RETHINKING THE CANON OF CONSTITUTIONAL AVOIDANCE

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The canon of constitutional avoidance is controversial in part because it sanctions statutory interpretations that courts might otherwise view as impermissibly activist, which makes the features of its definition of crucial importance. Critics have rightly condemned the Court's conception of the avoidance canon, but these criticisms have largely failed to identify the canon's flaws. For instance, the Supreme Court characterizes the avoidance canon as a mere tie-breaking principle that applies only after it identifies linguistic "ambiguity," but critics maintain that the Court frequently uses the canon as justification to "rewrite laws." The "rewriting" argument is overstated. In fact, the Court's conception of ambiguity in avoidance canon cases is too narrow. Primarily, this is because the Court has failed to recognize the different ways in which a statute might be indeterminate. For instance, the Court has mistakenly maintained that implied limitations on statutory language involve "notably generous" interpretation. To the contrary, implied meanings are a normal aspect of the meaning communicated by a text, and judicial recognition of an implied term does not necessarily involve the "rewriting" of laws. Furthermore, the Court's conception of the avoidance canon fails in other respects, also not often discussed by critics. Most significantly, while the Court insists that textual ambiguity is a condition precedent to the application of the avoidance canon, the Court's determination of ambiguity is largely subjective and based on jurisprudential commitments rather than neutral linguistic principles.

This Article presents a novel, interdisciplinary analysis of how the Court should reconceptualize the avoidance canon based on a more nuanced understanding of language and the function of interpretive principles. Part of the reconceptualization involves modifying the avoidance canon's ambiguity trigger to allow for a more expansive understanding of the multiple ways in which a text can be indeterminate. Instead of the Court's current narrow focus on the literal meaning of textual language, the avoidance canon should be based on a broader notion of indeterminacy viewed in light of the "communicative meaning" of a text. The avoidance canon is typically justified by normative principles regarding judicial restraint rather than as an aspect of the communicative meaning of a text. Like other substantive canons, though, it is also based on a presupposition about the clarity of congressional statutory drafting that is tied to communicative meaning. When framed in such a manner, the avoidance canon can serve as a useful tool for resolving statutory indeterminacy, particularly in cases where implied

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language is necessary to make a statute determinate enough to resolve the interpretive dispute. The purpose of this new understanding of the avoidance canon is not to create more situations where the canon is applied in order to select second-best interpretations. Rather, by reconsidering the foundation of the avoidance canon, the Court can make the canon more coherent as well as consistent with other important interpretive canons and principles governing language usage.

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INTRODUCTION

The canon of constitutional avoidance implicates some of the most fundamental aspects of the judicial function in matters of interpretation.[1] Along with avoiding the need for judicial invalidation of a statute on constitutional grounds, the avoidance canon enables courts to select interpretations that might otherwise be difficult to justify.[2] Not surprisingly, the canon has attracted significant attention and criticism. Critics argue that the canon allows courts to engage in sloppy constitutional reasoning and adopt statutory interpretations that ignore the clear terms of a provision.[3] Indeed, the canon has been deemed a

1 *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997) (referring to the avoidance canon as "perhaps the preeminent canon of federal statutory construction").

2 *See* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1275 (2016) (arguing that the Court has used the avoidance canon to "rewrite laws").

3 *See, e.g.*, Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2122 (2015) ("The avoidance canon enables—even demands—sloppy and cursory constitutional reasoning."); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 400 (2005) (indicating that a "fundamental attack" on the avoidance canon is that it "allows a court . . . to rewrite statutes without clear limits on the revising role"); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 831–32 (2001) (calling for the abandonment of the avoidance canon in part because it "frequently results in questionable statutory interpretations"); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 94–95 (1995) (arguing that the avoidance canon promotes judicial activism). Although most scholarship has been critical of the avoidance canon, empirical evidence indicates that the activism critiques may be overstated. *See also* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 830–31 (2017) (showing that the Court has often "used the avoidance canon to read a statute in a manner

"tool of constitutional law" rather than a "maxim of statutory interpretation."[4] Yet, perhaps in a desire to avoid charges of activism, the Supreme Court insists that the avoidance canon is "settled policy"[5] and "beyond debate"[6] and frames the canon as having a relatively modest effect on statutory interpretation. The Court is careful to maintain that the avoidance canon "does not supplant traditional modes of statutory interpretation"[7] and requires "ordinary textual analysis."[8] Thus, according to the Court, the avoidance canon "is a tool for choosing between competing plausible interpretations"[9] of a provision and "has no application in the absence of . . . ambiguity."[10] Nevertheless, despite the Court's claims that the avoidance canon is a mere tie-breaking principle that resolves ambiguity, criticisms persist (including from Justices in dissenting opinions) that the canon allows courts to "rewrite laws" in order to avoid definitively deciding constitutional questions.[11]

Critics have greatly overstated the extent to which the avoidance canon enables courts to "rewrite" legislation, but the Court's application of the avoidance canon often does not match its description of it. At times, the Court's application of the avoidance canon matches its narrow conception of it, but the Court has often applied the canon in a much more aggressive manner.[12] This inconsistency should compel the Court to modify the avoidance canon so that the canon's conceptualization and application cohere in a persuasive manner. This Article outlines a theory of how the Court should do so.

The inconsistency between the Court's conceptualization and application of the avoidance canon can be addressed through consideration of the two basic elements essential to the role of any principle of statutory interpretation. One element (which I name the

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that *honored* a recent congressional override, or to preserve a long-standing statute against constitutional challenge.").

4 Frickey, *supra* note 3, at 402.

5 Gomez v. United States, 490 U.S. 858, 864 (1989).

6 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

7 Boumediene v. Bush, 553 U.S. 723, 787 (2008).

8 Clark v. Martinez, 543 U.S. 371, 385 (2005).

9 *Id.* at 381.

10 United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2001).

11 *See, e.g.,* Zadvydas v. Davis, 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting) (arguing that the Court had interpreted "a statute in obvious disregard of congressional intent" and "cur[ed] the resulting gap [in the statute] by writing a statutory amendment of its own").

12 Part IV discusses examples of cases that critics and the current Court would characterize as involving aggressive application of the avoidance canon.

structural element) situates an interpretive principle within the commonly recognized judicial interpretive process and legitimizes the principle as an aspect of that process. Thus, in accordance with how courts normally interpret statutes, some interpretive principles determine the meaning of textual language while others resolve "ambiguity" or provide a reason for deviating from a provision's literal meaning.[13] For instance, a grammatical rule about commas helps determine the linguistic meaning of a text,[14] the rule of lenity resolves ambiguity in criminal statutes,[15] and the absurdity doctrine provides a reason for deviating from a provision's literal meaning.[16] The other element (which I name the *triggering element*) concerns the circumstances that activate the interpretive principle. Thus, a grammatical rule about commas is triggered by the presence (or absence) of a comma, the rule of lenity is triggered by a determination of ambiguity, and the absurdity doctrine is triggered when the literal meaning of a provision would result in an absurd outcome.[17]

Scholars and courts have largely overlooked the interaction between the structural and triggering elements, as well as whether a given trigger

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13 Some interpretive principles, such as legislative history, are used by some judges to determine the linguistic meaning of a provision and by other judges only to resolve ambiguity. *See* Mark DeForrest, *Taming a Dragon: Legislative History in Legal Analysis*, 39 U. DAYTON L. REV. 37, 41 (2013) ("There is a diversity of views regarding the use of legislative history, and not all judges and scholars are convinced it is necessary to find an ambiguity in statutory language before resorting to inspection of the legislative record.").

14 *See* Lance Phillip Timbreza, *The Elusive Comma: The Proper Role of Punctuation in Statutory Interpretation*, 24 QLR 63, 67–68 (2005) (identifying five "Punctuation Doctrines" the Supreme Court has relied upon in statutory interpretation).

15 *See* Callanan v. United States, 364 U.S. 587, 596 (1961) (explaining that the "'rule [of lenity]' . . . only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.").

16 *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) (describing how courts have long embraced the idea that "judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results.").

17 The term "literal meaning" is used throughout this Article and is meant to refer to the linguistic meaning of the relevant sentence that is conventional and context independent. *See* C. J. L. Talmage, *Literal Meaning, Conventional Meaning and First Meaning*, 40 ERKENNTNIS 213, 213 (1994) (advancing the proposition that there is a distinction between literal and conventional meaning). Essentially, then, literal meaning is based on the conventional meaning of language, which is primarily tied to the semantic meanings of the words. *See also* FRANÇOIS RECANATI, LITERAL MEANING 3 (2004) (establishing that literal meaning can be determined via rules of a language and independently of speaker intent). *See infra* notes 130–42 and accompanying text (explaining the difference between semantic and pragmatic meaning).

adequately furthers the objectives of the interpretive principle. Consider though how changing the structural element can require a court to change the triggering element. Imagine that the Supreme Court decides that the proper judicial function does not allow courts to deviate from the clear linguistic meaning of a statute.[18] If the absurdity doctrine is to remain a viable interpretive principle, the Court must then reconceptualize both its structural and triggering elements.[19] Does the absurdity doctrine now help determine the linguistic meaning of textual language? If so, how does it help determine linguistic meaning? Furthermore, what would be its trigger? More plausibly, the Court would declare that the absurdity doctrine is a device for resolving ambiguity, making its trigger a determination of ambiguity (plus an absurd outcome that would result from one of the possible interpretations). As a result, the additional triggering requirement of ambiguity might reduce the number of cases in which the absurdity doctrine is applied.

Changing an interpretive principle's trigger can therefore have practical consequences that include an impact on the frequency of the principle's application.[20] To illustrate, consider Justice Kagan's argument in her dissent in *Yates v. United States*[21] that the Court should not have applied two textual canons of interpretation, *noscitur a sociis* and *ejusdem generis*, because they "resolve ambiguity" rather than help determine the linguistic meaning of a provision.[22] Textual canons typically represent generalizations about how language is normally used, which makes them relevant to the linguistic meaning of a provision, in contrast to the typically normative interpretive principles used to resolve ambiguity.[23] Nevertheless, Justice Kagan, not wanting the canons to be applied in the particular case, argued that "ambiguity"

18 *See* Manning, *supra* note 16, at 2431–38 (arguing that the absurdity doctrine is in tension with the Constitution).

19 Courts frequently dispute the required trigger for an interpretive principle. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262–64 (1991) (Marshall, J., dissenting) (arguing that the majority had inappropriately elevated the presumption against extraterritoriality from a device to resolve ambiguity to clear statement rule status).

20 Another consequence is that changing the trigger may create conflicts with other interpretive principles that have the same trigger. Thus, changing an interpretive principle's trigger to ambiguity creates potential conflicts with other interpretive principles that are also triggered by ambiguity.

21 574 U.S. 528 (2015).

22 *Id.* at 564 (Kagan, J., dissenting).

23 *See infra* notes 60–61 and accompanying text (explaining the role of textual canons).

should be an element of the trigger for the canons.[24] Such a change to the triggering element can also require a reconceptualization of the structural element. If, for example, the Court believes that ambiguity is not an appropriate trigger for a given interpretive principle (as this Article advocates it should decide with the avoidance canon), it must not only choose a new triggering principle but also explain how the modified interpretive principle fits within the structure of interpretation.

This Article, through the first interdisciplinary, linguistic analysis of the avoidance canon, takes two novel positions. First, the Court's applications of the canon are not as activist as critics claim, but, second, the canon's structural and triggering elements should be reconceptualized.[25] In fact, the Court's recent efforts to define the avoidance canon narrowly have created an interpretive principle that is both based on a faulty understanding of language and in tension with other important interpretive principles (such as clear statement rules).[26] The most significant problem is that the trigger for the avoidance canon, which requires a finding of ambiguity, is not based on a neutral linguistic principle (as the discussion of 'ambiguity' below illustrates). The solution is to modify the avoidance canon's trigger to recognize a more nuanced and expansive understanding of the multiple ways in which a text can be indeterminate.[27] In turn, while separation-

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24 Ambiguity would thus be an element of the trigger for *noscitur a sociis* and *ejusdem generis* in addition to the textual context that would normally trigger them. Traditionally, the *ejusdem generis* canon is triggered by a catch-all phrase that is much broader in scope than the terms in the list that precede it. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 234 (1975) (providing an example in which "oaks, elms, and other vegetation" presumably limits the meaning of "other vegetation" to trees). A judicial finding of ambiguity is thus not necessary to trigger the canon, although the often broad scope of the judicial conception of ambiguity would allow a provision to be labeled as "ambiguous" whenever the canon is used (giving Justice Kagan a basis for her claim about the requirement of ambiguity). *See infra* notes 127–32 and accompanying text (describing the judiciary's definition of ambiguity).

25 Even if there is activism associated with the avoidance canon, it must be considered in light of the alternative of constitutional invalidation where judges nevertheless "effectively rewrite an unconstitutional statute in any way that will render it constitutionally valid." Eric Fish, *Judicial Amendment*, 84 GEO. WASH. L. REV. 563, 563 (2016).

26 *See infra* notes 155–60, 172–86, 249–65 and accompanying text (explaining why the Court's distinction between the avoidance canon and clear statement rules is incoherent).

27 In addition to the requirement of ambiguity, one of the available interpretations must "raise serious constitutional problems." INS v. St. Cyr, 533 U.S. 289, 299–300 (2001). Much of the controversy surrounding the avoidance canon derives from the Court's move from a

of-powers concerns may have motivated the creation of the avoidance canon,[28] courts should consider it an aspect of the "communicative meaning" of a provision by virtue of a presupposition about the clarity of congressional drafting when serious constitutional issues are implicated.[29] The avoidance canon's presupposition can serve to legitimize the canon and help courts analyze how a statute's indeterminacy should be resolved. These recommended changes to the avoidance canon are thus intended to enhance its coherency and consistent application rather than increase the number of situations where a court selects a second-best statutory interpretation in order to avoid a serious constitutional question.

Part I of this Article explains that a judicial determination of ambiguity is often used generally as a trigger for interpretive creativity, especially when the relevant statutory language is dangerously broad. Contrary to the conventional wisdom about judicial activism and the avoidance canon though, the Court has framed ambiguity narrowly in several recent avoidance canon cases by focusing on the ambiguity of explicit textual language. As a result, the Court views the recognition of implied meanings as instances of extraordinary or "notably generous" interpretation.[30] In defining ambiguity narrowly, the Court has distinguished the avoidance canon from another category of substantive canons known as clear statement rules.[31] In the Court's view, while the avoidance canon's function is to "choos[e] among plausible meanings of an ambiguous statute," a clear statement rule "implies a special substantive limit on the application of an otherwise unambiguous

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requirement of actual unconstitutionality to one where the interpretation must only raise serious questions about constitutionality. *See* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 331–32 (2015) (detailing the Court's increasing tendency to avoid constitutional questions altogether ("modern avoidance") rather than conclusive, unconstitutional interpretative outcomes ("classical avoidance")). As this Article focuses exclusively on the ambiguity aspect of the avoidance canon's trigger, for ease of composition and explanation, reference will be made in the singular to the avoidance canon's trigger, as though it consists only of the ambiguity prong.

28 *See* Kelley, *supra* note 3, at 833 (explaining that "[u]ntil relatively recently . . . commentators seemed not to focus much attention on the avoidance canon and whether it in fact advances its purported purpose of serving the separation of powers").

29 *See infra* Section IV.A. (encouraging the adoption of communicative rather than literal meaning as the framework for statutory interpretation).

30 *See* Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018) (explaining that "*Zadvydas* represents a notably generous application of the constitutional-avoidance canon" in part because the Court had recognized an implied meaning that restricted broad statutory language).

31 *See infra* notes 73–75 and accompanying text (describing clear statement rules).

mandate."[32] Thus, the avoidance canon resolves statutory ambiguity but does not "impl[y] limitations on otherwise unambiguous text."[33]

The Court's distinction between the avoidance canon and clear statement rules thus depends on the Court's view of language, which includes a focus on literal meaning and ambiguity. This focus is ill-conceived. Part II argues that instead of using the judicially created concept of ambiguity, which depends on ideology rather than linguistic tests or useful definitions, courts should focus on the multiple ways in which a provision might be indeterminate. In turn, as Part III explains, a broader notion of indeterminacy should be accompanied by a broader notion of statutory meaning that focuses on the communicative meaning of a text rather than merely its literal meaning. Defining meaning in such a manner is important because a text's communicative meaning often includes presuppositions, which denote implied background beliefs, the truth of which are taken for granted.[34] When applicable, every substantive canon is based on a particular presupposition about the clarity of congressional drafting, which provides a basis for connecting the canon to the communicative meaning of a provision and resolving statutory indeterminacy in light of the presupposition.[35] Utilizing presuppositions in this manner would require reconsideration of the Court's undertheorized distinction between implied terms and ambiguity, as well as the relationship between the avoidance canon and clear statement rules.

Finally, Part IV addresses two different categories of indeterminacy in which the presupposition underlying the avoidance canon can help guide a reviewing court in selecting an interpretation. The first category illustrates the Court's overreliance on the literal meanings of provisions and its failure to recognize the many situations where statutory language is indeterminate in the sense that an inference is required to precisify a provision in order to resolve the interpretive dispute. The

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32 Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 141 (2005).

33 *Id.* at 140. The Court reasoned that with the avoidance canon "the question was one of textual interpretation, not the scope of some implied exception. The constitutional avoidance canon simply informed the choice among plausible readings of [the statute's] text." *Id.*

34 *See infra* note 186 and accompanying text (explaining that presuppositions are a ubiquitous aspect of language).

35 The various presuppositions underlying substantive canons are generalized across time and subject matter, and thus are not always tied to specific legislative expectations at the time of enactment, making any connection to legislative intent at least partly fictional. *See infra* Section III.D. (explaining the generalized nature of substantive canons).

