# NOTES

# THE AMBIGUOUS AMBIGUITY INQUIRY: SEEKING TO CLARIFY JUDICIAL DETERMINATIONS OF CLARITY VERSUS AMBIGUITY IN STATUTORY INTERPRETATION

*Meredith A. Holland**

## Introduction

"How clear is clear?"[1] This question has often been asked regarding Step One of the *Chevron* doctrine, but its relevance is not limited to statutory interpretation in the administrative state.[2] Many interpretive doctrines,

* Candidate for Juris Doctor, Notre Dame Law School, 2018; Bachelor of Arts in Economics and Theology, University of Notre Dame, 2014. I would like to thank Judge Amy Coney Barrett for her helpful guidance and encouragement throughout the writing process, and my fellow students in Judge Barrett's Statutory Interpretation Seminar for the interesting conversation and inspiration to explore this topic. I am grateful to the staff of the *Notre Dame Law Review*, and to my friends and family for their endless love and support.

1 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520 ("If *Chevron* is to have any meaning, then, congressional intent must be regarded as 'ambiguous' not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist. This is indeed intimated by the opinion in *Chevron*—which suggests that the opposite of 'ambiguity' is not 'resolvability' but rather 'clarity.'"); *see also* Michael Herz, Essay, Chevron *Is Dead; Long Live* Chevron, 115 Colum. L. Rev. 1867, 1873 & n.31 (2015) (observing that "[d]octrinally, the impact and meaning of *Chevron* will depend on (a) in what circumstances it is triggered, and (b) how capacious step one is . . . ." and noting that (b) is "sometimes referred to as the 'how clear is clear?' question" (footnote omitted)); Note, *"How Clear Is Clear" in* Chevron*'s Step One?*, 118 Harv. L. Rev. 1687, 1688 (2005) ("[T]he question 'How clear is clear?' should have a different answer depending upon the circumstances.").

2 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is *clear*, that is the end of the matter; for the court, as well as the agency, must give effect to the *unambiguously* expressed intent of Congress. . . . [I]f the statute is silent or *ambiguous* with respect to the

including *Chevron*,[3] are triggered by a threshold finding of ambiguity. The threshold inquiry by a judge that a statute is either clear or ambiguous is a critical determination that can foreclose or make available a variety of interpretive tools.[4] "But how do courts know when a statute is clear or ambiguous? In other words, how much clarity is sufficient to call a statute clear and end the case there without triggering the ambiguity-dependent canons?"[5]

Though the importance of the ambiguity inquiry in statutory interpretation is well documented,[6] there is no established method governing the judge's threshold determination of ambiguity versus clarity.[7] In fact, there is no consistent definition of ambiguity.[8] As a result, the availability of the interpretive doctrines that purportedly depend on a finding of statutory ambiguity is often uncertain. Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit has recently proposed a new framework for determining when the use of such interpretive tools is appropriate. Motivated by the concern that numerous judicial "decisions leave the bar and the public understandably skeptical that courts are really acting as

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specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (emphasis added) (footnotes omitted)).

3 *See, e.g.*, Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 794 (2010) ("Under *Chevron*, the concept of ambiguity is therefore central to whether an agency's interpretation of a statute that it administers will receive judicial deference . . . .").

4 *See* Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 258 (2010) (noting that ambiguity is often treated "as a kind of gateway consideration when [judges] interpret a statute," allowing them to consider legislative history, apply *Chevron* deference, and invoke various canons of construction).

5 Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

6 *See, e.g.*, Farnsworth et al., *supra* note 4, at 257 ("Determinations of ambiguity are the linchpin of statutory interpretation.").

7 *See* Kavanaugh, *supra* note 5, at 2136 ("Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity to cross the line beyond which courts may resort to the constitutional avoidance canon, legislative history, or *Chevron* deference.").

8 *See, e.g.*, Farnsworth et al., *supra* note 4, at 258 ("To say that a statute is ambiguous could be a claim that ordinary readers of English would disagree about its meaning, which we will call an *external judgment*. Or it could be a private conclusion that, regardless of what others might think, the reader is unsure how best to read the text—which we will call an *internal judgment*." (emphasis added)); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 859–60 (2004) (distinguishing between *ambiguity*, which is "used to describe situations in which an expression can be understood in more than one distinct sense," and *vagueness*, which "refers to problems of borderline cases," and noting that "[w]hile all agree that ambiguity occurs when language is reasonably susceptible to different interpretations, people seem to differ with respect to whether those interpretations have to be available to a single person, or whether ambiguity occurs when different speakers of the language do not understand a particular passage the same way").

neutral, impartial umpires in certain statutory interpretation cases,"[9] Judge Kavanaugh seeks to reduce or eliminate threshold determinations of clarity versus ambiguity by establishing additional principles to guide the judicial inquiry: he abolishes the ambiguity requirement for particular canons of interpretation, and removes other canons from the practice of statutory interpretation altogether.

This Note will apply Judge Kavanaugh's proposed mechanism to the interpretation of the Title IX prohibition of discrimination on the basis of sex.[10] Part I discusses recent cases decided by the Roberts Court that demonstrate the difficulties with the current jurisprudential approach to the clarity versus ambiguity determination. Part II explores Judge Kavanaugh's recent proposal for reducing threshold findings of ambiguity. Part III considers various interpretive methods and applies Judge Kavanaugh's proposal in the context of Title IX. Finally, this Note concludes that Judge Kavanaugh's approach, while most dramatically transforming the purposivist approach, also has consequences for the textualist inquiry.

## I. Ambiguity in the Roberts Era

In recent years, the Roberts Court has demonstrated a willingness to consider factors beyond the statutory text in making the threshold determination of whether a text is clear or ambiguous.[11] Consideration of such factors during the initial inquiry disrupts the traditional reservation of some interpretive doctrines for cases of statutory ambiguity only. Richard Re has described this approach as "The New Holy Trinity":

> Instead of adhering to the New Textualism, the Roberts Court has repeatedly and visibly embraced what might be called "The New Holy Trinity." This approach calls for consideration of non-textual factors when determining how much clarity is required for a text to be clear. Aptly enough, the New Holy Trinity is itself triply trinitarian. It revitalizes the jurisprudential legacy of the original *Holy Trinity*. It is exemplified by three recent Supreme Court cases. And it rests on attention to three considerations: text, pragmatism, and purpose.[12]

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9 Kavanaugh, *supra* note 5, at 2119.

10 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."); *see also* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 710 (4th Cir. 2016), *vacated and remanded sub nom.* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017).

