ABSURDITY AND THE LIMITS OF LITERALISM: DEFINING THE ABSURD RESULT PRINCIPLE IN STATUTORY INTERPRETATION*

VERONICA M. DOUGHERTY**

> [I]t is a venerable principle that a law will not be interpreted to produce absurd results. "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'"[1]
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> [T]he absurdity clause has a relative and variable content which threatens the entire foundation of literal theory.[2]

INTRODUCTION

The absurd result principle in statutory interpretation provides an exception to the rule that a statute should be interpreted according

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** Assistant Director, Law and Public Policy Program, Cleveland-Marshall College of Law, Cleveland State University. J.D. 1987, Harvard Law School; M.P.P. 1987, Kennedy School of Government, Harvard University; B.A. 1977, Bethany College.

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1. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (quoting United States v. Kirby, 74 U.S. 482, 487 (1868)).

2. E. Russell Hopkins, *The Literal Canon and the Golden Rule*, 15 CAN. B. REV. 689, 695 (1937).

to its plain meaning. In an age of increasing debate about the proper approach to statutory interpretation, and of increasing emphasis on literal approaches, the absurd result principle poses intriguing challenges to literalism and to theories of interpretation generally.

The absurd result principle is extraordinarily powerful. It authorizes a judge to ignore a statute's plain words in order to avoid the outcome those words would require in a particular situation. This is a radical thing; judges are not supposed to rewrite laws. Ordinarily, such actions would be condemned as a usurpation of the legislative role, an unconstitutional violation of the separation of powers.[3] Even when a genuine question exists about the actual meaning of the statute's words, it is generally considered to be illegitimate for a judge to make the choice between possible meanings on the basis that the real-life result of one meaning strikes the judge as somehow objectionable.[4] The absurd result principle apparently gives just that power and authority to a judge.[5] Yet this principle enjoys almost universal endorsement, even by those who are the most critical of judicial discretion and most insistent that the words of the statute are the only legitimate basis of interpretation.[6]

This unique power of the absurd result principle stands in striking contrast both to the general lack of understanding of the principle and the dearth of attention it receives in the literature and in the courts. Cases using or referring to the principle do not define absurdity, nor do they specify the kinds of situations where the principle should be applied.[7] In addition, despite the recent increase in judicial and scholarly attention to issues involving topics of statutory interpretation, the principle, its theoretical foundations, and its

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3. *See infra* note 23 and accompanying text.

4. *See infra* notes 82-83 and accompanying text.

5. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (noting that absurd result principle allows judiciary to avoid applying statute's plain meaning).

6. *See, e.g., id.* (noting that absurd result principle is legitimate exception to plain meaning rule); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (rejecting literal interpretation of Federal Rule of Evidence 609(a)(1) because it would produce absurd result); Neal v. Honeywell Inc., 33 F.3d 860, 862 (7th Cir. 1994) (Easterbrook, J.) (stating that statutes are to be taken seriously, and their language bent "only when the text produces absurd results"); Central States, S.E. & S.W. Areas Pension Fund v. Lady Baltimore Foods, 960 F.2d 1339, 1345 (7th Cir. 1992) (Posner, J.) (remarking that "even interpretative literalists" recognize that if result of strict interpretation is absurd, "interpreter is free (we would say compelled) to depart in the direction of sense"), *cert. denied*, 113 S. Ct. 179 (1992).

7. *E.g.*, Rowland v. California Men's Colony, Unit II Men's Advisory Council, 113 S. Ct. 716, 720 (1993); *Public Citizen*, 491 U.S. at 470-75 (Kennedy, J., concurring) (endorsing principle, but not defining absurdity); *Bock Laundry*, 490 U.S. at 527-28 (Scalia, J., concurring) (stating principle, and saying it applies in this case, but not defining it); Kirby v. United States, 74 U.S. 482, 486-87 (1868) (stating principle but not defining it).

implications remain virtually unnoticed and unexamined.[8] Yet, the principle enjoys almost universal acceptance in the legal systems of the United States [9] and a number of other countries.[10]

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8. *But see generally* INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991) (discussing principle as one common to legal system of various countries studied, and also its function in various legal systems); *see also* Margaret Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267, 279-80 (1988) (discussing significance of absurd result principle in context of administrative interpretations of statutes). Several older articles also discuss the principle. *See, e.g.*, J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 298-312 (1936) (tracing development and application of golden rule of statutory interpretation that created exception to literalism for absurd consequences); Hopkins, *supra* note 2 (expounding on relationship between canon of literal interpretation and absurd result rule); Frederick J. de Sloovère, *The Equity and Reason of a Statute*, 21 CORNELL L.Q. 591, 600-02 (1936) (explaining absurd result principle in context of rule that statutes should be given reasonable interpretation).

