"AVOIDING" JUDICIAL ACTIVISM: THE SUPREME COURT'S UNCONVINCING EFFORTS TO RESTRICT THE SCOPE OF THE AVOIDANCE CANON

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The canon of constitutional avoidance is jurisprudentially important but poorly constructed. The Supreme Court frequently uses the canon in significant cases to justify second-best interpretations of statutes that avoid serious constitutional questions. Nevertheless, the trigger for the application of the avoidance canon, textual "ambiguity," has not been coherently developed by the Court and differs in important ways from ambiguity as linguists typically view it. In addition, the Court, in focusing on "ambiguity" as a precondition for the application of the avoidance canon, fails to recognize the different ways in which a statute might be indeterminate. Recently, the Court reaffirmed its conception of the avoidance canon in a case, Jennings v. Rodriguez,[1] *involving prolonged immigration detention. In* Rodriguez*, the Court focused on ambiguity to the exclusion of other types of linguistic indeterminacy and continued to defend an unduly narrow conception of ambiguity that rejects implicit limitations on the scopes of statutes. This Article argues that the* Rodriguez *case highlights the need for the Court to reassess the avoidance canon. By doing so, the Court can give the avoidance canon a more defensible foundation that is consistent with the ways in which language operates.*

INTRODUCTION

The Supreme Court decides many highly controversial cases, involving claims of constitutional violations, through creative statutory interpretations.[2] In many of these cases, the Court does this via the canon of

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1 138 S. Ct. 830 (2018).

2 *See, e.g.*, Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1276–78 (2016) (describing recent high-profile cases in which the Court has used the avoidance canon). The avoidance canon gives the Court a license to engage in creative statutory interpretation when serious constitutional issues are raised, but the Court sometimes uses

constitutional avoidance, which allows a reviewing court to avoid an interpretation of a statute that would raise a "serious doubt" about the constitutionality of the statute as long as some alternative interpretation is "fairly possible."[3] For courts, this is useful because it can legitimize interpretations that might otherwise be viewed as impermissibly activist.[4] Critics (including Justices in dissenting opinions) argue that the canon allows courts to "rewrite laws" in order to avoid definitively deciding constitutional questions.[5] Yet the Court typically frames the avoidance canon as having a modest effect on interpretations. The Court is careful to maintain that the application of the avoidance canon requires the statute to be "susceptible of more than one construction,"[6] and the interpretation avoiding the constitutional issue must be "fairly possible" or "plausible."[7] Thus, the Court insists that the avoidance canon "is a tool for choosing between competing plausible interpretations" of a provision[8] and "has no application in the absence of ambiguity."[9] The avoidance canon, according to the Court, therefore "does not supplant traditional modes of statutory interpretation"[10] and requires "ordinary textual analysis."[11]

The Court recently reinforced its view of the avoidance canon as a mere

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other interpretive principles to reach the same result. *See, e.g.*, Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2149–53 (2015) (describing a case in which the Court relied on federalism canons rather than the avoidance canon in order to justify a creative interpretation).

3 Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (internal quotation marks omitted) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). Some justices have offered alternatives to the "fairly possible" standard, such as Justice Breyer's argument that an alternative, clearly constitutional interpretation should be adopted if it can be done "without doing violence to the statutory language." *Rodriguez*, 138 S. Ct. at 869–70 (Breyer, J., dissenting).

4 *See, e.g.*, Fish, *supra* note 2, at 1275 (noting that the constitutional avoidance canon has been criticized as "unaccountable judicial lawmaking").

5 *Id.*; *see also Zadvydas*, 533 U.S. at 705 (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"); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 511 (1979) (Brennan, J., dissenting) (arguing that the Court had "substitute[d] amendment for construction to insert one more exception—for church-operated schools" in a statute that already contained multiple exceptions); Fish, *supra* note 2, at 1285 (indicating that under one understanding of the canon judges can "effectively change the meaning of the statute to something other than what Congress intended if doing so will avoid a constitutional problem" and referring to this as "rewriting avoidance" (internal quotation marks omitted)). Critics also argue that the avoidance canon promotes poor constitutional interpretation. *See* Katyal & Schmidt, *supra* note 2, at 2122 ("The avoidance canon enables—even demands—sloppy and cursory constitutional reasoning." (citation omitted)).