11 For an empirical and doctrinal examination of the Roberts Court's early statutory interpretation, see Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 Hastings L.J. 221 (2010).

12 Richard M. Re, *The New Holy Trinity*, 18 Green Bag 2d 407, 407–08 (2015) (footnotes omitted). Re's argument "differs from John Manning's claim, now several years old, that the Roberts Court was exhibiting adherence to 'the New Purposivism.' The New Purposivism resembles the New Textualism in that it honors clear text, viewing it as a 'trump'—but that is precisely the approach that the New Holy Trinity has now called into

Using *Bond v. United States*,[13] *Yates v. United States*,[14] and *King v. Burwell*[15] as illustrations, Re suggests that the Roberts Court has renewed the approach found in *Church of the Holy Trinity v. United States*[16] by making the spirit of the statute relevant to the threshold determination of clarity versus ambiguity.[17] This expands the bounds of the inquiry in an undisciplined manner. This move is further complicated by the Court's expansive use of doctrines of interpretation related to statutory ambiguity, such as the avoidance canon and legislative history.[18] Though the "text continues to play a meaningful

question." *Id.* at 408 n.4; *see also* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114–15.

13 134 S. Ct. 2077 (2014).

14 135 S. Ct. 1074 (2015).

15 135 S. Ct. 2480 (2015).

16 143 U.S. 457, 457–58 (1892) (finding that an arguably unambiguous statute prohibiting "the importation or migration of . . . aliens . . . or foreigners . . . to perform labor or service of any kind in the United States" did not apply to an alien contracted by a religious society to come to the United States to serve as a pastor (quoting Act of February 26, 1885, ch. 164, 23 Stat. 332 (1885))). The Court relied on "a familiar rule, that a thing may be within the *letter* of the statute and yet not within the statute, because not within its *spirit*, nor within the intention of its makers." *Id.* at 459 (emphasis added).

17 Re, *supra* note 12, at 409–15.

18 *See, e.g.*, *id.* at 408 ("To some extent, the New Holy Trinity is an extension of previous doctrinal trends. In the last few years, the Roberts Court has made creative use of the avoidance canon, which calls for the Court to interpret statutes to avoid asserted constitutional problems. . . . Now, instead of limiting itself to avoidance, the Court avoids undesirable textual results without invoking the Constitution at all." (footnote omitted)); *id.* at 411, 413 (explaining how the Court in *Yates* and *King* opened with a discussion of legislative history rather than the statutory text). Judge Kavanaugh classifies both interpretive doctrines as ambiguity-dependent. *See infra* note 38. This classification of the avoidance doctrine is debated; others argue that the canon may be applied in cases where there is a plain meaning, but it provokes constitutional doubt. *Compare* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 832 (2001) ("The rule of 'constitutional doubt' holds that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter.'" (alteration in original) (quoting Jones v. United States, 526 U.S. 227, 239 (1999))), *and* Eric S. Fish, Note, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1279 (2016) (explaining that the doctrine of constitutional avoidance "is officially framed as an interpretive technique—a court presumes that the legislature does not intend to act unconstitutionally, and so it construes ambiguous statutes to avoid constitutional problems"), *with* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 142 (2010) (contrasting the avoidance canon with the rule of lenity, which does not "permit[ ] a court to deviate from the best construction of statutory language"), *and* Gilbert Lee, Comment, *How Many Avoidance Canons Are There After* Clark v. Martinez*?*, 10 U. PA. J. CONST. L. 193, 200 (2007) ("Because the avoidance canon only makes a difference when a court uses it to deviate from the otherwise-preferred reading of a statute, criticisms of the avoidance canon center on lack of fidelity to a statute's plain meaning." (footnote omitted)). For purposes of this Note, Judge Kavanaugh's classification will be accepted and the definition of "ambiguity" will be understood to be sufficiently broad to include any statutory text that is susceptible to multiple interpretations, regardless of whether one

role," the initial inquiry is increasingly colored by considerations beyond the words of the statute, as "purposive and pragmatic considerations [become] relevant to the identification of textual clarity or ambiguity."[19]

This move to include additional considerations at the threshold ambiguity versus clarity determination reveals crucial differences between purposivism and textualism. Textualists argue that such considerations are legitimate only when ambiguity exists, such that "when a statutory text unambiguously points to a specific result . . . it [is] illegitimate to alter that command to reflect more accurately the statute's apparent background purpose."[20] Textualists, therefore, are more likely to make an initial finding of "clear" than purposivists because their threshold inquiry is more narrow.[21] In contrast, the initial ambiguity findings by the Roberts Court "all depended at least in part on purposive or pragmatic judgments," and the subsequent resolution of that ambiguity depended on additional purposive considerations.[22] While textualism and purposivism operate in similar ways following an initial determination of ambiguity, the interpretive tools allowed by each method in deciding the threshold inquiry vary significantly.

The judiciary routinely makes the decision of whether a statute is clear or ambiguous, but the underlying question—"how much clarity is required before declaring that a [statutory] provision is clear, as opposed to ambiguous?"[23]—has been left unanswered. "There is no metric for clarity."[24] The line of cases by the Roberts Court relying on the use of the avoidance canon in cases of statutory interpretation is particularly revealing of the undisciplined jurisprudential approach to this threshold inquiry.

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interpretation is more "plain" than another. *See supra* note 8 (discussing various definitions of ambiguity).

19 Re, *supra* note 12, at 417.

20 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408–09 (2003).

21 *See* Kavanaugh, *supra* note 5, at 2129 ("[F]or a variety of reasons, textualists tend to find language to be clear rather than ambiguous more readily than purposivists do. One need look no further than the statements of the archetypal textualist, Justice Scalia, for confirmation of this point. As a result, textualists tend to resort less often to ambiguity-dependent canons and tools of construction such as constitutional avoidance, legislative history, and *Chevron*." (footnote omitted)).

22 Re, *supra* note 12, at 409.

23 *Id.*

24 Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988) ("The use of original *intent* rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court. First, the court may choose when to declare the language of the statute 'ambiguous.' . . . The court's answer often will depend on the decision to move past the surface of the language—which means that the answer is up for grabs and controlled neither by the reasonable import of the language nor by the subjective intent of the drafters.").