9. State and federal courts refer to the absurd result principle with great frequency. For example, the U.S. Supreme Court explicitly endorsed the principle as recently as last year. *See Rowland*, 113 S. Ct. at 720 n.3 (calling absurd result principle "common mandate" and noting that it "has been applied throughout the history of 1 U.S.C. § 1 and its predecessors"). In addition, the highest courts of all 50 states and the District of Columbia have endorsed this principle. *See, e.g.*, State Farm Auto. Ins. Co. v. Reaves, 292 So. 2d 95, 101 (Ala. 1974); Nystrom v. Buckhorn Homes, 778 P.2d 1115, 1124 (Alaska 1989); City of Prescott v. Town of Chino Valley, 803 P.2d 891, 895 (Ariz. 1990); Cox v. State, 853 S.W.2d 266, 272 (Ark. 1993); Roberts v. City of Palmdale, 853 P.2d 496, 503 (Cal. 1993); Colorado State Bd. of Medical Examiners v. Saddoris, 825 P.2d 39, 44 (Colo. 1992); Scrapchansky v. Town of Plainfield, 627 A.2d 1329, 1332 (Conn. 1993); Lewis v. State, 626 A.2d 1350, 1356 (Del. 1993); Bates v. District of Columbia Bd. of Elections & Ethics, 625 A.2d 891, 896 (D.C. 1993) (Schwelb, J., concurring); Orange County v. Gipson, 548 So. 2d 658, 660 (Fla. 1989); Sizemore v. State, 416 S.E.2d 500, 502 (Ga. 1992); Keaulii v. Simpson, 847 P.2d 663, 666 (Haw. 1993); Permit No. 36-7200 *ex rel.* Idaho Dep't of Parks & Recreation v. Higginson, 828 P.2d 848, 851 (Idaho 1992); People v. Bole, 613 N.E.2d 740, 743 (Ill. 1993); Guinn v. Light, 558 N.E.2d 821, 823 (Ind. 1990); First Iowa State Bank v. Iowa Dep't of Natural Resources, 502 N.W.2d 164, 168 (Iowa 1993); State v. Schlein, 854 P.2d 296, 303 (Kan. 1993); City of Louisville v. Stock Yards Bank & Trust Co., 843 S.W.2d 327, 329 (Ky. 1992); Rodriguez v. Louisiana Medical Mut. Ins. Co., 618 So. 2d 390, 394 (La. 1993); Fraser v. Barton, 628 A.2d 146, 148 (Me. 1993); Lincoln Nat'l Life Ins. Co. v. Insurance Comm'r of Md., 612 A.2d 1301, 1304 (Md. 1992); Commonwealth v. LeBlanc, 551 N.E.2d 906, 907 (Mass. 1990); Gardner v. Flint Bd. of Educ., 517 N.W.2d 1, 9 (Mich. 1994); Park Towers Ltd. Partnership v. County of Hennepin, 498 N.W.2d 450, 454 (Minn. 1993); McBrayer v. State, 467 So. 2d 647, 648 (Miss. 1985); Magee v. Blue Ridge Professional Bldg. Co., 821 S.W.2d 839, 844 (Mo. 1991); Doting v. Trunk, 856 P.2d 536, 541 (Mont. 1993); Professional Firefighters of Omaha, Local 385 v. City of Omaha, 498 N.W.2d 325, 332 (Neb. 1993); Ashokan v. State, 856 P.2d 244, 248 (Nev. 1993); Raudonis v. Insurance Co. of N. Am., 623 A.2d 746, 749 (N.H. 1993); Essex County Div. of Welfare v. O.J., 608 A.2d 907, 913 (N.J. 1992); Ashbaugh v. Williams, 747 P.2d 244, 245 (N.M. 1988); People v. Bolden, 613 N.E.2d 145, 149 (N.Y. 1993); Burgess v. Your House of Raleigh, 388 S.E.2d 134, 140 (N.C. 1990); Ames v. Rose Township Bd. of Township Supervisors, 502 N.W.2d 845, 856 (N.D. 1993); Gates Mills Club Dev. Co. v. Cuyahoga County Bd. of Revision, 594 N.E.2d 580, 582 (Ohio 1992); TRW/Reda Pump v. Brewinston, 829 P.2d 15, 20 (Okla. 1992); State *ex rel.* Kirsch v. Curnutt, 853 P.2d 1312, 1315 (Or. 1993); Commonwealth v. Zdrale, 608 A.2d 1037, 1039 (Pa. 1992); State v. Lusi, 625 A.2d 1350, 1351 (R.I. 1993); Fort Hill Natural Gas Auth. v. City of Easley, 426 S.E.2d 787, 789 (S.C. 1993); *In re* Petition of Famous Brands, 347 N.W.2d 882, 886 (S.D. 1984); Tidwell v. Collins, 522 S.W.2d 674, 676 (Tenn. 1975); Lanford v. Fourteenth Court of Appeals, 847 S.W.2d 581, 587 (Tex. 1993); Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1292 n.24 (Utah 1993); *Ex rel.* B.L.V.B., 628 A.2d 1271, 1273 (Vt. 1993); Smith v. Richmond Memorial Hosp., 416 S.E.2d 689, 693 (Va. 1992); State v. Neher, 771 P.2d 330, 351 (Wash. 1989); Pristavec v. Westfield Ins. Co., 400 S.E.2d 575, 581 (W. Va. 1990); SueAnn A.M. v. Rob S., 500 N.W.2d 649, 652 (Wis. 1993); Cook v. State, 841 P.2d 1345, 1356

This intriguing combination of characteristics inspired this Article, which attempts to remedy some of the neglect and lack of understanding of the absurd result principle. The Article focuses on two questions about the principle: What does it mean? Where does it get its authority? The Article develops and discusses a definition of the concept of absurdity as used by the courts. In addition, it investigates the source of the principle's authority and its implications for theories of statutory interpretation.

A. The Source of the Principle's Authority

One potential source of authority considered and rejected is the legislature.[11] An argument exists that courts may reject plain meaning because the legislature could not have intended the absurd result. In other words, the legislature implicitly authorizes courts to reject any interpretation that will result in absurdity. The absurd result principle, allowing judges to ignore or rewrite the words of the legislature, has traditionally been regarded as a threat to legislative supremacy.[12] This 'implicit legislative intent' justification defused that threat—or at least seemed to.[13]

The legislative intent justification of the absurd result principle conflicts with the position of some theorists who reject the concept of intent in statutory interpretation.[14] Those theorists claim that intent

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(Wyo. 1992) (Golden, J., concurring).

10. Both common law and civil law systems utilize the absurd result principle. *See* Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis, in* INTERPRETING STATUTES: A COMPARATIVE STUDY, *supra* note 8, at 461, 485 (noting that all countries in this study recognize absurd result principle though its exact form may vary). This study involved the legal systems of Argentina, the Federal Republic of Germany, Finland, France, Italy, Poland, Sweden, the United Kingdom, and the United States. *Id.*

11. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring) (arguing that when strict statutory interpretation results in absurdity, courts may assume that legislative branch did not intend that interpretation); FBI v. Abramson, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting) (recognizing that absurd result principle may be used when "Congress could not possibly have intended" result); *see also* Crooks v. Harrelson, 282 U.S. 55, 60 (1930) (indicating that to apply absurd result principle, "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail").

12. *See* sources cited *infra* note 37.

13. *See Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring) (clarifying that absurd result principle does not threaten legislative power but rather "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way").

14. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641-48 (1990) [hereinafter *Textualism*] (describing realist, historicist, and formalist critiques of use of intent for statutory interpretation). The fact that the principle continues to flourish at present, when courts are increasingly focusing on a statute's text as the primary (if not the sole) legitimate referent for interpretation, and when the concept of intent has itself come under increasing criticism, *see generally id.*, brings into question that traditional justification. Modern currents toward textualism notwithstanding, however, it is questionable whether the principle has ever

is neither a legitimate basis of interpretation nor a coherent concept.[15] But even those who question intent generally endorse the absurd result principle.[16]

The effort to attribute the principle's authority to the legislature seems to involve more fiction than fact. Cases dealing with the principle often speak of intent in the form of a presumption that the legislature always acts reasonably or rationally, at least to the extent of not intending absurdity.[17] But the discussion of the definition of absurdity that follows indicates that this presumption of legislative rationality goes beyond the descriptive, and that in fact it imposes limits on the effective reach of legislative will. That is, this presumption acts prescriptively.[18] This suggests that the absurd result

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been based in actual intent. As noted below, *see infra* note 17 and accompanying text, courts, while purporting to justify the principle in terms of legislative intent, have in fact often applied a *presumption* about intent. *Id.* The presumption that the legislature could not have intended an absurdity, if it deals with intent at all, uses an objective notion of intent, that is, the projected intent of the ideally rational legislator (a close relation of the familiar "reasonable person"). *Id.* This objective notion of intent is a construct, and it is a familiar concept in many legal systems. *See* D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification, in* INTERPRETING STATUTES: A COMPARATIVE STUDY, *supra* note 8, at 511, 522-24. In the United States, however, the subjective notion of intent, the actual intent of actual legislators, has been primary. *Id.* at 524.