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

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

8 *Martinez*, 543 U.S. at 381.

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

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

11 *Martinez*, 543 U.S. at 385.

tie-breaking principle in *Jennings v. Rodriguez*,[12] a case involving a challenge to the constitutionality of extended detention of immigrants during the pendency of their immigration proceedings. In *Rodriguez*, the Court reaffirmed that "ambiguity" must be found before the avoidance canon can be applied.[13] The Court also seemed skeptical that reviewing courts can read limitations into statutes in order to avoid serious constitutional questions.[14] The decision is one of several recent cases in which the Court has offered an unsatisfactory explanation of the sort of indeterminacy that should trigger the avoidance canon. The decision is also noteworthy for its failure to acknowledge the Court's long history of interpretive creativity in immigration (and other) statutory interpretation cases involving constitutional challenges.[15]

This Article briefly describes the Court's attempts to distinguish the avoidance canon from so-called "clear statement rules" and argues that the Court's insistence that the avoidance canon cannot sanction judicial creation of implied provisions ignores many of the Court's own precedents.[16] This Article further argues that the Court should recognize the variety of ways in which legal texts may be indeterminate, since ambiguity is only one type of indeterminacy. In doing so, the Court should determine whether judicial recognition of implicit language is consistent with the legislative design of the statute.[17] By recognizing the variety of linguistic indeterminacies, and addressing the normative aspects of how the avoidance canon coheres with the judicial function, the Court can reframe the avoidance canon in a way that is consistent with its own precedents as well as scholarship on language.

I

JENNINGS V. RODRIGUEZ AND THE AVOIDANCE CANON'S REQUIREMENT

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12 138 S. Ct. 830.

13 *See id.* at 842–44 (focusing on the requirement of ambiguity and emphasizing the "clear language" of the relevant provisions).

14 *See id.* at 843 (noting that an earlier case involving an implicit limitation on immigration detention "represents a notably generous application of the constitutional-avoidance canon"); *id.* at 846 (indicating a reluctance to infer "time limits out of statutory silence").

15 *See generally* Fish, *supra* note 2, at 1275, 1296–99 (explaining how the Court uses the avoidance canon to adopt implausible interpretations); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 573–74 (1990) (explaining how the Court has used the avoidance canon in immigration law by engaging in statutory interpretations that have involved significant judicial creativity).

16 Scholars have cataloged a variety of clear statement rules, with some scholars listing the avoidance canon as one of the clear statement rules. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010) (identifying several clear statement rules, including the avoidance canon).

17 The term "legislative design" will be used throughout this Article and is meant to refer to the totality of contextual cues courts often consider when making sense of a provision, such as information from legislative history and related provisions.

OF AMBIGUITY

In *Rodriguez*, the Court considered a class-action lawsuit challenging the detention of certain immigrants during the course of their immigration proceedings. The class members had been detained for an average of one year, with many detained for significantly longer periods of time.[18] 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 but instead mandate detention in certain circumstances and also give the Attorney General the authority in certain circumstances to temporarily parole immigrants from detention.[19] The Court, applying the *expressio unius est exclusio alterius* canon,[20] reasoned that the express provision for parole implies that "there are no *other* circumstances under which aliens detained under [the relevant provisions] may be released."[21]

Part of the context for *Rodriguez* was the Court's earlier decision in *Zadvydas v. Davis*.[22] As opposed to *Rodriguez*, which involved immigrants detained during immigration proceedings, *Zadvydas* involved the detention of immigrants already ordered to be deported by immigration courts.[23] The government claimed it had authority under 8 U.S.C. § 1231(a)(6) to indefinitely detain immigrants who had been ordered to be deported but could not be transferred to other countries.[24] Section 1231(a)(6) provides as follows:

> An alien ordered removed who is inadmissible, removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy,] or 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 detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision ….[25]

Because the government's interpretation of the statute raised a serious constitutional issue by authorizing the government to indefinitely detain

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18 *Rodriguez*, 138 S. Ct. at 860 (Breyer, J., dissenting).

19 *See* 8 U.S.C. § 1225(b) (2012) (describing detention pending credible fear interviews and consideration of applications for asylum); *id.* § 1226(a) (authorizing discretionary detention pending a decision on removal); *id.* § 1226(c) (proscribing mandatory detention pending a decision on removal based on commission of certain crimes); *id.* § 1182(d)(5)(A) (vesting Attorney General with parole authority "for urgent humanitarian reasons or significant public benefit").