### *A.* Bond v. United States

*Bond v. United States* addressed the question of whether the statute implementing the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction reached the conduct of the petitioner, who was prosecuted for spreading chemicals on the car, mailbox, and doorknob of a woman having an affair with the petitioner's husband.[25] The Chemical Weapons Convention Implementation Act "forbids any person knowingly 'to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.'"[26]

Writing for the Court, Chief Justice Roberts explicitly invoked the doctrine of constitutional avoidance: he considered whether the statute in question covered the petitioner's conduct, and expressed "doubts that a treaty about *chemical weapons* has anything to do with Bond's conduct."[27] In holding that the statute did not reach the petitioner's conduct, the Court pointed toward "the background principles of construction that our cases have recognized [including] . . . those grounded in the relationship between the Federal Government and the States under our Constitution."[28] The statutory ambiguity therefore "derive[d] from the improbably broad reach of the key statutory definition given the term—'chemical weapon'—being defined," such that the background principles of federalism actually created ambiguity based on the "improbably *broad reach*" of the statutory text.[29]

The threshold determination of ambiguity by the Court had little to do with the text itself, and was instead based on the perceived incompatibility between the statute's possible widespread application and constitutional principles of federalism. "In other words, *Bond* paralleled *Holy Trinity* in limiting the relevant statute's scope to its apparent purpose."[30] For purposes of the ambiguity inquiry, the plain meaning of the text was not determinative; rather, other considerations taken alongside the most natural reading implied an ambiguity requiring judicial resolution. Application of the doctrine of constitutional avoidance thus does not require a kind of ambiguity that is particularly unclear, suggesting that a finding of clarity instead

25 Bond v. United States, 134 S. Ct. 2077, 2080–81 (2014).

26 *Id.* at 2085 (quoting 18 U.S.C. § 229(a)(1) (2012)). The Act defines 'chemical weapon' "in relevant part as '[a] toxic chemical and its precursors . . . .'" *Id.* (quoting 18 U.S.C. § 229F(1)(A)). "'Toxic chemical,' in turn, is defined in general as 'any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.'" *Id.* (quoting 18 U.S.C. § 229F(8)(A)).

27 *Id.* at 2087–88.

28 *Id.* at 2088.

29 *Id.* at 2090 (emphasis added); *see also* Re, *supra* note 12, at 410 ("So *Bond* expressly held that 'ambiguity derives from' a series of purposive and pragmatic conclusions.").

30 Re, *supra* note 12, at 411.

requires absolute, or nearly absolute, certainty of meaning. The canon may be invoked despite a plain meaning, where any permissible alternative reading of a text may be adopted if that plain meaning provokes a serious constitutional question.[31]

Justice Scalia, concurring in the judgment, would have made a threshold determination of clarity and instead decided the case based on the unconstitutional application of the statute to the petitioner.[32] Finding that "[t]he meaning of the Act is plain" and "[a]pplying those provisions to this case is hardly complicated," Justice Scalia traced the statutory language explaining the prohibited conduct and defining the relevant terms and then declared: "End of statutory analysis."[33] Justice Scalia criticized the majority for its "result-driven antitextualism" that "befogs what is evident," and expressed his discomfort with the "judge-empowering principle" declared by the Court.[34] What the majority saw as legitimate to consider in determining whether the statute was ambiguous or clear, Justice Scalia saw as wholly irrelevant to the threshold question; the existence of a plain meaning of the text precludes the use of external considerations to justify a finding of ambiguity or the adoption of a strained alternative reading.

### *B.* National Federation of Independent Business v. Sebelius

*National Federation of Independent Business v. Sebelius* reveals a similarly extreme application of the doctrine of constitutional avoidance that forces an admittedly unnatural reading of a statutory text.[35] In a fractured decision, Chief Justice Roberts admitted that "the statute reads more naturally as

31 This argument relies on the understanding of "ambiguity" as a text susceptible to more than one interpretation by a single person. Despite the presence of an apparently "plain reading," which could result in a finding of clarity, the ambiguity concept has become so broad as to encompass every possible play in the joints of the text: any reading that could reasonably be construed as permissible besides the "plain meaning" allows for a finding of ambiguity. *See supra* note 18 and *infra* notes 57–60 and accompanying text.

32 *Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring in the judgment).

33 *Id.* at 2094.

34 *Id.* at 2095–96 ("Just ponder what the Court says: '[The Act's] ambiguity *derives* from the improbably broad reach of the key statutory definition . . . the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so . . . .' Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . *is ambiguous*!" (quoting *id.* at 2081 (majority opinion))). *But see* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 & n.15 (1987) ("Exceptions, however, do exist because an apparently clear text can be rendered ambiguous by a demonstration of contrary legislative expectations or highly unreasonable consequences." (citing *Holy Trinity* as an example of "interpreting [a] relatively clear statutory prohibition leniently in light of legislative history and current policy")).

35 NFIB v. Sebelius, 567 U.S. 519 (2012) (holding that the individual mandate of the Patient Protection and Affordable Care Act, which required the purchase of minimum essential health insurance coverage by individuals, was not justifiable by the Commerce Clause or the Necessary and Proper Clause, but could be upheld as an exercise of Congress's Taxing Power).

a command to buy insurance than as a tax, and [he] would uphold it as a command if the Constitution allowed it."[36] However, the Commerce Clause does not permit such action by Congress:

> And it is only because we have *a duty to construe a statute to save it*, if fairly possible, that § 5000A [the individual mandate provision] can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.
>
> The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.[37]

The Chief Justice's acknowledgement of the more natural reading of the text was quickly followed by a reformulation of the statute's reasoning as a constitutional exercise of congressional power. The plain reading of the statute was arguably ignored, as the Court did not even explicitly address the threshold inquiry of ambiguity versus clarity. Chief Justice Roberts invoked principles of interpretation that are traditionally ambiguity-dependent after admitting to the existence of a plain meaning and without determining that the statute was, in fact, ambiguous.[38]

The dissent, a joint opinion by Justices Scalia, Kennedy, Thomas, and Alito, argued that this reformulation was not a valid move, even given the doctrine of constitutional avoidance:

> [W]e cannot rewrite the statute to be what it is not. "'[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute' or judicially rewriting it."[39]

For the dissenting justices, the Taxing Clause would only be relevant if Congress had exercised—or attempted to exercise—this power.[40] Without any indication of this characterization found in the text, the dissent was unwilling to allow this external, purposive approach to affect the threshold determination of clarity or to disrupt the clear, plain meaning of the statute.

*Bond* and *NFIB* are just two examples of the Roberts Court's embrace of the constitutional avoidance canon.[41] These cases are closely intertwined

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36 *Id.* at 574 (opinion of Roberts, C.J.).

37 *Id.* at 574–75 (emphasis added).

38 *See, e.g.*, Kavanaugh, *supra* note 5, at 2118 (listing constitutional avoidance as a "substantive principle[ ] of interpretation [that] . . . depend[s] on an initial determination of whether a text is clear or ambiguous").