15. *See* MacCormick & Summers, *supra* note 14, at 524; *infra* notes 176-77 and accompanying text.

16. *E.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) (acknowledging legitimacy of absurd result principle); Neal v. Honeywell, 33 F.3d 860, 862 (7th Cir. 1994) (Easterbrook, J.) (stating absurd result principle).

17. *See supra* note 11 (collecting cases). This presumption may be merely a courtesy to the legislature; the absurd result principle may be no more than an acknowledgement that the legal community (lawmakers, judges, practitioners, and scholars) does not deal in nonsense. More specifically, one part of this community, the judiciary, will pay the courtesy to another part of that community, the legislature, to presume that the former acts within the bounds of rationality. *See Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring) ("When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way."). If this analysis is correct, it poses an interesting problem given that a similar presumption has been criticized and rejected as an empirical flaw in traditional legal process thought by some modern theories of legisprudence, and in fact provides a jumping off point for some of them. *See infra* Part III.A.2. This is true of some varieties of law and economics theories that are informed by public choice models. Some such theories assert that legislators do not act primarily in the pursuit of reasoned public policy, but rather from self-interest, often an interest in being reelected. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 323-26 (1988). Yet, adherents to these schools of thought apparently nonetheless embrace the absurd result principle. *See* Central States, S.E. & S.W. Areas Pension Fund v. Lady Baltimore Foods, 960 F.2d 1339, 1345 (7th Cir.) (Posner, J.) (explaining that even "interpretive literalists" reject literal reading of statute when result would be absurd), *cert. denied*, 113 S. Ct. 179 (1992); Sisters of the Third Order of St. Francis v. Swedish Am. Group Health Benefit Trust, 901 F.2d 1369, 1372 (7th Cir. 1990) (Easterbrook, J.) (recognizing that courts depart from strict statutory interpretation to "avoid absurdity").

18. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 460 (1892) (quoting State v. Clark, 29 N.J. Law 96, 99 (1860), which stated that if literal construction would result in absurdity, act "must be so construed as to avoid the absurdity," and that court "must restrain the

principle is not in fact based on intent, or at least not on intent as generally understood in the U.S. legal system.[19] In applying the absurd result principle, then, it appears that judges give a nod to legislative supremacy while actually responding to some other authority entirely, either their own or an authority inhering in neither the judiciary nor the legislature.[20]

A presumption about intent removes the conflict that the absurd result principle creates for those who reject actual intent as a basis of interpretation.[21] This presumption, however, may pose a more serious challenge to an approach to statutory interpretation based primarily, if not exclusively, on text, because the application of a reasonableness presumption may require the judge to deviate from plain meaning and interpret the statute according to something other than its words.[22] Such a presumption is thus offensive to the view that only the words of the statute are legitimate law because the words alone have satisfied the bicameralism and presentment requirements of the Constitution.[23] If the absurd result principle is in fact prescriptive, it also has interesting (and to some, possibly disturbing) implications for our understanding of legislative supremacy and the role of the judiciary. The implications suggest that there is a restriction on the lawmaking powers of the legislature, a restriction whose source is not the Constitution, but one that is nonetheless applied and enforced by the judiciary.

Whatever other authority judges are actually responding to when applying the absurd result principle, it is that authority, and not the authority of the legislature, that legitimizes the principle. The discussion below, which attempts to define absurdity, points toward that authority and toward an explanation of why the principle exerts such a privileged and pervasive influence on statutory interpretation.

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words"); United States v. Kirby, 74 U.S. 482, 486-87 (1868) (noting that "[i]t will always . . . be presumed" that legislatures intended exceptions to literal reading of statutes to avoid absurd results).

19. The cases may be using a constructive or objective notion of intent. *See supra* note 14 and *infra* note 115.

20. *See* discussion *infra* Part III.C.

21. *See* discussion *infra* Part III.A.1-2.

22. *See id.*

23. U.S. CONST. art. I, § 7. Many states have analogous bicameralism and presentment requirements. *E.g.*, OHIO CONST. art. II, § 15. This belief is one commonly cited basis for textualism. *See Textualism*, *supra* note 14, at 649-50 (explaining formalist critics' argument that judicial reliance on legislative history is inconsistent with constitutionally created bicameral system).

B. The Meaning of Absurdity

The term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense. Based on those values, courts reject certain outcomes as unacceptable, thereby rejecting the literal interpretations of statutes when they would result in those outcomes.[24] As this Article points out, those values represented by the term absurd accordingly act as a pervasive check on statutory law,[25] and are rooted in the rule of law. The absurd result principle is both a surrogate for, and a representative of, rule of law values.

The term rule of law has been used to mean a variety of things. Two common components, however, are: (1) the predictability of the law, which enables people to rely on it in ordering their affairs, and to plan their conduct with some confidence and security;[26] and (2) the coherence of the legal system as a whole (that is, that one standard of law will not contradict another).[27] The recent trend toward literalism in statutory interpretation has emphasized the first component: the argument is that only through a system of interpreta-

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24. The discussion of definitions also indicates that, contrary to suggestions made by the comments of some judges, *see* Rowland v. California Men's Colony, Unit II Men's Advisory Council, 113 S. Ct. 716, 720 (1993) (implying that absurdity has to do with lack of "syllogistic force"); FBI v. Abramson, 456 U.S. 615, 642-43 (1982) (O'Connor, J., dissenting) (implying that majority's deviation from plain meaning would be justified only when plain meaning leads to absurdity in sense of illogic and not Court's view of "what makes little sense as a matter of public policy"), the principle is not fundamentally a matter of formal logic, that can be applied mechanically without any exercise of judicial discretion. *See infra* Part II.B.1.b, II.B.2.

25. *See* text accompanying *infra* notes 159-63 (arguing that, though it might be suggested that absurd result principle is not pervasive but rather operates only rarely, in fact principle is always in operation and always primary to text, even if it rarely alters outcome that would obtain in its absence).

26. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (explaining that predictability is important factor in rule of law); *see also infra* Part III.B.

27. *See* MacCormick & Summers, *supra* note 14, at 535 (elaborating on role of rule of law in maintaining legal coherence); *see also infra* note 203 and accompanying text. MacCormick and Summers indicate the complexity of the rule of law doctrine:

> [T]he Rule of Law is an internally complex doctrine, which is far from giving unqualified endorsement to an unfettered legislative supremacy. As well as stressing the necessity for clear ex ante legislation regulating the use of coercive power, the Rule of Law is commonly understood as setting conditions for the proper exercise of legislative power, for example banning or restricting retrospection, and stipulating reasonable generality, clarity and constancy in the law. It also sets strict conditions on the legitimacy of coercion under criminal or penal law. In general terms, respect for the Rule of Law is expressed or expressible in terms of the postulate that a legal system must exhibit, and be interpreted as exhibiting, a relatively high degree of coherence as a normative system.