20 The *expressio unius* canon provides that "[w]hen a statute expresses something explicitly (usually in a list) anything not expressed explicitly does not fall within the statute." BRIAN G. SLOCUM, ORDINARY MEANING 182 (2015).

21 *Rodriguez*, 138 S. Ct. at 844.

22 533 U.S. 678 (2001).

23 *Id.* at 684–85.

24 *See id.* at 689 (noting the government's argument in its brief that the statute should be read as permitting indefinite detention).

25 8 U.S.C. § 1231(a)(6) (2012).

immigrants who are considered to have entered the country (whether legally or otherwise), the Court invoked the avoidance canon.[26] Despite "[t]he Government['s] argu[ment] that the statute means what it literally says," the Court "read an implicit limitation into the statute."[27] This limitation of a six-month period of detention unless there is a "significant likelihood of removal in the reasonably foreseeable future"[28] was more implied in law than in fact and could not be traced to the Congress that enacted § 1231(a)(6).[29] 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."[30]

Despite conceding that it was "read[ing] an implicit limitation into the statute," the Court in *Zadvydas* nevertheless attempted to identify a linguistic ambiguity in the language of § 1231(a)(6).[31] 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."[32] The Court in *Rodriguez* agreed that the identification of linguistic ambiguity 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) rendered § 1231(a)(6) "ambiguous."[33] The Court adopted a similar approach in *Clark v. Martinez*, a follow-up case to *Zadvydas*, which held that the implicit six-month limitation on detention in § 1231(a)(6) applied even to immigrants who are considered to have been stopped at the border and whose detention would not raise serious constitutional issues.[34] In *Martinez*, the Court emphasized the necessity of ambiguity to the avoidance canon, indicating that the canon is a "tool for choosing between competing plausible interpretations of a statutory text."[35]

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26 *See Zadvydas*, 553 U.S. at 689. The Court was careful to distinguish—for the purpose of the constitutional analysis—between immigrants who had entered the United States, such as the immigrants in the 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." (collecting citations)).

27 *Id.* at 689; *see also* Clark v. Martinez, 543 U.S. 371, 378 ("As the Court in *Zadvydas* recognized, the statute can be construed 'literally' to authorize indefinite detention . . . ." (quoting *Zadvydas*, 553 U.S. at 689)).

28 *Zadvydas*, 533 U.S. at 701.

29 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 81 and accompanying text.

30 *Zadvydas*, 533 U.S. at 689 (citing United States v. Witkovich, 353 U.S. 194, 195, 202 (1957)).

31 *Id.* at 689.

32 *Id.* at 697.

33 Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018) (internal quotation marks omitted).

34 Clark v. Martinez, 543 U.S. 371, 386–87 (2005).

35 *Id.* at 382.

Although *Zadvydas* involved both an implicit limitation and perceived linguistic ambiguity, the Court has framed the case, and more broadly the avoidance canon, as turning on the determination of linguistic ambiguity rather than the recognition of an implicit limitation on the scope of the relevant statute. In *Spector v. Norwegian Cruise Line Ltd.*,[36] 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).[37] The Court, in ruling that the clear statement rule did create 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.[38] 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."[39] Thus, in the Court's view, the avoidance canon resolves statutory ambiguity but does not "impl[y] limitations on otherwise unambiguous text."[40] *Martinez* and *Zadvydas* therefore "give full respect to the distinction between rules for resolving textual ambiguity and implied limitations on otherwise unambiguous text."[41]

Perhaps recognizing that the Court in *Zadvydas* did much more than merely resolve a linguistic ambiguity, the Court in *Rodriguez* claimed that "*Zadvydas* represents a notably generous application of the constitutional-avoidance canon."[42] The *Zadvydas* decision was not particularly noteworthy in that respect, however. 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 first identifying a linguistic ambiguity.[43] A good example of this occurred in *NLRB v. Catholic Bishop of*

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36 545 U.S. 119 (2005).

37 *See id.* at 122, 125; *see also* 42 U.S.C. §§ 12181–84 (2012).

