing. And you tried to do what you can within the existing statutory authority, and it’s a lot of pressure on the agencies to push the envelope. Well, that’s where I think the courts come in saying, “Wait a second. As a matter of separation of powers, that’s beyond the existing authority you have. You have to go back to Congress to get additional authority for that.”

But I think what I saw in that process convinced me that it’s important that the courts police that, because all the incentives in the executive branch are to push beyond existing authority. The incentives are to do what they can to solve the environmental problem or to help make better securities regulations or better labor regulations or immigration, as we’ve seen over and over, where Presidents have trouble getting legislation passed and want to push forward on legislation.

So both an understanding the presidency, the demands on it, the national security demands, and then understanding the agency process. I learned so much in those five and a half years. And I think, you listen to oral arguments, even recent oral arguments, you can tell that that’s not far from my mind.

And then I’ll add one last thing, just going around with President Bush for three years, I got to know him extremely well personally. And like Justice Kennedy, President Bush is a tremendous role model for me in how he conducted himself and how he treated other people. Even when he was criticized, he was always optimistic. I keep a painting above my desk that my former clerks gave for the Court when I was confirmed to this Court. It’s a painting that’s a replica of a painting President Bush had in the Oval Office all eight years. It’s called *Sunrise Side of the Mountain*. And it has the quote underneath it, “I live on the east side of our mountain // It is the sunrise side, not the sunset side // It is the side to see the day that is coming // Not the side to see the day that is gone.” And President Bush used to always talk about living on the Sunrise Side of the Mountain and staying optimistic. Despite all the criticism that comes on the presidency, despite all the demands, he was always generous to other people, and always great to his staff. I try to live up to that. We get a lot of criticism, and we get a lot of heat as judges, and I constantly think about being optimistic. I’m optimistic about the Court. I’m optimistic about the country. I’m optimistic about my colleagues. I remember those lessons from President Bush, and I think those are really helpful to me on a daily basis to kind of think through, “Okay, don’t worry about today’s criticism. Just stay

optimistic about the future.” So I credit him for helping reinforce that in me.

In keeping on this theme of how you treat other people, the Court has come under criticism for losing a spirit of compromise. Can you comment on the extent to which you engage in conciliation with each other when you’re in the process of assembling an opinion?

Sure. I think there’s a lot of collegiality and talk among all of us. And I’m going to give you a few examples. Obviously, on some cases, you just end up with disagreement. And you talk about it, but you end up with disagreement at the end of the day. Some cases don’t lend themselves to that. And there’s some big cases, of course, that fall into that category. And there’s some small cases as well, smaller cases that fall into that category. But in a lot of cases, we are able to either forge consensus—Justice Breyer, I mentioned earlier was a master at that—but there are also cases that I think don’t fall into what might be perceived by some students or others as the typical pattern.

Just to think about last term, which was obviously a term with some tough cases, and people pay a lot of attention to them (as I understand and completely respect), we had a lot of cases that did not follow the usual pattern and were big cases. For example, Chief Justice Roberts wrote an immigration opinion on the Return to Mexico policy that ruled for the Biden administration.¹⁹ That was a 5–4 or 6–3 case, depending on how you think about it, and I was part of the majority with Chief Justice Roberts, Justice Kagan, Justice Breyer, and Justice Sotomayor on that. Chief Justice Roberts wrote the *Ramirez* case, as well, that was a case about chaplains in the execution room, which we have been struggling with for a few years.²⁰ And he wrote a case about the right of someone on death row to have a chaplain in the execution room. Not necessarily what you expect.

Justice Breyer wrote an important 5–4 decision on state sovereign immunity.²¹ I was part of the majority with Chief Justice Roberts in that case. Justice Sotomayor wrote two really important 5–4 decisions last year. One was a First Amendment case about an Austin sign ordinance.²² I was in the majority with her, Chief Justice Roberts, Justice Kagan, and Justice Breyer in that one. And then another case was about criminal proceedings under the First Step Act.²³ I was in dissent in that one, but Justice Sotomayor was in the majority with

19 *Biden v. Texas*, 142 S. Ct. 2528 (2022).

