Conversational Implicatures and Legal Texts

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Abstract. Legal texts are often given interpretations that deviate from their literal meanings. While legal concerns often motivate these interpretations, others can be traced to linguistic phenomena. This paper argues that systematicities of language usage, captured by certain theories of conversational implicature, can sometimes explain why the meanings given to legal texts by judges differ from the literal meanings of the texts. Paul Grice's account of conversational implicature is controversial, and scholars have offered a variety of ways to conceptualize implicatures and Grice's maxims of conversation. Approaches that emphasize the systematic nature of implicatures can provide explanatory accounts of the gap between literal meaning and the meaning communicated in the text. For example, a theory of scalar implicature, a type of generalized conversational implicature, can account for the application of the interpretive principle known as *ejusdem generis*, which narrows the scope of "catch-all" clauses located at the end of lists of items. Despite the availability of such theories, some scholars have argued that conversational implicatures are not applicable to legislation. The arguments, based primarily on the uniqueness of the legislative context and its noncooperative nature, though, do not establish the inapplicability of conversational implicatures to legislation.

1. Introduction

Natural language is full of nonliteral meanings, such as metaphors, idioms, slang, and polite talk. In such situations, the literal meaning of the given expression will differ from its understood meaning. In most conversational contexts, a gap between literal and understood meaning is uncontroversial and expected. In contrast, legal texts do not contain many of the kinds of nonliteral meanings found in conversational contexts. Nevertheless, the literal meaning of a legal text will often differ from the meaning given to it by a court. In fact, a marked feature of many of the interpretive principles created and used by courts is that they serve to restrict the domains of legal texts (i.e., their scope of application), thereby creating a gap between literal meaning and the meaning given to the text by the court (i.e., its legal meaning) (Slocum 2008). Such an assertion should not be surprising to commentators, as the tendency of courts to give texts meanings based on legal considerations has been well documented. Many of these interpretive principles have been categorized by scholars as substantive canons of interpretation. Substantive

canons have been described as "essentially presumptions about statutory meaning based upon substantive principles or policies drawn from the common law, other statutes, or the Constitution" (Eskridge and Frickey 1995, 634). They have also been referred to as "normative canons," amongst other terms (Bradley 1998, 507). For instance, pursuant to the presumption against retroactivity, a clear textual statement is required in order for a statute to have retroactive application.[1] Similarly, pursuant to the presumption against extraterritoriality, a clear textual statement is required in order for a statute to have extraterritorial application.[2]

A more controversial claim, which this paper will make, is that at times linguistic phenomena, which exist independently of any legal system and either are directly relevant to the interpretation of legal texts or provide linguistic justification for some interpretive principle used by courts, create a distinction between the literal meaning of the relevant text and the meaning communicated by the text.[3] Undoubtedly, there are various ways to define *literal meaning*, just as there are various ways to define most other linguistic terms. Talmage (1994) indicates that literal meaning is commonly identified with the conventional meaning of language. For the purposes of this paper, the term is used in a similar way that is essentially synonymous with the linguistic meaning of the relevant sentence that is conventional and context-independent.[4] Incidentally, this definition of *literal meaning* has the additional advantage of being consistent with how courts use the term, as they often employ dictionary definitions without consideration of context (Solan 2010).

An important aspect of the communicated meaning of a text is the basic principle, so commonly stated by courts as to become boilerplate, that language in a legal text should be interpreted according to its "ordinary meaning." The ordinary meaning doctrine stands for the concept that language in legal texts should be interpreted on the basis of general principles of language usage that apply equally outside the law (Slocum 2014). Legal texts are widely viewed as a form of communication (McCubbins and Rodriguez 2011; Van Schooten 2007). Ideally, assuming that successful communication is the goal in most cases, these texts should be understood by different people in the same way. One aspect of this broad requirement is that legal texts should be understandable to the general public, as well as to judges and sophisticated practitioners. As Cappelen (2007, 19) explains, "[w]hen

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[1] See *Landgraf v. USI Film Products*, 511 U.S. 244, 272–73 (1994), stating that there is "a presumption against retroactivity [unless] Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."

[2] See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), stating that it is a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."

[3] The "meaning communicated by the text" should be taken as 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. Thus, the focus is on external determinants of meaning rather than internal intentions. Courts purport to interpret textual language on the basis of external determinants rather than internal intentions.

[4] This characterization of literal meaning is taken from Recanati 2004. The characterization makes literal meaning equivalent to "sentence meaning," plus the assignment of references to explicitly context-dependent elements, such as indexicals.

we articulate rules, directives, laws and other action-guiding instructions, we assume that people, variously situated, can grasp that content in the same way."

The goal of the ordinary meaning doctrine is, of course, often not realized, as legal texts are often not understandable to the general public (or even to experts). Yet the judicially avowed goal of interpreting language in legal texts according to its ordinary meaning would seem to require that absent some reason for deviation, such as words with technical or special legal meanings, the language used in legal texts should be viewed as corresponding with that used in nonlegal communications (Mellinkoff 1963). To be sure, it is unlikely that the meaning of a provision in a legal text is often determined without consideration of the legal context in which it appears, and without concern for the legal consequences of a particular interpretation. Even when the legal context is not considered explicitly, it would likely at least be considered implicitly by the legal interpreter in virtue of the interpreter's training and motivations. Even so, an interpretation motivated by an interpretive principle that is specific to law and created in order to promote or protect legal concerns is conceptually distinct from a linguistic phenomenon that exists outside of any legal context.

Section 2 of this paper discusses a longstanding principle of interpretation used by courts, the *ejusdem generis* canon, which when applied creates a gap between the literal meaning of the relevant provision and the meaning given to the text by the court. Sections 3 and 4 explain that instead of a classical Gricean analysis, which would be deficient in important ways, the *ejusdem generis* canon can be justified under a generalized conversational implicature, scalar implicature theory that emphasizes the systematic nature of language. Section 5 argues that the *ejusdem generis* canon can be said to be motivated by linguistic rather than purely legal concerns, although courts are generally motivated to limit the scope of statutes. Finally, Sections 6–8 reject the arguments made by various prominent scholars that question whether conversational implicatures are applicable to legislation.