Court's recent, and highly consequential, cases challenging the constitutionality of prolonged immigration detention offer examples of this scenario. The second category involves situations where a statutory term's uncertain meaning presents a disputed range of applications. This Part uses the phrase "intangible right of honest services," from *Skilling v. United States*,[36] as an example of how courts should exercise discretion within the scope of indeterminacy to select a meaning that avoids serious constitutional issues. In both the first and second scenarios, the role of the presupposition should be to help select a precisifying interpretation that does not conflict with the relevant legislative scheme even though it might be a second-best resolution of the indeterminacy.[37]

I. INTERPRETIVE PRINCIPLES AND THE STRUCTURE OF INTERPRETATION

Judges are often tempted to define ambiguity broadly in order to address situations where the literal meaning of a statutory provision is much broader in scope than the problem(s) the legislative scheme was designed to address.[38] As this Part explains, labeling a provision as ambiguous allows a court to appeal to interpretive principles that would otherwise not typically be available, such as the avoidance canon and other substantive canons. Although there is a long history of judicial narrowing of problematically broad statutes, this history is in tension with the Court's view of ambiguity in recent avoidance canon cases. In these cases, the Court has defined ambiguity narrowly, indicating a far more modest role for the avoidance canon than for clear statement rules. In the Court's view, the function of a clear statement rule, but not the avoidance canon, is to sometimes recognize an implied limitation on broad statutory language.

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36 Skilling v. United States, 561 U.S. 358, 368 (2010).

37 Thus, there must be sufficient indeterminacy to allow for an implied term without disrupting the legislative scheme designed by Congress. *See infra* note 276 and accompanying text.

38 *See generally* Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641 (2019) (documenting the problems that broad statutes create for courts). It should not be surprising that statutory language that is general is a common source of interpretive problems. Legal language follows non-legal language in many respects and a ubiquitous aspect of non-legal language is open-ended terms that can result in indeterminacy. *See infra* IV.A. (explaining the concepts and sources of linguistic underdeterminacy and indeterminacy).

A. Ambiguity as a Device that Sanctions Non-Literal Interpretations

Consider a scenario involving a woman, CAB, who discovers that her husband is having an affair with her closest friend. CAB seeks revenge against her (former) friend and spreads toxic chemicals on her friend's property hoping that the friend will develop an uncomfortable rash. Federal prosecutors learn about CAB's actions and charge her with violating the Chemical Weapons Convention Implementation Act ("Chemical Weapons Act").[39] The statute is quite broad, perhaps alarmingly so, forbidding 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."[40] The other operative provisions are defined in similarly broad terms. For instance, a "chemical weapon" includes a "toxic chemical," which is defined 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.[41]

Fearing a lengthy prison sentence, CAB would like the court to declare the Chemical Weapons Act unconstitutional.[42] Alternatively, CAB would be satisfied with a narrow interpretation that would avoid the constitutional question but exclude her conduct from falling under the statute. The challenge of such an interpretive argument is that the literal meaning of the statutory language is quite broad and covers CAB's conduct. The broad reach of the terms of the statute, if interpreted literally, would seem to undermine any resolution of the case in CAB's favor because the Supreme Court has repeatedly indicated that a

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39 *See* Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229(a)(1) (2017).

40 *Id.*

41 18 U.S.C. § 229F(8)(A). "Chemical weapon" is defined under the statute in relevant part as "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." § 229F(1)(A). A person who violates the statute may be subject to severe punishment: imprisonment "for any term of years," or if a victim's death results, the death penalty or imprisonment "for life." § 229A(a).

42 One possible claim is that the statute is not a necessary and proper means of executing the federal government's power to make treaties. *See* Bond v. United States, 572 U.S. 844, 855 (2014) (noting that the parties in the case had "devoted significant effort to arguing whether [the statute at issue] is a necessary and proper means of executing the National Government's power to make treaties").

precondition for application of the avoidance canon is a judicial finding of "ambiguity."[43]

Of course, the situation described above involved a real case (CAB being Carol Anne Bond), where the Supreme Court, in *Bond v. United States*,[44] found the statute to be "ambiguous" and narrowed its meaning, despite the lack of linguistic uncertainty regarding the reach of its terms.[45] Specifically, the Court found that

> the ambiguity derives from the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism.[46]

Having found ambiguity, the Court could then refer to "basic principles of federalism embodied in the Constitution to resolve [the] ambiguity."[47]

Less frequently, judges also define ambiguity broadly in order to address situations where the literal meaning of a statutory provision is much narrower in scope than the problem(s) the legislative scheme was designed to address. In *King v. Burwell*,[48] one of the most discussed statutory interpretation cases in recent memory, the problem was an underinclusive provision rather than an overbroad one. In interpreting one of the Affordable Care Act's (ACA) key provisions referring only to "State" as including both federal and state governments, the Court based its ambiguity determination on the consequences of a literal interpretation.[49] The Court reasoned that a literal interpretation would "make little sense," and thus that "when read in context," the relevant provisions were "properly viewed as ambiguous."[50] The finding of ambiguity allowed the Court to "avoid the type of calamitous result that Congress plainly meant to avoid" and gave it justification for

43 *See infra* Section II.A. (describing the ambiguity trigger).

44 572 U.S. 844, 855 (2014).

45 *Id.* at 860–61. The literal meanings of the terms of the statute clearly covered Bond's conduct, although, as with any statute, there are possible scenarios where coverage could be contested. *Id.* at 861.

46 *Id.* at 860.

47 *Id.* at 859.

48 King v. Burwell, 576 U.S. 473 (2015).

49 *Id.* at 487–88.

50 *Id.* at 487–491.

"interpret[ing] the Act in a way that" improves health insurance markets and does not destroy them.[51]

By relying on contextual evidence even in the face of semantic clarity, the Court in *Bond* and *Burwell* sought the meaning communicated by the text, rather than just its literal meaning, thereby implicitly signaling that semantic clarity does not necessarily preclude a finding of ambiguity.[52] As Justice Scalia argued in both cases, the semantic meaning of the relevant language was clear.[53] Consider that in *Burwell* the Court recognized that it was choosing an interpretation that deviated from the literal meaning of the provision, indicating that "the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."[54] After all, the ACA's definition of "State" as meaning "each of the 50 States and the District of Columbia" was straightforward and clearly excluded the federal government.[55] Neither the government nor the Court was attempting to interpret the ACA's definition of "State," determine the term's ordinary meaning or, in any genuine sense, declare that the term must be given some special technical meaning in light of the context.

B. The Different Functions of Interpretive Principles

The Court's decisions in *Bond* and *Burwell* illustrate the justificatory benefits of declaring a provision "ambiguous" as a means of narrowing the scope of dangerously broad statutes or, less often, broadening overly narrow statutes. Labeling a provision as "ambiguous" allows a court to appeal to interpretive principles that would otherwise not typically be available, such as the avoidance canon and other substantive canons. As exemplified best in *Burwell,* a judicial determination of ambiguity even allows a court to be explicitly guided by the policy consequences of

51 *Id.* at 498.

52 As explained below, the Court sought the communicative meanings of the statutes. *See infra* Section II.C. (contrasting *Bond* and *Burwell* with the Court's other ambiguity cases).

53 *See Burwell*, 576 U.S. at 500 (Scalia, J., dissenting) ("It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words 'established by the State.'"). *See also* Bond v. United States, 572 U.S. at 867 (Scalia, J., concurring) ("[I]t is clear beyond doubt that [the statute] covers what Bond did; and we have no authority to amend it.").

54 *Burwell*, 576 U.S. at 497.

55 42 U.S.C. § 18024(d) (2012).

possible interpretations.[56] Correlatively, the significance of a finding of ambiguity illustrates the distinction between interpretive principles that determine the linguistic meaning of a provision and those that serve other functions, such as avoiding the linguistic meaning or resolving ambiguity.[57]

In some way, although often imperfectly, courts attempt to determine the linguistic meaning of a statute as part of the process of giving it some legal meaning. Classifying an interpretive principle as one that helps to determine the linguistic meaning of a provision is important due to the legitimization such a justification provides. Compare, for example, the absurdity doctrine and textual canons. Recall that the absurdity doctrine authorizes judicially created departures from the literal meaning of a statutory provision when that meaning would result in absurdity.[58] Even if well accepted, much of the debate surrounding the absurdity doctrine concerns how to define the doctrine narrowly in light of the judiciary's role as the "faithful agent" of Congress.[59] In contrast, textual canons, which represent presumptions about general language usage drawn from the drafter's choice of words, typically present different justificatory issues.[60] With textual canons, instead of a debate that focuses on their compatibility with the proper judicial role, criticism typically centers on whether a particular textual canon represents an accurate presumption about language usage.[61]

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56 More controversially, as in *Bond* and *Burwell*, the policy consequences of a literal meaning interpretation may convince a court that the provision is ambiguous. *See infra* notes 142–51 and accompanying text (addressing arguments that labeling a provision as ambiguous because of the consequences of a literal meaning interpretation involves circular reasoning).

57 This Article makes an important distinction between the "literal meaning" of a text and its potentially broader "communicative meaning." *See supra* note 17 (defining "literal meaning"). *See also infra* Section III.A. (defining "communicative meaning"). In various places in this Article, however, it is useful to refer to a generic, general "linguistic meaning" of a provision which does not distinguish between literal and communicative meaning.

58 *See supra* notes 16–19 and accompanying text (describing the absurdity doctrine).

59 *See* Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 231 (2013) ("The traditional understanding of statutory interpretation is that the judiciary should serve as a faithful agent of the legislature").

60 *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634 (2d ed. 1995) (describing textual canons as those that "set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement, in sentences, and their relationship to other parts of the 'whole' statute.").

61 *See* BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 181–202 (2015) (analyzing whether textual canons help determine the ordinary meaning of a legal text).

The interpretive category into which an interpretive principle is placed thus determines the sort of justification required to situate it as an aspect of legal interpretation. It is thus intuitive that courts are motivated to categorize a favored interpretive principle as an aspect of linguistic meaning rather than contributing to a deviation from it.[62] Although the linguistic meaning of a text is not always dispositive, because courts sometimes choose interpretations that diverge from it, judicial consideration of an interpretive principle that determines linguistic meaning is *per se* legitimate.[63] Thus, a determinant of linguistic meaning generally does not need any further normative legitimization.[64] In contrast, interpretive principles that are not aspects of linguistic meaning require a demonstration of compatibility with the proper judicial function.[65] This sort of legitimization is comparatively straightforward if the linguistic meaning of the text is "ambiguous" and the interpretive principle is a means of resolving the indeterminacy.[66] Conversely, legitimization is more challenging if, like the absurdity

62 This follows from the commitment of judges to act as the "faithful agents" of Congress in matters of statutory interpretation and the default assumption that Congress intends for legal texts to be given their ordinary meanings. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (citations omitted)).

63 *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1123 (2017) ("Because language depends on practice, a linguistic rule stands or falls by its use").

64 While an interpretive principle that helps determine linguistic meaning does not need any further normative justification, not all determinants of communicative meaning are considered legitimate by all judges. For example, supporters of legislative history claim that it helps determine the communicative meaning of a text, while critics argue that for various reasons it is not a valid source of interpretive evidence. *See generally* John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000) (discussing the objections to legislative history).

65 A proper judicial function may be to resolve ambiguity in a way that is compatible with the normative values of the legal system or consistent with legislative expectations, but in either case a judge must connect the interpretive principle to some legitimate goal. More difficult justifications are required when interpretive principles run counter to likely legislative expectations but are not mandated by the Constitution. *See generally* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) (offering theories of why some interpretive principles run counter to likely legislative preferences).

66 Thus, the use of legislative history is less controversial when it resolves ambiguity than when it is used to avoid the communicative meaning of a text. *See* Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) ("[E]ven those of us who believe that clear legislative history can 'illuminate ambiguous text' won't allow 'ambiguous legislative history to muddy clear statutory language.'" (quoting Milner v. Dep't of Navy, 52 U.S. 562, 572 (2011))).

doctrine, the interpretive principle neither determines the linguistic meaning of a provision nor is not a device to resolve ambiguity.[67]

Despite the Court's occasional claims that the avoidance canon is consistent with congressional expectations, the Court also maintains that it is a device for resolving statutory ambiguity.[68] Like other substantive canons, the basic function of the avoidance canon is to restrict the domains of statutes.[69] That is, substantive canons tend to reduce the number of situations to which the statute may potentially apply, in accordance with the normative policy underlying the canon. The conventional view is that these restrictions are not based on general principles of language usage that apply outside of the law.[70] Instead, substantive canons, also referred to as "normative canons" among other terms,[71] are "presumptions about statutory meaning based upon substantive principles or policies drawn from the common law, other statutes, or the Constitution."[72] The strongest substantive canons are "clear statement rules" and require a court to avoid a particular result unless the statute (more clearly than usually required) indicates that the result was intended.[73] In contrast, courts apply weaker substantive canons in order to resolve statutory ambiguity.[74]

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67 For instance, legitimizing the rule of lenity (which directs courts to resolve ambiguity in favor of the criminal defendant) as a requirement of due process is much easier than an argument that a proper judicial function is to create penalty default rules that are designed to incentivize legislatures to be as clear as possible when drafting criminal statutes. *See Einer* Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2139 n.368 (2002) (describing the rule of lenity as a penalty default rule).

68 *See infra* note 225 and accompanying text (describing the Court's views that the avoidance canon is consistent with legislative expectations).

69 Perhaps the classic explanation of how canons narrow meaning is David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

70 *See generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (describing the normative underpinnings of substantive canons).

71 *See* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (referring to substantive canons as "normative canons").

72 ESKRIDGE & FRICKEY, *supra* note 60, at 634.

73 *See Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994) (noting that clear statement rules "erect potential barriers to the straightforward effectuation of legislative intent"). *See also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) (arguing that the Court's clear statement rules "amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced").

74 *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 341 (2000) (explaining that courts apply weak substantive canons only after the traditional tools of statutory interpretation fail to reveal the statute's meaning).

Substantive canons therefore function as directives that resolve statutory uncertainty, and the strength of a substantive canon depends on two elements: 1) the standard that must be met in order to overcome the meaning the canon directs courts to select, and 2) the other interpretive evidence that may be considered when evaluating whether the burden has been met.[75] The scalability of substantive canons along these two dimensions accounts for how the canons operate. For example, the relatively weak rule of lenity, often referred to as a tie-breaker canon, is triggered by a judicial finding of ambiguity.[76] The canon directs courts to consider all relevant determinants of meaning and requires the government only to establish that its interpretation is at least slightly superior to the defendant's interpretation.[77] Conversely, the presumption against retroactivity, often referred to as a clear-statement rule, directs courts to select a prospective only interpretation unless the language of the provision clearly indicates that retroactive application was intended.[78] Thus, in a criminal case the government has only a modest more-likely-than-not burden in order to avoid application of the rule of lenity, and can assert any determinant of meaning supporting its interpretation (such as legislative history), while a party arguing for retroactive application of a statute must demonstrate that specific language of the provision itself allows for retroactive application.[79]

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75 Restricting the allowable determinants of meaning may thus result in a standard that is more difficult to overcome. *See* Eskridge & Frickey, *supra* note 73, at 597 (distinguishing between a clear-statement approach that is willing to consider legislative history and "super-strong" clear-statement rules that can only be satisfied by a specific statement in the statutory text).

76 *See* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420–28 (2006) (describing the rule of lenity and the common criticisms of it).

77 *See* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 2029 (2015) (describing the "weak and theoretically bankrupt rule of lenity"). Criticism of the weakness of the rule of lenity is long-standing. *See, e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198–99 (1985) (stating that the rule of lenity "survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation").

78 *See* Caleb Nelson, *What Is Textualism*, 91 VA. L. REV. 347, 384 (2005) (noting that the presumption against retroactively "often causes courts to infer exceptions to statutory provisions whose words, on their face, appear to cover all pending cases").

79 *Compare* Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994) (indicating that statutes "will not be construed to have retroactive effect unless their language requires this result" (citation omitted)), *with* Reno v. Koray, 515 U.S. 50, 65 (1995) (indicating that "[t]he rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'" (citations omitted)).

C. The Supreme Court's Distinction Between Ambiguity and Implied Terms

As the *Bond* and *Burwell* cases exemplify, the ambiguity concept often serves as a means of mediating between judicial observance of statutory dictates and policy based interpretive creativity, making the features and determination of ambiguity of significant importance. The Court's decision in *Bond* may seem (to some) to be part of a sensible and long-standing practice of judicial narrowing of problematically broad statutes,[80] but its treatment of ambiguity is inconsistent with the Court's view of ambiguity in recent avoidance canon cases. Rather, as described below, in these cases the Court has defined "ambiguity" narrowly, making the trigger for the avoidance canon harder to satisfy. Furthermore, in focusing on the ambiguity of explicit statutory terms in avoidance canon cases, the Court has distinguished between the avoidance canon and clear statement rules on the basis that the function of a clear statement rule, but not the avoidance canon, is to sometimes recognize an implied limitation on broad statutory language.

The Court's ambiguity trigger for the avoidance canon, as well as the Court's efforts to distinguish between the avoidance canon and clear statement rules, can be illustrated through several recent cases, some of which involved challenges to prolonged immigration detention.[81] In *Nielsen v. Preap*,[82] and *Jennings v. Rodriguez*,[83] cases involving challenges to the extended detention without bond hearings of immigrants during the pendency of immigration proceedings, the Court reaffirmed that "ambiguity" must be found before the avoidance canon can be applied.[84] *Rodriguez*, the more illustrative case for present purposes, involved a class-action lawsuit challenging the detention

80 *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1021 (2001) (finding a large "number of cases narrowing broad statutory language under courts' ameliorative powers").

81 Although this Article uses immigration detention cases as examples, there is no reason to believe that the Court applies a narrower version of the avoidance canon in such cases. In fact, the Court has historically used the avoidance canon quite aggressively in immigration cases. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 547 (1990) (describing the Court's aggressive use of the avoidance canon in immigration cases).