39 *Sebelius*, 567 U.S. at 662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (second alteration in original) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986)) (some internal quotation marks omitted).

40 *Id.* at 661–62 ("It is important to bear this in mind in evaluating the tax argument of the Government and of those who support it: The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so.").

41 *See* Kavanaugh, *supra* note 5, at 2140–41 ("For example, consider some of the cases that have turned on the constitutional avoidance canon in the recent past: the *NFIB*

with the Court's undisciplined jurisprudential approach to the threshold inquiry of statutory clarity versus ambiguity.[42] Because "[i]f the statute was clear, then there would be no warrant for using the constitutional avoidance canon," the perceived need to apply the canon therefore became a critical factor in the "necessarily difficult evaluation of whether the text was clear or ambiguous."[43] The lack of guidance in making this threshold determination and the malleable availability of interpretive tools supposedly used only in cases of ambiguity has left the judiciary with an unmanageable—perhaps even nonexistent—approach to this essential question.[44]

## II. A New Approach to the Ambiguity Versus Clarity Determination

Although the presence and consequences of statutory ambiguity are well recognized, the concept remains difficult to define and identify in a consistent manner. This Part will address Judge Kavanaugh's recent response to this difficulty. His proposal seeks to reduce or eliminate threshold determinations of ambiguity by clarifying the task of the judge and removing the ambiguity requirement from several interpretive canons to avoid the temptation to create ambiguity.[45] Though his proposal more drastically impacts the purposivist interpretive approach because of purposivism's willingness to consider extratextual factors in the initial reading of a text,[46] Judge Kavanaugh's framework also affects the textualist approach: after the elimination of the threshold inquiry, his understanding of which canons are valid (and in what contexts) requires all interpreters to seek the plain meaning of the text in a modified way.

In his review of a book on statutory interpretation by Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, Judge Kava-

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healthcare case, the *NAMUDNO* [Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009)] voting rights case, and the *Wisconsin Right to Life* [FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007)] campaign finance case.").

42 *See id.* at 2141 ("Those were hugely significant cases, each of which turned to a significant extent on an initial question of whether the relevant statute was clear or ambiguous.").

43 *Id.*

44 *See* Slocum, *supra* note 3, at 802 ("The lack of a coherent legal definition of ambiguity and the conflation of ambiguity with vagueness help illustrate the problematic nature of the ambiguity concept in legal discourse, although these issues are peripheral to the central problem of how ambiguity determinations are made by judges."). In addition, anticipating Judge Kavanaugh's proposal to eliminate the threshold determination because of its inadequate ability to aid interpretation of statutes, Solan noted that "[p]art of the problem is that the law only has two ways to characterize the clarity of a legal text: It is either plain or it is ambiguous." Solan, *supra* note 8, at 861.

45 Judge Kavanaugh recognizes several "ambiguity-dependent canons[,] includ[ing]: (1) in cases of textual ambiguity, avoid interpretations raising constitutional questions; (2) rely on the legislative history to resolve textual ambiguity; and (3) in cases of textual ambiguity, defer to an executive agency's reasonable interpretation of a statute, also known as *Chevron* deference." Kavanaugh, *supra* note 5, at 2135.

46 *See supra* notes 20–22 and accompanying text.

naugh seeks to address the lingering problem in statutory interpretation of judges' inability to make the "initial clarity versus ambiguity decision in a settled, principled, or evenhanded way."[47] Explicitly addressing the lack of established guidance for this threshold determination, Judge Kavanaugh argues:

> To make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them *in advance* as we can. Doing so would make the rules more predictable in application. In other words, if we could achieve more agreement ahead of time on the rules of the road, there would be many fewer disputed calls in actual cases. That in turn would be enormously beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary.[48]

The significant consequences that result from a finding of ambiguity or clarity in terms of invoking certain canons of interpretation create both conscious and unconscious incentives to decide one way or the other, and therefore threaten the realization of an impartial judiciary.[49]

In order to achieve this neutrality in the area of statutory interpretation and preserve the separation of powers established by the Constitution, Judge Kavanaugh proposes a two-step process that attempts to avoid the "problematic threshold dichotomy" of ambiguity or clarity, such that courts rarely, if ever, engage in this initial inquiry.[50] At step one, "courts could determine the best reading of the text of the statute."[51] Then, "once judges have arrived at the best reading of the text, they can apply—openly and honestly—any substantive canons (such as plain statement rules or the absurdity doctrine) that may justify departure from the text."[52]

The first step requires that courts read the statute as an ordinary user of English, such that the "best reading" of the statute depends on "(1) the

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47 Kavanaugh, *supra* note 5, at 2118. Judge Kavanaugh describes the basic themes of Chief Judge Katzmann's *Judging Statutes*: "[C]ourts should understand Congress better, should interpret statutory text in light of Congress's purpose in enacting the particular statute, and, in particular, should rely on committee reports and other legislative history to try to divine Congress's purpose." *Id.* at 2122.

48 *Id.* at 2121.

49 *See id.* at 2143 ("After nearly a decade on the bench, I have a firm sense that the clarity versus ambiguity determination—is the statute clear or ambiguous?—is too often a barrier to the ideal that statutory interpretation should be neutral, impartial, and predictable among judges of different partisan backgrounds and ideological predilections."); *see also* Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909 (2017) ("[U]ncertainty in certain aspects of statutory and constitutional interpretation is affecting the Court, and the vision of the Court that the American people hold.").

50 Kavanaugh, *supra* note 5, at 2135 ("Under the structure of our Constitution, Congress and the President—not the courts—together possess the authority and responsibility to legislate. As a result, clear statutes are to be followed." (footnote omitted)); *id.* at 2144 (outlining two-step process).

51 *Id.*

52 *Id.*

words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons, which at the end of the day are simply a fancy way of referring to the general rules by which we understand the English language."[53] While some canons—those that the ordinary user of the English language would naturally employ in her reading of the statute—are helpful to judges in their interpretation of the best reading of the text, some are not so helpful.[54] Judge Kavanaugh advocates removing the *ejusdem generis* canon, the antiredundancy canon, and the consistent usage canon from the set of canons available to the judge, regardless of whether the statute is "ambiguous."[55] The best reading of the statute instead ought to depend primarily on the general rules of understanding text that would be employed by the ordinary user of the English language, and the availability of such an understanding ought not to depend on an initial finding of ambiguity.