2. The *Ejusdem Generis* Canon of Interpretation

For various reasons, it is useful to distinguish between those interpretive principles that are created by judges to address issues particular to the legal system and those that are based on linguistic phenomena that apply outside of any legal context. For one, the justification for a judge-created interpretive rule that is based on concerns particular to the legal system must be different from the justification required for an interpretive rule that reflects some linguistic phenomenon that applies outside of any legal context. Also, there may be interpretive principles that address no issues particular to the legal system and are based on erroneous views about language usage. In such a situation, there may be no justification for their continued use. Conversely, if some linguistic phenomenon is identified that applies outside of any legal context, courts should consider whether it is relevant to the interpretation of legal texts.

Consider one paradigmatic interpretive principle, the *ejusdem generis* canon, which is applicable to a variety of legal texts. The *ejusdem generis* canon is known as a "textual canon," a term that designates a category of interpretive principles which "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" (Eskridge and Frickey 1995, 634). One description of the *ejusdem generis* canon provides that "if a series of more than two items ends with a catch-all term that is broader than the category into which the proceeding items fall but which those items do not exhaust, the catch-all term is presumably intended to be no broader than that category" (Dickerson 1975, 234). The motivation for the *ejusdem generis* canon is straightforward and intuitive. Simply put, legal drafters often use general terms at the end of lists of specifics that intuitively must be narrower in meaning than the literal meaning of the general term would suggest. Any indeterminacy associated with the canon relates not to whether there is typically a gap between the literal meaning and the communicative meaning of the general term, but instead the multiple ways in which the general catch-all term (usually an "other" phrase) can be given a limited meaning.

It is not difficult to conceive of examples where application of the *ejusdem generis* principle seems intuitively correct and part of the ordinary meaning of the expression. For example, a law concerning the regulation of

(1) gin, bourbon, vodka, rum, and other beverages

would not likely (absent some unusual context) be interpreted as including Coke (the soda), even though it is a "beverage." Due to the predilection that legal drafters have for general, "other" phrases following lists of specific items, courts frequently apply the *ejusdem generis* canon in order to narrow the meaning of the "other" phrase. By doing so, they create a gap between literal meaning and legal meaning. Consider, for instance, the following provision that gave the Illinois Department of Conservation the power to sell

(2) gravel, sand, earth, or other material

from state-owned land.[5] The Sierra Club filed a lawsuit seeking to enjoin the department from inviting bids for logging a portion of Pere Marquette State Park. One of the interpretive issues in the case involved the scope of "other material," as indicated in (2). A literal interpretation would give an extremely broad scope to the phrase, including anything that might be deemed a "material." The Supreme Court of Illinois, though, applied the *ejusdem generis* canon and held that the provision did not include commercial timber harvested on state-owned land (see ibid.). The court stated that "other materials" "can only be interpreted to include materials of the same general type" as those listed (i.e., gravel, sand, and earth).[6] The court reasoned that it would "both defy common sense and render the other statutes on timber sales surplusage" to include timber within the provision (see ibid., 127–8.).

3. Conversational Implicatures and Scalar Implicatures

Notwithstanding the assertion that a textual canon such as *ejusdem generis* represents a principle of language usage, some theory must be offered as to how the

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[5] See *Sierra Club v. Kenney*, 88Ill.2d. 110, 127 (Ill. 1981).
[6] Ibid.

application of a textual canon results in a meaning that is the communicative meaning of the sentence at issue, as opposed to some external, artificial constraint on meaning. One possibility is that Grice's theory of "conversational implicature" provides justification for concluding that it is an aspect of the ordinary meaning of the relevant provision. Grice's conversational implicatures are oriented towards everyday conversation where people often convey information that goes beyond the literal meaning of the language used. Grice distinguished between "what is said," which he understood as being closely related to the conventional meaning of the words uttered, and what is "conversationally implicated," which can be inferred from the fact that an utterance has been made in context. What is conversationally implicated is not coded but, rather, is inferred on the basis of assumptions concerning the Cooperative Principle and its constituent maxims of conversation, which describe how people interact with each other. The *Cooperative Principle* is the following: "Make your contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged" (Grice 1989, 26). The Cooperative Principle works in both directions, in the sense that speakers observe it and listeners assume that speakers are observing it.

In fleshing out the Cooperative Principle, Grice proposed four maxims of conversation, which describe specific rational principles observed by people who obey the Cooperative Principle. There is a maxim of quality ("Try to make your contribution one that is true"), a maxim of relation ("Be relevant"), a maxim of quantity ("Make your contribution as informative as is required (for the current purposes of the exchange)" and "Do not make your contribution more informative than is required"), and various maxims of manner ("Be perspicuous") (ibid., 26–7). The maxims enable effective communication and are a way of explaining the link between utterances and what is understood from them. Conversational implicatures arise on the basis that the maxims are being preserved. A conversational implicature is defined by Grice as follows:

A man who, by (in, when) saying (or making as if to say) that *p* has implicated that *q*, may be said to have conversationally implicated that *q*, provided that (1) he is presumed to be observing the conversational maxims, or at least the Cooperative Principle; (2) the supposition that he is aware that, or thinks that, *q* is required in order to make his saying or making as if to say *p* (or doing so in those terms) consistent with this presumption; and (3) the speaker thinks (and would expect the hearer to think that the speaker thinks) that it is within the competence of the hearer to work out, or grasp intuitively, that the supposition mentioned in (2) is required. (Grice 1989, 30–1)

Levinson (2000, 15) explains that, amongst other characteristics, conversational implicatures are defeasible (i.e., cancellable), calculable (i.e., "the more or less transparent derivation of the inference from premises that include the assumption of rational conversational activity"), nonconventional (i.e., "the noncoded nature of the inferences and their parasitic dependence on what is coded"), and reinforcable (i.e., "it is often possible to add explicitly what is anyway implicated with less sense of redundancy than would be the case if one repeated the coded content").