82 Nielsen v. Preap, 139 S. Ct. 954 (2019).

83 Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

84 *See id.* at 842–44 (focusing on the requirement of ambiguity and emphasizing the "clear language" of the relevant provisions); *see also Nielsen*, 139 S. Ct. at 972 (citations omitted) ("The [avoidance] canon 'has no application' absent 'ambiguity.'").

without bond hearings of certain immigrants during the course of immigration proceedings.[85] The class members had been detained for an average of one year, with many detained for significantly longer periods of time.[86] The immigrants fell into multiple categories, but the relevant statutory provisions do not explicitly provide for a general entitlement to a bond hearing or contain explicit restrictions on the length of detention.[87] Instead, the provisions mandate detention in certain circumstances (without providing any explicit language regarding the length of detention) and give the Attorney General the authority in certain circumstances to temporarily parole immigrants from detention.[88] The Court, applying the *expressio unius est exclusio alterius* canon, reasoned that the express provision for parole in a separate provision "implies that there are no other circumstances under which aliens detained under § 1225(b) may be released."[89]

Part of the context for *Rodriguez* was the Court's earlier decision in *Zadvydas v. Davis*.[90] As opposed to *Rodriguez*, which involved immigrants detained during immigration proceedings, *Zadvydas* involved the detention of immigrants already ordered deported by immigration courts.[91] The government claimed it had authority under 8 U.S.C. § 1231(a)(6) to indefinitely detain immigrants who had been ordered deported but could not be transferred to other countries.[92] Section 1231(a)(6) provides as follows:

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be

85 *Jennings*, 138 S. Ct. at 836.

86 *Id.* at 860 (Breyer, J., dissenting).

87 *See id.* at 843 (majority opinion) ("Nothing in the text of § 1225(b)(1) or § 1225(b)(2) even hints that those provisions restrict detention after six months . . . .").

88 *See* 8 U.S.C. § 1225(b) (outlining detention pending credible fear interviews and consideration of applications for asylum); 8 U.S.C. § 1226(a) (explaining the procedure for discretionary detention pending a decision on removal); 8 U.S.C. § 1226(c) (mandating detention pending a decision on removal based on commission of certain crimes); 8 U.S.C. § 1182(d)(5)(A) (authorizing Attorney General's parole authority "for urgent humanitarian reasons or significant public benefit . . .").

89 *Jennings*, 138 S. Ct. at 844.

90 Zadvydas v. Davis, 533 U.S. 678 (2001).

91 *Id.* at 684–85.

92 *See id.* at 688–89 (noting the government's argument in its brief that the statute should be read as permitting indefinite detention).

> detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.

Because the government's interpretation of the statute raised a serious constitutional issue by authorizing the government to indefinitely detain aliens who legally are considered to have entered the country, the Court invoked the avoidance canon.[93] Despite "[t]he Government[']s argu[ment] that the statute means what it literally says,"[94] the Court "read an implicit limitation into the statute."[95] The Court's limitation of a six-month period of detention unless there is a "significant likelihood of removal in the reasonably foreseeable future"[96] was more implied in law than in fact and could not be traced to the Congress that enacted § 1231(a)(6).[97] The Court justified its interpretation in part by noting that it had in the past "read significant limitations into other immigration statutes in order to avoid their constitutional invalidation."[98]

Despite conceding that it was "read[ing] an implicit limitation into the statute," the Court in *Zadvydas* nevertheless attempted to identify an ambiguity in the explicit terms of § 1231(a)(6).[99] The Court focused on the "may be detained" phrase and argued that "while 'may' suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word 'may' is ambiguous."[100] The Court in *Rodriguez* agreed that the identification of an ambiguous explicit term was crucial to the decision in *Zadvydas*, emphasizing (repeatedly) that the Court in *Zadvydas* "defended its resort to [the avoidance] canon on the ground that" the phrase "*may* be detained" (emphasis added by the Court)

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93 *Id.* at 692. The Court was careful to distinguish for the constitutional analysis between immigrants who had entered the United States, such as the immigrants in this case, and those who had been stopped at the border. *See id.* at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.").

94 *Id.* at 689; *see also* Clark v. Martinez, 543 U.S. 371, 378 (2005) (citation omitted) ("As the Court in *Zadvydas* recognized, the statute can be construed 'literally' to authorize indefinite detention . . . .").

95 *Zadvydas*, 533 U.S. at 689.

96 *Id.* at 701.

97 The Court did not point to any evidence that the Congress that enacted § 1231(a)(6) had ever considered the issue of indefinite detention and relied instead on a statement from legislative history from forty years earlier. *See infra* note 305 and accompanying text.

98 *Zadvydas*, 533 U.S. at 689.

99 *Id.*

100 *Id.* at 697.

rendered "§ 1231(a)(6) . . . ambiguous."[101] Similarly, *Clark v. Martinez* was a follow-up case to *Zadvydas* involving immigrants considered to have been stopped at the border and whose detention would not raise serious constitutional issues.[102] Nevertheless, the Court applied the same implicit six-month limitation on detention in § 1231(a)(6), emphasizing that it used the avoidance canon in *Zadvydas* as a "tool for choosing between competing plausible interpretations of a statutory text."[103]

Although *Zadvydas* involved both an implicit limitation and the perceived ambiguity of an explicit term, the Court has framed the case, and more broadly the avoidance canon, as turning on the determination of the ambiguity of explicit terms. In *Spector v. Norwegian Cruise Line Ltd*, the Court decided whether the "internal affairs clear statement rule," which requires a clear statement of congressional intent before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations, created an implied limitation on the Americans with Disabilities Act (ADA).[104] The Court, in ruling that the clear statement rule created implied limitations on some aspects of the ADA but not others, distinguished the situation from the one in *Martinez*. The Court explained that the "internal affairs clear statement rule is an implied limitation on otherwise unambiguous general terms of the statute," similar to clear statement rules such as the presumption against extraterritorially.[105] While the avoidance canon's function is to "choos[e] among plausible meanings of an ambiguous statute," a clear statement rule "implies a special substantive limit on the application of an otherwise unambiguous mandate."[106] Thus, the avoidance canon resolves statutory ambiguity but does not "impl[y] limitations on otherwise unambiguous text."[107] *Martinez* and *Zadvydas* therefore "give[] full respect to the distinction between rules for

101 Jennings v. Rodriguez, 138 S.Ct. 830, 843 (2018).

102 543 U.S. 368, 373–74 (2005).

103 *Id.* at 381.

104 545 U.S. 119, 125 (2005) (noting that, while "[o]ur cases hold that a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations," that rule "is inapplicable to many other duties Title III might impose").

105 *Id.* at 139 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991)).

106 *Id.* at 141.

107 *Id.* at 140. The Court reasoned that "the question was one of textual interpretation, not the scope of some implied exception. The constitutional avoidance canon simply informed the choice among plausible readings of § 1231(a)(6)'s text." *Id.*

resolving textual ambiguity and implied limitations on otherwise unambiguous text."[108]

Despite the Court's efforts in *Martinez* and *Spector* to frame the *Zadvydas* decision as one merely involving resolution of the ambiguity of an explicit term, the Court in *Rodriguez* claimed that "*Zadvydas* represents a notably generous application of the constitutional-avoidance canon."[109] The *Zadvydas* decision, though, was not particularly noteworthy in that respect. Contrary to the Court's assertions in *Spector* and *Rodriguez*, the Court has imposed implicit restrictions on the scope of statutes through the avoidance canon without also identifying a linguistic ambiguity.[110] A well-known example of this occurred in *NLRB v. Catholic Bishop of Chicago*, where the National Labor Relations Board (NLRB) had interpreted its jurisdiction under the National Labor Relations Act (NLRA) as giving it authority over schools that were "religiously associated."[111] The Court, relying on the avoidance canon, rejected the agency's interpretation and held that the NLRA did not grant the NLRB jurisdiction over religiously associated schools.[112] The statute, 29 U.S.C. § 152(2), defined "employer" broadly and explicitly included several exceptions from the definition (none of which covered religiously associated schools).[113] Instead of framing its analysis in terms of whether one of the explicit statutory terms was ambiguous, the Court indicated that "the question we consider . . . is whether Congress intended the Board to have

108 *Id.*

109 Jennings v. Rodriguez, 138 S.Ct. 830, 843 (2018).

110 *Cf.* Clark v. Martinez, 543 U.S. 371, 400 (2005) (Thomas, J., dissenting) ("A disturbing number of this Court's cases have applied the canon of constitutional doubt to statutes that were on their face clear.").

111 440 U.S. at 492–93.

112 *Id.* at 507. The Court also described the avoidance canon in terms that suggested comparability to a clear statement rule than a device to resolve ambiguity, stating that if the agency's interpretation would raise serious constitutional questions, the Court "must first identify 'the affirmative intention of the Congress clearly expressed'" before accepting that interpretation. *Id.* at 501.

113 Section 152(2) states:

> The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(2) (2018).

jurisdiction over teachers in church-operated schools."[114] In the view of the Court,

> [n]either the language of the statute nor its legislative history discloses any affirmative intention by Congress that church-operated schools be within the NLRB's jurisdiction, and, absent a clear expression of Congress' intent to bring teachers of church-operated schools within the NLRB's jurisdiction, the Court will not construe the Act in such a way as would call for the resolution of difficult and sensitive First Amendment questions.[115]

Like in *Zadvydas*, the Court in *Catholic Bishop* created an implicit limitation on the scope of the statute. In fact, the Court in *Catholic Bishop* was arguably more aggressive in its interpretation considering that § 152(2) already contained explicit exceptions to the definition of "employer," indicating that Congress had affirmatively considered the desired scope of the provision.[116] In any case, the Court's recent statements that the avoidance canon cannot sanction implied limitations ignore cases, such as *Catholic Bishop*, that contradict such claims.

As framed by the Court, the avoidance canon is thus dissimilar from both clear statement rules and weak tie-breaker canons like the rule of lenity. Like tie-breaker canons, the avoidance canon is triggered by ambiguity and, in the view of the Court, requires "ordinary textual analysis"[117] and "does not supplant traditional modes of statutory interpretation."[118] Yet, unlike tie-breaker canons, the avoidance canon explicitly authorizes second-best interpretations by providing that the avoiding interpretation must merely be "fairly possible."[119] Even so, the Court has at times defined "ambiguity" narrowly, making the trigger for the canon harder to satisfy, and has distinguished clear statement rules

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114 *Catholic Bishop*, 440 U.S. at 500. In a dissenting opinion in *Rodriguez*, Justice Breyer framed the issue before the Court in similar terms, stating that "I would also ask whether the statute's purposes suggest a congressional refusal to permit bail where confinement is prolonged. The answer is 'no.' There is nothing in the statute or in the legislative history that reveals any such congressional intent." 138 S.Ct. at 872 (Breyer, J., dissenting).

115 *Catholic Bishop*, 440 U.S. at 490.

116 *See id.* at 511–12 (Breyer, J., dissenting) (discussing the eight express exceptions). As Justice Brennan noted in dissent, "those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement, the Court can virtually remake congressional enactments." *Id.* at 509 (Brennan, J., dissenting).

117 *See Rodriguez*, 138 S.Ct. at 842 (indicating that the avoidance canon "comes into play only . . . after the application of ordinary textual analysis").

118 Boumediene v. Bush, 553 U.S. 723, 787 (2008).

119 Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

from the avoidance canon on the basis of how the respective interpretive principles interact with linguistic meaning. Despite the counterexamples such as *Catholic Bishop*, the Court has asserted that clear statement rules can create implied exceptions but the avoidance canon only resolves ambiguity. Thus, in the Court's view, implied meanings and ambiguity are distinct phenomena where a finding of ambiguity regarding an explicit term is required in order to license implied language in avoidance canon cases (and even that is disfavored, "notably generous" interpretation),[120] but in clear statement cases there is no such precondition for implied language.[121]

II. THE AVOIDANCE CANON'S FLAWED AMBIGUITY TRIGGER

The concept of ambiguity thus triggers application of the avoidance canon, but the Court has applied the ambiguity concept inconsistently, as the examples discussed in Part I illustrate. Part II explains how the judicial conception of ambiguity differs in important ways from how linguists define ambiguity, making the ambiguity trigger a legal doctrine subject to jurisprudential commitments and biases rather than a neutral linguistic one. The result is an undertheorized concept that is both too broad (by combining ambiguity identification and disambiguation) and too narrow (by not recognizing the various forms of indeterminacy), and which serves poorly its function of mediating between judicial observance of statutory dictates and policy based interpretive creativity.

A. The Unique Judicial Conception of Ambiguity

Part of the problem with the ambiguity trigger is that, as defined by courts, it requires a potentially uncertain reorientation from the process

120 *See supra* note 108 and accompanying text.

121 It is indisputable that in *Zadvydas* the Court recognized an implied limitation on detention limited to a "period reasonably necessary to bring about that alien's removal from the United States," 533 U.S. at 689, but the Court found it necessary to first identify an ambiguity in the explicit language of the statute. *See id.* at 697 (declaring that "may" is ambiguous). The incoherence of needing to first recognize an ambiguity in explicit textual language prior to creating an implied term is explained by the Court's focus on literal and explicit meanings, which often obscure the actual source of indeterminacy. *See infra* Part V.A.1. (explaining how to view the indeterminacy at issue in *Zadvydas*).

of determining the "best reading" of a statute.[122] When a serious constitutional issue is raised about a potential interpretation, courts attempt to determine the linguistic meaning of the provision as they would normally in order to determine the "best reading" of a statute. At the same time, courts must also decide whether the provision is ambiguous in light of the same contextual cues that are considered in determining linguistic meaning.[123] The interpretive process would be more straightforward if the ascertainment of ambiguity meant that the best reading of a statute could not be determined, but the two are not mutually exclusive. Instead, the communicative meaning of a provision may be clear even when ambiguity is also present. The reason is that ambiguity, as defined by linguists, is ubiquitous in natural languages but does not always impede successful communication.[124] In fact, speakers often make their communications more efficient by utilizing ambiguity, as long as context is informative about meaning.[125] Ambiguous expressions are therefore merely potentially indeterminate in the sense that the relevant context may disambiguate the expressions.

Linguists often use devices, such as definitions and tests, to describe and identify ambiguity and distinguish it from disambiguation, as well as other forms of indeterminacy, such as vagueness and generality.[126] In contrast, the concept of ambiguity as created by courts conflates the various forms of indeterminacy, and the determination tracks

122 *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2144 (2016) (explaining how courts should typically seek to determine the "best reading" of a statute).

123 The Supreme Court has consistently asserted that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." Brown v. Gardner, 513 U.S. 115, 118 (1994).

124 *See, e.g.*, Steven T. Piantadosi, Harry Tily & Edward Gibson, *The Communicative Function of Ambiguity in Language*, 122 COGNITION 280, 280 (2012) ("Ambiguity is a pervasive phenomenon in language which occurs at all levels of linguistic analysis.").

125 *See id.* ("It is easy to justify ambiguity to anyone who is familiar with information theory."); Hannah Rohde et al., 2012, *Communicating with Cost-based Implicature: a Game-Theoretic Approach to Ambiguity*, *in* PROCEEDINGS OF SEMDIAL 2012 (SEINEDIAL) 108 (Sarah Brown-Schmidt et al. eds., 2012) ("Rather than avoiding ambiguity, speakers show behavior that is in keeping with theories of communicative efficiency that posit that speakers make rational decisions about redundancy and reduction.").

126 *See, e.g.*, Brendan S. Gillon, *Ambiguity, Generality, and Indeterminacy: Tests and Definitions*, 85 SYNTHESE 391, 393–95, 406–07 (1990). Although linguists distinguish among different forms of indeterminacy, there is debate regarding the tests used to identify the different forms. *See, e.g.*, David Tuggy, *Ambiguity, Polysemy, and Vagueness*, 4 COGNITIVE LINGUISTICS 273, 273 (1993) (explaining that "[t]raditional linguistic tests for ambiguity vs. vagueness fail to yield clear judgments in such cases, and in fact can easily be made to yield opposing judgments by varying the context"). The particular details of the debates are not relevant, though, because judges do not use any of the available tests to determine ambiguity.

disambiguation rather than ambiguity identification.[127] Courts thus typically conflate ambiguity identification with disambiguation and consider broad contextual evidence for indications of legislative intent as part of the determination.[128] Consequently, language that a linguist might identify as ambiguous is deemed by courts to be unambiguous if the relevant context can disambiguate the language.[129] The judicially created ambiguity concept thus elides the separate issues of ambiguity identification and disambiguation, and the result is that the ambiguity determination depends on an assessment of the available evidence but without any linguistic tests or useful definitions to guide judges.

B. The Manipulability of the Ambiguity Determination

Given the judicial conflation of ambiguity identification and disambiguation, the process of determining whether a provision is ambiguous is simply the normal interpretive process of determining statutory meaning (as the Court itself has indicated).[130] Courts therefore necessarily seek to identify the semantic meaning of the language as well as make inferences about the meaning communicated by the text.[131] Thus, a determination of ambiguity is based on a combination of general language usage (i.e., semantics) and the meaning of the language in some particular context (i.e., pragmatics).[132] Semantics concerns the conventional meaning of the representation and pragmatics the "contributions of the ambient circumstances."[133] The

127 *See* Brian G. Slocum, *Replacing the Flawed* Chevron *Standard*, 60 WM. & MARY L. REV. 195, 219–23 (2018) (describing how courts conflate ambiguity identification and disambiguation).

128 *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (citations omitted) (A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

129 *See id.* Conversely, language a linguist might identify as unambiguous is sometimes deemed to be ambiguous by courts if the relevant context indicates that the textual meaning is problematic in some way. For an example, see *supra* notes 48–54 and accompanying text (discussing King v. Burwell).