The "best reading" of a statute further requires that the text be understood from the perspective of the ordinary user of the English language at the time of the statute's enactment. Though Judge Kavanaugh's proposal does not specifically address this timing question, the time of enactment approach is implicit in his methodology and further cabins the ambiguity inquiry. Reading the statute as it would have been read at the time of enactment is most consistent with the allocation of power to each federal branch established by the Constitution that Judge Kavanaugh seeks to protect:

> Article I assigns Congress, along with the President, the power to make laws. Article III grants the courts the "judicial Power" to interpret those laws in individual "Cases" and "Controversies." When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power.[56]

Seeking the best reading of the statute as understood at the time of enactment allows for the appropriate exercise of judicial restraint in furtherance of the separation of powers.

Judge Kavanaugh also calls for canon-by-canon revision of the rules for invoking many substantive canons of statutory interpretation, the use of which has depended traditionally on a threshold finding of ambiguity.[57] He

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53 *Id.* at 2144–45.

54 *See id.* at 2159–60.

55 *Id.* at 2160–62.

56 *Id.* at 2120 (footnotes omitted) (first quoting U.S. CONST. art. III, § 1; then quoting U.S. CONST. art. III, § 2).

57 *See id.* at 2145 ("But given that several existing canons depend on a threshold determination of ambiguity, wouldn't this proposed approach work a significant change in certain aspects of statutory interpretation? Not necessarily. It depends on which canons we end up discarding. Importantly, moreover, this is not an all-or-nothing proposal: we could refashion some ambiguity-dependent canons but not others depending on the values at stake with particular canons."). Judge Kavanaugh addresses only a small selection of substantive canons and admits that some canons are more difficult than others to revise. *See, e.g.*, *id.* at 2145 n.136 ("To take one example, I do not have a firm idea about how to handle the rule of lenity."). His proposal, by refashioning the use and availability of the traditional canons, also addresses the confusion between *determining* and *resolving* ambigu-

first calls for the elimination of the constitutional avoidance canon, focusing largely on the interpretive difficulties posed by the application of the doctrine in *NFIB*.[58] As discussed above, the sole source of disagreement between the Justices was the application of the constitutional avoidance canon, the result of uncertainty regarding the rules of the road for the threshold determination of statutory ambiguity versus clarity.[59] Judge Kavanaugh declares this to be "an odd state of affairs. A case of extraordinary magnitude boils down to whether a key provision is clear or ambiguous, even though we have no idea how much ambiguity is enough to begin with, nor how to ascertain what level of ambiguity exists in a particular statute."[60] The capacity of the constitutional avoidance doctrine to influence the threshold determination is the prototypical example of the serious problems posed by the lack of established rules confining the threshold inquiry.

Under Judge Kavanaugh's proposed framework, the use of legislative history and *Chevron* deference will also be significantly revised. If the ability to "'pick out your friends'—that is, to pick out the result you find most reasonable—[relies on] a finding of ambiguity," the temptation to ensure such a finding initially in order to turn to legislative history later will mean that "some judges are going to be more likely to find ambiguity in certain cases."[61] By eliminating the threshold determination of ambiguity and replacing this framework with a "best reading" of the statute approach, the use of legislative history will be reduced.[62] Similarly, difficulties result in cer-

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ity. *See* Slocum, *supra* note 3, at 811 ("Further, courts arbitrarily designate certain interpretive tools as being applicable to ambiguity determinations and others as being applicable to only ambiguity resolution, such as the position of some courts, including the Supreme Court on occasion, that legislative history will only be considered if the statute is first found to be ambiguous.").

58 *See* Kavanaugh, *supra* note 5, at 2145. Re similarly noted the risks of the constitutional avoidance canon in his account of the New Holy Trinity approach. *See* Re, *supra* note 12, at 418 ("On the down side, the New Holy Trinity affords the Court even greater power and discretion than the amount already afforded under the controversial avoidance canon and so increases the risk of biased, insincere, and unexpected rulings.").

59 *See* Kavanaugh, *supra* note 5, at 2147.

60 *Id.*

61 *Id.* at 2149 (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005)). Judge Harold Leventhal is the original source of this "memorable phrase." *Allapattah*, 545 U.S. at 568; *see also* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

62 *See* Kavanaugh, *supra* note 5, at 2150 (arguing that "legislative history would be largely limited to helping answer the question of whether the literal reading of the statute produces an absurdity," a question reached only at stage two of his proposed interpretive approach). Textualists note the dangers of using legislative history, including "that the impulse to make the semantic details of a statute more coherent with its apparent animating policy—the impulse that underlies classic intentionalism—poses too great a risk to whatever legislative bargain or bargains were needed to ensure enactment." John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 444 (2005). *But see* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 99–100 (2010) (arguing that Congress "may deliberately write vague or ambiguous language to secure the necessary votes to enact the legislation," and that a court's use of legislative history in later interpreting the

tain applications of *Chevron* because of the indeterminate nature of the threshold decision of clarity versus ambiguity.[63] Judge Kavanaugh argues that, while "*Chevron* makes a lot of sense in certain circumstances . . . we need to consider eliminating that inquiry as the threshold trigger" because the doctrine has not been confined to cases where it makes the most sense given the overwhelming breadth of ambiguity findings.[64]

Although several ambiguity-dependent substantive canons would be largely eliminated under Judge Kavanaugh's proposal, some could simply be applied as plain statement rules during the "best reading" step without requiring an initial finding of ambiguity.[65] Presumptions that carry sufficiently significant value should not be dependent on a finding of ambiguity, but should simply be applied as the court engages in its reading of the statute through the eyes of the ordinary user of the English language.[66] For Judge Kavanaugh, presumptions concerning extraterritorial application, repeal of a prior statute, mens rea, and retroactive application are among several that carry sufficient value so as to earn their place as plain statement rules to be considered independent of the old ambiguity trigger.[67]

Beyond these plain statement rules, Judge Kavanaugh allows for an extremely limited application of the mistake and absurdity canons—an application that the Supreme Court, at least implicitly, also endorses.[68] The absurdity doctrine is a "sound principle, although the alleged absurdity must surmount a high bar to be truly absurd."[69] The mistake doctrine is similarly narrow, limited to drafting or scrivener's errors.[70]

Judge Kavanaugh's proposal therefore seeks to eliminate the threshold inquiry, and, in doing so, redefines the rules that designate which tools of statutory interpretation are available to judges at particular stages of the

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statute is appropriate for the court to be able to "do[ ] its best to make the statute work in the best way possible").