38 *Spector*, 545 U.S. at 139 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring)).

39 *Id.* at 141.

40 *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.*

41 *Id.*

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

43 *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." (collecting citations)); *see also* Motomura, *supra* note 15, at 564–75, 590–93

Chicago,[44] where the National Labor Relations Board (NLRB) had interpreted its jurisdiction under the National Labor Relations Act[45] (NLRA) as giving it authority over schools that were "religiously associated."[46] 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.[47] 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.[48] Instead of framing its analysis in terms of whether it could identify linguistic ambiguity, the Court indicated that "the question we consider first is whether Congress intended the Board to have jurisdiction over teachers in church-operated schools."[49] In the view of the Court, neither the language of the statute nor its legislative history demonstrated any affirmative congressional intention to place church-operated schools within the NLRB's jurisdiction. Absent "a clear expression of Congress's intent to bring teachers in church-operated schools within the jurisdiction of the [NLRB]," the Court indicated that it would not construe the Act in a manner that would require resolving "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clause."[50]

As in *Zadvydas*, the Court in *Catholic Bishop* created an implicit limitation on the scope of a 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 explicitly considered the desired scope of the

(describing various cases where the Court engaged in creative statutory interpretations, including Jean v. Nelson, 472 U.S. 846 (1985), where the Court interpreted a silent immigration provision as barring any race or national origin discrimination).

44 440 U.S. 490 (1979).

45 29 U.S.C. §§ 151–69 (2012).

46 *Catholic Bishop*, 440 U.S. at 492–93 (internal quotation marks omitted) (quoting Roman Catholic Archdiocese of Balt., 216 N.L.R.B. 249, 250 (1975)).

47 *See id.* at 507. The Court also described the avoidance canon in terms that made it seem more like 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.

48 Section 152(2) provides: "The term 'employer' includes any person acting as an agent of an employer . . . but shall not include the United States . . . or any person subject to the Railway Labor Act . . . or any labor organization . . . ." 29 U.S.C. § 152(2) (2012).

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

50 *Catholic Bishop*, 440 U.S. at 507.

provision and whether any exceptions were warranted.[51] 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.

II
REASSESSING THE REQUIREMENT OF AMBIGUITY FOR APPLICATION OF THE AVOIDANCE CANON

Imposing an implicit limitation on the scope of a statute while claiming that the avoidance canon's function is to resolve linguistic ambiguity (as the Court did in *Zadvydas*) might seem like a flat contradiction, but there is a rationale that would resolve the seeming contradiction. Namely, if an interpretation would raise a serious constitutional question, perhaps a finding of linguistic ambiguity licenses the imposition of an implicit restriction on the reach of a statute. Thus, a finding that the term "may be detained" is ambiguous justified the Court in *Zadvydas* in recognizing the six-month limitation on detention.[52] The problem with this resolution of the Court's contradictory treatment of the avoidance canon is that ambiguity is a distinct concept from the sort of linguistic generality that would accommodate implicit language, and a requirement of ambiguity does not address the concerns that are raised when courts impose implicit restrictions on statutory language.

Merely identifying linguistic ambiguity is relatively simple considering that linguists frequently note that natural languages, including English, are rife with ambiguities.[53] Ambiguity is only one of several kinds of indeterminacy, however, even if courts typically use the term "ambiguity" to refer generically to disputes about linguistic meaning.[54] *Syntactic ambiguity* exists if an expression has two or more possible logical structures.[55] *Lexical ambiguity* exists if an expression has two or more unrelated lexical

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51 *See id.* at 511–12 (Brennan, J., dissenting) (arguing that the Court's holding inserts one more exception to the statute that Congress had considered and rejected). 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.

52 *See supra* notes 22–33 and accompanying text (describing the *Zadvydas* decision).

53 *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.").

54 *See* Brian G. Slocum, *Replacing the Flawed* Chevron *Standard*, 60 WM. & MARY L. REV. 195, 195 (2018) (arguing that courts often "treat ambiguity as an umbrella concept that encompasses distinct forms of linguistic indeterminacy such as vagueness or generality").

55 *See* David Lanius, Strategic Indeterminacy in the Law 14 (Apr. 28, 2017) (unpublished Ph.D. dissertation, Humboldt University of Berlin) (on file with New York University Law Review).

meanings.[56] In addition to ambiguity, three other basic categories are typically used to identify and describe the causes of semantic indeterminacy: polysemy, semantic vagueness, and generality.