130 *See supra* notes 7–10 and accompanying text.

131 *See* Dan Sperber & Deirdre Wilson, *Pragmatics, Modularity and Mind-reading*, 17 MIND & LANGUAGE 3 (2002) (explaining that the meaning produced by simply decoding word meanings vastly underdetermines the speaker's meaning).

132 *See* SLOCUM, *supra* note 61, at 107–09 (explaining how legal interpretation depends on both generalizations about language usage and inferences from the specific context of the statute).

133 PRASHANT PARIKH, LANGUAGE AND EQUILIBRIUM 6 (2010).

traditional conception is that semantics "first underspecifies content that is later filled in by pragmatics."[134] Semantics therefore accounts for meaning by relating, via the rules of the language and abstracting away from specific contexts, linguistic expressions to the world objects to which they refer.[135] Thus, the semantic meaning of a sentence consists of the "common core of meaning shared by every utterance of it."[136] In turn, pragmatics accounts for meaning by reference to the language user (producer or interpreter), and it involves inferential processes.[137] Pragmatics takes account of contextual factors, such as the mutual knowledge shared by the speaker and addressee, even if such information is not explicitly reflected in the syntactic properties of the sentence.[138]

The consideration of pragmatic evidence focuses the interpreter's attention on the entire communicative context rather than a single term or sentence considered in isolation. The process will thus involve the interpreter making inferences from context, which means that conventional word meanings, and other objective determinants of meaning, will not provide the sole basis for determining ambiguity.[139] In fact, ignoring pragmatic (i.e., contextual) evidence results in the interpreter not taking sufficient note of the circumstances which regulate language comprehension.[140] While conventional meanings are important, context-specific pragmatic information can always shape and change the ultimate meaning of the communication.[141] The

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134 *Id.*

135 *See* MIRA ARIEL, DEFINING PRAGMATICS 6 (2010) (describing the "semantics/pragmatics division of labor"). A semantic meaning is therefore compositional (i.e., rule-governed) and convention based. *See id.* at 24. The principle of compositionality states that the "meaning of a complex linguistic expression is built up from the meanings of its composite parts in a rule-governed fashion." M. LYNNE MURPHY & ANU KOSKELA, KEY TERMS IN SEMANTICS 36 (2010). Thus, a sentence is compositional if its meaning is the sum of the meanings of its parts and of the relations of the parts.

136 DAN SPERGER & DEIRDRE WILSON, RELEVANCE: COMMUNICATION AND COGNITION 9 (1986).

137 *See generally* ARIEL, *supra* note 135.

138 *See id.* at 28.

139 *See* Varol Akman, *Rethinking Context as a Social Construct*, 32 J. PRAGMATICS 743, 745 (2000) (explaining how "[c]ontext is . . . a crucial factor in communication").

140 *See* Elin Fredsted, *On Semantic and Pragmatic Ambiguity*, 30 J. PRAGMATICS 527, 532 (1998) (explaining that ambiguity is manifest in the use of language where "a stable logical-semantic kernel of meaning exists" that is "overlaid by an unstable context specific pragmatic meaning").

141 *See id.* In fact, many scholars agree with the "linguistic underdeterminacy thesis," which holds that "[t]he linguistically encoded meaning of a sentence radically underdetermines the

decoding aspect of interpretation, which involves semantic evidence, and the inferential aspect of interpretation, which involves pragmatic evidence, thus require a weighing of the probative value of the (potentially conflicting) sources of meaning in general, as well as a weighing of the information each determinate generates in any particular interpretive dispute.

With legal interpretation, accounting for both semantic and pragmatic evidence in the ambiguity determination involves familiar debates about the weighing of semantic meaning and contextual evidence, a process which makes the ambiguity determination both subjective and subject to jurisprudential commitments. Consider again *Bond* and *Burwell*, where the Court viewed ambiguity in a broad sense. This broad conception of ambiguity included a view of context akin to the "totality of the knowledge, beliefs, and suppositions that are shared by the speaker and the listener, a.k.a. the common ground," which would allow for consideration of the consequences of a possible interpretation.[142] Justice Scalia, in his *Bond* concurrence, argued for a narrower conception of ambiguity that would make improper the Court's reliance on the consequences of the government's interpretation.[143] In Justice Scalia's view, a reviewing court should apply "traditional interpretive tools" before concluding that a provision is ambiguous.[144] As a result, the Court's reasoning "that a statute can be ambiguous *because* it threatens the balance of federal and state power" was flawed because "[t]here does not seem to be any *textual* ambiguity in the law."[145] Other commentators have agreed with Justice Scalia's view of ambiguity and have argued that the Court's reasoning in *Bond* was circular.[146] These claims are wrong, though, in light of the manner in which the Court purports to determine ambiguity. If a judicial

proposition a speaker expresses when he or she utters that sentence." Yan Huang, *Neo-Gricean Pragmatics*, *in* THE OXFORD HANDBOOK OF PRAGMATICS 70 (Yan Huang ed., 2017).

142 *See* Akman, *supra* note 139, at 746 (explaining that context can include "(i) the words around a word, phrase, statement, etc. often used to help explain (fix) the meaning; [and] (ii) the general conditions (circumstances) in which an event, action, etc. takes place"); CHRISTINE GUNLOGSON, TRUE TO FORM : RISING AND FALLING DECLARATIVES AS QUESTIONS IN ENGLISH 39 (2014) (indicating that "the Common Ground . . . is a set of propositions representing what the participants in a discourse take to be mutually believed, or at least mutually assumed for the purposes of the discourse.").

143 *See* Bond v. United States, 572 U.S. 844, 868–71 (2014) (Scalia, J., concurring).

144 *Id.* at 869.

145 Katyal & Schmidt, *supra* note 3, at 2151–52.

146 *See id.* ("From a textualist standpoint . . . *Bond* is hard to defend" and that "[t]he problem with the Court's opinion . . . is the logical circularity at its core.").

determination of ambiguity is a conclusion, at the end of a process of "traditional" statutory interpretation, that the meaning communicated by the provision does not select only one meaning, relevant evidence of meaning includes pragmatic inferences that include the assignment of reasonable intentions to the author.[147] Thus, considering the consequences of a particular interpretation is consistent with the Court's repeated assertion that application of the avoidance canon furthers congressional intent because Congress does not intend its legislative efforts to raise serious constitutional questions.[148] A failure to take account of such evidence is an indication that the interpretive process is dependent on jurisprudential commitments rather than linguistic principles.

The causes of interpretive dissensus in ambiguity determinations are thus the same as the causes of interpretive dissensus generally. Divergent outcomes may result from meta-normative disagreements about the respective weight that should be given generally to semantic and pragmatic evidence. For instance, textualists like Justice Scalia argue that semantic meaning should be highly influential if not dispositive in determining the legal meaning of a provision, and thus a provision's clear semantic meaning cannot be changed by pragmatic evidence.[149] Divergent outcomes also result from judicially imposed restrictions on consideration of evidential sources, disagreements about the persuasive weight that should be given an individual evidential source in a general sense and in any particular case, as well as disagreements about how to resolve conflicts among conflicting evidential sources. For example, some judges, but not others, restrict certain pragmatic sources of meaning such as legislative history or, alternatively, give it little persuasive weight generally or in a particular case, meaning that the same interpretive information may be given a

147 *See* Nicholas Allott & Benjamin Shaer, *Legal Speech and the Elements of Adjudication*, in THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 191–214 (Brian G. Slocum ed., 2017) (arguing that legal interpretation should be defined broadly as being a variety of verbal communication that is consistent with ordinary speech and which involves various inferences about the legislature).

148 *See infra* note 225 and accompanying text.

149 *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006) ("Textualists give primacy to the semantic context—evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words.").

different persuasive value by different judges.[150] These evidential decisions are typically based at least partly on normative concerns specific to the law (e.g., a belief that considering legislative history is in tension with the legislative process required by the Constitution) rather than valid linguistic principles that reflect how language functions.[151]

C. Assessing Ambiguity as a Trigger

The avoidance canon's ambiguity trigger is thus problematic for various, interrelated reasons that reveal it as a legal rather than a linguistic doctrine. First, it is an umbrella concept that conflates the various separate ways in which a statute might be indeterminate, which contributes to the uncertainty of its determination.[152] Second, the ambiguity trigger creates interpretive uncertainty by providing a standard for the adoption of a second-best interpretation that departs from the normal judicial function of selecting the best reading of a statute.[153] That the intended meaning of a communication may be ascertainable even though its language may be linguistically ambiguous only increases the uncertainty associated with the ambiguity standard.[154] Furthermore, the conflation of ambiguity and disambiguation allows for interpretive dissensus based on ideological grounds and makes the ambiguity determination dependent on subjective assessments of the evidence.[155] The Court is thus able to

150 Various scholars, as well as judges, have criticized the legitimacy and usefulness of legislative history to statutory interpretation. *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998) (questioning the judiciary's ability accurately to discern legislative intent from legislative history). A judge will tend to have some conception of the persuasive value of legislative history as a general matter. *Cf.* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220 (2006) (examining the decline in the use of legislative history). Even if the judge supports the use of legislative history as a general matter, the judge must determine its probative value in any individual case. Furthermore, the legislative history may conflict with one or more interpretive principles, forcing the judge to determine the value of those interpretive principles in the particular case and to weigh that value against the information provided by the legislative history.

151 *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (arguing that legislative history creates an opportunity for legislative self-delegation, contrary to the clear assumptions of the constitutional structure).

152 *See supra* note 127 and accompanying text.

153 *See supra* note 129and accompanying text.

154 *See id.*

155 *See supra* notes 143–52 and accompanying text (discussing divergent outcomes that result from various strategies for interpreting ambiguity).

arbitrarily define and determine ambiguity, such as by focusing only on the ambiguity of explicit terms, while still maintaining that the ambiguity concept is a neutral linguistic principle.[156] Rather than acting as a neutral trigger, the ambiguity concept therefore adds to the arbitrariness of the Court's application of the avoidance canon but without being an inherently mandatory component of the canon.

III. PRESUPPOSITIONS AND STATUTORY INTERPRETATION

Instead of ambiguity, the linguistic concepts of indeterminacy and presupposition should serve to trigger the avoidance canon and situate it within the interpretive process. These concepts, though, function best within a certain understanding of meaning and communication. This Part thus begins with a brief description of communicative meaning that should be general and uncontroversial. With an understanding of communicative meaning in mind, the linguistic concept of presupposition is then introduced as the theory that situates the avoidance canon within the structure of interpretation. Although fictional to some degree in its application to substantive canons, the presupposition concept can provide a framework for understanding the avoidance canon, as well as other substantive canons, as aspects of the communicative meaning of a provision. One result of such an understanding is that, contrary to the view of the Court as well as critics, an implied restriction is not necessarily an example of an extraordinary interpretation where the reviewing court has rewritten the statute.[157] The concept of presupposition should therefore require a reconsideration of the Court's undertheorized distinction between implied terms and ambiguity, as well as the relationship between the avoidance canon and clear statement rules.[158] Furthermore, the presupposition underlying the avoidance canon is consistent with a

156 *See supra* Part I.C.

157 *See* Jennings v. Rodriguez, 138 S.Ct. 830, 843 (2018) (arguing that *Zadvydas,* which involved an implied provision, "represents a notably generous application of the constitutional-avoidance canon").

158 *See supra* notes **Error! Bookmark not defined.**–09 and accompanying text (describing the Court's view of the relationship between ambiguity and implied terms).

requirement that indeterminacy, properly understood, is necessary to trigger the avoidance canon.[159]

A. A Description of Communicative Meaning

One of the flaws of the Court's ambiguity concept (especially in recent avoidance canon cases) is that it sometimes views meaning in an unduly restrictive way that emphasizes literal meaning and a narrow view of context. This approach is flawed because it is "widely recognized that . . . in order to understand a text, we must understand more than what is encoded in the text itself . . . . This broader comprehension, . . . which is closely connected with contextual knowledge, . . . [includes things that are] presupposed and/or implicated by the text."[160] A court must therefore appreciate that sometimes the meaning communicated by a statute differs from the literal meaning of the language.

Consider how the communicative meaning of a legal text might be framed in a way that is consistent with traditional notions of the proper judicial role in interpretation.[161] While definitions may of course vary, any adequate account of communicative meaning must consider the externality of legal interpretation and the concomitant necessity of applying generalized principles of language usage in light of the particularized context of a statute.[162] Thus, communicative meaning might be framed something along the lines of *the meaning an appropriate hearer would most reasonably take a speaker to be trying to convey in employing a given verbal vehicle in the given communicative-context*.[163] This definition of communicative meaning is

159 *See supra* notes 84–88 and accompanying text (discussing the requirement of indeterminacy for application of the avoidance canon).

160 Marina Sbisà, *Presupposition, Implicature and Context in Text Understanding*, *in* MODELING AND USING CONTEXT: SECOND INTERNATIONAL AND INTERDISCIPLINARY CONFERENCE, CONTEXT '99, TRENTO, ITALY, SEPTEMBER 9-11, 1999 PROCEEDINGS 324 (Paolo Bouquet, Luciano Serafini, Patrick Brézillon, Massimo Benerecetti, & Francesca Castellani, eds., 1999).

161 "Communicative meaning" is not a term used by courts, but judges nevertheless determine the communicative meaning of statutes, even if they sometimes reject it. *See supra* notes 16–19 and accompanying text (describing the absurdity doctrine).

162 *See supra* notes 131–44 and accompanying text (explaining how interpreters account for both semantic and pragmatic evidence in determining the meaning of a communication).

163 *See* Brian G. Slocum, *Conversational Implicatures and Legal Texts*, 29 RATIO JURIS. 23, 24 (2016) (describing communicative meaning); *see also* Lawrence B. Solum, *Originalist Methodology*, 84 U. Chi. L. Rev. 269, 271 (2017) (defining "communicative meaning" as "the

similar to how the goal of legal interpretation has long been defined.[164] By focusing on an objective hearer rather than the actual speaker, the definition frames the inquiry in terms of external determinants of meaning that represent valid principles of language usage rather than the internal intentions of the speaker.[165] Nevertheless, the perceived intentions of the speaker are still relevant in various ways, including, for example, the identification of components of meaning that are implied rather than explicit.[166] The definition therefore accounts for both the common judicial assertion that statutory language should be given its "ordinary meaning," which relies on generalized principles of language usage,[167] and the necessity that interpretation be made in light of the particularized context of the statute.[168]

Note that the description of communicative meaning does not select between textualist and intentionalist/purposivist approaches to interpretation, other than to maintain that implied meanings are a

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linguistic meaning or communicative content of a text"); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L. Rev. 479, 480–84 (2013) (distinguishing between communicative meaning and the legal meaning given a text).

164 Oliver Wendell Holmes emphasized the externality of legal interpretation more than one hundred years ago when he explained that the interpreter's role is not to ask what the author meant to convey but instead determine "what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . . ." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1898-1899).

165 The focus on external determinants of meaning is necessary because autoglottic space (a distance between the writing and the author(s)) is an inherent characteristic of legal texts. Courts must therefore create interpretive tools, such as the ordinary meaning concept, that are based on generalized, and often fictional, assumptions about authorial intent. *See generally* Roy Harris, *How Does Writing Restructure Thought?*, 9 LANGUAGE AND COMMUNICATION 99 (1989) (explaining the concept of "autoglottic space" and how writing is different from oral communication).

166 *See* Kent Bach, *Impliciture vs. Explicature: What's the difference?*, *in* EXPLICIT COMMUNICATION 126, 126–27 (Belén Soria & Esther Romero eds., 2010) (explaining that speakers can communicate things that are not fully determined by the semantics of the uttered sentence).

167 *See infra* note 245 (claiming that traditional legal analysis does not provide an adequate account of making sense in law).

168 *See* Kent Bach, *Context Dependence (such as it is)*, *in* THE CONTINUUM COMPANION TO THE PHILOSOPHY OF LANGUAGE (M. Garcia-Carpintero & M. Kölbel, eds., 2012) (explaining that "the same sentence can be used to convey different things in different contexts"). Thus, a determination of the communicative meaning of a statute must consider not only the conventional meanings of words, and correlatively sentences, but also the relevant context and overall legislative design of the statute.

natural aspect of textual language comprehension.[169] After all, textualist approaches to interpretation purport to consider context and purpose,[170] and intentionalist approaches consider general conventions of meaning.[171] For instance, even when the interpreter has little independent access to the context (as textualists argue is often true with statutes), the interpreter can nevertheless "exploit all the details of the text in order to project as much of its context as [she] can."[172] Distinctions among the competing interpretive approaches turn largely on whether to privilege semantic or pragmatic evidence, and the above description of communicative meaning indicates that both types of evidence are relevant but does not mandate that one source be privileged over another in cases where the evidence conflicts.[173]

B. Implied Restrictions on Unambiguous Text

An understanding of communicative meaning provides a basis for concluding that part of the incoherence of the Court's treatment of substantive canons, and its distinction between clear statement rules and the avoidance canon, stems from its unduly narrow view in avoidance canon cases of the different ways in which a text can communicate meaning.[174] This narrow understanding, and focus on literal meaning in avoidance canon cases, has caused the Court to assert

169 Because they are an aspect of the normal functioning of language, the possibility of implied meanings should be amenable to textualists, as well as intentionalists. Manning argues that textualism maintains that "texts should be taken at face value—with no implied extensions of specific texts or exceptions to general ones—even if the legislation will then have an awkward relationship to the apparent background intention or purpose that produced it." John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424–25 (2005). Such a view is normative in nature, rather than a description of how language functions. Manning defends the no-exceptions view as necessary to preserve the "bargain" struck by legislators in enacting the statute, *see id.* at 431, but this view fails to recognize that implied restrictions are sometimes necessary in order to preserve that bargain.

170 *See* Manning, *supra* note 16, at 2392–93 (indicating that textualists "ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context").