63 Kavanaugh, *supra* note 5, at 2154.

64 *Id.* at 2152–54; *cf.* Slocum, *supra* note 3, at 812 ("[T]he Court has allowed substantive canons to displace *Chevron*. Although these applications of substantive canons are highly significant because they foreclose the possibility of deference to agency interpretations, the Court has not yet offered a comprehensive explanation for when substantive canons should be invoked as a substitute for deference to agency interpretations." (footnote omitted)); *id.* at 829 (arguing that "substantive canons should be applied in *Chevron* cases similarly to non-*Chevron* cases").

65 *See* Kavanaugh, *supra* note 5, at 2156.

66 *See id.*

67 *See id.*

68 *See generally id.* at 2156–59.

69 *Id.* at 2156–57.

70 *See id.* at 2157. However, Judge Kavanaugh is careful to note that even though the Supreme Court purports to now reject an *explicit* mistake canon as applied in *Holy Trinity*, it has nonetheless used a mistake canon of this kind *implicitly* in *King v. Burwell*. While the Court "used the term 'ambiguous' to describe the law, . . . the Court was describing more of a mistake rather than ambiguity in any traditional sense." *Id.* at 2158, 2159 ("[T]he Supreme Court decided against *explicitly* using a kind of mistake canon—perhaps because doing so would resurrect a form of the now-disfavored *Holy Trinity* doctrine.").

interpretive process. His approach, rather than merely establishing rules of the road that address "[t]he simple and troubling truth . . . that no definitive guide exists for determining whether statutory language is clear or ambiguous," transforms the interpretive process on a fundamental level by eliminating the inquiry altogether and restructuring the manner in which canons of interpretation are applied.[71] Judge Kavanaugh admits that this approach is not possible in all cases, for "on occasion the relevant constitutional or statutory provision may actually *require* the judge to consider policy and perform a common law–like function."[72] However, Judge Kavanaugh argues, the issue in most cases is interpretive, and can thus be cabined and guided by rules that are settled in advance of the inquiry.[73] By reconsidering the validity of the canons and redistributing the use of interpretive tools without regard to their previous dependency on an initial determination of ambiguity, Judge Kavanaugh offers a guide to the courts that eliminates the gatekeeping function of the judge in statutory interpretation and instead encourages an impartial reading of the text.

## III. TITLE IX: A CASE STUDY

This Part discusses possible methods for interpreting the text of Title IX and its implementing regulation. Section III.A provides the statutory and regulatory framework for the debate. Section III.B outlines the methods of statutory interpretation underlying the opposing conclusions, with reference to the related statutory area of Title VII. Section III.C compares these methods with the framework proposed by Judge Kavanaugh.

### *A. The Statutory and Interpretive Landscape*

Title IX is a statutory prohibition of discrimination: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[74] This provision and its implementing regulation on the availability of facilities[75] have been the subject of much litigation. Most recently, in *G.G. ex rel. Grimm v. Gloucester County School Board*, the Court addressed whether the Department of Education's interpretation of the statutory prohibition on sex discrimination and its implementing regulation to include discrimination based on gender identity should be given effect.[76]

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71 *Id.* at 2138.

72 *Id.* at 2120.

73 *See id.* at 2121.

74 20 U.S.C. § 1681(a) (2012).

75 *See, e.g.*, 34 C.F.R. § 106.33 (2017) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

76 *See generally* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *vacated and remanded sub nom.* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S.

In May 2016, the Assistant Secretary for Civil Rights for the Department of Education issued a "Dear Colleague" letter, which explained that the Title IX "prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status," where "gender identity" is defined as "an individual's internal sense of gender" and "transgender" refers to "those individuals whose gender identity is different from the sex they were assigned at birth."[77] Therefore, "[a] school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity."[78] The Department of Education has since withdrawn this guidance, issuing a new "Dear Colleague" letter in February 2017 to explain the decision to rescind the 2016 DCL.[79] This change in policy is the result of the underlying interpretive dispute: some have "concluded that the term 'sex' in the regulations is ambiguous," while others have "held that the term 'sex' unambiguously refers to biological sex."[80] Such divergent conclusions are the result of the undisciplined jurisprudential approach to the threshold ambiguity versus clarity inquiry.

### *B. A Variety of Interpretive Methods*

Courts have differed in their approaches to the question raised by *G.G. v. Gloucester*. The 2017 DCL first references the U.S. Court of Appeals for the Fourth Circuit, which "conclude[d] that the regulation is ambiguous as applied to transgender individuals" and therefore held that the Department's interpretation was entitled to deference.[81] The Fourth Circuit began with the ambiguity versus clarity inquiry, which it noted "is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole."[82] Writing for the majority, Judge Floyd acknowledged that the "plain" reading that results from these interpretive criteria is that the regulation "permits schools to provide separate toilet, locker room, and shower facilities for its male and female students."[83] However, the court determined that its "inquiry is not ended . . . by this straightforward conclusion.

Ct. 1239 (2017). The Court remanded to the Fourth Circuit after the Department of Education issued new guidance. *See infra* note 79 and accompanying text.

77 "Dear Colleague" Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., and Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice 1 (May 13, 2016) [hereinafter 2016 DCL].

78 *Id.* at 3.

79 "Dear Colleague" Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., and T.E. Wheeler, II, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice 2 (Feb. 22, 2017) [hereinafter 2017 DCL].

80 *Id.* at 1. This Note does not address the corresponding policy dispute, nor is it intended to indicate support of any one substantive viewpoint. Rather, this Note seeks to understand the dispute over the statutory text at issue from an interpretive perspective.

81 *G.G.*, 822 F.3d at 721 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

82 *Id.* at 720.

83 *Id.*

Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms."[84] This additional consideration resembles the New Holy Trinity move made by the Roberts Court, as purposivist concerns influenced the threshold ambiguity inquiry.[85] The court found that this silence is grounds for finding ambiguity, as the text can be understood to permit a determination of male or female with reference to genitalia or with reference to gender identity.[86] The Department's interpretation that the determination should be made based on gender identity was awarded deference, a direct consequence of the threshold ambiguity finding.[87] In his dissent, Judge Niemeyer sharply disagreed with the majority's ambiguity determination and reformulation of the term "sex" to mean gender identity: "Accepting that new definition of the statutory term 'sex,' the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex."[88]

Second, the 2017 DCL refers to a decision by the U.S. District Court for the Northern District of Texas,[89] which found that the regulation "is not ambiguous" and that "[i]t cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth."[90] The District Court therefore rejected the defendants' argument that Congress's lack of intent to protect transgender individuals is irrelevant because of the Supreme Court's holding in *Oncale v. Sundowner Offshore Services, Inc.*[91] In *Oncale*, the Court found based on similar statutory language prohibiting sex-based employment discrimination that same-sex sexual harassment was actionable:

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84 *Id.*

85 *See supra* notes 11–24 and accompanying text.