In contrast to a lexically ambiguous expression, a *polysemous* expression has two or more (related) senses of one lexical meaning.[57] The distinction between lexical ambiguity and polysemy concerns the "relatedness of [the] meanings."[58] Polysemy, which is a feature of most natural language expressions, involves meanings that are more closely related, although the distinction operates on a continuum rather than a bright line.[59] "Bank" is often used as an example of a lexically ambiguous term because it can mean either a financial institution or the slopes bordering a river. Thus, the term "bank" can be used to express two unrelated words which happen to look and sound alike. [60] "Bank" is also polysemous because it can mean a financial institution or the building where a financial institution offers services.[61]

The other two categories—semantic vagueness and generality—account for indeterminacy regarding an expression's single meaning. In contrast to being lexically ambiguous or polysemous, an expression is *semantically vague* if its meaning allows for borderline cases.[62] For instance, a gradable adjective such as "tall," viewed in its context of usage, has a core of settled meaning, but there will be borderline cases where its applicability is debatable and can be decided either way (often arbitrarily).[63] This is akin to H.L.A. Hart's famous (within the law) "core of settled meaning" and "penumbra of debatable cases" framework.[64] When borderline cases are possible, it is often said that the expression is "fuzzy."[65] Expressions such as "many friends" or "about 20" are fuzzy because the phrases may have an invariant core (for example, 100,000 is not "about 20" but 19.999 is) but an

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56 *See id.* at 16.

57 *See id.* at 17–18.

58 *See id.* at 18.

59 *See id.*

60 *See Polysemy Is Like Homonomy, Only Different*, SCI. BLOGS (Nov. 3, 2006), http://scienceblogs.com/mixingmemory/2006/11/03/polysemy-is-like-homonomy-only/ (using "bank" as an example of a polysemous word).

61 *Id.*

62 *See* Lanius, *supra* note 55, at 21.

63 *See* DIANA RAFFMAN, UNRULY WORDS: A STUDY OF VAGUE LANGUAGE 108 (2014) (claiming that "vagueness is a form of arbitrariness").

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

65 M. LYNNE MURPHY & ANU KOSKELA, KEY TERMS IN SEMANTICS 72 (2010). The term "fuzziness" is used in linguistics and philosophy of language to describe the boundaries of categories (such as that expressed by the word "vehicle") that are "ill-defined, rather than sharp." *Id.*

indistinct boundary that often varies depending on the context.[66]

The last category is *generality*. While generality also addresses the indeterminacy of an expression's single meaning, generality is distinct from all of the above forms of indeterminacy. An expression is *general* if its meaning is a genus of more than one species.[67] 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."[68] As these examples suggest, the more general the expression is, the less informative the utterance becomes (and vice versa). Yet, whether generality causes indeterminacy depends on an expression's context of use (which includes the purpose of the usage).[69] 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).[70] Thus, generality can be viewed from a broader perspective than a focus on acontextual word meaning and can be seen as a kind of *underdeterminacy*. 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."[71] In contrast, *underspecificity* involves situations where it is undetermined which of several determinate meanings were intended.[72] 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).[73] Underdetermination, however, does not suppose that there is a determinate meaning to specify. Instead, the meaning is yet to be fully fleshed out and will never be fully fleshed out.

As the above paragraph suggests, the more general (i.e.,

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66 *See* Qiao Zhang, *Fuzziness—Vagueness—Generality—Ambiguity*, 29 J. PRAGMATICS 13, 14–15 (1998) (giving several examples of "fuzziness"); *see also* Grace Qiao Zhang, *Fuzziness and Relevance Theory*, 22 WAIGUO YUYAN WENXUE (外国语言文学) [FOREIGN LANGUAGE & LITERATURE STUD.] 73, 74–75 (2005) (China) (noting that fuzzy language "tends to be clear-cut as far as the core meaning (sense) is concerned, but blurred around peripheral meaning").

67 *See* Brendan S. Gillon, *Ambiguity, Generality, and Indeterminacy: Tests and Definitions*, 85 SYNTHESE 391, 394–95 (1990) (defining "generality" and noting that it is distinct from ambiguity).