171 *See* SLOCUM, *supra* note 61, at 76–79 (describing how both intentionalists rely on conventions of meaning and hypothetical notions of legislative intent).

172 Sbisà, *supra* note 160, at 325.

173 *See* Manning, *supra* note 149 (explaining the textualist position that semantic evidence should be privileged over pragmatic evidence).

174 *See* Part IV.A. (defining "communicative meaning").

an important distinction between ambiguity and implied terms.[175] Recall the Court's assertion that clear statement rules may "impl[y] . . . limit[ations] on . . . otherwise unambiguous [text]," but the avoidance canon serves only to resolve linguistic ambiguity.[176] The Court's understanding of implied terms as being extraordinary aspects of legal interpretation is unfortunate considering that the meaning communicated by both legal and non-legal utterances often includes propositions that are unarticulated (i.e., implied).[177] So-called unarticulated constituents are not expressed in the explicit form of a sentence but nevertheless must be interpreted in order to grasp the correct meaning of that sentence.[178] Recognizing that some of the meaning of a communication may be implied is a routine aspect of language comprehension. Context may always reveal that a given communication cannot be understood accurately without some unarticulated constituent being part of its meaning.[179] The notion of unarticulated constituents is thus dependent on the interpreter making use of relevant contextual information, and in that sense is consistent with the evidence showing how interpreters help make communication more efficient by routinely using contextual evidence to disambiguate language.[180]

Despite the Court's view of implied meanings in some avoidance canon cases, courts frequently restrict the literal meanings of statutes on the basis of implicit understandings, as the normal functioning of language dictates should happen. In fact, statutes often contain implicit restrictions that are so obvious and accepted that they would not be the

175 *See supra* notes **Error! Bookmark not defined.**–09 and accompanying text (referring primarily to *Martinez* and *Zadvydas* to show the distinctions between rules for resolving textual ambiguity and implied limitations on otherwise ambiguous text, despite *Zadvydas*'s notably generous application).

176 Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 141 (2005).

177 *See* SLOCUM, *supra* note 61, at 153–72 (discussing the quantifier domain restriction and ordinary meaning).

178 An unarticulated constituent is part of the intuitive meaning of the utterance yet does not correspond to anything in the sentence itself. For a comprehensive account of unarticulated constituents, see RECANATI, *supra* note 17.

179 *See generally* Kent Bach, *Semantic, Pragmatic*, *in* MEANING AND TRUTH 1, 1–2 (J. Keim Campbell, M. O'Rourke, & D. Shier eds., 2002) (explaining the prevalence of unarticulated constituents).

180 *See supra* notes 124–28 and accompanying text (explaining and justifying the claim that the communicative meaning of a provision may be clear even when linguistic ambiguity is also present).

source of litigation.[181] These implied limitations on texts can derive from linguistic features that also exist outside of legal contexts as well as those that are mostly found in legal contexts.[182] In both situations, implied meanings often involve interpretive principles that are triggered by explicit and relatively specific linguistic phenomena (such as the existence of certain words or types of words).[183] In contrast, substantive canons are not triggered by any specific linguistic formula.[184] Instead, any substantive canon is triggered by a combination of the potential consequences of a particular interpretation (such as an interpretation that would raise a serious constitutional issue) and the absence of sufficiently clear textual language supporting that interpretation.[185] It is therefore not possible to legitimize a substantive canon through its connection to the linguistic meaning of some explicit term in a given provision. Rather, in order to situate substantive canons as aspects of the communicative meaning of a provision, there must be some understanding of implied meanings and their connection to communicative meaning. The concept of presupposition provides such a mechanism for determining whether a substantive canon can be viewed, at least as a general matter, as a part of the communicative meaning of a provision.

181 *See* SLOCUM, *supra* note 61, at 158–67 (discussing how so-called universal quantifiers, which are aspects of both ordinary speech and legal texts, typically contain implied restrictions, inferred on the basis of contextual evidence, which are sometimes obvious and sometimes contestable).

182 *See id.* (regarding descriptive semantics of qualifier domain restrictions). The textual canon *ejusdem generis* is an example of a legal interpretive principle, though consistent with linguistic principles, which provides for implied restrictions on broad textual language. *See id.* at 186–202 (discussing the *ejusdem generis* canon).

183 *See supra* note 181 (referring to universal quantifiers).

184 In contrast, the *ejusdem generis* canon is triggered by a catch-all phrase and quantifier domain restriction is triggered by a quantifier (usually a universal quantifier). *See supra* note 24 (describing how the *ejusdem generis* canon is triggered); *supra* note 181 (describing universal quantifiers).

185 *See supra* notes 75–79 and accompanying text (explaining substantive canons' functions, elements and examples that speak to their strength of force).

C. The Linguistic Principle of Presupposition and Literal Meaning

1. A Description of Presupposition

Presuppositions are ubiquitous in language and are part of the context in which a communication occurs.[186] A presupposition denotes a background belief the truth of which is taken for granted. In more formal terms, *A* presupposes a statement *B* if *B* is a precondition of the truth or falsity of *A*.[187] Thus, to take a simple and obvious example, if someone says that "Gavin's bicycle is grey," the speaker could be said to convey at least two propositions.[188] The first is that 'Gavin has a bicycle,' and the second is that 'the bicycle is grey.'[189] The second proposition is 'asserted,' but the first is 'presupposed.'[190] The presupposition, 'Gavin has a bicycle,' must be supposed to be true in order for the proposition, 'Gavin's bicycle is grey,' to be judged true or false.[191]

The truth of the presupposition must be taken for granted by the producer of an utterance and must be known and taken account of by the interpreter for the utterance to be considered appropriate in context.[192] The inquiry can be objectified in the sense that it can be said that *x* presupposes *y* if, "normally speaking, a speaker who uttered *x* would thereby commit himself to the presupposition that *y* is true."[193] Thus, a presupposition can arise from "general properties of the context and the expectations of the discourse participants."[194] The "common ground" between speaker and participants therefore plays a crucial role in assessing the validity of a presupposition.[195] Acceptance of the presupposition is "'mutual' in the following sense: if *x* is in the common ground, then:

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186 *See* E.J. KRAHMER, PRESUPPOSITION AND ANAPHORA 3 (1998); ALAN CRUSE, A GLOSSARY OF SEMANTICS AND PRAGMATICS 139 (2006) (explaining that presuppositions are a ubiquitous aspect of language).

187 *See* KRAHMER, *supra* note 186, at 139.

188 *See id.*

189 *Id.*

190 *Id.*

191 *See* MURPHY & KOSKELA, *supra* note 135, at 127–28.

192 *See* CRUSE, *supra* note 186, at 138; *see also* Sbisà, *supra* note 160, at 325 (explaining that if the interpreter does not share the speaker's presuppositions, the interpreter might misunderstand her).

193 *See* Bart Geurts, *Presupposition and Givenness*, in THE OXFORD HANDBOOK OF PRAGMATICS 3 (Yan Huang ed., 2017).

194 Christopher Potts, *Presupposition and Implicature*, in THE HANDBOOK OF CONTEMPORARY SEMANTIC THEORY 169 (Shalom Lappin & Chris Fox eds., 2015).

195 *See* Geurts, *supra* note 193, at 4.

(a) all participants accept *x*;

(b) all participants accept (a);

(c) all participants accept (b);

and so on.[196]

By using an expression that triggers the presupposition that *x*, the speaker signals (or acknowledges) that *x* is already part of the common ground.[197]

2. An Example of Presupposition: The Case of the Speluncean Explorers

Presuppositions easily fit within the concept of communicative meaning.[198] Yet, due to the uncertainty of implied meanings in legal interpretation, debates about which presuppositions courts should recognize have long been an aspect of interpretive disputes.[199] One example of implied terms based on presuppositions involves common law exceptions to statutory provisions that do not otherwise provide for them. A classic discussion of these unarticulated constituents can be found in Lon Fuller's famous law review article, "The Case of the Speluncean Explorers."[200] In the article, Fuller presents a scenario where five men are trapped in a cave while hiking.[201] Eventually, the group decides that in order to avoid death by starvation one of the men would have to be eaten by the others.[202] The group casts lots to determine which member to sacrifice.[203] After putting to death and eating one of the group members, the four remaining members are rescued and charged with murder.[204] The criminal provision at issue, N. C. S. A. (n. s.) § 12- A, provides simply that:

196 *Id.* n.1.

197 *See id.* at 5.

198 *See supra* Part IV.A. (defining communicative meaning).

199 Of course, judges rarely, if ever, use the term "presupposition" when discussing an interpretive dispute that involves the possible recognition of a presupposition. Instead, the Court uses the term "presumption" to mean, roughly, the same thing. *See infra* notes 212–21 and accompanying text.

200 *See* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

201 *Id.* at 616.

202 *Id.* at 618.

203 *Id.*

204 *Id.* at 618–19.

"Whoever shall willfully take the life of another shall be punished by death."[205]

Although succinct, the provision is misleadingly clear to those not knowledgeable about the legal system, considering the difficulties that the (fictional) individual justices had in deciding the meaning of it.[206]

Fuller's article, which contained five opinions from the justices of the fictional Supreme Court of Newgarth, illustrates the debate about literal meaning versus implied terms.[207] Specifically, one question was whether common law defenses to criminal charges were still available notwithstanding the unlimited scope (at least with respect to defenses) of the criminal provision.[208] Under one theory of the case, the defendants needed the benefit of a necessity defense in order to avoid conviction.[209] Although there was no majority of justices willing to recognize a necessity defense, Chief Justice Foster commented that self-defense was a recognized defense to § 12- A, even though there is nothing in the wording of the statute that suggested the exception.[210] The literal meaning of § 12- A therefore exceeded in scope the legal meaning of the provision, which had its domain limited by the availability of at least one implicit defense.

3. Presuppositions and Substantive Canons

The concept of presupposition thus provides a theory of how an implied term, motivated by legal concerns, may nevertheless be an aspect of the communicative meaning of a provision.[211] Presupposition can also explain the Court's decision in *Bond*, and in fact is the theory that the Court used to justify its implied restriction on the scope of the statute.[212] Recall that in limiting the reach of the Chemical Weapons Convention Implementation Act of 1998 the Court cited the "ambiguity"

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205 *Id.* at 619.

206 The court ended up deadlocked, with one justice withdrawing from the case. *See id.* at 645.

207 *See id.* at 624–26.

208 *Id.*

209 *Id.* at 625.

210 *Id.* at 624.

211 For example, in the case of the Speluncean Explorers, the theory would be that the legislature accepts when drafting the criminal provision that courts will accept that the legislature anticipates that the usual criminal defenses should apply, even though the criminal provision is not explicit in that respect. For more recent analyses of the issues raised by the Speluncean Explorers hypothetical see Naomi R. Cahn et al., *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754 (1993).

212 Bond v. United States, 572 U.S. 844, 857 (2014).

of the definition of "chemical weapon," which was based on its "improbably broad reach."[213] The Court also framed its holding as though it relied on a presupposition, explaining that, "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions."[214] Thus, the Court explained that it presumes "that a criminal statute derived from the common law carries with it the requirement of a culpable mental state—even if no such limitation appears in the text—unless it is clear that the Legislature intended to impose strict liability."[215] Similarly, in the Court's view, Congress is clear when it overrides the "usual constitutional balance of federal and state powers."[216] Thus, the Court sought a "clear indication that Congress meant to reach purely local crimes," which would rebut the presupposition that Congress is clear when it wishes to "intrude[] on the police power of the States."[217] By relying on a presupposition, the Court had no need to also declare the provision to be ambiguous, although the declaration of ambiguity may have been a reflexive move designed to undermine claims of judicial activism.[218]

As the Speluncean Explorers and *Bond* examples illustrate, a statute may contain an implied provision that restricts its scope, even if the implied provision is not triggered by any explicit term in the provision. If accepted, the presupposition is part of the communicative meaning of the text. When applied to substantive canons, the principle of presupposition therefore provides a way of resolving the dilemma of how an interpretive principle can both be tied to legislative intent (through the concept of communicative meaning) and provide a term that cannot be found in the explicit language of the provision. Consider a clear statement rule, the presumption against retroactivity, which directs courts to give statutes only prospective effect unless the statute

213 *Id.* at 859–60.

214 *Id.* at 857 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)). As Justice Frankfurter put it in his famous article on statutory interpretation, correctly reading a statute "demands awareness of certain presuppositions." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

215 *Bond*, 572 U.S. at 857 (citation omitted).

216 *Id.* at 858 (citation omitted).

217 *Id.*

218 *See supra* Part II.A. (explaining that courts are often motivated to find ambiguity in order to give themselves interpretive flexibility).

clearly provides that it should have retroactive effect.[219] The presumption against retroactivity may be premised on the idea that members of Congress rarely intend to establish new substantive rules for past conduct.[220] In fact, the Court has asserted that "[b]ecause it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations."[221] The presumption against retroactivity is therefore a demanding canon to overcome and requires statutory language that is "so clear that it could sustain only one interpretation" before statutes will be given retroactive effect.[222] Thus, in such cases, the presupposition would be something like, *when a statute does not expressly provide for retroactive application, Congress intends for the statute to have prospective only application.*[223] In more formal terms, the conclusion, *A*, that the statute at issue applies only prospectively, even though there is no explicit limit on the statute's application, presupposes the presupposition, *B*, that Congress expressly provides for retroactive application. Consequently, a statutory provision containing broad, general language should be interpreted in light of the presupposition that Congress is explicit when it intends for a statute to be applied retroactively.

The above analysis can be extended to other substantive canons, including the avoidance canon. The Court generally legitimizes substantive canons on the basis that their application will result in a statutory interpretation that reflects congressional intent, even though

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219 *See* Landgraf v. USI Film Prods., 511 U.S. 244, 267–68 (1994) (stating that "statutory retroactivity has long been disfavored" and is accompanied by "a requirement that Congress first make its intention clear" to find retrospective relief).

220 Nelson, *supra* note 78, at 390. Congressional enactments that operate retroactively do not necessarily violate the Constitution. *See* INS v. St. Cyr, 533 U.S. 289, 325 n.55 (2001) ("[O]ur decision today is fully consistent with a recognition of Congress' power to act retrospectively. We simply assert, as we have consistently done in the past, that in legislating retroactively, Congress must make its intention plain.").

221 *Landgraf*, 511 U.S. at 272. *See also* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L. J. 291, 348–49 (2003) (noting that the Court's motivation for the presumption against retroactivity is the unfairness involved in retroactive legislation and concern for the rule of law).

222 *St. Cyr*, 533 U.S. at 316–17 (quoting Lindh v. Murphy, 521 U.S. 320, 328, n.4 (1997)).

223 In *St. Cyr*, the Court held that provisions in immigration statutes that repealed discretionary relief from deportation did not apply retroactively because the provisions lacked a "clearly expressed statement of congressional intent" that they be applied retroactively. *Id.* at 314. Although the statute must be "clear," the Court has stated that the canon does not require that the statute contain an "express provision about temporal reach" for it to have retroactive potential. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 40 (2006).

substantive canons are designed to vindicate normative concerns specific to the law.[224] Thus, in the Court's view, the avoidance canon represents a "reasonable presumption" that Congress "did not intend the alternative which raises serious constitutional doubts" and is thus "a means of giving effect to congressional intent, not of subverting it."[225] Similarly, the presumption against extraterritorial application of federal statutes reflects the "commonsense notion that Congress generally legislates with domestic concerns in mind."[226]

The concept of presupposition can therefore provide the link between substantive canons and legislative intent either because each substantive canon's presupposition generally represents congressional preferences or because "[i]t is presumable that Congress legislates with knowledge of [the Court's] basic rules of statutory construction[.]"[227] Thus, courts and Congress are part of an interpretive community engaged in a dialogue where Congress understands the basic interpretive principles that will be applied by courts.[228] In essence, then, like the Speluncean Explorers hypothetical, a legislature may assume it can enact unqualified provisions and courts will restrict the domains of these provisions based on established presuppositions, thereby making the drafting process more efficient.[229] Indeed, the Court has maintained that using substantive canons to create limitations on broad statutory language "is a valid approach whereby unexpressed congressional intent may be ascertained."[230] As Justice Scalia has explained with

224 *See supra* notes 71–71 and accompanying text (describing the normative basis of substantive canons).

225 Clark v. Martinez, 543 U.S. 368, 381–82 (2005).

226 Small v. United States, 544 U.S. 385, 388 (2005) (quoting Smith v. United States, 507 U.S. 197, 204, n.5 (1993)). *Small* continues and states that the Court has "adopt[ed] the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Id.* at 388–89 (citation omitted). Other substantive canons are similarly based on generalizations about congressional intent. For instance, the canon benefiting Native Americans "assumes Congress intends its statutes to benefit the tribes[.]" Chickasaw Nation v. United States, 534 U.S. 82, 95 (2001).

227 McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

228 *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 16 (2001) (explaining that textualists "argue that a faithful agent's job is to decode legislative instructions according to the common social and linguistic conventions shared by the relevant community").

229 In a similar way, it is often more efficient to use ambiguous language, knowing that the circumstances will enable the listener to effectively disambiguate. *See supra* notes 123–26 and accompanying text.