86 *G.G.*, 822 F.3d at 720.

87 *Id.* at 721.

88 *See id.* at 730 (Niemeyer, J., concurring in part and dissenting in part); *id.* at 736 ("The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility 'on the basis of sex' employs the term 'sex' as was generally understood at the time of enactment. . . . Indeed, although the contemporaneous meaning controls our analysis, it is notable that, *even today*, the term 'sex' continues to be defined based on the physiological distinctions between males and females." (citations omitted)).

89 *See* Texas v. United States, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016) (granting plaintiffs' motion for a preliminary injunction and finding that defendants failed to comply with the notice and comment requirements of the Administrative Procedure Act and "issu[ed] directives which contradict the existing legislative and regulatory texts"); *see also* Texas v. United States, No. 7:16-cv-00054, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (clarifying original order).

90 *Texas*, 201 F. Supp. 3d at 832–33.

91 *See id.* at 831 (referring to Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[92]

The District Court did not dispute that the language of Title VII is written in such a way that the statute covers situations that Congress did not anticipate, nor did it argue that the principal concerns of Congress ought to control the court's interpretation of legislation instead of the statutory language. Rather, the inclusion of same-sex harassment within the statutory language in *Oncale* preserved the plain meaning of "sex" as "the biological and anatomical differences between male and female students [or persons] as determined at their birth," while the transformation of the term "sex" in Title IX to mean "gender identity" could not.[93] The conflicting opinions of the Fourth Circuit and the Northern District of Texas reveal the lack of an established method for approaching the threshold ambiguity versus clarity inquiry. This disagreement parallels that seen among the members of the Roberts Court[94] and advances Judge Kavanaugh's claim that this lack of clarity justifies a new interpretive framework.[95]

The Seventh Circuit's recent decision in *Hively v. Ivy Tech Community College of Indiana* is similarly helpful in determining the statutory meaning of "sex" in terms of both substantive law and interpretive approach.[96] Relying on the Supreme Court's reasoning in *Oncale*, a related line of gender nonconformity cases, and the associational theory first noted in *Loving v. Virginia*,[97] the Seventh Circuit applied a comparative method to demonstrate that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimina-

92 *Oncale*, 523 U.S. at 79. Although there are differences between Title VII and Title IX, this Note will assume for purposes of discussion that their statutory text is analogous with regards to use of the term "sex."

93 *Texas*, 201 F. Supp. 3d at 832–33. The district court implied that the definitional transformation can be justified only by engaging in a dynamic approach to statutory interpretation. *See id.* at 833 (quoting a memorandum in support of the defendant's position that explains how "[t]he federal government's approach to this issue has also evolved over time"). For a discussion of this approach, see Eskridge, *supra* note 34.

94 *See supra* Part I.

95 *See supra* note 47 and accompanying text.

96 Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (holding that discrimination on the basis of sexual orientation is a form of sex discrimination).

97 Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding that statutes prohibiting interracial marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

tion for Title VII purposes."[98] The majority supposedly rested its holding on the statutory language and precedent, yet purposivist considerations saturate the opinion.[99] Though its threshold determination was not explicit, the majority implicitly claimed that the statute is ambiguous because of tension between the plain reading of the text and "the conventional wisdom about the reach of the law."[100] Like the Fourth Circuit's reading of Title IX and its regulation, this initial determination based on purposivist considerations follows the New Holy Trinity approach of the Roberts Court.[101]

In his concurrence, Judge Posner described the traditional textualist and purposivist approaches to statutory interpretation, but ultimately advocated for applying a third method of interpretation: "judicial interpretive updating."[102] After admitting that "Title VII does not mention discrimination on the basis of sexual orientation," Judge Posner determined that "an explanation is needed for how 53 years later the meaning of the statute has changed and the word 'sex' in it now connotes both gender *and* sexual orientation."[103] His interpretation does not seem to rely on a finding of ambiguity. Rather than turning to extratextual considerations because the meaning of the text is *unclear*, Judge Posner argued that modern understandings are relevant in demonstrating that the meaning of the text, clear at the time of the statute's enactment, has *changed*.[104] He analogized Title VII to the interpretive method observed in reading the Sherman Antitrust Act,[105] which has "been updated by, or in the name of, judicial interpretation—the form of interpretation that consists of making old law satisfy modern needs and understandings" because of changes in economics.[106]

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98 *Hively*, 853 F.3d at 345, 351–52 ("It is critical, in applying the comparative method, to be sure that only the variable of the plaintiff's sex is allowed to change. The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once. . . . The counterfactual we must use is a situation in which [the plaintiff] is a man, but everything else stays the same: in particular, the sex or gender of the partner.").

99 *See, e.g.*, *id.* at 342 ("Especially since the Supreme Court's recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, bizarre results ensue from the current regime." (citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015))).

100 *Id.* at 343.

101 *See supra* note 85 and accompanying text.

102 *Hively*, 853 F.3d at 353 (Posner, J., concurring).

103 *Id.*

104 *See id.*

105 *Id.* at 352, 355 ("Failure to adopt [the broader reading of 'sex'] would make the statute anachronistic, just as interpreting the Sherman Act by reference to its nineteenth-century framers' understanding of competition and monopoly would make the Sherman Act anachronistic."). *See generally* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).

106 *Hively*, 853 F.3d at 352 (Posner, J., concurring). Judge Kavanaugh does not dispute that some provisions require judges to "perform a common law-like function," but argues that this is a valid approach only when the text of the statute requires the judge to make a "determination of what is reasonable or appropriate." *See* Kavanaugh, *supra* note 5, at 2120 & n.12; *see also supra* note 71 and accompanying text.

Application of the "judicial interpretive updating" method is limited, and the dissent challenged that Title VII invites such judicial legislation. Judge Sykes argued that Title VII is not one of the "so-called 'common-law statutes.'"[107] In fact, the Supreme Court has already spoken indirectly to this debate:

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. Both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are such statutes. The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.[108]

According to the dissent, the text of Title VII did not establish a standard that is susceptible to a changing interpretation based on evolving values; rather, the text set forth a rule whose meaning must be determined by "an objective inquiry that looks for the meaning the statutory language conveyed to a reasonable person at the time of enactment."[109] This inquiry requires that "sex" and "sexual orientation" remain different classifications because "[t]he two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here."[110] The contrasting interpretive methods used in *Hively* demonstrate the malleability of the ambiguity versus clarity determination and the willingness of judges to depart from the plain meaning of the statute.