MacCormick & Summers, *supra* note 14, at 535.

tion limited to the words of the statute can we hope to have clear and predictable rules, and therefore a system under the rule of law.[28]

A strict literalism, however, can undermine the rule of law because it can work against the second component, the coherence of the legal system as a whole. For example, a literal interpretation that results in absurdity is likely to offend some other legal principle.[29] Thus, if the literal meaning is enforced, it will establish a precedent in conflict with other parts of the legal system, and will thereby undermine the system's coherence. The absurd result principle tempers literalism, and the principle of legislative supremacy which literalism is meant to serve, by restraining both according to a collection of values that provide coherence and legitimacy to the legal system.

Understood in this way, the absurd result principle becomes not the enemy of literalism, but a necessary component of literalism, without which literalism could not serve the rule of law. As such, the absurd result principle is not subservient to the principle of legislative supremacy, but actually legitimizes the legislative role. The perceived tension between the two principles is not something that requires resolution or elimination. Rather, these two principles, like the underlying values they represent, are complementary; they appropriately remain in dynamic tension with each other, to be balanced in any interpretive act. Grounding the absurd result principle in the rule of law explains its presence throughout history and across legal systems, and its acceptance by people of widely varying legisprudential leanings.

Part I begins with a brief sketch of the historical development of the absurd result principle in the Anglo-American legal system. Part II proposes and discusses possible definitions for the concept of absurdity, and tests the definitions in light of the archetypal examples courts use to illustrate the principle, and also in light of one of the modern cases dealing with the principle. Part III concludes the Article with suggestions regarding the implications of the principle for theories of statutory interpretation.

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28. *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 543 (1992) (outlining and questioning formalist arguments that reliance on plain meaning in interpretation fosters rule of law by, among other things, promoting clear rules); Scalia, *supra* note 26, at 1179 (noting that clear rules promote certainty, which in turn promotes Rule of Law).

29. *See infra* note 195 and accompanying text.

I. HISTORY AND DEVELOPMENT OF THE ABSURD RESULT PRINCIPLE

The absurd result principle appears in the late eighteenth and early nineteenth century in Britain.[30] It is seen in the jurisprudence of the U.S. Supreme Court as early as 1819.[31] The principle became a part of what has been referred to as the golden rule of statutory interpretation.[32] The golden rule was grounded in ordinary meaning, but provided specific exceptions in the event of absurdity or certain other variously stated consequences.[33] It is said to have

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30. *See, e.g.*, Wansey v. Perkins, 135 Eng. Rep. 55, 63 (C.P. 1845) (Cresswell, J.) ("It may be laid down as a safe rule, in the construction of acts of parliaments, that we are to look at the words of the act and to render them strictly, unless manifest absurdity or injustice should result from such a construction."); Perry v. Skinner, 150 Eng. Rep. 843, 845 (Ex. 1837) (Parke, B.) ("The rule by which we are to be guided in construing acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice."); Becke v. Smith, 150 Eng. Rep. 724, 726 (Ex. 1836) (Parke, B.) (stating "useful rule" that courts adhere to ordinary meaning of statute unless interpretation "leads to any manifest absurdity or repugnance"); *see also* Corry, *supra* note 8, at 299-300 & nn.71-76 (noting development of absurdity exception to literalism and citing cases).

In 1765, Blackstone made several references to absurdity as justifying either a deviation from literal meaning or the voiding of an act of Parliament with regard to absurd consequences. He noted: "As to the effects and consequence [of statutes], the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *61 (1st ed. 1765) [hereinafter BLACKSTONE'S COMMENTARIES]. Later in the same volume, when describing the principal "rules to be observed with regard to the construction of statutes," *id.* at *87, Blackstone noted: "[I]f there arise out of [acts of parliament] . . . any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void," *id.* at *91.

31. *See* Sturges v. Crowninshield, 17 U.S. 122, 202-03 (1819) (discussing absurdity as justifying departure from plain meaning of words); *see also* United States v. Kirby, 74 U.S. 482, 486 (1868) (arguing that statutory terms should be interpreted to avoid "injustice, oppression, or an absurd consequence").

32. *See* Corry, *supra* note 8, at 299 (describing how "golden rule" was created in reaction to strict literalism that would not have allowed exception even for absurdity) (citations omitted). The rule was distilled by commentators from various judicial statements about how statutes should be interpreted. *See* JIM EVANS, STATUTORY INTERPRETATION: PROBLEMS OF COMMUNICATION 10 (1988). Although it is not clear who first christened this approach the "golden rule," it has been attributed to Lord Wensleydale. *See id.* (quoting Lord Blackburn's statement in River Wear v. Adamson, 2 App. Cas. 743, 764 (1877), that Lord Wensleydale used to call it the golden rule).

33. *See, e.g.*, Lau Ow Bew v. United States, 144 U.S. 47, 56 (1892) (indicating that laws should be construed to avoid absurd and unjust results); Heyenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634, 638 (1876) (same); *Kirby*, 74 U.S. at 486 (maintaining that construction of statutes should avoid injustice, oppression, and absurdity); *Perry*, 150 Eng. Rep. at 845 (construing act of Parliament to avoid "absurdity or manifest injustice"), *cited in* Corry, *supra* note 8, at 299.

Treating consequences other than absurdity as justifying a deviation from plain meaning has been criticized:

> It is urged . . . that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle . . . is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that, to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the

developed in reaction to a strict literal approach, which itself developed as a natural corollary to the late eighteenth century recognition of the supremacy of the British Parliament.[34] The golden rule, with its absurdity exception, was thus born out of an attempt to resolve the tension between the principle of legislative supremacy and the occasionally objectionable results of the strict literalism that legislative supremacy was assumed to logically require.[35]

Reflecting the inception of the golden rule, many courts and commentators have historically perceived the absurd result principle to be in tension with legislative supremacy. Courts often justify the principle in terms of legislative intent,[36] perhaps to minimize this tension, or perhaps to mask it. By presuming that the legislature

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general moral or common sense . . . .

Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter.

Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930) (citations omitted). Frederick de Sloovère took a similar view:

[T]he presumption of the Golden Rule of reasonable interpretation on the part of the legislature in order to avoid absurdities is a genuine process if the meaning reached is one that the words will bear by fair use of language. The doctrine of literalness, however, does not permit avoiding the single sensible meaning that in application in particular cases gives an unjust, inequitable, or inconvenient result.

de Sloovère, *supra* note 8, at 601.

34. *See* Corry, *supra* note 8, at 298-99 (explaining development of golden rule as modification to doctrine of literalism).

35. *See* Corry, *supra* note 8, at 299 (explaining that golden rule avoided harsh consequences of literal interpretation and prevented courts from encroaching on legislative powers).

36. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (noting that when absurdity would result from literal statutory interpretation, court need not follow literal meaning); Territory of Haw. v. Mankichi, 190 U.S. 197, 212-14 (1903) (explaining that "[i]t will always . . . be presumed that the legislature intended exceptions to its language" to avoid absurd results); Church of the Holy Trinity v. United States, 143 U.S. 457, 459-60 (1892) (explaining that use of absurd result principle assumes legislative intent and is not substitution of "the will of the judge for that of the legislator"); *Kirby*, 74 U.S. at 486-87 (declining to give statute literal interpretation because result would mean legislature intended absurd result).