20 *Ramirez v. Collier*, 142 S. Ct. 1264 (2022).

21 *Torres v. Texas Dep’t of Pub. Safety*, 142 S. Ct. 2455 (2022).

22 *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022).

23 *Concepcion v. United States*, 142 S. Ct. 2389 (2022).

Justice Thomas, Justice Gorsuch, Justice Kagan, and Justice Breyer on a really important case. If you run into Justice Sotomayor, she'll talk to you about that case. That's an important case. And that's not following some kind of usual perceived lineup.

Justice Kagan wrote an important 5–4 decision on the statutory route for challenging method-of-execution claims, which has been an important issue in the Court for decades now.²⁴ And that was a 5–4 decision. I was in the majority in that one.

There were just a lot of cases that were important. I realize those don't get attention. I'm not complaining about that at all. Totally understand. But just so students get a more nuanced understanding, the docket is larger than you might suspect. And when you get into that docket, you see, I think, methodological consistency by us, we hope and strive for, but with results that you might think, "Hmm, I didn't expect that result." That's been true my whole four years, whether it's the DACA case,²⁵ or the *Ramos* case, where we overruled precedent and said nonunanimous juries are no longer permissible.²⁶ The *Bostock* case, which Justice Gorsuch wrote.²⁷ There have been a lot of cases over my four years that might not fit some kind of preconception.

Again, just so you have a broader picture for some of the students here, I think it's important to think about those cases as well. And those underscore that in all those cases, we're all working together, with different groups of people in the majority. And so, I might be working with Justice Sotomayor on one case, and we might be in disagreement on the other, but we're working together on the one, and that we're not going to let the relationship from the one suffer because we might disagree on the other. And I think all nine of us do that, and it's very friendly at conference. People disagree on issues they care about, but this is just my perspective; I think the relationships are quite good, and they result in cases that don't get a lot of attention but that are really important where the lineups are not necessarily what you might think.

Speaking of your relationships with the people that you work with: you worked in the White House with our professor, Bill Kelley. What can you tell us about your experience working with him?

I worked with Bill Kelley in three separate jobs: in the Solicitor General's Office, in the Independent Counsel's office, and the White

24 *Nance v. Ward*, 142 S. Ct. 2214 (2022).

25 *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

26 *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

27 *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

House. And I said when I was here in 2014—he introduced me in 2014 for this speech—and I said, “There’s no finer man than Bill Kelley.” And that is, as he would say, a “true story.” And I’ve benefited from his friendship and advice. In difficult times that I’ve had, he has been a great source of advice and reassurance, and in good times, he’s been a great source of keeping me on a level plane. And he’s just a great friend and a great scholar. I’m teaching with him in a few weeks for a few days and I think he represents Notre Dame Law School so well. This is, as I said at the beginning, a fantastic law school, and I think of Bill Kelley as someone who has helped form the foundation of all the success that you’re leading now at this law school. So, great friend. Can’t say enough good things about him.

What do you look for in a law clerk?

The law clerk relationship is really special. You have four each year, and you spend so much time with them. You spend a lot of time with your eight colleagues and then a lot of time with your four law clerks, and you spend more time with both those groups than your family, oftentimes, because you’re at work all day long. It’s really important to have what I already described with the colleagues, but with the law clerks as well.

So, I think there are kind of obvious things and then nonobvious things. The obvious things are the ability to write well, to edit well, to research well, and to analyze well, all of which you get through recommendations from law professors (how they did in law school), recommendations from judges they might have clerked for on the courts of appeals or state supreme courts, or where have you, because there’s a lot of work to do. And they can spend, by definition, four times as much time on every case than you can, so you need them sometimes to help do research and to help find things.

A little plug for law reviews, while we’re at it. One of the things I’m constantly asking my law clerk is “There’s got to be some good law review articles on this.” And I use law review articles. I’m not one of the members of the Court who is dismissive of law reviews. They’re always required in the binders that they prepare with all the background material for me.

So anyway, clerks should be researchers. And then in, especially in our Court, the law clerks need to work with all eight other chambers. I’m insistent on that. You have to be able to deal with all thirty-two other clerks, deal with them well, deal with them fairly, and deal with them respectfully. So I’m looking for people who get along well with other people. And that’s essential for me, as well as people who are

going to deal well with the other three coclerks in the chambers and with me, as well.