230 Equal Emp. Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

regard to the clear statement rule against waiver of state sovereign immunity, "since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed [by Congress] rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation."[231]

D. The Fictions of Presuppositions and Substantive Canons

Despite the Court's assertions about the connection between substantive canons and legislative intent, any description of how presuppositions work in legal interpretation is necessarily based on a view of the legislative process that, at least to some degree, is fictional. Presuppositions are justified if the speaker accepts all of the information in the common ground as normally being true and understands that all of the participants accept the information as true.[232] Yet, in legal interpretation presuppositions associated with substantive canons are, in essence, attributed by the interpreter (judges) to the speaker (Congress) on the basis of concerns articulated by the interpreter rather than the speaker. After all, Congress has not created any of the substantive canons, and indications of congressional acquiescence generally do not come from explicit congressional approval. A given presupposition might therefore be fictitious because Congress does not have the canon in mind when drafting legislation, or because Congress attempts but is unable to comply with the clarity required by the canon.[233]

The ideal scenario may be one where the judiciary's presuppositions become the legislature's presuppositions, but while substantive canons reflect the priorities of the judiciary, they may not necessarily reflect those of Congress. Still, nonconformity of substantive canons with congressional preferences might depend on the generality at which the intent issue is framed. For instance, when the avoidance canon is viewed in a highly generalized sense that cuts across all categories of cases as well as time, it may be consistent with legislative preferences in

231 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (Amy Gutmann ed., 1997).

232 *See supra* notes 185–98 and accompanying text.

233 Thus, Congress may generally have a substantive canon in mind when drafting legislation but may be unable to draft the legislation in a way that will convince the reviewing court that the clarity requirement of the canon has been satisfied.

the sense that Congress desires that statutory indeterminacy be resolved in a manner consistent with "fundamental national principles."[234] On the other hand, at a lower level of generality, it may be that the avoidance canon is often applied in a manner designed to elicit a legislative reaction to the judicial decision.[235] This would especially be true when the avoidance canon is applied to statutes that burden discrete and insular minorities.[236] Similarly, the avoidance canon might be applied in order to force legislative deliberation to make up for underenforced constitutional norms, such as the nondelegation doctrine.[237]

If Congress had substantive canons in mind when drafting legislation, it would arguably be insignificant (as far as presupposition is concerned) if Congress did not embrace the normative concerns underlying the canons. The interpretive community model, though, is a broad generalization that can accurately describe only some of the interaction between courts and Congress. The drafters of legislation are often unaware of substantive canons, or are only aware of them in a very general sense, and may not always carefully consult them when drafting legislation.[238] Even if Congress considered substantive canons when drafting legislation, in some cases it is difficult or impossible to predict

234 *See* Elhauge, *supra* note 655, at 2256; *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 948 (2013) (reporting that a survey of congressional staffers showed that "[f]orty-four percent of [the] respondents reported a judicial presumption in favor of upholding federal statutes").

235 *See* Elhauge, *supra* note 655, at 2166 (explaining that substantive canons like the rule of lenity may be counter to the desires of the legislature); *see also* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1580 (2000) (citation omitted) ("[T]he avoidance canon actually makes a difference only in those cases where the best evidence of Congress's intent apart from the canon points toward the *broader*, more constitutionally problematic construction." (emphasis in original)).

236 *See* Elhauge, *supra* note 655, at 2210 (arguing that using the avoidance canon to "interpret ambiguous legislation not to burden [discrete and insular minorities] where legislative preferences are unclear usefully results in more precise legislation").

237 *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2111–13 (1990); *see also* Elhauge, *supra* note 657, at 2256 (noting that the avoidance canon is used to avoid conflict with the legislative branch and preserve the Court's political capital to enforce constitutional judgments).

238 *See* Gluck & Bressman, *supra* note 234, at 902 (finding that there are some canons drafters know and use, while there are others that many drafters either reject or do not know). *See generally* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002) (concluding that traditional judicial understandings of the legislative process are inaccurate);.

how courts will apply the canons.[239] Reviewing judges may disagree with the existence of a canon on normative grounds and may thus wish to avoid its application or, conversely, may strongly agree with the canon and be motivated to apply it even when the linguistic and other evidence seems clear.[240] Nevertheless, predicting likely application is easier for same canons than for others. The strongest clear statement rules set forth relatively determinate conventions. For example, "magic words" (i.e., specific language) may be required before a court will interpret a statute as divesting courts of habeas corpus jurisdiction.[241] In contrast, the avoidance canon is triggered by ambiguity (according to the Court), but it is difficult to predict whether a reviewing court will find statutory language to be ambiguous.[242] In addition, it is not always possible to anticipate the constitutional issues that may be raised by the application of a statute. In some cases, it may be virtually impossible because the law may change and create constitutional issues that were not present at the time of the statute's enactment.[243]

The idea that the concept of presupposition can situate the avoidance canon as an aspect of the communicative meaning of a statute may thus seem problematic because such a theory relies on contestable, and perhaps fictitious, inferences about congressional intent. Fictions, though, are an ineliminable aspect of the interpretive process generally. Selecting an interpretation of a statute involves a multi-step process of inferential reasoning that includes decisions about how the evidence from different sources of meaning should be combined and which evidence to privilege when there is a conflict.[244] In fact, a multi-step

239 *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 (1989) (describing the "battles" involved in determining "[h]ow clear is clear" in the application of one substantive canon).

240 *See generally* Torben Spaak, *Relativism in Legal Thinking: Stanley Fish and the Concept of an Interpretive Community*, 21 RATIO JURIS 157 (2008) (describing problems inherent in the idea of interpretive communities).

241 *See* Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 327 (2001) (Scalia, J., dissenting) (arguing that the Court had established "a superclear statement, 'magic words' requirement for the congressional expression of" an intent to preclude habeas review). The absence of "magic words" may thus justify a court in concluding that a provision does not strip courts of habeas corpus jurisdiction, even if there is no evidence that the legislature considered the issue.

242 *See supra* Part II.B (describing the subjectivity inherent in the ambiguity determination).

243 *See generally* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1583 (2020) (discussing the problems that arise when the law changes between the time of statutory enactment and when a substantive canon is to be applied).

244 *See* Allott & Shaer, *supra* note 147, at 196–98 (explaining the inferential nature of legal interpretation and the need to balance various possible sources of meaning).

process of inferential reasoning is associated with any given interpretive principle, even when considered in isolation. Furthermore, all of these processes of inferential reasoning are contestable in various ways. Consider the ordinary meaning doctrine, which represents the judicial commitment to interpret words in legal texts in accordance with accepted and typical standards of communication that apply outside of the law.[245] The doctrine acts as an umbrella of sorts that encompasses various interpretive principles and sources of meaning. Dictionaries are an obvious, and commonly used, example, even though commentators have harshly criticized judicial reliance on dictionaries.[246] A dictionary definition is not useful because it reveals some particular legislative intent but, rather, because of the (often mistaken) belief that the definition provides the ordinary meaning of the relevant word and the correlative, generalized presumption that the legislature intended for the word to be given its ordinary meaning.[247]

Legal interpretation thus includes both fictional principles as well as the sort of presuppositions and implied meanings that are an aspect of interpretation generally. Some of the presuppositions and implied meanings, like other interpretive principles, may be based at least partly on fictions, or at least a lack of knowledge about legislative preferences.[248] The presupposition underlying the avoidance canon is something like, *Congress clearly indicates its intent for a statute to apply to a situation that raises a serious constitutional question*, but the presupposition is contestable.[249] More importantly, a rejection of the avoidance canon's presupposition as an unacceptable fiction would not undermine the reality that some aspects of meaning are implied and the Court's focus on literal meaning instead of communicative meaning is misplaced. Furthermore, the avoidance canon's presupposition offers a

245 *See generally* BERNARD S. JACKSON, MAKING SENSE IN LAW: LINGUISTIC, PSYCHOLOGICAL AND SEMIOTIC PERSPECTIVES (1995) (explaining how to make sense of the law, and concluding that it is not through traditional legal analysis).

246 *See, e.g.*, Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998) (describing the unprincipled use of dictionaries by the Supreme Court).

247 *See* Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (explaining that the Court "assume[s] that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" (quoting Richards v. United States, 369 U.S. 1, 9 (1962))).

248 *See generally* Elhauge, *supra* notes 655, 67 (categorizing interpretive principles on the basis of whether they are consistent with likely legislative preferences).

249 *See supra* notes 117–20 and accompanying text (explaining the level of clarity required by the avoidance canon).

theory of how the avoidance canon fits into the structure of interpretation as an aspect of the communicative meaning of a text, but the structural element is separate from the triggering element.[250] Thus, indeterminacy, properly understood, can still act as the trigger for the avoidance canon even if presupposition is rejected as the structural element of the avoidance canon.

E. Substantive Canons, Presuppositions, and Implied Terms

If the concept of presupposition is the theory that best explains and situates the avoidance canon within the structure of interpretation, it has equal relevance to clear statement rules. Similar to the avoidance canon, clear statement rules are triggered by a judicially perceived lack of linguistic clarity, rather than by a particular word or phrase.[251] The process of inferential reasoning is also similar for the avoidance canon and clear statement rules. Compare a paradigmatic clear statement rule, the presumption against retroactivity, with the avoidance canon. The presupposition supporting the presumption against retroactivity is that Congress is clear when it desires that a statute should have retroactive effects, and the presupposition supporting the avoidance canon is that Congress is clear when it is legislating in sensitive areas that raise serious constitutional questions.[252] The respective presuppositions are general ones that cut across time and subject matter, and legislative intent typically cannot be traced to the statute at issue in the sense that specific evidence can be uncovered that Congress desired that the statute be interpreted in light of the presupposition.[253] Furthermore, in both situations statutory language may be general in nature and, by its terms, seem to apply both prospectively and retroactively or cover the constitutionally sensitive issue.

Although the Court has asserted a distinction between the avoidance canon and clear statement rules, the Court has not offered a theory of how clear statement rules can recognize implied exceptions to broad

250 *See supra* notes 13–17 and accompanying text (explaining the distinction between the structural and triggering aspects of interpretive principles).

251 *See supra* notes 71–72 and accompanying text (describing clear statement rules).

252 *See supra* notes 223, 250 and accompanying text (describing the presuppositions underlying the presumption against retroactivity and the avoidance canon).

253 That is, it is unlikely that in many cases members of Congress would have discussed the potential judicial application of a substantive canon during the legislative process. *See infra* notes 270–73.

statutory language but the avoidance canon cannot.[254] For example, the Court has not explained how any differences in treatment are traceable to congressional intent.[255] The Court's failure to provide a rationale for the disparate treatment is not surprising. There is no reason to believe that somehow by their very nature clear statement rules create implied limitations while the avoidance canon is limited to resolving explicit linguistic ambiguity, particularly considering the wide variety of implied meanings that exist in both legal and non-legal communication.[256]

Even if the various substantive canons fit into the structure of interpretation in similar ways based on the concept of presupposition, it is still possible to sort the canons based on their underlying presuppositions. The distinctions relate to how easily the respective presuppositions can be cancelled. Presuppositions in general are not cancelled by grammatical means but, instead, by extragrammatical evidence, including the specific context of the communication and its goals, as well as "our general knowledge store."[257] As such, presupposition interpretation is an extragrammatical phenomenon.[258] With substantive canons, the ease with which a presupposition is cancelled should naturally vary based on the specificity of the presupposition.[259] For instance, recall that the presupposition

254 *See supra* notes **Error! Bookmark not defined.**–08 and accompanying text (describing the Court's distinction between the avoidance canon and clear statement rules).

255 For example, in theory there could be evidence that Congress may, as a general matter, desire that the avoidance canon be limited to resolving linguistic ambiguity but clear statement rules be allowed to create implied limitations.

256 It is possible that the difference in treatment may be based on the normative basis for the canons. Perhaps clear statement rules are supported by more powerful normative justifications, thus dictating a more powerful role in statutory interpretations. *See* Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1497 (2019) (arguing that "the meaning of legal clarity in any given doctrinal context should turn on the purposes of the relevant doctrine"). The Court has not, however, articulated such a view or explained how a more compelling normative basis should result in a higher level of clarity required to overcome a canon.

257 *See* ARIEL, *supra* note 137, at 41 ("[P]resuppositions are here 'canceled' not by grammatical means, but rather, by extragrammatical factors (referring to the specific context, the goals of the communication, and our general knowledge store), our pragmatics, in other words.").

258 *See id.*

259 Recall that the strength of a substantive canon involves both the standard that must be met to overcome the meaning the canon directs courts to select and the determinants of meaning that may be considered when evaluating whether the burden has been met. *See supra* note 75 and accompanying text. Thus, a clear statement rule might be stronger than another substantive canon based on a greater degree of clarity required and fewer interpretive sources, such as legislative history, that can be used to meet that standard.

underlying the presumption against retroactivity is something like, *when a statute does not expressly provide for retroactive application, Congress intends for the statute to have prospective only application.*[260] In such a situation, extraordinarily strong evidence would be required to establish that Congress expressed an intent that the provision apply retroactively, even if Congress did not make its intent explicit in the text of the provision. In fact, it may be that the presupposition cannot be cancelled, but rather only fulfilled or not by the explicit statutory text.[261] Recall, in contrast, that the presupposition underlying the avoidance canon is more general, providing that *Congress clearly indicates its intent for a statute to apply to a situation that raises a serious constitutional question.*[262] For the avoidance canon, the presupposition may be more easily cancelled, such as through a combination of broad statutory language and a legislative scheme that is incompatible with an implied limitation.[263]

The picture that emerges is that the various presuppositions underlying substantive canons are generalized across time and subject matter, and thus are not always tied to legislative expectations at the time of enactment of a statute. Nevertheless, the concept of presupposition illustrates that, contrary to the Court's assertions, implied meanings are compatible with the avoidance canon in the same way they are compatible with clear statement rules.[264] Even so, the Court's view that clear statement rules are more interpretively significant than the avoidance canon is consistent with the presuppositions associated with the various canons. Thus, without

260 *See supra* note 221–25 and accompanying text (explaining the level of clarity required by the presumption against retroactivity).

261 Thus, the presupposition holds but may be satisfied by the kind of explicit evidence required by the Court.

262 *See supra* notes 117–20, 225 and accompanying text (explaining the level of clarity required by the avoidance canon).

263 Thus, the avoidance canon's presupposition may be cancelled through sufficient evidence indicating congressional intent that the statute cover constitutionally problematic scenarios even though the language of the statute does not clearly mandate such applications. *Cf.* Mandy Simons, *On the Conversational Basis of Some Presuppositions*, *in* 2 PERSPECTIVES IN PRAGMATICS, PHILOSOPHY & PSYCHOLOGY, PERSPECTIVES ON LINGUISTIC PRAGMATICS, 329, 331 (Alessandro Capone, Franco Lo Piparo & Marco Carapezza eds., 2013) (explaining that presuppositions are susceptible to cancellation in "explicit ignorance contexts" where "it is apparent to the addressee that the speaker is ignorant with respect to the proposition that would normally be presupposed").

264 *See supra* Part IV.C.1. Considering these generally applicable interpretive principles, the Court's assertion that the role of some canons is to resolve ambiguity while other canons allow for the recognition of implied terms is, at the least, undertheorized.

relying on the ambiguity doctrine, distinctions can be made regarding the degree of indeterminacy required to trigger substantive canons. The strength of the presupposition will depend on how precisely it should be framed, and thus the evidence required to overcome it. This will naturally make the presuppositions underlying clear statement rules stronger than the necessarily general presupposition underlying the avoidance canon.

IV. THE NEW CANON OF CONSTITUTIONAL AVOIDANCE: A DEMONSTRATION

The trigger for the avoidance canon is left be clarified and connected to the concept of presupposition. Connecting the avoidance canon to communicative meaning via a presupposition situates the avoidance canon within the structure of interpretation, but if the ambiguity concept is not the trigger for the avoidance canon, there must be some alternative understanding of the sort of clarity that would satisfy the avoidance canon's presupposition.[265] Courts can thus continue to insist that indeterminacy (the opposite of "clarity") is the trigger for the avoidance canon. Recall that the current ambiguity concept elides the different ways in which language can be indeterminate, and courts have therefore not considered how different types of indeterminacy might trigger the avoidance canon and interact with its presupposition.[266] Nevertheless, various types of indeterminacy should be uncontroversial as triggers for the avoidance canon, such as uncertainty about whether the semantic meaning of a term covers certain situations (as discussed below).[267] If communicative meaning rather than literal meaning is the focus of interpretation, however, some kinds of indeterminacy are far more controversial.

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265 In addition to a trigger for application, the new avoidance canon would involve an evidential question concerning the allowable determinants of meaning. If communicative meaning is sought, allowable evidence would include contextually based inferences regarding the purpose of the communication as well as the consequences of selecting a particular interpretation. *See supra* note 75 and accompanying text (describing how substantive canons are scalable partly on the basis of the allowable determinants of meaning).

266 *See* Slocum, *supra* note 127, at 211–17 (describing some of the different forms of indeterminacy that are conflated within the ambiguity concept by courts).

267 The lexical meaning of a term might be indeterminate for various reasons, including polysemy (two or more related meanings) and vagueness (one meaning with uncertainties regarding its scope). *See infra* notes 275–81, 292, 329, 343–49. Neither situation, however, involves an indeterminacy that should be controversial as a trigger for the avoidance canon.

Consider the situation, raised by the *Bond* case, where a court must decide whether the broad language of a statute should be interpreted in accordance with its literal meaning.[268] These scenarios are common because legal texts are often drafted with high levels of generality (sometimes alarmingly so).[269] While generality can serve various legitimate functions, the enacting legislature is unlikely to have considered many of the interpretive issues that will arise when the statute must be applied to specific cases.[270] Thus, for example, in *Rodriguez*, Justice Breyer argued that the broad statutory language, taken as "legislative silence," "suggest[ed] not disapproval of bail, but a lack of consideration of the matter."[271] There are various reasons for this legislative neglect, such as inattention to detail or a desire not to upset legislative compromises, but a significant reason is the inability to foresee all of the factual scenarios that may fall under the statute.[272] Situations where there is a stark mismatch between broad statutory breath and much narrower statutory purpose, which creates situations where the provision's literal meaning threatens to cover sensitive situations, can fairly be labeled as indeterminate if the communicative meaning of a statute is being determined.[273] Still, as exemplified by *Bond*, the judicial choice between interpreting broad, general statutory language literally or in some way restricting its scope is a long-standing topic that depends on normative notions of the proper judicial function in matters of statutory interpretation.[274]

This Article does not seek to resolve the normative issues involved in deciding whether *Bond*-like indeterminacy should trigger the avoidance canon. Instead, this Part illustrates how the new avoidance canon should function by analyzing two familiar scenarios that (should) involve less controversial notions of indeterminacy. The first involves

268 *See supra* notes 44–55 and accompanying text (describing the Court's decision in *Bond v. United States*).