68 *Id.* at 394.

69 *See id.* at 394–95 (noting the difference between generality and indeterminacy).

70 For example, the paragraph in which the sentence is contained might focus solely on a blue car or a particular mother.

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

72 *See* Una Stojnić et al., *Distinguishing Ambiguity from Underspecificity*, *in* PRAGMATICS, TRUTH AND UNDERSPECIFICATION: TOWARDS AN ATLAS OF MEANING 149, 149–50 (Ken Turner & Laurence Horn eds., 2018) (explaining Jay Atlas's doctrine of underspecificity).

73 *See* Slocum, *supra* note 54, at 213–14 (describing the word "bank" as having different meanings depending on context). Of course, sentential context often can help specify the correct meaning.

underdetermined) an expression is, the less informative the utterance becomes (and vice versa). For example, 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. If required to provide guidance, the expression will require significant nonlanguage-based precisification. Significantly, with a legal text, underdeterminacy requires substantial nonlinguistic judicial (or agency) judgment to sufficiently precisify the concepts to satisfy the needs of the law.[74]

The distinction between ambiguity and underdeterminacy serves to help illustrate the flaws of the Court's approach in *Zadvydas* and *Rodriguez*. Recall that the Court in *Zadvydas* justified application of the avoidance canon on the basis of the ambiguity of the verb "may" in the statutory phrase "may be detained."[75] Although the Court's reasoning was not explicit, presumably the Court was contrasting "may" with an auxiliary verb such as "shall," which would mandate continued detention.[76] 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)–(2), on the basis that § 1231(a)(6) uses the ambiguous "may," while the other two provisions use the "unequivocal[] mandate" of "'shall' be detained."[77] The problem with such a focus is that neither a permissive ("may") nor a mandatory ("shall") authorization to detain addresses the temporal issue of *when* the authorization terminates.[78] The distinction between a grant of authorization in permissive or mandatory terms is therefore tangential to the temporal domain of the authorization, which was the indeterminacy that should have been the focus of the Court's analysis. Thus, contrary to the Court's assertions in both *Zadvydas* and *Rodriguez*, the language in § 1231(a)(6) was

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

75 Zadvydas v. Davis, 533 U.S. 678, 682, 697 (2001).

76 The Court focused on the ambiguity of "may," but the example the Court provided of a statute providing a "clearer" authorization for long-term detention also used "may" rather than "shall." The difference was that the "clearer" statute also contained language providing that the Attorney General "must review the detention determination every six months." *Id.* at 697. Thus, despite its unfortunate focus on the word "may," and failure to explicate the key difference between § 1231(a)(6) and the "clearer" statute, the Court at least hinted that the length of detention authorized was the key indeterminacy at issue (although the "clearer" statute similarly did not explicitly authorize indefinite detention).

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

78 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.

not ambiguous but, rather, underdetermined regarding the temporal domain.

The Court in *Zadvydas*, as well as *Rodriguez*, should have focused on 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. For instance, the text of § 1231(a)(6) contains a temporal prepositional phrase, "may be detained beyond the removal period."[79] 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 subclasses address the question of *how long*. Instead of exploring the possibility of an implied contextual restriction on the temporal domain of "beyond," and thus resolving the relevant underdeterminacy, the Court in *Zadvydas* failed to persuasively identify uncertainty regarding the scope of the detention authority and provided a poor basis for the application of the avoidance canon by focusing instead on the irrelevant fact that "may" is permissive.

Once indeterminacy is properly identified, its judicial resolution through the avoidance canon becomes, at least partly, a normative issue. In cases of underdeterminacy, the normative issue concerns the judicial construction of an implied provision, as occurred in *Catholic Bishop* and other cases involving the avoidance canon. Judges must decide whether it is consistent with the judicial function to create implied provisions that, at least in some cases, cannot be convincingly traced to legislative intent. Such efforts are more properly seen as a kind of delegation of lawmaking authority from Congress to judges to avoid serious constitutional issues rather than as a part of a genuine effort to implement legislative intent. In *Zadvydas*, for instance, the Court's imposition of an implied six-month limit on detention was likely not in line with the intended meaning of § 1231(a)(6), to the extent that the term "intent" can be meaningfully applied to situations Congress might not have even considered.[80] The Court pointed to the government's brief in a 1957 case, which cited a congressional statement found in legislative history from over forty years prior to the enactment of § 1231(a)(6), for the proposition that Congress doubted the constitutionality of detention for more than six months.[81] That is pretty thin evidence, however,

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79 8 U.S.C. § 1231(a)(6) (2012).