Although perhaps useful when reasoning at a high level of abstraction, by themselves Grice's maxims are deficient when used to account for linguistic phenomena. In order to account for textual canons as part of the ordinary meaning of a given provision, a more systematic approach to language is required. Traditionally,

implicatures have been considered to be a wholly pragmatic phenomenon (Chierchia, Fox, and Spector 2012).[7] On the classical Gricean view, conversational implicatures, including scalar implicatures, are derived on the assumption that the speaker is trying to be cooperative. Since Grice, various accounts have been offered that provide more systematic analyses of the linguistic phenomena that motivated Grice's conversational implicatures. One aspect of this systematicity is the distinction between "particularized conversational implicatures" (PCIs) and "generalized conversational implicatures" (GCIs). Levinson describes the distinction between PCIs and GCIs as follows:

a. An implicature *i* from utterance *U* is *particularized* if and only if *U* implicates *i* only by virtue of specific contextual assumptions that would not invariably or even normally obtain.
b. An implicature *i* is *generalized* if and only if *U* implicates *i* *unless* there are unusual specific contextual assumptions that defeat it. (Levinson 2000, 16)

Levinson (ibid., 22) views the application of GCIs as constituting preferred or default interpretations. In explaining his view of GCIs, Levinson distinguishes between sentence meaning and speaker meaning (or utterance-token meaning), neither one of which captures the features of GCIs. Sentence meaning is conventional and context-independent (and as such, it cannot capture the features of GCIs). In contrast, speaker meaning is a matter of the "actual nonce or once-off inferences made in actual contexts by actual recipients with all of their rich particularities" (ibid.). The speaker-meaning level is inadequate, though, because it underestimates the regularity, recurrence, and systematicity of many kinds of pragmatic inferences. Instead, a third-level "utterance-type meaning" is required, located between sentence meaning and speaker meaning. The third level accounts for GCIs and is based not on direct computations about speaker intentions but rather on general expectations about how language is normally used. At the utterance-type level, Levinson views the systematicity of inference as being deeply interconnected with linguistic structure and meaning, making distinctions between semantic theory and pragmatics problematic.

   Levinson's (ibid., 24) view of GCIs provides a generative theory of idiomaticity that consists of a set of principles that guide "the choice of the right expression to suggest a specific interpretation" and that also offer a theory that will account for preferred (or default) interpretations. The theory focuses on the combination of utterance-form and content that triggers the inferences. In Levinson's (ibid., 29) view, inference is cheap and articulation expensive, and thus the design requirements are for a system that maximizes inference. Further, linguistic coding is to be thought of less like definitive content and more like interpretive clue. Levinson sets up his theory through the following hypothetical. One is to assume that there is a world consisting of a set of cubes, cones, and pyramids of different colors. The

[7] A long-standing view is that semantics accounts for linguistic phenomena by relating, via the rules of the language and abstracting away from specific contexts, linguistic expressions to the world objects to which they refer (Ariel 2010). In contrast to semantics, pragmatics is not compositional, accounts for linguistic phenomena by reference to the language user (producer or interpreter), and involves inferential processes (ibid.). Pragmatics is concerned with whatever information is relevant to understanding an utterance, even if such information is not reflected in the syntactic properties of the sentence.

Table 1 Levinson's Heuristics

Heuristic 1 (Q) What isn't said, isn't.	*There's a blue pyramid on the red cube.* **Licensed inferences**: There is not a cone on the red cube. There is not a red pyramid on the red cube.
Heuristic 2 (I) What is simply described is stereotypically exemplified.	*The blue pyramid is on the red cube.* **Licensed inferences (amongst others)**: The pyramid is a stereotypical one, on a square, rather than, e.g., a hexagonal base. The pyramid is directly supported by the cube (e.g., there is no intervening slab).
Heuristic 3 (M) What's said in an abnormal way isn't normal. OR Marked message indicates marked situation.	*The blue cuboid block is supported by the red cube.* **Licensed inferences**: The blue block is not, strictly, a cube. The blue block is not directly or centrally or stably supported by the red cube.

italicized sentences in the boxes in the right-hand column represent utterances. Below the italicized sentences are licensed inferences corresponding to the heuristic in the box in the left-hand column (Levinson 2000).

In Levinson's view, Heuristic 1 is related to Grice's first Maxim of Quality: Make your contribution as informative as is required. This heuristic depends crucially on clearly established salient contrasts. The reason is that if the heuristic were unrestricted, whatever one did not specify would not be the case, and such a powerful heuristic would inhibit one from saying anything in fear of having to exhaustively list everything that is the case. Heuristic 2 is, in Levinson's view, extremely powerful because it allows an interpreter to bring background knowledge about a domain to bear on a rich interpretation of a minimal description. In turn, Heuristic 3 is complementary to Heuristic 2. Heuristic 3 allows the communicator to cancel the assumptions that would otherwise follow from Heuristic 2's assumption that a normal description indicates a normal situation. A simple description can be assumed to be stereotypically exemplified, and thus what is described in a marked or unusual way should be assumed to contrast with that stereotypical or normal exemplification.

Heuristic 1 describes how scalar implicatures are conceived. Consider the utterance

(3) Some of the students did well.

The literal meaning of (3) is that some, and perhaps all, of the students did well. In contrast, the intuitive interpretation, of course, is that not all of the students did well. The latter interpretation can be based on the theory of a scalar implicature, the central notion of which is a contrast set, or linguistic expressions in salient contrast, which differ in informativeness. The heuristic thus depends crucially on a restriction to a set of salient alternatives. Relevant to the interpretation of (3), there is a scalar contrast set <some, all>, such that saying (3) implicates the rationale that the speaker would have chosen the stronger

alternative if she was in a position to do so. Thus, for sets of alternatives, use of one (especially a weaker) implicates rejection of another (especially an otherwise compatible stronger alternative).

In Levinson's (2000, 41) view, a scalar implicature is metalinguistic in the sense that it can only be recovered by reference to what else might have been said but was not. Other systematic theories of scalar implicatures have been offered. Regardless of the specific theory advocated, the various positions all follow Horn's (1972; 1989) proposal to some extent, which focuses on the principle that scalar implicatures come about through a constrained set of relevant alternatives. In typical cases, as illustrated above in Levinson's example, they are lexically constrained by items of the same category whose entailments line them up in a scale of increasing informativeness. Examples of Horn's scales (Horn 1972) are the following:

Table 2 Horn's Scales

The positive quantifiers	some, many, most, all
The negative quantifiers	not all, few, none
Numerals	one, two, three, . . .
Modals	can, must
Sentential connectives	and, or
Gradable adjectives	warm, hot/cold, freezing, etc.