### *C. The Search for a New Interpretive Approach*

The argument that "sex" can be defined to include "gender identity" therefore requires two interpretive moves under the current threshold determination regime: first, the judge must raise purposivist and pragmatic consid-

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107 *Hively*, 853 F.3d at 360 (Sykes, J., dissenting) ("The majority deploys a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. So does Judge Posner in his concurrence. Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges. Judge Posner admits this; he embraces and argues for this conception of judicial power. The majority does not, preferring instead to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents. Either way, the result is the same: the circumvention of the legislative process by which the people govern themselves.").

108 Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 97 (1981) (citation omitted). The Court carefully distinguished antitrust law, which "involves a substantially different statutory scheme" and is an area where "the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute." *Id.* at 98 n.42.

109 *Hively*, 853 F.3d at 361 (Sykes, J., dissenting).

110 *Id.* at 363.

erations during the threshold textual inquiry to justify a finding of ambiguity; and, second, the judge must, in part, base those extratextual considerations on the present alleged understanding, rather than that of the time of enactment. Judge Kavanaugh's proposal allows for neither of those moves to occur.

Judge Kavanaugh proposes that courts first seek the "best reading" of the statute, based on the text, the statutory context, and any relevant semantic canons.[111] Generally, there is agreement that the plain meaning of the statutory and regulatory text allows for a school to provide separate facilities for its male and female students, and that "the word 'sex' was understood *at the time the regulation was adopted* to connote male and female and that maleness and femaleness were determined primarily by reference to the factors . . . termed 'biological sex.'"[112] The disagreement only arises by raising pragmatic issues not considered at the time of statutory enactment.[113] For Judge Kavanaugh, those considerations cannot disrupt the interpretation based only on the text, the statutory context, and relevant semantic canons.[114] Perhaps the most convincing argument employing semantic canons—particularly, *expressio unius est exclusio alterius*—for preserving the distinction between "sex" and "gender identity" is analogous to the argument made by Judge Sykes in her *Hively* dissent to distinguish between "sex" and "sexual orientation":

> This commonsense understanding [that sexual orientation discrimination is not synonymous with sex discrimination in ordinary language] is confirmed by the language Congress uses when it *does* legislate against sexual-orientation discrimination. For example, the Violence Against Women Act prohibits funded programs and activities from discriminating "on the basis of actual or perceived race, color, religion, national origin, *sex, gender identity, . . . sexual orientation*, or disability."[115]

Using the framework proposed by Judge Kavanaugh, there appears to be little reason to alter the plain meaning recognized by the various judges, regardless of their interpretive approach.

Second, Judge Kavanaugh suggests that the judge ought to consider any relevant substantive canons, such as applicable plain statement rules and the

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111 *See supra* note 53 and accompanying text.

112 G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016) (emphasis added), *vacated and remanded sub nom.* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017); *see also* Texas v. United States, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016).

113 *See G.G.*, 822 F.3d at 722 ("As the United States explains, the issue in this case 'did not arise until recently.'").

114 *See supra* note 53 and accompanying text.

115 *Hively*, 853 F.3d at 363 (Sykes, J., dissenting) (some emphasis added) (quoting 42 U.S.C. § 13925(b)(13)(A) (2012)). The majority disagreed, arguing that "Congress may certainly choose to use a both a belt and suspenders to achieve its objectives, and the fact that 'sex' and 'sexual orientation' discrimination may overlap in later statutes is of no help in determining whether sexual orientation discrimination *is* discrimination on the basis of sex." *Id.* at 344 (majority opinion).

absurdity doctrine.[116] While an interpretation that refuses to equate "sex" with "gender identity" arguably has odd results,[117] none of the various interpretive approaches suggest that the result would be absurd. The other canons that Judge Kavanaugh proposes should be applied as plain statement rules are not implicated.[118] Again, the acknowledged plain meaning dictated by Judge Kavanaugh's approach and recognized by the judges cannot be defeated by the considerations of his step two. This approach and result is far more closely aligned with the textualist approach taken in the Northern District of Texas decision and the Fourth Circuit dissent than the purposivist approach of the opposing judges, but the restructuring of the interpretive doctrines' availability following the elimination of the ambiguity versus clarity inquiry nonetheless has consequences for both methodologies.

Judge Kavanaugh recognizes that his approach is not always applicable to the statute at hand: some provisions may require judges to engage in common-law reasoning and to consider policy.[119] He offers several cases "where the judicial inquiry requires determination of what is reasonable or appropriate," including the requirements that searches must be "reasonable" under the Fourth Amendment and that evidentiary privileges are recognized "in the light of reason and experience."[120] Because of the statutory text, the Title IX prohibition against discrimination on the basis of sex is not amenable to this "common law–like judging."[121] The prohibition does not establish a malleable standard, but instead sets forth a rule that a judge can only interpret and apply.

## Conclusion

This Note has outlined the difficulties of the existing clarity versus ambiguity determination and considered the recent proposal of Judge Kavanaugh to reduce or eliminate this threshold inquiry. His approach establishes rules to guide judges' interpretation of statutory texts, cabining the tools available in the search for the "best reading" of the statute and revising the requirements for invoking many substantive canons of interpretation. While Judge Kavanaugh's proposal affects the purposivist inquiry more dramatically, the effect on the textualist framework is not absent: the canon-by-canon revision prevents the textualist from yielding to the temptation to find a statute unclear to invoke ambiguity-dependent canons and the temptation to disguise purposivist considerations as textualist by including extratextual factors during the threshold inquiry regarding the clarity of the text. The application of Judge Kavanaugh's proposal to the interpretive debate about the

116 *See supra* note 52 and accompanying text.

117 *See supra* note 98 and accompanying text.

118 *See* Kavanaugh, *supra* note 5, at 2154–56 (listing several substantive canons that can be applied as plain statement rules).

119 *See supra* note 72 and accompanying text.

120 Kavanaugh, *supra* note 5, at 2120 n.12 (quoting U.S. Const. amend. IV; Fed. R. Evid. 501).

121 *Id.*

meaning of "sex" in the context of Title IX demonstrates the promise of the search for the "best reading" of the statutory text. By clarifying the task of the judge and cabining her interpretive inquiry, Judge Kavanaugh's proposal eliminates the temptations created by the current ambiguity versus clarity inquiry and offers a new approach for reading statutes that furthers the ideal of a neutral and principled judiciary.