269 *See* Gluck & Bressman, *supra* note 234, at 997 (explaining that "lack of time," the "complexity of the issue," and the "need for consensus" are reasons why statutes are drafted with indeterminacy).

270 *Cf.* Small v. United States, 544 U.S. 385, 390 (2005) (explaining that interpretive assumptions "help[] us determine Congress' intent where Congress likely did not consider the matter ").

271 Jennings v. Rodriguez, 138 S. Ct. 830, 872 (2018) (Breyer, J., dissenting).

272 *See id.* (explaining that "legislative silence" is most likely caused by Congress' inability to predict whether a certain outcome would occur).

273 *See supra* Part II.A. (describing how alarming generality can be viewed as indeterminacy).

274 Thus, not every recognized indeterminacy must count as an indeterminacy for every substantive canon, although courts should articulate coherent theories of why certain indeterminacies should not act as triggers for a given substantive canon.

the much more common than currently recognized situation where, unlike the *Bond* case, the statutory language is indeterminate in the sense that an inference is required to precisify the provision in order to decide the interpretive question. The immigration detention cases offer examples of this situation. The second scenario involves (quite common) situations of lexical meaning where the term at issue has a semantic meaning that may have some clear applications but also presents a range of applications where it is not clear whether the term applies.[275] A court thus has discretion within the range of indeterminacy to select a meaning that avoids serious constitutional issues. In both the first and second scenario, the role of the presupposition should be to help select a precisifying interpretation that does not conflict with the legislative scheme even though it might be a second-best resolution of the indeterminacy.[276]

The framework illustrated in this Part may not increase the number of situations where a court selects a second-best statutory interpretation in order to avoid a serious constitutional question. The new trigger for the avoidance canon, 'indeterminacy,' determined in light of the communicative meaning of the text, is based in part on an understanding that implied meanings are a normal aspect of interpretation.[277] Yet, even when an implied meaning is at issue and a serious constitutional issue is raised, a judge should select a second-best interpretation only if it would not conflict with the legislative scheme. Furthermore, as illustrated below, implied meanings are often required to resolve interpretive disputes, even when the reviewing court pretends that the dispute can be resolved on the basis of literal meaning.[278] Similarly, uncertainty about the semantic meaning of a word or phrase often exists even if a court pretends that the literal meaning is clear. Thus, the framework, if adopted, may well reduce interpretive decisions that are based on a misidentification of the linguistic meaning of the text.

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275 This sort of situation is commonly referred to as "vagueness," although it more often involves the concept of "multi-dimensional polysemy." DAVID LANIUS, STRATEGIC INDETERMINACY IN THE LAW 21, 129 (Janet Ainsworth et al. eds., 2019).

276 Thus, there must be sufficient pragmatic uncertainty that would allow for an implied term without disrupting the legislative scheme designed by Congress.

277 *See supra* Part.III.A. (describing communicative meaning as a model for statutory interpretation).

278 In such a situation, the reviewing court may be selecting a second-best interpretation while maintaining that it is merely applying the clear linguistic meaning of the text.

A. Implied Restrictions Triggered by Indeterminacy

The Court's assertion that the avoidance canon, unlike clear statement rules, cannot sanction implied meanings fails to recognize situations where implied language is required to make a provision determinate enough to resolve the interpretive dispute.[279] Sometimes the Court will label a provision as "ambiguous" rather than declaring that its meaning is underdetermined, even though the two terms refer to different phenomena.[280] As explained in more detail below, communicative underdeterminacy exists when an expression does not specify certain details.[281] Underdeterminacy can result when a legal text is drafted with a high level of generality and a corresponding lack of legislative attention to the specific scenarios that could arguably fall within the scope of the statute. Thus, in situations involving underdeterminacy, the provision's meaning cannot be determined by linguistic meaning alone, or often by relying on extra-textual indications of legislative intent, leaving the meaning to be determined in other ways.[282]

1. Zadvydas v. Davis *and Implied Meanings*

The recent immigration detention cases provide excellent examples of the Court failing to identify underdeterminacy. In those cases, the Court focused on the explicit meanings of the provisions instead of acknowledging that inferences were necessary to precisify the statutory language in order to resolve the interpretive disputes. Recall, for example, that the issue in *Zadvydas* was whether the statutory language "may be detained beyond the removal period" authorized the Attorney General to detain indefinitely immigrants beyond the statutory removal period.[283] The Court justified application of the avoidance canon on the basis of the "ambiguity" of the verb "may" in the statutory phrase "may be detained."[284] Although the Court's reasoning was not explicit,

279 *See supra* notes 177–82 and accompanying text (describing situations where recognition of an implied term is appropriate (or required) without regard to the existence of a presupposition).

280 *See infra* notes 286–94 and accompanying text (describing underdeterminacy).

281 Qiao Zhang, *Fuzziness – Vagueness – Generality – Ambiguity*, 29 J. PRAGMATICS 13, 16 (1998).

282 ROBYN CARSTON, THOUGHTS AND UTTERANCES: THE PRAGMATICS OF EXPLICIT COMMUNICATION 20–21 (2002).

283 *See supra* notes 92–93 and accompanying text.

284 Zadvydas v. Davis, 533 U.S. 678, 697 (2001).

presumably the Court was contrasting "may" with "shall," which would mandate continued detention.[285] In fact, the Court in *Rodriguez* distinguished the statute at issue in *Zadvydas*, § 1231(a)(6), from two provisions at issue in the case, §§ 1225(b)(1) and (b)(2), on the basis that § 1231(a)(6) uses the ambiguous "may," while the other two provisions "unequivocally mandate that aliens falling within their scope 'shall' be detained."[286] The Court itself in *Zadvydas*, though, seemed to be confused about whether the permissive "may" rendered the statute ambiguous, referencing the government's argument that "the statute means what it literally says."[287] In fact, the problem with the Court's focus is that neither a permissive ("may") nor a mandatory ("shall") authorization to detain addresses the temporal issue of *when* the authorization terminates, which was the indeterminacy that should have been the focus of the Court's analysis.[288]

The distinction between ambiguity and generality/underdeterminacy serves to help illustrate the flaws of the Court's interpretations in *Zadvydas* and *Rodriguez*. An expression is *general* if its meaning is a genus of more than one species.[289] Thus, for example, the term "color" is general because it includes within its scope "red," "green," "blue," etc. The term "parent" is general because it includes within its scope "mother" and "father."[290] Generality can be viewed as a kind of *underdeterminacy* where the more general the expression is the less informative the utterance becomes (and vice versa). Underdeterminacy "does not entail that there is no fact of the matter as regards the proposition expressed, but rather that it cannot be determined by linguistic meaning alone."[291] In contrast,

285 The Court's example supporting its claim that "may" was ambiguous did not go to the "may" vs. "shall" distinction, however, leaving unclear how exactly the example was relevant to the ambiguity of "may." The example involved a statute providing that the Attorney General "may" retain terrorist immigrants in custody and "must review the detention determination every six months." *Id.* Thus, perhaps the Court's point was that the terrorist provision explicitly contemplated extended detention. If so, the mandated review language still does not explicitly authorize indefinite detention.

286 Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018).

287 *Zadvydas*, 533 U.S. at 689.

288 Consider a father's authorization to his child to go outside the house. Regardless of whether the father said "you may go outside" or "you shall go outside," the child would still not know when the authorization terminated.

289 *See* Gillon, *supra* note 126, at 394–95 (defining "generality" and noting that it is distinct from ambiguity).

290 *Id.* at 394.

291 *See* CARSTON, *supra* note 282, at 20–21.

underspecificity involves situations where it is undetermined which of several determinate meanings were intended.[292] For example, one way of treating ambiguity is to assert that a term, such as "bank," has a single lexical entry with an underspecified meaning because the word itself does not specify which of the typical meanings was intended (i.e., a river bank or a financial institution).[293]

Significantly, with a legal text underdeterminacy requires nonlinguistic judicial judgment to precisify the textual language to satisfy the needs of the law.[294] Some scenarios involving underdeterminacy might require only obvious inferences from context while others require greater judicial creativity. For example, one can easily imagine scenarios when "color" or "parent" could be used when indeterminacy would not result because the context indicates a more specific meaning (if a more specific meaning is needed). In contrast, the expression "some event will happen at some time" is general in the lack-of-detail sense. Both "some event" and "some time" are, for most purposes, insufficiently informative in a way that needs little elaboration. The expression represents more than just a category with a "fuzzy" boundary.[295] If required to provide guidance, the expression will require significant nonlanguage-based precisification.

Instead of focusing on semantic ambiguity, the Court in *Zadvydas*, as well as *Rodriguez*, should have addressed underdeterminacy and the difficult issues involved with the temporal domains of sentences. In both cases, the relevant provisions could be viewed as underdetermined regarding the authorized scope of detention. Regarding *Zadvydas*, the relevant provision, § 1231(a)(6), contains a temporal prepositional

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292 *See* Una Stojnić, Matthew Stone & Ernie Lepore, *Distinguishing Ambiguity from Underspecificity*, *in* PRAGMATICS, TRUTH AND UNDERSPECIFICATION: TOWARDS AN ATLAS OF MEANING 149, 149–50 (Ken Turner & Laurence Horn eds., 2018) (explaining underspecificity).

293 Mixingmemory, *Polysemy Is Like Homonomy, Only Different*, SCIENCEBLOGS (Nov. 3, 2006), http://scienceblogs.com/mixingmemory/2006/11/03/polysemy-is-like-homonomy-only/ [https://perma.cc/RF9J-7CFQ]. Of course, sentential context often can help specify the correct meaning.

294 *See* PETER LUDLOW, LIVING WORDS: MEANING UNDERDETERMINATION AND THE DYNAMIC LEXICON 65 (2014) ("[Words used by lawmakers are just as open-ended as words used in day-to-day conversation. . . . [T]he idea that the answer is to be found in the language of the [text] is, in many cases, absurd.").

295 The term "fuzziness" is used in linguistics and philosophy of language to describe the boundaries of categories (such as "vehicle") that are "ill-defined, rather than sharp." MURPHY & KOSKELA, *supra* note 135, at 72. Commentators often describe fuzziness as a type of vagueness.

phrase, "may be detained beyond the removal period."[296] Temporal prepositions establish a temporal relationship between the complement and some other sentence element, such as the subject or another object. Temporal prepositions can be divided into the two subclasses of *time position* (e.g., noon) and *duration.* The duration subclass addresses the question of *how long*. To illustrate, even simple assertive sentences like "Mary kissed John" make an existential claim that an event of a certain type (i.e., Mary kissing John) occurred within some contextually determined interval.[297] The Court in *Zadvydas* should thus have explored the possibility of an implied contextual restriction on the temporal domain of "beyond" which would have resolved the relevant underdeterminacy. Instead, by focusing on the peripheral fact that "may" is permissive, the Court failed to persuasively identify uncertainty regarding the scope of the detention authority (which invited vigorous dissenting opinions) and provided a poor basis for the application of the avoidance canon.[298]

The Court in *Zadvydas* should therefore have focused not on the ambiguity of any of the explicit terms in the provision (such as "may") but, instead, on the underdeterminacy of the language. The dissenting opinions in *Zadvydas* claimed that the majority rewrote the provision, but such a position fails to recognize the underdetermined language of the provision.[299] Contrary to the government's arguments in the case (and the Court's acceptance of those arguments), the literal meaning of "beyond the removal period" is not *forever* or *indefinitely*.[300] Rather, the provision is silent regarding the length of authorized detention. Fixing its authorized length involves judicial judgment of some sort,

296 8 U.S.C. § 1231(a)(6) (2012).

297 *See* Ian Pratt & Nissim Francez, *Temporal Prepositions and Temporal Generalized Quantifiers*, 24 LINGUISTICS & PHIL. 187, 200 (2001). Temporal preposition phrases (TPPs) include situations where explicit temporal indications are provided. Thus, for example, in the sentence "Mary kissed John during every meeting" the existential quantification present in the sentence falls within the scope of the universal quantification (i.e., "every") over meetings. *See id.*

298 In an important sense, "may" gave the Attorney General more discretion, and hence more power, than "shall," making the Court's conclusion odd.

299 Zadvydas v. Davis, 533 U.S. 678, 702 (2001) (Scalia, J., dissenting) (referring to the "Attorney General's clear statutory authority to detain criminal aliens with no specified time limit"); *id.* at 705 (Kennedy, J., dissenting) (claiming that the Court avoided a constitutional question "by interpreting a statute in obvious disregard of congressional intent; curing the resulting gap by writing a statutory amendment of its own").

300 Or any other term meaning that there are no constraints on the government's power to detain.

whether that judgment involves an inference about congressional intent based on the statutory scheme or something more normative in nature.[301]

If the presupposition underlying the avoidance canon is that *Congress clearly indicates its intent for a statute to apply to a situation that raises a serious constitutional question*, the identification of linguistic underdeterminacy should give the reviewing court a considerable range of interpretive flexibility in precisifying the statute. In such cases of underdeterminacy, the interpretive question concerns the judicial construction of an implied provision, as occurred in *Zadyvydas* and other cases involving the avoidance canon.[302] In some cases, the implied provision may have a more tenuous connection to likely legislative intent than do other possible implied provisions.[303] In *Zadvydas*, for instance, the Court's imposition of an implied six-month limit on detention was likely not the intended meaning of § 1231(a)(6).[304] The Court's general holding, which itself was implied and motivated by serious constitutional concerns, was that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[305] In order to provide a more precise rule regarding the permissible length of detention, the Court pointed to a congressional statement found in legislative history from over forty years prior to the enactment of § 1231(a)(6) that doubted the constitutionality of detention for more than six months.[306] That is thin evidence, however, on which to decide that the legislative intent was for § 1231(a)(6) to include the (implicit) six-month restriction. In

301 This is not to argue that the possible terms fixing the authorized length of detention are all equally persuasive but, rather, that there may be multiple permissible ways to set some limitation on the Attorney General's power to detain.

302 *See supra* Part I.C. (describing the *Zadvydas* and *Catholic Bishop* cases).

303 This is especially true if intent is measured in terms of congressional intent regarding the meaning of the provision as opposed to a more general notion of the purpose of the provision or how Congress might have responded to an issue if it had been explicitly considered.

304 Indeed, one of the primary complaints of Justice Kennedy's dissenting opinion (joined by Justices Scalia and Thomas and Chief Justice Rehnquist) in *Zadvydas* was that the statute was clear and that "[a]n interpretation which defeats the stated congressional purpose does not suffice to invoke the constitutional doubt rule, for it is plainly contrary to the intent of Congress." *Zadvydas*, 533 U.S. at 707 (Kennedy, J., dissenting) (internal quotation marks omitted).

305 *Id.* at 699 (majority opinion).

306 *See id.* at 701 ("We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months." (citing Juris. Statement in *United States v. Witkovich*, O.T.1956, No. 295, pp. 8–9)).

imposing the more determinate restriction of six-months, rather than merely the general requirement of "significant likelihood of removal in the reasonably foreseeable future,"[307] the Court had to go beyond the meaning communicated by the text.[308] The Court admitted as much when it asserted that it was adopting the six-month limitation "for the sake of uniform administration in the federal courts."[309]

The Court's interpretation in *Zadvydas* might have been second-best, but if the meaning of a statute is underdetermined, deciding whether a given implied meaning has a closer connection to likely legislative intent than do other possible implied meanings is normal interpretation that would occur regardless of the existence of a serious constitutional question. Instead, the question should be whether the implied provision, that would both avoid the constitutional issue and make the provision sufficiently determinate, would undermine the legislative scheme. Justice Kennedy argued in dissent in *Zadvydas* that there was no "ambiguity in the delegation of the detention power to the Attorney General," but he also argued that the Court's implied limitation "defeat[ed] the statutory purpose and design."[310] More specifically, Justice Kennedy argued that the Court's implied limitation made "the statutory purpose to protect the community ineffective,"[311] the Court's interpretation would result in unintended benefits for classes of immigrants not before the Court,[312] and the Court's opinion would interfere with the Executive's foreign affairs authority.[313] Whether these arguments are persuasive cannot be addressed here (although the Court did not find them persuasive), but they illustrate what should be the next stage of avoidance canon argumentation once indeterminacy is identified.

307 *Id.*

308 *See id.* at 699 (examining legislative history to ascertain Congressional intent).

309 *Id.* at 701.

310 *Id.* at 707 (Kennedy, J., dissenting).

311 *See id.* at 708 ("The authority to detain beyond the removal period is to protect the community, not to negotiate the aliens' return.").

312 *See id.* at 710–11 (arguing that contrary to the Court's claims, its interpretation would apply to immigrants stopped at the border, which would be inconsistent with congressional intent).

313 *See id.* at 711 ("The Court rushes to substitute a judicial judgment for the Executive's discretion and authority.").