I tell them in the interview, “We go through a lot of drafts.” I’m understating it. They always get there and are like, “Another draft?!” “Yes, another draft. I told you in the interview. It’s going to be a lot of drafts.” So the writing process is really intensive, and someone who can participate in that with the kind of optimistic spirit and good nature that I want.

It’s really important, and the one thing that might not be obvious, is getting along well with other chambers. You have to represent me. And I am insistent that that be a person who’s not going to cause problems in the Court. And one of my colleagues said to me when I got there, “You know, if any one of us hires a bad apple, it kind of infects the whole place.” And so it’s important to try to avoid doing that. The recommendations from professors and judges and your grades are important, the basics. But that intangible is important as well.

I realize by saying it, this is going to happen all the time now, but I’ll say it anyway: a clerk came into me three years ago for the interview, and she concluded the interview by saying, “I just want you to know, I got a lot of grit.” And that’s how I refer to her now, it’s “Grit.” It worked. I hired her; she was an awesome clerk. She was with me last year, which was a very, obviously, difficult year at the Court, and she was awesome. So I now realize every interview is going to end with “I got a lot of grit,” but that was a good thing. I like that in life. And it showed stick-to-it-iveness, and she was fantastic.

One thing you commented on earlier was the fact that we have balance on the faculty here at Notre Dame. Do you look for the same kind of thing in your chambers as far as law clerks? Or are you looking for people who reflect the kinds of judgments you make about law and policy?

I’ve had clerks of a pretty broad range, especially if you go back to the D.C. Circuit. A little less so on the Supreme Court because it has to be people who are comfortable with my general approach. And at this point, I’ve got sixteen years of cases, and I think you can tell where I’m coming from on a lot of things. So there’s some self-selection in that, I suppose, but also I look for people who are not going to be having concerns. Obviously, clerks will disagree. It’s not helpful to hire four clerks who just say, “Yes, yes, yes, yes. Your ideas. Great.” That’s not so helpful for me, so to get differing views is helpful. But it’s got to be someone within the umbrella of comfortable with my general approach to constitutional and statutory decisionmaking. So

it's probably not quite as wide an umbrella as it was on the D.C. Circuit. But I've definitely had clerks who disagree with me, including disagreeing with me on big thing things, and that's good. I mean, that's going to happen. As long as they have that respectfulness and they're going to be okay about it and deal well with me and deal well with others in the chambers when that happens. So that's a little bit of a muddled answer, I suppose. But it's pretty broad range.

What is your opinion on what's happening with the *U.S. News & World Report* rankings?

I think those ratings are very problematic. I think they're based on things, from what I understand, that are very amorphous, very subjective, very word-of-mouth factors that don't correlate well with the education that you're actually receiving. And I find them highly problematic. The reputation score, that's kind of a joke, isn't it? I mean, who has the knowledge of all the different scores as a judge to give anything approaching a good analysis of that? And, as I understand it—I should probably stop, but I'm going to say it anyway—they look at how much money is spent on this versus that and the library. Does that really show whether a student's getting a better education at School A or School B? I think they're very problematic, and I'm a judge, so I don't know everything like you all might on this, but it seems to cause all sorts of perverse incentives to kick in at law schools. Transfer policy seems to be affected dramatically at some schools I'm familiar with by trying not to hurt their *U.S. News* ranking.

If you think about what are you trying to accomplish in a law school, it is to take a group of people and try to get them—like I was talking about me as a judge, I want to get as close as I can to whatever my potential is, wherever that is—we want to take a group of people and try to get them as lawyers as close as they can be to whatever their potential is in three years. And that's very hard. *U.S. News* is not measuring that. And that's really an analysis of the kind of professors you have, how much time they put in with the individual students, how much mentorship goes on, how much writing they're teaching you, what kind of extracurriculars do they have, like this Symposium and *Law Review*. And I just don't think that's measured, as I understand it. Again, I could be wrong—I'm going get a letter from *U.S. News*—but I could be wrong. I just don't think that's measured. It's like if you measured a good coach by how much money he spends on shoes. Well, no, that's not really relevant. What matters is: does the coach get the team to play together and get the team to achieve its potential and bring out the best in each player? And that's what I'm thinking law schools should be doing, and I think Notre Dame is doing, and I don't

think the rankings quite capture that. I think they just have gone on too long.