Blackstone seems to have attempted to minimize this tension essentially by ignoring it. 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *90-91. He asserted that the legislature has the right to "enact a thing to be done which is unreasonable" and that judges have no right to reject such a statute. *Id.* at *91. Yet he allowed that a court may disregard the statute, or consider it void, as to unreasonable consequences. *Id.* He couched this allowance for judicial disregard of the statute's plain meaning in terms of the intent of the legislature, suggesting that those consequences may be assumed by the court not to have been intended. *Id.* "But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are, in decency, to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and *quoad hoc* disregard it." *Id.*

would not intend absurd consequences, the court avoids the appearance that it is infringing on legislative supremacy when it rejects a plain meaning that would result in absurdity.[37]

With this approach, the intent and supremacy of the legislature formally prevail. In practice, however, judges can avoid unreasonable consequences by assuming that the legislature did not really mean what it said. The presumption imposes limits on the effective reach of legislative will: legislators will not be allowed to intend an absurdity, or, even if they do, the courts will not enforce it.[38]

An early Supreme Court decision, *Kirby v. United States*,[39] provides a good example both in historical terms and in terms of the principle's present application.[40] *Kirby* involved a statute that

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37. Historically, this offered justification did not entirely resolve the perceived tension between the absurd result principle and the principle of legislative supremacy. Apparently, the theoretical question remained whether the legislature *could* enact an absurdity. For some, the perceived tension was irresolvable, and required the rejection of the absurd result principle, or at least its relegation to a position subsidiary to literal meaning, to be used only in cases of ambiguity. *See* Altrincham Elec. Supply Co. Ltd. v. Sale Urban Dist. Council, 154 L.T.R. 379, 388 (1936) (Macmillan, L.J.). Lord Macmillan stated:

> [B]y what criterion are your Lordships to judge whether a particular enactment, if literally read, is so absurd that Parliament cannot have intended it to be so read and that the courts ought not to give effect to its plain meaning? I agree with Lord Bramwell who said that [the absurd result principle] "opens a very wide door" and adds: "I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another . . . ."

Id. (citations omitted); *see also* Hopkins, *supra* note 2, at 695 (warning that absurd result principle threatens basis of literal interpretation theory). Hopkins writes: "[T]he absurdity clause has a relative and variable content which threatens the entire foundation of literal theory. Literal interpretation means nothing if plain words may be qualified according to common sense and justice as conceived judicially." *Id.* Hopkins recognized that the judicial role necessarily entails some discretion, but supported restricting that discretion as much as possible in order to secure to the legislature its proper functions, and to protect it from encroachment by the judiciary. *Id.* at 695-96. This is identical to the position of some modern literalists and other formalists. *See Textualism*, *supra* note 14, at 648 (describing position of critics who oppose broad use of legislative history in statutory interpretation in part because it allows too much room for judicial discretion in interpretation of statutes).

38. Stated like this, the judicially created presumption poses an outright challenge to legislative supremacy that might be attacked as illegitimate. Perhaps that is why it is not stated in these terms. Or at least, even if the presumption is stated quite strongly, there may be some formal allowance made for its rebuttal, by clear, express, and unambiguous indication of legislative intent to the contrary. *See infra* note 47 and accompanying text.

This brings to mind so-called "clear statement" rules, according to which the Supreme Court in recent years has required an extraordinarily clear expression of legislative intent to rebut a judicial presumption, for example, that Congress did not intend an interpretation of a statute that would raise constitutional questions. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 469-70 (1991) (interpreting statute so not as to intrude on state government functions). *See generally* William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (outlining concerns about Supreme Court's "super-strong" clear statement rules).

39. 74 U.S. 482 (1868).

40. *See, e.g.*, Rowland v. California Men's Colony, Unit II Men's Advisory Council, 113 S. Ct. 716, 720 n.3 (1993) (citing *Kirby* and other cases applying absurd result principle from *Kirby* to

prohibited a person from "knowingly and willfully obstruct[ing] or retard[ing] the passage of the mail, or of any driver or carrier."[41] Defendant Kirby was a county sheriff who had a bench warrant commanding him to arrest a man named Farris, who, in addition to having been indicted for murder, also happened to be a mail carrier.[42] Kirby and his posse arrested Farris while he was carrying the mail, and were indicted for violating the statute.[43] The Court ruled that the statute did not apply to the situation before it.[44]

Though presented with authority supporting a strict application of the statute's text,[45] the Court did not follow the literal language.[46] Instead, the Court set up a presumption with regard to legislative intent. It began by saying that no legislative intention to exempt mail carriers from such an arrest "should be attributed to Congress unless clearly manifested by its language,"[47] and then continued:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. *It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.* The reason of the law in such cases should prevail over its letter.[48]

In *Kirby*, the Court enunciated a strong presumption about outcome considerations. The Court did not attempt to justify the presumption in terms of actual legislative intent.[49] Rather, the principle stands on its own. Its authority derives from its pedigree and, more fundamentally, from common sense:

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present); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 352 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) (noting that absurd result principle is venerable rule of statutory interpretation); United States v. Albertini, 472 U.S. 675, 699 (1985) (Stevens, J., dissenting) (arguing that court should have applied absurd result principle rather than relying on Due Process Clause for its decision); INS v. Phinpathya, 464 U.S. 183, 198 (1984) (Brennan, J., concurring) (rejecting literal interpretation of statute to avoid absurdity).

41. United States v. Kirby, 74 U.S. 482, 483 (1868) (citing 4 Stat. 104 (1825)).

42. *Id.* at 484.

43. *Id.*

44. *Id.* at 487.

45. *See id.* at 484 (quoting authorities supporting strict application of statute according to its terms).

46. *See id.* at 486-87 (emphasizing that when absurd consequences may result, "the reason of the law . . . should prevail over its letter").

47. *Id.* at 486. This sounds remarkably like the very strong version of a clear statement rule requiring express evidence in the text of the statute to overcome a presumption against an interpretation that would raise constitutional questions. *See supra* note 38 and accompanying text (discussing presumption that legislatures do not intend absurdity).

48. *Kirby*, 74 U.S. at 486-87 (emphasis added).

49. *Id.* at 486 (stating that Court should not impute congressional intention to exempt sheriff from arrest "unless clearly manifested by . . . [statute's] language").

> The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks from prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'[50]

The Bolognian law and the statute of 1st Edward II are both archetypes referred to throughout the history of the absurd result principle, even to the present.[51] Indeed, these archetypes are the nearest thing we have to a legal definition of absurdity. They act as examples of the appropriate use of the principle, often suggesting by comparison that the situation before the court falls short of the absurdity that justifies an exception to plain meaning.[52] Because these archetypes enjoy universal acceptance and are continually utilized to illustrate the principle, this Article initially discusses the possible definitions of absurdity in light of them. Then it analyzes a recent case using those definitions.[53]

II. THE MEANING OF ABSURDITY IN THE CONTEXT OF STATUTORY INTERPRETATION

As previously mentioned, the cases applying the absurd result principle neither define absurdity nor discuss the reasoning behind the principle.[54] Rather, they merely refer to it, sometimes as a "venerable principle,"[55] and then invoke vintage illustrations to

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50. *Id.* at 487.