The scales are characterized by the increasing strength of the items going from left to right. If, for example, all of the students did well, then "most," "many," and "some" of them did. The process for the other scales works similarly.

While GCIs are the default mode of reasoning, they are defeasible and can be overcome by the addition of further premises. Thus the assertion in (3) can be overcome through the addition of a second sentence:

(4) In fact, *all* of the students did well.

Further, and importantly to the *ejusdem generis* canon, Chierchia, Fox, and Spector (2012, 2303) argue that "Horn's suggestions can be extended to other seemingly more volatile/ephemeral scales." The authors consider the following example:

(5) *a*: Did John mail his check?
    b: He wrote it.

The suggested interpretation is that *b* has conveyed that John did not mail the check. The scale considered by the interpreter would be something like <write the check, mail the check>. The authors argue that it is crucial that the relevant options are not *mailing* vs. *not mailing*, or *mailing* vs. *stealing*, for otherwise we would only derive ignorance implicatures (i.e., the speaker does not know which is the case). The key point is that the notion of relevance used in implicature calculation is context-dependent but constrained through the lexicon (certain classes of words form lexical scales) and through a monotonicity constraint (scales cannot simultaneously include upwards and downwards entailing elements).

4. The *Ejusdem Generis* Canon and Scalar Implicatures

The recent work on scalar implicatures provides a way of conceptualizing the role of the *ejusdem generis* canon. Instead of trying to understand the rationale of the canon through consideration of the vague Gricean maxims, which do not provide any particular insight as to why the legislature did not provide a more specific category instead of a catch-all, the notion of the scalar implicature should be used. Importantly, considering scalar implicatures to be a systematic aspect of language usage justifies the relevance of GCIs to legal texts. It also acknowledges the fundamental differences between spoken and written language. Considerations that depend on the dynamics of oral conversations are not necessarily relevant to the interpretation of texts, especially legal texts. Further, various scholars have explored how the legislative drafting process does not follow the assumptions of a cooperative oral exchange, and especially does not adhere to the maxims of quantity or manner. For instance, legal texts are often drafted with intentional vagueness or ambiguity, and legislatures generally do not draft with the level of informativeness that legal interpreters desire. Partly, this is due to the impossibility of predicting the range of factual scenarios to which the statute will need to be applied. Often compounding the problem is the significant gap of time between when a statute is drafted and when it will be interpreted. Focusing on the systematicities of language helps avoid these difficulties. The systematic nature of GCIs and the other insights about language made by Levinson and others (some of whom do not view all conversational implicatures as inferences) indicates that the generalities of language identified by these scholars should apply to both oral conversations and written texts.

Applying the concept of scalar implicatures thus provides a way of considering the *ejusdem generis* canon. As explained above, the *ejusdem generis* canon is based on salient contrasts. A generic scale, as considered by a drafter of a legal text, might look as follows: <specific list, list + 'other' clause, general term>. For example, a prohibition might be phrased as a specific list, like the following

(6) No dogs, cats, or birds allowed.

In (6), the scope of the provision is constrained and does not allow (at least explicitly) for prohibitions outside of "dogs," "cats," or "birds."

Suppose, though, that the drafter believes that "dogs," "cats," and "birds" are the known and primary targets of the prohibition but that other, similar targets exist, even if they cannot all be known at the time of drafting. The drafter might then redraft (6) as follows:

(7) No dogs, cats, birds, or other animals allowed.

Compared to (6), (7) is a stronger statement. In addition to "dogs," "cats," and "birds," "other animals" are prohibited. Of course, the literal meaning of (7) is broad, and can be said to include all animals, but its ordinary meaning is narrower. This is illustrated by the option on the far right of the scale, as illustrated below in (8).

Suppose that instead of (6) or (7) the drafter has the following prohibition:

(8) No animals allowed.

The scope of the literal meaning of (7) and (8) is the same. Both would seem to prohibit all animals, and (7) would seem to include unnecessary surplusage (i.e., "dogs, cats, birds"). When considering scalar implicatures, though, the ordinary meanings of (7) and (8) may differ. While (7) has a list of specifics followed by an "other" clause, (8) has a general prohibition. In comparison to (6) and (7), (8) is the stronger statement. The comparison between (6) and (8) is obvious. The list of specifics in (6) is narrower in scope than the category "animals" in (8). The comparison between (7) and (8), while less obvious, also reveals that the scope of (8) is broader than the scope of (7). The drafter of (7) understands that (8) is more succinct than (7), if the intent is for (7) to carry its literal meaning. There is reason, though, to believe that (7) should not carry its literal meaning. Instead, one of Levinsons's heuristics is applicable. Specifically, the drafter intends the "other" clause in (7) to carry its stereotypical meaning. Levinson's Heuristic 2 provides that what is simply described is stereotypically exemplified. Contrary to the views of some analysts, a broad catch-all 'other' phrase is not due to infelicitous drafting, but, rather, because the language (simply describing a concept) has a conventional meaning that is stereotypically exemplified through the other items on the list.[8] Otherwise, the drafter could simply use the catch-all, as in (8), without the list of specifics. By not explicitly defining the classification, the drafters leave courts with the flexibility to frame the classification in light of the variety of cases (some of them undoubtedly unexpected by the legislature) that come before the court.