Let me transition because I haven't mentioned it yet: in my four years on the Supreme Court, I've had two spectacular law clerks from Notre Dame Law, Lexi Baltes, who was with me last year, and Audrey Beck, who was there with me in my second year, and whom I actually worked with on the symposium when I was here in 2017. So I first got to know her then. And Lexi was there last year, which obviously, again, was a challenging year in terms of our caseload, and both of them were just fantastic representatives of Notre Dame Law School. Great law clerks. Great friends. The one thing that I'd say about both of them is they just worked so hard. Lexi, last year, I had to tell her: "You better take several months off when you walk out the door here, and just go wander around the world." And I think she did that. Because she gave it her all. And I thought that both of them reflected very well on Notre Dame Law School in terms of what they knew law-wise and how they approached the job and also their work ethics, as well.

What is your opinion on expansion of the College Football Playoff, as well as your thoughts on Notre Dame joining a conference?

I'm not getting near the latter. Whatever Father John and the administration decides I'm sure will be a wise decision. [AUDIENCE LAUGHTER]

It will be complicated. I know college sports has a lot of pressure on it, and a lot of changes are coming. But I don't think I want to get into that. On the College Football Playoff, I'm not going to say what I want, but isn't it inevitable that it's going to expand even more? I think in the bowl games right now, a lot of the good players are not playing in the bowl games because they want to preserve themselves for the NFL draft. That's going to put a lot of pressure on the bowl games because the viewership will go down and the money will go down. Just guessing here. Plus, like the excitement of the NCAA basketball tournament, to the extent you can kind of translate that into football is good. The problem, obviously, in football is you don't want the kids playing too many weeks, because the injury ratio is so much higher in football and so you want to be careful about over scheduling them. But I think about the excitement that the NCAA basketball tournament (men's and women's) has had for so many years. If you could bottle that and bring it to football, that would probably be something good for football, good for the colleges, and bring more schools into the process. I don't think it's great to just have four every year necessarily, but I'm probably getting outside my lane there.

My girls both play sports. They are a junior and a freshman in high school. My older one plays varsity basketball at Georgetown Visitation. The younger one is now playing ice hockey. They both play lacrosse. I am on sidelines or on the side of court a lot. My daughters and I have had a tradition for many years. We go to the women's Final Four basketball tournament. And we were there when Notre Dame beat U. Conn. and Arike Ogunbowale hit that shot. We were right there. Just great memories with my daughters of going to those games and watching the development of particularly women's college basketball over the last few years has been extraordinary. I think that women's college basketball is just on a real upward trajectory. And watching Notre Dame yesterday, the crowd was awesome. Niele Ivey is a great new coach here. And say a prayer for Dara Mabrey, who had a bad knee injury yesterday. That was tough to watch. I've seen that (ACL) before on the sidelines and on the court, and that did not look good yesterday. I hope it's not the worst. But in any event, she's an awesome player and a great, great person to watch. The whole team's great to watch.

You learn a lot of lessons from playing sports. I learned so much from playing sports. And now I have a bond with my daughters over sports. It's just been fantastic: the trips we've taken, the games we've watched, being on the sidelines at all their games. And one good thing about being an appellate judge is usually you don't have oral argument at four o'clock in the afternoon or five or seven at night. And so I make most of the games. I talked to the *Law Review* staff earlier, and they asked me about work-life balance. One of things I said is that you just block out the time. So on my schedule, "Game," I don't violate that time. I make it to the games. It's really fun and great to watch.

Sports is a great part of this institution as well. I talked about my approach to the Supreme Court as being part of a team of nine. I've tried to underscore today with some of my comments that obviously we have difficult cases, and we disagree passionately on some, but I personally think that I try to participate in a team of nine. And I think my colleagues do the same. It's a great honor to be part of it.