2. Recent Immigration Detention Cases and Implied Meanings

Similar to *Zadvydas*, the Court in *Nielsen v. Preap*,[314] and *Jennings v. Rodriguez*,[315] maintained that the avoidance canon cannot be triggered in the absence of statutory "ambiguity."[316] Even Justice Breyer in dissent in *Rodriguez* indicated that a finding of linguistic ambiguity (in *Rodriguez*, the term "detain") is necessary in order to authorize the Court to fashion an implied provision.[317] Unlike *Zadvydas*, though, in neither *Rodriguez*[318] nor *Nielsen*[319] did the Court address whether its interpretation, which rejected any entitlement to bond hearings in various situations involving long-term detention, raised a serious constitutional question. In *Zadvydas*, the Court first established that indefinite immigration detention would raise a serious constitutional issue before considering whether an alternative interpretation was plausible.[320] By engaging instead in its normal process of statutory interpretation, the Court in *Nielsen* and *Rodriguez* negated the presupposition associated with the avoidance canon and any motivation for selecting a second-best interpretation (even if only slightly second-best). Thus, without any reference to the avoidance canon, the Court in *Rodriguez* framed the interpretive issue as whether there was a "statutory foundation" for a restriction on detention without a bail hearing,[321] in the sense that the provisions may "plausibly be read to contain an implicit 6-month limit."[322] By framing the issue as whether Congress specifically intended for there to be an *implicit* provision regarding bail, rather than whether there is sufficient indeterminacy such that an implicit provision would not be in tension with the legislative scheme, the Court in essence decided the case before analyzing the interpretive arguments.

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314 139 S. Ct. 954 (2019).

315 138 S. Ct. 830 (2018).

316 *See supra* note 84 and accompanying text (discussing the necessity of ambiguity to operation of the avoidance cannon).

317 138 S. Ct. at 870 (Breyer, J., dissenting) (arguing that the relevant term, "detention," was ambiguous).

318 *See id.* at 851 (majority opinion) (explaining that it would not address the constitutional challenges because they were not addressed at the Circuit Court level).

319 *See Nielsen*, 139 S. Ct. at 972 (emphasizing that the "arguments here have all been statutory").

320 *See* Zadvydas v. Davis, 533 U.S. 678, 696 (2001) ("Despite this constitutional problem, if 'Congress has made its intent' in the statute 'clear, we must give effect to that intent.'" (quoting Miller v. French, 530 U.S. 327, 336 (2000))).

321 *Rodriguez*, 138 S. Ct. at 842.

322 *Id.* at 843.

If the Court had (properly) used the avoidance canon in *Rodriguez*, the analysis would have been different. As in *Zadvydas*, the Court in *Rodriguez* focused on the identification of "ambiguity," and thus on mandatory vs. permissive language (the "may" vs. "shall" issue),[323] when it should have addressed the temporal issues regarding the length of detention. Consider that of the provisions discussed by the Court in *Rodriguez*, only one of them, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), which was not directly applicable to the case, explicitly required detention until the end of removal proceedings.[324] Instead, the relevant sections either explicitly permit (but do not require) release on bond,[325] provide that the immigrant shall be detained "for" a further proceeding but do not explicitly mandate detention until its conclusion,[326] or, most restrictively, provide for release from detention only in certain circumstances.[327] Thus, like with the provision at issue in *Zadvydas*, the provisions implicated in *Rodriguez* require inferences in order to mean that bail is not available for the duration of immigration proceedings, no matter the duration of those proceedings. The necessity of an inference in order to make the relevant provisions sufficiently determinate does not mean, of course, that the implied language requested by the immigrants was necessarily appropriate. Rather, the reviewing court should determine whether an implied provision would undermine the legislative scheme, and the majority and dissenting justices disagreed on that issue.[328] Thus, even if the Court in *Rodriguez* had framed the

323 *See supra* notes 100–101 and accompanying text (explaining the "may" versus "shall" issue).

324 *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2012) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.").

325 *See* 8 U.S.C. § 1226(a)(2) (2012) (stating "may release the alien").

326 *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (2012) (stating that an alien shall be detained pending review, but not explicitly mandating detention for any specified period of time or until any specified event); 8 U.S.C. § 1225(b)(2)(A) (2012) (prescribing "shall be detained for a proceeding").

327 *See* 8 U.S.C. § 1226(c)(2) (2012) (prescribing "may release an alien . . . only if").

328 In dissent, Justice Breyer came close to the analysis advocated for in this Article. Justice Breyer indicated that "[l]inguistic ambiguity, while necessary, is not sufficient. I would also ask whether the statute's purposes suggest a congressional refusal to permit bail where confinement is prolonged." Jennings v. Rodriguez, 138 S. Ct. 830, 872 (2018) (Breyer, J., dissenting). The second part of the inquiry, where the focus is on whether there is a "congressional refusal to permit bail where confinement is prolonged" is the proper way to frame the inquiry, but if so, the requirement of linguistic ambiguity adds an uncertain element to the analysis that the concept of presupposition, and a more granular understanding of the ways in which a provision can be indeterminate, do not. *Id.*

linguistic issues properly, implied limitations might still have been inappropriate.

3. Presupposition, Underdeterminacy and the Avoidance Canon

In various cases involving constitutional issues, the Court has failed to recognize that the provision at issue is underdetermined relative to the requirements of the interpretive dispute. Part of the problem is related to the Court's focus on "ambiguity," particularly that of explicit terms. Instead, the Court should adopt a more nuanced (and accurate) view of the meaning communicated by language which would recognize the existence of implied terms and the reality that the explicit meaning of a provision is often not sufficient to resolve all interpretive disputes. By reframing the analysis by addressing indeterminacy in light of the avoidance canon's presupposition, rather than searching for "ambiguity," the Court would be able to give decisions like that in *Zadvydas* a much more coherent foundation.

B. Creative Lexical Meanings

The presupposition underlying the avoidance canon is also relevant to other common interpretive problems, such as indeterminacy regarding the semantic meaning of statutory words and phrases. When an interpretive dispute involves the meaning of one of the explicit but undefined words or phrases in a statute, a reviewing court will naturally feel constrained by the semantic meaning of the language.[329] The semantic meaning thus satisfies the clarity requirement of the avoidance canon presupposition. Nevertheless, there will often be indeterminacy regarding the semantic meaning of statutory terms, and the presupposition may justify the court in choosing an interpretation that avoids the constitutional issue. In fact, lexical meaning is more indeterminate than courts typically acknowledge, and terms specific to the law are prototypical examples where a court should frequently not feel overly constrained by semantic meaning.

329 *See supra* notes 131–38 and accompanying text (explaining semantic meaning).

1. Hart's No-Vehicles-In-The-Park Hypothetical and Indeterminate Lexical Meanings

Courts have long struggled to define terms in legal texts with the precision necessary to resolve interpretive disputes. The difficulties associated with attempts to define even common words like "vehicle" precisely were famously raised by H.L.A. Hart's no-vehicles-in-the-park hypothetical, which "forbids you to take a vehicle into the public park."[330] The hypothetical classically frames the challenges caused by the difficulties of categorizing objects and defining words (such as *vehicle*) and the consequent fuzziness (often labeled as vagueness) associated with such attempts.[331] Hart's hypothetical reflects an underlying belief that the meaning lexicalized by a word (i.e., its semantic meaning) is to some degree generalizable across contexts and not based on any specific interpretive clues that can be traced to the drafter of the text. Thus, Hart asserts that the rule "plainly . . . forbids an automobile."[332] Yet, as Hart also recognizes, the inherent fuzziness of words means that there will be uncertainties regarding the domain of "vehicle."[333]

If, for example, a court were obliged to construe "vehicle" narrowly in order to avoid a serious constitutional question, it would be mandatory to include those things that are clearly vehicles, such as automobiles, and exclude those things that are clearly not vehicles, which would be most objects the world.[334] In addition, in order to avoid the serious constitutional issue, the court should exclude from the scope of the statute things that are not clearly vehicles, such as bicycles, roller skates, toy automobiles, and airplanes.[335] Such a division requires of

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330 H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

331 *See* Eleanor Rosch, *Principles of Categorization*, *in* COGNITION AND CATEGORIZATION 27, 27–48 (Eleanor Rosch & Barbara Lloyd eds., 1978) (describing the challenges of categorization); Vladimir M. Sloutsky, *The Role of Similarity in the Development of Categorization*, 7 TRENDS COGNITIVE SCIS. 246, 246 (2003) (describing how categorization works).

332 *See* Hart, *supra* note 330, at 607.

333 *Id.* The "domain" refers to the objects to which the word at issue should be applied.

334 Trees, flowers, buildings, etc., are clearly not vehicles.

335 Some scholars have advocated that questions such as the meaning of "vehicle" are "empirical" and can be answered by using the methods of corpus linguistics. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018) ("Our proposed methodology is a set of tools utilized in a field called corpus linguistics."). It is certainly the case that corpus analysis, and other big data approaches, can reveal how

course some methodology for identifying core and peripheral word meanings. Regardless of methodology, though, some scenarios are inevitably more straightforward than other scenarios, and should therefore more tightly constrain judicial discretion. For instance, tangible *artefactual kinds* (i.e., "categor[ies] based on a particular human relationship to some natural things") such as "vehicle" typically have discernable ordinary meanings that can be determined by courts.[336] Similarly, with *natural kind* terms (i.e., categories of things, such as "pigeon," "that occur naturally in the world without need for human intervention"), it is quite plausible that technical definitions or ordinary meanings that have at least prototypical examples can be identified.[337] Thus, while there might be some uncertainty regarding the extension (i.e., its referential scope) of "vegetable," as the Supreme Court's famous decision in *Nix v. Heddon*[338] illustrates, certain things are definitely vegetables or definitely not vegetables.

2. Skilling v. United States *and Indeterminate Lexical Meanings*

Many statutory words present far more significant definitional challenges than the artefactual and natural kinds described above. Consider the "intangible right of honest services" phrase at issue in *Skilling v. United States*,[339] which some critics have accused the Court of narrowing contrary to its accepted meaning.[340] As the phrase illustrates, often statutes reference intangible concepts that do not exist outside of the law.[341] In contrast to familiar terms such as "vehicle"[342] and "fruit,"[343] the meaning of "intangible right of honest services" phrase

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language is used in ways that dictionary definitions cannot. Corpus analysis cannot definitively answer all questions of lexical meaning, however, especially when the term is intangible and not used outside of the law.

336 *See* MURPHY & KOSKELA, *supra* note 135, at 110.

337 *See id.*

338 149 U.S. 304 (1893). In *Nix*, the Court determined, through its own understanding of language and the world, that a "tomato" was a "vegetable" rather than a "fruit." *Id.* at 306.

339 561 U.S. 358 (2010). The constitutional issue arose because Skilling argued that the honest-services statute, 18 U.S.C. § 1346, is unconstitutionally vague. *Id.* at 399.

340 *See, e.g.*, Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 533–34 (2019) (referring to the Court's "strained" interpretation).

341 18 U.S.C. § 1341 (2012) provides a penalty to anyone who devises "any scheme or artifice to defraud," which under 18 U.S.C. § 1346 (2012) includes "a scheme or artifice to deprive another of the intangible right of honest services."

342 *See* McBoyle v. United States, 283 U.S. 25, 25–27 (1931) (determining that an "airplane" is not a "vehicle").

343 *Nix*, 149 U.S. at 306–07 (determining that "tomatoes" are "vegetables" and not "fruit").

cannot be determined by reference to non-legal sources, and thus does not have an "ordinary" meaning. Rather, it is a judicially created term and as such has developed in a common law, piecemeal fashion.[344]

A few aspects of a term like "intangible right of honest services" create genuine space for judicial interpretive creativity because the semantic constraints are narrow. The combination of intangibility and judicial or statutory creation is an indication that it will often be unclear which features are aspects of a word's lexical meaning, resulting in multiple possible meanings (referred to as *multi-dimensional polysemy*).[345] For example, even a common word like "intelligent" (like "reasonable") is potentially indeterminate, based on multi-dimensional polysemy, because it may be unclear which features are intrinsic to the concept itself.[346] The term may be applied based on some combination of one's capacity "for memory, abstract thought, self-awareness, communication, learning, emotional knowledge, creativity, and problem solving," or on the basis of other features.[347] Furthermore, even though the phrase "intangible right of honest services" consists entirely of common words found outside the law, combinations of words frequently present interpretive difficulties. Conceptual combination is often illustrated using the "pet fish" example.[348] Something is a "pet fish" if it is both a "pet" and a "fish."[349] One might think that something is a stereotypical pet fish if it is a stereotypical pet and a stereotypical fish.[350] The problem, though, is that a good example of a pet fish (perhaps, a guppy) is neither a prototypical pet (some breed of dog) nor a prototypical fish (perhaps, a trout).[351] The example illustrates that two concepts, "pet" and "fish," often cannot be combined in a straightforward way to create a complex concept.[352] This definitional

344 *See Skilling*, 561 U.S. at 404 (indicating that the Court would "pare that body of precedent [interpreting "intangible right of honest services"] down to its core" in order to preserve the statute).

345 *See* LANIUS, *supra* note 275, at 33.

346 *See id.*

347 *Id.*

348 *See* Andrew C. Connolly, Jerry A. Fodor, Lila R. Gleitman, & Henry Gleitman, *Why Stereotypes Don't Even Make Good Defaults*, 103 COGNITION 1, 5 (2007).

349 *Id.*

350 *See id.*

351 *See id.* ("[T]here is a *prima facie* problem about how to reconcile the stereotype theory of concepts with the compositionality constraint.").

352 *See id.*

issue is especially acute for intangible concepts that do not exist outside of the law.[353]

As the Court explained in *Skilling*, it is unclear which features are intrinsic to the concept of "intangible concept of honest services."[354] Seeking to "construe[] rather than invalidate[]," the Court examined case law and "pare[d] that body of precedent down to its core."[355] Although previous courts had at times applied the term more broadly, and the decisions were "not models of clarity or consistency,"[356] the Court limited the term to its "solid core,"[357] which involves "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived."[358] In a concurring opinion, Justice Scalia argued that case law had created significant uncertainties regarding the meaning of "intangible concept of honest services," courts had used the term much more broadly than the Court had indicated, and the Court's definition was much narrower than what Congress had intended.[359] The legitimacy of the Court's opinion, though, does not turn on whether there is substantial uncertainty regarding the meaning of the term or whether it had at times been used more broadly than the Court's definition. Similar to "vehicle," where a court would be justified in excluding things as vehicles when they are not clearly vehicles, the Court was justified in excluding activities as falling within the "intangible concept of honest services" category when the activities did not clearly fall within the category.[360] Rather, Justice Scalia's argument would be persuasive only if there was no stable semantic meaning that could form the basis of the term, or if it was clear that the semantic meaning of the term must exceed the Court's definition.

353 *See id.*

354 Skilling v. United States, 561 U.S. 358, 404 (2010).

355 *Id.*

356 *Id.* at 405.

357 *Id.* at 407.

358 *Id.* at 404.

359 *See id.* at 417–22 (Scalia, J., concurring). Justice Scalia also argued that even under the Court's definition the phrase is impermissibly vague. *Id.* at 421.

360 *See supra* notes 330–36 and accompanying text (explaining the difficulties in properly defining terms that create categories).

3. Assessing Presuppositions and Lexical Indeterminacy

As the *Skilling* case illustrates, the presupposition model of the avoidance canon can take account of disputes regarding lexical meaning. Because the presupposition is based on an assumption of clarity, word meanings can be narrowed to exclude marginal meanings and applications, subject to the restraint that doing so must not undermine the legislative scheme. Furthermore, an understanding of the significant indeterminacy present in word meanings, especially with intangible, multi-word terms that are specific to the law, underscores the legitimacy of courts defining terms (usually narrowly) in order to avoid serious constitutional issues.

CONCLUSION

The avoidance canon has played a crucial role in many important Supreme Court cases, and undoubtedly will do so in the future, yet scholars have persistently criticized the legitimacy of the canon's influence on the Court's statutory interpretations.[361] The Court's understatement of the avoidance canon's influence only serves to underscore the undertheorized nature of the canon's structural and triggering elements,[362] as does the Court's misguided efforts to distinguish between the avoidance canon and clear statement rules.[363] The central flaw in the avoidance canon is clear. The Court's concept of ambiguity does not offer a neutral triggering mechanism for the canon because it depends on ideology rather than linguistic tests or useful definitions.[364] Solving the avoidance canon's deficiencies requires a more nuanced approach to language, including a broader notion of statutory meaning that focuses on the communicative meaning of a text rather than merely its literal meaning as well as recognition of the multiple ways in which a provision might be indeterminate.[365] In turn, this understanding of language offers a basis for reconceptualizing the

361 *See supra* note 2 (arguing that the Court has used the avoidance canon to "rewrite laws").

362 *See supra* notes 6–10 and accompanying text (describing the Court's view of the role of the avoidance canon).

363 *See supra* notes 104–09 and accompanying text (describing the Court's distinction between the avoidance canon and clear statement rules).

364 *See supra* Part III. (describing the connections between presupposition and statutory interpretation).

365 *See supra* Part IV.A. (describing communicative meaning).

avoidance canon's triggering element and the theory of how it fits into the structure of statutory interpretation.

The discussion of triggering and structural elements might seem abstract and theoretical, but changing these elements of the avoidance canon would be more than an academic exercise. Rather, doing so would change the manner in which the Court approaches statutory interpretation in avoidance canon cases and, consequently, the results in some of those cases. Consider the Court's problematic focus on literal meaning and rejection of implied meanings.[366] One consequence of this focus, exemplified by *Zadvydas* and other immigration detention cases, is a failure to recognize the inferences that are necessary to make the textual language sufficiently determinate to decide interpretive disputes. Changing the avoidance canon's trigger would reorient the interpretive focus from the ambiguity of some explicit term to a broader search for indeterminacy that would sanction judicial recognition of implicit language that is consistent with a statute's legislative design.[367] By reconsidering the avoidance canon's structural and triggering elements in this way, the Court can give the avoidance canon a more coherent foundation that would better legitimize the Court's decisions. Furthermore, examination of triggering and structural elements should not be limited to the avoidance canon. Other interpretive principles would undoubtedly benefit from reconsideration along the same lines.

366 *See supra* Part IV.B. (describing how implied understandings are a natural part of both legal and non-legal interpretation).

367 *See supra* notes 266–277 and accompanying text (exploring the complexities of triggering the avoidance canon in legal interpretation).