5. The *Ejusdem Generis* Canon as Part of Ordinary Meaning

The *ejusdem generis* canon may be justified as being based on a certain theory of language, but it is less clear to what extent it is actually motivated by concerns specific to the legal system. It is doubtful that courts choose the general category to limit the "other" phrase without consideration of legal consequences. Further, aspects of the canon may be peculiar to the legal system. For instance, Scalia and Garner (2012) explain that the *ejusdem generis* canon is not applicable when there is a general term that is followed by a list of specific items. In their view this formulation serves the function of making "doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics" (ibid., 204). Scalia and Garner reason that while the general-before-the-specific formulation often includes a phrase such as "including without limitation," the specific-before-the-general formation never does so. Further, some courts and commentators have argued that the *ejusdem generis* canon is

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[8] As discussed further below, the meanings generated by implicatures are defeasible interpretations that can be overcome by the addition of further premises. The scalar implicature creates the ordinary-meaning, default interpretation. The interpreter can thereafter consider the broader context and determine the appropriate meaning to give to the "other" phrase.

not applicable when there is only one specific term followed by a general term.[9]

On the other hand, the *ejusdem generis* canon can be said to be motivated by linguistic rather than purely legal concerns (although courts are generally motivated to limit the scope of statutes). As indicated above, the Horn theory can be applied to non-traditional scales. "Other" phrases following lists of specific items have not been studied by philosophers or linguists, but that is perhaps due to the relative scarcity of such clauses outside of the legal context. Further, the *ejusdem generis* canon often operates to narrow the domain of a statute from its literal meaning even if the restriction is not relevant to the particular interpretive dispute before the court. For example, Scalia and Garner consider the following sentence placed on a sign at the entrance of a butcher shop:

(9) No dogs, cats, pet rabbits, parakeets, or other animals allowed.

The authors argue that "no one would think that only domestic pets were excluded, and that farm animals or wild animals were welcome" (ibid., 212). The authors reason that "when the context argues so strongly against limiting the general provision, the canon will not be dispositive" (ibid.). This may be true, and would provide a reason for deciding the case on the basis of other interpretive principles, but note that even with this example the canon has a role. No one would argue that, for example, the prohibition would include humans.

In contrast to various interpretive principles that tend to narrow the scope of statutes (such as the canon that directs courts to avoid interpretations that would allow a statute to apply extraterritorially), textual canons like *ejusdem generis* are motivated by linguistic phenomena.[10] As the above discussion illustrated, the *ejusdem generis* canon can be legitimized through a scalar implicature analysis. Further, as Levinson (2000) and others have shown, there is a level of systematicity to GCIs such that the semantics/pragmatics distinction is implicated. While Recanati (2004) views implicatures as wholly pragmatic, researchers like Chierchia, Fox, and Spector (2012) question this designation. Ultimately, for purposes of ordinary meaning, the semantics/pragmatics distinction is not as relevant as the systematicity of the linguistic phenomena. For GCIs, as the above discussion illustrated, theorists have shown how salient interpretations are determined without the necessity of consideration of the context of the particular situation in which the utterance was made (Jaszczolt, 2005).

Further, as Levinson explains, the meanings generated by implicatures are defeasible interpretations that can be overcome by the addition of further premises. This aspect situates the *ejusdem generis* canon well as an aspect of ordinary meaning.

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[9] In a dissenting opinion, Justice Kennedy argued that the *ejusdem generis* canon's application "is not limited to those statutes that include a laundry list of items." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 231 (2008) (Kennedy, J, dissenting). Whether Justice Kennedy is correct is relevant to the convention of language associated with the *ejusdem generis* canon, but the precise contours of the canon are irrelevant to the issue of whether the canon is a proper aspect of the ordinary meaning of a provision.

[10] The presumption against extraterritoriality is known as a "substantive canon," a class of interpretive principles that are normatively based presumptions about statutory meaning that are derived from the common law, other statutes, or the Constitution (Slocum 2008).

The scalar implicature creates the ordinary meaning, default interpretation. The interpreter can thereafter consider broader contextual evidence and determine the appropriate meaning to give to the "other" phrase. Similarly, the ordinary meaning selected may be defeated because the list is exhaustive of the general category selected. In these situations, the court may decide that the "other" phrase should carry its literal meaning (which should be surplusage). Further, in some cases the list of items may be too disparate in kind to identify a general category with which to limit the scope of the "other" clause. In such situations, the ordinary meaning of the "other" clause is not determinable (Scalia and Garner 2012).

The *ejusdem generis* canon may properly be part of the ordinary meaning of a given provision, as the scalar implicature analysis illustrates, but application of the interpretive principle leaves the interpreter with a core of ineliminable discretion. Of course, in general the interpreter has discretion to decide, on whatever grounds she feels are persuasive, to reject the ordinary meaning of a provision in favor of a different meaning. Similarly, the *ejusdem generis* canon may conflict with other interpretive principles, such as other textual canons, that are also legitimately aspects of the ordinary meaning of a given provision. More relevant to this discussion, though, is that an ordinary meaning determination via the *ejusdem generis* canon itself is also, at its core, highly discretionary. Justice Scalia (idem., 207) himself concedes that application of the canon is discretionary due to the issue of how broadly or narrowly to define the general class delineated by the specific items listed. The doctrine does not purport to guide whether the court should identify the genus at the lowest level of generality, the highest level of generality, or some other level. Obviously, a higher level of generality will give a broader scope to the "other" phrase. This determination is often crucial, then, in determining the outcome of the litigation.

Scalia and Garner (ibid., 208) advocate that the interpreter should "consider the listed elements, as well as the broad term at the end, and ask what category would come into the reasonable person's mind." Often, in their opinion, the "evident purpose of the provision makes the choice clear," and the "difficulty of identifying the relevant genus should not be exaggerated." In general, things should not be exaggerated, of course, but advocating the reasonable person standard and the consideration of context does not foreclose the inherent discretion involved in selecting a general category that will account for the specific items listed. There are always multiple ways, at slight but legally significant degrees of difference, in which to define the general category, and often insufficient contextual evidence that makes one choice clearly superior to the others. Hence, the inherent discretion involved cannot be minimized by (bald) assertions that interpreters would invariably agree in their judgments.