80 Indeed, one of the primary complaints in 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.'" 533 U.S. at 707 (Kennedy, J., dissenting) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994)).

81 *See id.* at 701 (majority opinion) ("We do have reason to believe, however, that Congress

on which to decide that the legislative intent was for § 1231(a)(6) to include the six-month restriction. In imposing the more determinate restriction of six-months, rather than the more general requirement of "reasonably foreseeable," the Court had to go beyond the meaning communicated by the text.[82] 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."[83]

Similarly, instead of focusing on mandatory versus permissive language (the "may" versus the "shall" issue), or whether there was a "statutory foundation"[84] in the sense that the provisions may "plausibly be read to contain an implicit 6-month limit,"[85] the Court in *Rodriguez* should have recognized that the provisions are underdetermined regarding the length of detention. None of the provisions, after all, explicitly mandate detention until the conclusion of immigration proceedings.[86] The recognition of underdeterminacy does not mean, however, that some implied provision is appropriate, even if courts conclude that creating implied provisions is consistent with the judicial function when the avoidance canon is applicable. Rather, the reviewing court should determine whether an implied provision is consistent with the legislative design of the statute. Thus, even if the Court in *Rodriguez* had framed the linguistic issues properly, it might still be the case that, in contrast to the situation in *Zadvydas*, an implied limitation was inconsistent with the various statutory provisions that needed to be considered. Such a conclusion, even if contestable, would at least be based on an honest account of the linguistic issues raised by the relevant provisions.

CONCLUSION

The Court has on multiple occasions, including most recently in *Rodriguez*, emphasized that the avoidance canon is meant to resolve linguistic ambiguity rather than impose implicit limitations on otherwise unambiguous texts. However, the Court has a history of creating implicit provisions in order to avoid serious constitutional issues. The *Rodriguez* Court claimed that the respondents had performed no linguistic analysis of

previously doubted the constitutionality of detention for more than six months.") (citing Brief for United States at 9–10, United States v. Witkovich, 353 U.S. 194 (1957) (No. 295)); Brief for United States, *supra*, at 26 (citing S. REP. NO. 81-2239, at 8 (1950) for the proposition that "doubts hav[e] been expressed as to the constitutionality of detention [for an indefinite period]").

82 *Zadvydas*, 533 U.S. at 699. The Court's holding was that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.*

83 *Id.* at 701.

84 Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018).

85 *Id.* at 843.

86 The Court noted that the provisions do not explicitly limit the length of authorized detention, *see id.* at 846, but silence as to the length of detention is distinct from language that would explicitly grant authorization to detain for a certain period of time.

the relevant statutes,[87] but this objection fails to appreciate the variety of possible indeterminacies. If underdeterminacy is a type of indeterminacy that warrants application of the avoidance canon, the interpretive analysis should focus not on whether linguistic ambiguity exists (which is a separate type of indeterminacy) but whether judicial recognition of some implicit language is consistent with the legislative design of the statute. Thus, it is legitimate to reject an implicit limitation on the scope of a provision because the limitation is inconsistent with the legislative design, but not because a litigant cannot identify a linguistic ambiguity.

Furthermore, the Court should reconsider whether the distinction it has made between the avoidance canon and clear statement rules is coherent. The rationale the Court has advanced for the avoidance canon is similar to the rationale it has given for clear statement rules. The Court has described the avoidance canon as "resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[88] Similarly, a clear statement rule creates an "implied limitation" to "ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation."[89] Thus, both the avoidance canon and clear statement rules rest on similar generalized theories about legislative intent that cut across particular statutes. By considering the normative aspects of how the avoidance canon coheres with the judicial function and its relationship to clear statement rules, along with recognition of the various kinds of linguistic indeterminacies, the Court can give the avoidance canon a more coherent foundation.

87 *Id.* at 843 (arguing that "respondents do not engage in any analysis of the text").

88 Clark v. Martinez, 543 U.S. 371, 381 (2005).

89 Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005).