Notwithstanding the discretion inherent in its application, the *ejusdem generis* canon is consistent with the other interpretive principles employed by courts. In fact, the function of the *ejusdem generis* canon underscores the common theme that courts employ interpretive principles in order to narrow the scope of statutes. Shapiro (1992) argues that both substantive and textual canons reflect a judicial preference for continuity over change, which comes from narrowing the scope of legal provisions form their literal meanings. This judicial tendency exists outside the application of substantive or textual canons. Consider that even when a broad concept is used, as in (8) with "animals," the legal meaning of the provision will

typically be narrower than its literal meaning. Certainly, difficulties in application would likely arise, such as whether police dogs or guide dogs fall under the scope of the prohibition, and the difficulties would not all fall within the scope of some canon. These types of situations would require courts to consider whether implied exceptions to the seemingly unlimited mandate of the provision should be recognized. For other reasons, a court may determine that the general term is too broad to fit the purpose of the provision. Such decisions are not determinations of ordinary meaning, but instead decisions that, based on legal concerns, the scope of the provision should be narrower than its literal meaning. In addition, "animals" would also have to be defined. One would expect, absent unusual circumstances, that humans would be excluded from the scope of the statute.

6. Implicatures, Literal Meaning and Legal Texts

Based on the above discussion, it might seem quite intuitive that the *ejusdem generis* canon is an aspect of ordinary meaning and can be given a Gricean-type explanation. As Carston (2013), a leading pragmatic theorist, notes, textual canons look very similar to the principles/heuristics formulated by theorists of pragmatics for general communication and interpretation. Some prominent scholars, though, have criticized the idea that conversational implicatures are applicable to legislation. Marmor (2008), for instance, argues that, unlike ordinary conversations, it would be "very rare" for there to be cases in which the content the legislature prescribes is not exactly what the text says.[11] In Marmor's view, the reason is that "[a]n essential aspect of what enables parties to an ordinary conversation to express content that is not exactly what their expressions mean, consists in the fact that an ordinary conversation is, typically, a cooperative activity" (Marmor 2008, 429). In contrast, legislation is typically a form of complex strategic behavior and cannot be considered a cooperative activity. Poggi (2011, 21) similarly argues against the applicability of conversational implicatures to legal texts. His main reasons concern the "conflictual behaviour of the addressees and, above all, [...] the insurmountable indeterminacy of the contextual elements."[12]

For a variety of reasons, the arguments about the inapplicability of conversational implicatures to legal texts are mistaken. Sometimes, it *is* obvious that the literal content of a legal text must differ from its legal meaning. Carston (2013) reasons that one might expect a higher degree of explicitness in legal texts than in day-to-day speech, and thus fewer cases of implicatures. This observation may be accurate. The law, though, requires a higher degree of precision than does day-to-day speech, and cases often turn on small nuances of meaning. Courts are often motivated for various reasons to select interpretations that deviate from the literal meanings of the relevant texts. In any case, judicial assignments of non-literal

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[11] In a later publication, Marmor (2014) concedes the possibility that some implicatures in law would work. However, he does not offer any examples.

[12] Asgeirsson (2012) disagrees with some of Marmor's analysis, particularly his claim that a speaker succeeds in asserting something other than what she literally says only if it is obvious that she cannot be intending to assert the literal content of her remark. However, he agrees with Poggi that the legislative context is typically equivocal and rarely supports the application of conversational implicatures.

meanings to legal texts are commonplace, and some of these deviations from literal meaning can be explained as implicatures. Even when application of an implicature would leave a degree of interpretive discretion regarding the meaning of the text, this would (contra Poggi's position) constitute a normal aspect of interpretation and not a reason to reject the applicability of implicatures. Of course, there are a variety of ways to conceptualize implicatures and Grice's maxims. Even if considering conversational implicatures only under a Gricean-type analysis (as Levinson's [2000] approach does), Marmor and Poggi's arguments are not sufficient to establish that conversational implicatures are not applicable to legal texts.

As indicated above, the fact that courts are willing to find that the content the legislature prescribed is different from the literal meaning of the relevant text is a prosaic, not an exceptional, aspect of legal interpretation. It is not at all unusual for the literal meaning of a legal text to differ from its linguistic ordinary meaning. In fact, it is often obvious that the literal meaning of the text is not coterminous with its ordinary meaning. These situations are not, however, likely to be part of a litigated interpretive dispute. For instance, in *Ali v. Bureau of Prisons*,[13] the Supreme Court had to determine whether the phrase "any other law enforcement officer," located in 28 U.S.C. par. 2680(c), included officers serving in a prison, even though the context of the provision focused on customs and excise concerns. Whether "any other law enforcement officer" includes officers serving in a prison is debatable, but there is no doubt that the ordinary meaning of the phrase differs from its literal meaning. The literal meaning would include any law enforcement officer in the world (or in existence, if one prefers). Considering that the related provision, 28 U.S.C. par. 1346(b)(1), to which par. 2680(c) is the exception, authorizes claims against the United States only for acts of employees of the federal government, including foreign or state law enforcement officers in par. 2680(c) would obviously be nonsensical. Precisely because such an interpretation is so obvious, and pointless to challenge, it would not be litigated. Thus, judicial decisions, which generally resolve (relatively) close interpretive disputes, do not reflect the variety of obvious ways in which the literal meanings of legal texts differ from their ordinary meanings.

7. The Cooperative Principle and Legal Texts

One of the main arguments against the applicability of conversational implicatures to legal texts is that the legislative process does not adhere to Grice's Cooperative Principle. Davis (1998) paraphrases the Cooperative Principle as follows: Contribute what is required by the accepted purpose of the conversation.

It is true that legislation, as well as the legislative process, cannot be compared to an ordinary conversation. Consider Marmor's (2008, 435) arguments regarding the Cooperative Principle and its inapplicability to the legislative process:

The Gricean maxims of conversational implicatures are the norms that apply to an ordinary conversation, where the purpose of the participants is the cooperative exchange of information. But the legal case is quite different. The enactment of a law is not a cooperative exchange of information. Therefore, we should not be surprised if some of the Gricean maxims may not apply to the context of legislation and, more problematically, it is often not clear

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[13] 552 U.S. 214 (2008).

which norms, if any, do apply. The main reason for the difference resides in the fact that legislation is typically a form of *strategic behavior*. In fact, the situation is more complicated: Legislation consists of at least *two conversations*, so to speak, not one. There is a conversation between the legislators themselves during the enactment process, and then the result of this internal conversation is another conversation between the legislature and the subjects of the law enacted. (Marmor 2008, 435)

Marmor's arguments about the legislative process are correct. The legislative speech act is designed not to be a cooperative exchange of information but instead to generate rules that modify behavior (Soames 2011). These observations about the legislative process do not, however, establish that conversational implicatures are not relevant to the interpretation of legal texts. Among other problems, the arguments made by critics exaggerate the requirements of the Cooperative Principle.

Marmor and Poggi are not the first scholars to criticize the applicability of the Cooperative Principle to a defined set of communications. Even outside of the legislative context the Cooperative Principle has been criticized for the reason that people are not always or generally cooperative, especially in certain circumstances (such as institutional discourse).[14] The criticisms are not, however, always warranted. Lumsden (2008, 1900) explains that the Cooperation Principle can concern "some constrained form of cooperation, a kind of cooperation within the conversation, as opposed to cooperation generally." Similarly, Pavlidou (1991, 12) distinguishes between "formal cooperation" and "substantial cooperation." Formal cooperation is cooperation in the Gricean tradition, which involves acting according to or contrary to the conversational maxims. In contrast, substantial cooperation refers more broadly to the sharing of common goals amongst the communication partners that go beyond the maximal exchange of information. In some cases an extralinguistic goal determines linguistic cooperation, but in other situations an extralinguistic goal of one of the participants is clearly not shared by the other. In fact, Lumsden describes situations in which no significant extralinguistic goals enter into the relevant conversation at all, so the issue of the goals being shared or not does not arise. The extralinguistic goal, if any, therefore does not determine the linguistic goal. Yet the Cooperative Principle is still applicable.

The Cooperative Principle therefore should be viewed as requiring only linguistic cooperation, as there is no common nonlinguistic goal in some cases where implicatures are applicable. Further, the linguistic cooperation required is itself relatively narrow. The principle thus "does not say anything about the speaker's extralinguistic goals, but is a theory of the ways in which speakers maximize the efficiency of information transfer" (Capone 2001, 446–7). The cooperation expected allows the speaker to rely on the audience to interpret the implicatures, thereby allowing the speaker to communicate more briefly. Thus, the linguistic goal itself can be imprecise and does not require that the linguistic purposes be shared or mutual, but only that the purposes be mutually modeled. As Lumsden (2008) argues, critics should be open to a range of cases displaying variation in the form and nature of the cooperation. Marmor and Poggi thus overstate the requirements

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[14] Sarangi and Slembrouck (1992) address the applicability of the cooperativeness principle to institutional discourse.

of the Cooperative Principle. There is no obvious reason to think that a legislature and the judiciary, the body primarily responsible for giving statutes authoritative interpretations and thus the most relevant cooperative partner, do not engage in the kind of "formal cooperation" that is sufficient to warrant the application of at least some conversational implicatures.

8. Other Arguments about Implicatures and Legal Texts

Marmor (2008) makes further, related arguments regarding implicatures that deserve some attention. Specifically, Marmor (ibid., 434) argues that, generally speaking, pragmatic implication requires (at least) three conditions:

(1) A *speaker* who has certain communicative intentions.
(2) A conversational *context* that, at least to some extent, is *common knowledge* and is shared by speaker and hearer.
(3) Some *conversational maxims* that apply to the relevant speech situation.

The first requirement should not be troubling. Marmor's objections are persuasive when concerning the possibility of deriving some conversational implicature on the basis of an inference from actual legislative intent. Like the arguments about the Cooperative Principle, however, it is important not to overstate the requirement of communicative intentions. It may be necessary that the speaker have a communicative intention, but it is not necessary to identify any specific communicative intention. If recognizing the speaker's actual communicative intentions was necessary for application of implicatures, the usefulness of the theory would be greatly limited. It would be difficult, for example, to see how implicatures could be applicable to a conversation that involved two strangers, each with little contextual knowledge of the other. Viewing interpretation as being primarily based on objective features of the relevant context does not, therefore, foreclose the possibility of recognizing conversational implicatures.

For similar reasons, it is important not to exaggerate the required common knowledge that is shared by speaker and hearer. The sole relevance of common knowledge in this context is to determine the applicability of implicatures. Assuming that the relevant hearer is the judiciary, it should not be difficult to conclude that, in general, sufficient common knowledge exists to make at least some implicatures generally applicable. As part of his analysis of the applicability of implicatures, Marmor (2008) analyzes the Supreme Court's famous decision in *Holy Trinity*.[15] *Holy Trinity*, though, is not a good example from which to conclude that implicatures are not applicable to the interpretation of legal texts. *Holy Trinity* involved the question of whether a broad immigration provision that prohibited the facilitation of the immigration of those who would perform "labor or service of any kind" should be interpreted literally or instead should only be interpreted as including laborers. As Marmor notes, due to the conflicting contextual cues, which include a provision that already contained exceptions to the general prohibition, it

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[15] *Rector, Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892).

is highly debatable whether a conversational implicature could be said to apply to the text and thereby narrow its domain. The *Holy Trinity* case did not, however, involve a regularity of language or drafting, making the relevance of a conversational implicature particularly controversial. In contrast to *Holy Trinity*, situations involving a regularity of language or drafting present a much more compelling case for the application of an implicature. If, for instance, a legislature uses an "other" clause, it is doing so in a certain general but reoccurring context. The relevant context is not the particular statute itself but, rather, the long history of legislative use of such clauses and of courts interpreting them more narrowly than their literal meanings would indicate.

In any case, Marmor's requirements are the mirror image of many of the judiciary's presumptions about interpretation. With respect to textual canons, courts do not require that it be obvious, based on context, that they should be applied but rather that it be obvious that they should *not* be applied. Perhaps some interpretive rules should be excluded from discussion because they are based on legal concerns and not communicative ones. Textual canons cannot, however, be so readily dismissed. Rather, they are created based on generalized beliefs about how drafters and others use language. If such beliefs are generally unwarranted in lieu of specific evidence of legislative intent that a regularity of language was intended, a court would be equally warranted in refusing to give a word its conventional meaning absent specific evidence that it should do so. If linguistic cooperation is not sufficient to establish drafting regularities, it is not sufficient to establish conventional meaning.

In considering implicatures, it is also important to distinguish between PCIs and GCIs, which were defined above. Marmor and Poggi's arguments are relevant to PCIs but much less so to GCIs. Recall that GCIs, especially as conceptualized by scholars like Levinson (2000), do not depend on particular features of context and operate as a kind of default reasoning, which can be defeated by contextual evidence. GCIs are governed by the specific maxims or heuristics, without the need to appeal to the overarching principle of cooperativeness (Lumsden 2008). They are thus very different from PCIs, which are implicated only by virtue of specific contextual assumptions that would not normally obtain. In that sense, then, GCIs are closely related to conventional implicatures, which should uncontroversially be considered aspects of the ordinary meaning of legal texts.

Blome-Tillman (2013) explains that conventional implicatures are utterance contents that are grammatically encoded and thus triggered by the conventional meaning of (some of) the words used in the utterance. He offers the following examples:

(10) Marie is poor, but she's honest.

   a. Marie is poor and Marie is honest.
   b. Poor people are not usually honest.

The *a*-sentence in (10) expresses "what is said" by utterances of (10), while the *b*-sentence expresses content that is conventionally implicated. The reason why *b* is a case of implicature is that sincere utterances of (10) appear true to competent

speakers just in case its *a*-contents appear true—independently of our truth-value intuitions about its *b*-contents. Because the perceived truth-values of the conventionally implicated *b*-proposition seems largely irrelevant with respect to the truth-evaluation of utterances of (10), *b* is, on the Gricean approach, merely implicated rather than part of what is said.

Although scholars such as Levinson (2000) have tended to undermine the distinction between conventional implicatures and conversational implicatures, the difference between the two concepts "hinges largely on the property of deniability (cancellability)" (Potts 2005, 28). For example, as was explained above, the conversational implicature "not all" arising from (3)

(3) Some of the students did well.

can be cancelled through the addition of (4),

(4) In fact, *all* of the students did well.

In contrast, consider the following example (taken from Lumsden [2008]), illustrating the noncancellability of conventional implicatures:

(11) Marie is poor, but she's honest. *And poor people are usually honest.

In contrast to the addition of sentence (4) to (3), a perceived contradiction would arise in (11).

As illustrated by the above examples, the "other" clause that is typically at issue when applying the *ejusdem generis* canon cannot be viewed as a conventional implicature, as its implication can be cancelled. This fact does not, however, undermine its status as a component of ordinary meaning.[16] Marmor (2008, 424) indicates that "it would be difficult to think of a legal context where semantically encoded implication, if there is one, should not be seen to form part of what the law determines." While GCIs are not lexicalized in the same way as conventional implicatures, there are no sufficient reasons why GCIs should not also be considered part of the ordinary meaning of the relevant sentence.

Poggi's (2011) arguments regarding the indeterminacy of the contextual elements of legislation as establishing the inapplicability of conversational implicatures are also insufficient. Certainly, the interpretation of legal texts carries with it an ineliminable element of discretion. Partly, this is due to the nature of language and the interpretive principles applied by courts. In addition, though, interpretive discretion exists because the available context contains information that can support more than one interpretation. With an understanding that conflicting contextual information is the default but is nonetheless sufficient to allow for authoritative

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[16] For example, recall (1),
(1) gin, bourbon, vodka, rum and other beverages. As (12) illustrates, in contrast to the situation with a conventional implicature, the addition of a second sentence can negate the implicature without a perceived contradiction:
(12) gin, bourbon, vodka, rum and other beverages. Thus, all beverages fall under the prohibition.

interpretations of legal texts, it is difficult to maintain that a greater univocality of context should exist before conversational implicatures are applicable to legal texts. In many cases, a discretionary judgment will decide the precise nature of the implicature, as when determining the scope of the "other" clause in applying the *ejusdem generis* canon. Such a situation, though, is synonymous with how literal meanings are determined.

It is not, therefore, exceptional that legal texts can have nonliteral meanings. Rather, the interpretive principles applied by courts tend to narrow the scope of statutes, sometimes creating a gap between literal meaning and ordinary meaning. Conversational implicatures are congruent with this judicial orientation and should be treated as such. Marmor, Poggi, and the other scholars with similar theories, though, are not the only ones to fail to appreciate the frequent gaps between literal meaning and ordinary meaning. So-called textualists also seem to believe that recognizing a gap between literal meaning and ordinary meaning is either an instance of judicial activism or an indication that the speaker has made a mistake in expressing herself. Manning for instance, indicates that

an important strand of modern language theory, known as pragmatics, rests on the [. . .] premise that because human beings sometimes express themselves inaccurately, listeners in a cooperative setting must occasionally tweak the literal meaning of what has been said in order to make sense of an utterance in context. (Manning 2006, 2014–5)

Of course human beings sometimes express themselves inaccurately, but pragmatics does *not* rest on the premise that human beings express themselves inaccurately. Rather, pragmatics (as well as some semantic theories) recognizes that humans often express themselves succinctly, assuming that context will contribute to the meaning of the words expressed. Thus, use of a universal quantifier (e.g., *all*, *any*, etc.) in a situation where some more limited scope is intended is not an incorrect or inaccurate use of language. Similarly, use of a general "other" clause is not an incorrect use of language. Instead, users of such expressions recognize that interpreters are able to discern the correct, ordinary meaning of the language based on the available context.

9. Conclusion

A common characteristic of legal interpretive principles is that they serve to restrict the domains of legal texts, thereby creating a gap between literal meaning and ordinary meaning. Not all of these interpretive principles, however, are relevant to the ordinary meaning of a given provision. While some interpretive principles generally cannot be considered relevant to ordinary meaning, because they derive from legal considerations and not from linguistic ones, at least some textual canons can be considered determinants of linguistic ordinary meaning. The *ejusdem generis* canon is one such interpretive principle. It must be conceded that, at least sometimes, the literal meaning of a general "other" phrase must differ from its ordinary meaning and must be limited to the category that accounts for the specific items listed. The justification for application of the interpretive principle rests not on indications of the actual intent of the drafter but rather on a GCI that reflects the way in which people normally use language. Like other interpretive principles,

though, a systematic account of the *ejusdem generis* canon cannot eliminate the discretionary nature of its application. Rather, the discretionary nature of interpretation holds regardless of whether a particular linguistic phenomenon is considered to be an aspect of ordinary meaning.

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