51. *See, e.g.*, Rowland v. California Men's Colony, Unit II Men's Advisory Council, 113 S. Ct. 716, 720 n.3 (1993) (citing pages in *Kirby* that refer to these archetypes); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring) (reciting these two archetypes as examples of "true absurdity"); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) (reciting these two archetypes as contained in *Kirby* and rejecting Justice Brennan's approach, which would disregard statute's language when absurdity would not result); Sorrells v. United States, 287 U.S. 435, 447 (1932) (referring to these two "classical illustrations found in Puffendorf and Plowden" and listing Court's application of absurdity principle in earlier cases); Church of the Holy Trinity v. United States, 143 U.S. 457, 461 (1892) (reciting these two archetypes as contained in *Kirby*); 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *61 (reciting classic example from Puffendorf and suggesting that it is necessary to deviate from literal interpretation of rule if it is absurd).

52. *See, e.g., Public Citizen*, 491 U.S. at 470-71.

53. *See infra* Part II.

54. *See supra* notes 8-9 and accompanying text.

55. *See K Mart Corp.*, 486 U.S. at 324 n.2 (Scalia, J., concurring in part and dissenting in part) (stating that "it is in a venerable principle that the law will not be interpreted to produce absurd results"); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452

confirm that description.[56] The classic illustrations noted in *Kirby* appear frequently,[57] but they are not cited by courts for purposes of factual analogy. In other words, the illustrations are not used because they involve similar fact patterns, and therefore justify the application of the same legal rule. Nor are they chosen because they involve similar statutory matters and so provide a legal analogy. Rather, it is the absurd result principle itself that is relied on, and it is not justified by argument, but is rather directly invoked by the judge.[58]

The cases defy categorization in terms of the meaning they give to the notion of absurdity. Though a definition does not leap from the cases,[59] however, an examination of theoretically possible definitions does reveal the contours of the term. Accordingly, the following discussion suggests and considers several possible definitions and, in turn, identifies some of the underlying values that the absurd result principle represents and protects.

(1987) (Scalia, J., concurring) (using "venerable principle" language); United States v. Watson, 788 F. Supp. 22, 24 (D.D.C. 1992) (saying that suggested broad interpretation of statute governing crime of possession with intent to distribute cocaine near school would violate this "venerable principle") (quoting *K Mart*); *see also Rowland*, 113 S. Ct. at 720 (calling absurd result principle "common mandate of statutory construction").

56. Occasionally, a judge offers something beyond citations and the traditional examples embodied in them. *See Public Citizen*, 491 U.S. at 470-71 (Kennedy, J., concurring) (asserting that exception to plain meaning is justified only "where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result, . . . and where the alleged absurdity is so clear as to be obvious to most anyone"). After these attempts at clarification, however, Justice Kennedy retreated to the archetypal "examples of true absurdity," mentioning the situation in *Kirby* and the classic illustration found in Puffendorf. *Id.* at 471. Likewise, Chief Justice Marshall in Sturges v. Crowninshield, 17 U.S. 122 (1819), attempted to describe the absurdity necessary to trigger the principle by reaching beyond the traditional examples. He said that the absurdity and the injustice that justify disregarding plain meaning must be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Id.* at 203; *see also* Crooks v. Harrelson, 282 U.S. 55, 60 (1930) ("[T]o justify a departure from the letter of the law . . . , the absurdity must be so gross as to shock the general moral or common sense."); *In re* Rose, 86 B.R. 86, 89 (E.D. Mich. 1988) (stating that "ludicrous" is synonymous with "absurd").

57. *See supra* note 51.

58. *See supra* note 51 (citing cases where principle was invoked but not justified by argument). On occasion, a judge will elaborate on the implications of the literal reading of the statute in an attempt to demonstrate that absurdity results from such a reading. *See* Chapman v. United States, 500 U.S. 453, 474 (1991) (Stevens, J., dissenting) (arguing that majority's reading of Comprehensive Drug Abuse Prevention and Control Act, which determines sentence in part by adding weight of substance in which LSD is carried to weight of LSD itself, would result in grossly inconsistent sentences for sales of identical amounts of drug, depending merely on type of carrier (e.g., sugar cube, blotter paper or orange juice) in or on which LSD was sold).

59. Indeed some claim that it is not possible to define absurdity sufficiently to create a clear rule as to whether an interpretation leads to absurdity in any particular case. *See* de Sloovère, *supra* note 8, at 600-01 (arguing that judges must use their training, experience, and sense of what is right and just when deciding whether particular meaning of statute is absurd).

A. *A Plain Meaning Approach: Dictionary Definitions of Absurd*

The dictionary, a source often used by courts to determine the meaning of words, is an appropriate first source in the search for a definition of absurdity pertinent to the absurd result principle.[60] Dictionary definitions include: (1) "clearly untrue or unreasonable; ridiculously inconsistent with reason, or the plain dictates of common sense; logically contradictory";[61] (2) "not in accordance with common sense, very unsuitable";[62] and (3)"ridiculous, foolish."[63]

The dictionary definitions can be grouped into two broad, basic categories. The first has to do with formal logic. The second, which is more diverse, deals with truth, rationality or reasonableness, and common sense. These definitions suggest the kinds of things that the absurd result principle guards within the legal system. The concepts are quite abstract. The several possible types of absurdity suggested must be explored in greater detail and within the context of statutory interpretation.

B. *Possible Varieties of the Absurd in the Context of Statutory Interpretation*

1. *Absurdity as a concept of formal logic*

One possible form of absurdity in legislation involves formal logic. There are at least two ways in which a statute could be absurd in this sense. First, there is the illogic of internal contradiction. Second, there is the illogic of flawed deductive reasoning, that is, a flaw in the application of a rule in a particular set of circumstances.

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60. *See, e.g., Chapman*, 500 U.S. at 462 (using dictionary to determine meaning of "mixture" in Comprehensive Drug Abuse and Prevention and Control Act); John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989) (discussing dictionary definition of "compiled" for use in interpreting Freedom of Information Act); Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979) (using dictionary definition of "property" to determine that term as used in the Clayton Act includes money). The courts apparently do not use the term absurd in any technical sense, which would make the dictionary an inappropriate research aid. *See* Nix v. Hedden, 149 U.S. 304, 306-07 (1893) (suggesting that words in statutes should be understood in their ordinary sense unless some special technical sense is indicated, and that dictionary is appropriate aid to understanding ordinary meaning).

61. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 8 (2d ed. 1983). The following synonyms are listed: "foolish, irrational, ridiculous, preposterous, silly, unreasonable, nonsensical." *Id.*

62. OXFORD AMERICAN DICTIONARY 5 (1st ed. 1980).

63. *Id.* Reflecting the tendency of courts to tie the absurdity exception to legislative intent, *Black's Law Dictionary* defines absurdity as "[a]nything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion. Obviously and flatly opposed to the manifest truth; inconsistent with the plain dictates of common sense; logically contradictory; nonsensical; ridiculous." BLACK'S LAW DICTIONARY 10 (5th ed. 1979).

a. The illogic of internal contradiction

A purported absurdity could lie in the statute itself, in that the rule expressed therein is internally contradictory, and for that reason illogical. An example would be a statute that provided:

> Anyone who does A is guilty of X; and, anyone who does A is not guilty of X.

This general rule can be expressed as the major premise of a syllogism:

If p then q; and, if p then not q.

The absurdity lies in the internal contradiction of the law's directive, entirely apart from its application to any particular set of facts.

It is difficult to find a case that illustrates this type of absurdity. Even though there may be disagreement about the precise contours of the term absurd in statutory interpretation, it is reassuring to find that the absurd result principle's presumption of a rational legislature comports with reality at least to the extent that blatantly self-contradictory laws are rare.[64]

But this does not close consideration of this category altogether. If, as the language of some cases suggests, the presumption of a reasonable legislature is merely descriptive,[65] then the empirical challenge made to that description by public choice theory[66] leads to the theoretical possibility that a legislature could pass a law that was absurd in the sense of logically contradictory. Some public choice scholars have presented a picture of the legislature as a marketplace, with interest groups making up the demand side for legislation, and

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64. Rare, but apparently not unheard of, as rules have evolved to deal with just such situations. *See* EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 166 (1940) (noting and commenting on rules for dealing with conflicting provisions of statutes, including provisions that are irreconcilable); REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 228 & n.31 (1975) (referring to rules developed to decide cases that cannot be resolved by actual meaning, and giving example of "the rule adopted in some jurisdictions, that if two provisions of the same statute unresolvably contradict each other, the later one prevails"). In some jurisdictions, these rules have even been codified. *See, e.g.*, OHIO REV. CODE ANN. § 1.52 (Baldwin 1992) (providing that if amendments to same statute "are substantively irreconcilable, the latest in date of enactment prevails").

65. *See supra* note 11 and accompanying text.

66. *See* ESKRIDGE & FRICKEY, *supra* note 17, at 49 (commenting that public choice theory involves economic analysis of political science, and that "[o]ne prominent aspect of public choice theory has been the creation of models that treat the legislative process as a microeconomic system in which 'actual political choices are determined by the efforts of individuals and groups to further their own interests'") (quoting Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983)); *see also supra* note 64 (noting existence of such laws, as evidenced by rules developed to deal with them). *See generally* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890-99 (1987) (discussing economic theory of legislation).

legislators as suppliers whose primary motivation is to maximize their chances at reelection.[67] Because in this scenario a legislator's primary goal is reelection and not reasoned deliberation, one can imagine key legislators making deals with interest groups in exchange for the funds and friends needed to secure victory.[68] This is, after all, the picture given by public choice theory. And there are no logic or consistency constraints on the process; there is only the utility-maximization of economic man.[69]

What would we do with a law that was logically contradictory? Would courts strain to interpret it in a way that avoided the contradiction? If a noncontradictory interpretation could not be devised except by giving the words of the statute a meaning they would not bear (stretching them beyond any acceptable usage), would a court be forced, by the principles of legislative supremacy and separation of powers, to enforce the law as written (perhaps noting that it did so with regret, but that it was up to the legislature to remedy the contradiction)?

But how could a law like this be enforced? How can a person be found both guilty and not guilty? Faced with such an impossibility, would the court choose instead to either nullify or rewrite the statute because it was absurd as written?[70] If the court chose the latter path, should it strive to find the legislative purpose or intent of the law, and rewrite it according to that purpose or interest?[71] If judges were to

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67. *See generally* Farber & Frickey, *supra* note 66. As Farber and Frickey point out, though later public choice scholarship provides more sophisticated models, avoiding some of the reductionism of early research, "the legal literature . . . has not always advanced beyond the early [reductionist] models." *Id.* at 875.

68. *See* Farber & Frickey, *supra* note 66, at 891 (stating assumption of economic models that legislators must maximize likelihood of their reelection). *See generally* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977) (explaining that rational choice theory is based on assumption that primary goal of legislators is to be reelected).

69. This is not to suggest that the economic model is illogical or inconsistent. However, logic and consistency are not, according to that model, independent constraints on activity or outcome. Rather, it is more accurate to say of at least some versions of the model that whatever outcomes the system produces are assumed at the outset to be rational *per se.*

70. *See* 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *91 (stating that "acts of parliament that are impossible to be performed are of no validity," and that if any absurdity results from them, they are void with respect to those consequences). Another alternative would be to follow the legislature's own directive for such situations, if one exists. *See supra* note 64.

71. Construing the words of a statute in light of the statute's purpose or legislative intent is a traditional approach to statutory interpretation. *See* FBI v. Abramson, 456 U.S. 615, 625, 634-35 (1982) (choosing interpretation that "more accurately reflects the intention of Congress, . . . and more fully serves the purposes of the statute," despite dissent's claim that interpretation ignored plain meaning of words); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."). *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1157 (tentative ed. 1958) [hereinafter THE LEGAL PROCESS]

follow this course, they might encounter the objection that there is no actual intent of the legislature, and no purpose other than the deal as struck by Congress.[72] If judges did rewrite the statute, would they be justly accused of engaging in judicial legislation, and of overstepping their proper role?[73] Or would such an action instead be justified under the absurd result principle as legitimately within the power and traditional role of the court?[74] Which would we expect, and which would we counsel? And, perhaps most importantly, why?

Although the definition of absurdity as involving internal contradiction depicts an extreme case, the questions generated by it highlight some fundamental issues concerning the absurd result principle. First, they illustrate the historically perceived tension between the absurd result principle and the principle of legislative supremacy.[75] Second, the questions point out several problems with some approaches to statutory interpretation. For example, they show a core problem with a literalism divorced from considerations of legislative intent or purpose.[76] In addition, they show a similar problem with making either legislative intent or the text of the statute the primary referent for statutory interpretation.[77] Finally, the questions raised by this definition of absurdity suggest the theoretical necessity of an

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(describing "purpose" approach to interpreting statutes); *Textualism*, *supra* note 14, at 626 (noting that legislative history is usually relevant to meaning of ambiguous statute); Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975) ("[I]t is an article of faith among American lawyers that the function of a court when dealing with a statute is to ascertain and effectuate the intention of the legislature.").

72. *See Textualism*, *supra* note 14, at 640-44 (briefly summarizing critiques of concept of legislative intent, based on schools of thought such as legal realism, law and economics, and public choice theory).

73. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring) (accusing majority of "'substituti[ng] [its own] pleasure to that of the legislative body'") (alteration by Kennedy, J.; quoting THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); Griffin v. Oceanic Contractors, 458 U.S. 564, 575 (1982) (citing Crooks v. Harrelson, 282 U.S. 55 (1930), and noting that remedy for dissatisfaction with outcome of statute lies with Congress); *Crooks*, 282 U.S. at 59-60 (cautioning that remedy for laws thought to be absurd should in most cases lie with legislatures, not courts).

74. *See, e.g.*, *Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring) ("When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way."); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (declaring that when literal interpretation produces absurd result, it is task of Court to give some alternative meaning to statute); Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function.").

75. *See supra* notes 23, 36 and accompanying text.

76. *See supra* note 11 and accompanying text (noting theory that courts may reject plain meaning because legislature did not intend absurd results).

77. *See infra* Part III (arguing need for absurd result principle's overarching restraint on both text and intent, in order to maintain coherence of legal system as whole).

absurd result principle that would cover at least the situation in which a statute was internally contradictory.[78]

b. The illogic of a flaw in deductive reasoning

There is a second way in which a statute could involve absurdity in terms of formal logic. The logical flaw may reside not in the words themselves (that is, it may not be the illogic of self-contradiction), but rather in the deductive process of applying those words to a particular set of facts (that is, it may be the illogic of arriving at a conclusion contradictory of the premises of the syllogism).

To illustrate, consider the following statute:

> Any person driving faster than 55 mph shall be guilty of speeding.

This rule can be restated as:

> *If p then q.*

Suppose a man is brought before a judge for speeding. The man does not dispute the fact that he was driving at a speed greater than 55 mph. Thus, *p* exists. If the judge finds the man not guilty (*not q*), the result is strictly illogical in that the conclusion is contradictory of the combination of the rule and the fact of *p*.

As a matter of deductive reasoning, the application of the statute to these facts would read:

> Any person driving faster than 55 mph shall be guilty of speeding.
> Mr. X was driving faster than 55 mph.
> Mr. X is not guilty of speeding.

The absurdity is evident in the language of formal logic:

> *If p then q.*
> *P.*
> *But not q.*

This absurdity rests not in any internal contradiction in the law (the rule or major premise), but rather in the reasoning that results in an illogical deduction from that premise. What would be done with a law, or rather, an application of a law, that involved absurdity in this sense? The problem presented here as compared to the first potential definition of absurdity, where the statute itself was internally contradictory, clearly is one of applying the law, and therefore is more arguably within the bailiwick of the judge.[79]

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78. *See infra* Part III.

79. *See supra* note 74 (citing cases indicating that interpretation is traditional role of judge); *cf.* de Sloovère, *supra* note 8, at 600-01 (stating that judges must use their discretion when

Is it conceivable that such a thing could occur? One can think of several situations in which it might. The man may have been speeding because his brakes had given out on a steep hill. Or he may have been the judge's brother-in-law.

A judge faced with the logical problem that this outcome presents (that is, finding a person who has clearly committed *p* not guilty, or *not q*) might be expected to attempt to resolve or, depending on her motives, obscure it in some way. The following approaches, each relating to one of the steps in the syllogism, are among those available to the judge.

First, and perhaps most obviously, the judge may find the man guilty. This would resolve the absurdity because the conclusion (guilty) follows logically from the premises. The argument and conclusion could then be written without a logical flaw:

If p then q.
P.
Therefore q.

A second option would be for the judge to focus on the minor premise (*p exists*). If the facts confronting the judge can be understood as not constituting *p*, then the statute is not triggered and the logical problem stemming from its application does not arise.

It is difficult in this situation to imagine how the facts could be construed so as not to fall within the rule as stated. It is not difficult, however, to imagine a judge faced with an outcome objectionable either to him personally or in terms of other legal principles and notions of justice, straining so to portray the facts that they will not fall within the reach of an apparently applicable legal rule.[80]

This maneuver strikes one as illicit. Perhaps that is because the illogic or absurdity of the original example remains where the rule is not enforced merely because the judge renames the facts *r* when they are apparent to most onlookers as in fact constituting *p*.

If there is some legitimate reason why the rule should not be enforced in this situation, a less objectionable approach might be to look to the rule itself to see if there might be latent within it some exception for *p*s of the particular kind confronting the judge. The judge might look to see if the rule applies not, in fact, to all *p*s, but only to some subset, *p'*, which does not include the situation at hand. This is the third alternative open to the judge who wants to avoid

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determining meaning of absurd statute).

80. At least in those reported cases not involving dissents, it is unlikely that this approach could be discerned, because the judge's portrayal of the facts would be the only one available to the reader, and thus the reader would not be aware that the reality was otherwise.

applying the rule to the speeding man, but also wants to avoid the absurdity of: *If p then q; p, but not q.* The judge can focus on the major premise, the legal rule, and interpret it so that it does not require *q* in this instance.[81] This approach is apparently more legitimate than reconstruing the facts because it involves the interpretation of a legal rule, which is a traditional judicial function.

Of course, this third approach may be no less of a strategic maneuver than the second alternative, in which the judge reconstrues the factual situation to avoid triggering the legal rule.[82] If it is merely an attempt to avoid what the judge perceives as an objectionable result, it is likely to be viewed as illegitimate.[83]

That is true except in one instance: if the result avoided is itself absurd. For of course it is a "venerable principle" that a judge shall construe a statute to avoid an absurd result.[84]

But what sort of absurdity is this? Surely not the one this section has addressed so far, the absurdity of formal logic resulting from the application of a legal rule in an illogical manner (*If p then q; p, but not q*).[85] This sort of absurdity arises only when that latter type is avoided, that is, when the rule *is* applied to the facts at hand (so, *If p then q; p, therefore q*), and when the result of that logical application is what is being called absurd.

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81. *See* FBI v. Abramson, 456 U.S. 615, 625 (1982) (construing exemption to Freedom of Information Act disclosure requirements for documents compiled for law enforcement purposes to also cover documents containing information from such sources, but created for other purposes).

82. *See supra* text accompanying note 80. In that alternative, the judge reconstrued the facts so that the minor premise (*p exists*) was not satisfied.

83. *See* Hopkins, *supra* note 2, at 695-96 (condemning absurd result principle for allowing judges to ignore clear words of legislature in order to avoid outcomes judges find objectionable); *see also* de Sloovère, *supra* note 8, at 602-03 (asserting that "judicial construction . . . must not become judicial legislation by seeking to contradict the plain meaning by a supposed legislative policy or purpose or by a so-called equity of the statute").

84. *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("[I]t is a venerable principle that a law will not be interpreted to produce absurd results."); United States v. Watson, 788 F. Supp. 22, 24 (D.D.C. 1992) (quoting Justice Scalia's reference to absurd result principle in *K Mart* to discredit Government's argument that federal drug prevention statute should be broadly interpreted); de Sloovère, *supra* note 8, at 600-01 (pointing out that absurdity is only situation in which it is legitimate for judge to interpret to avoid certain outcome, and emphasizing that other outcomes, such as injustice, inequity, and inconvenience, do not justify avoiding single statutory meaning); *id.* ("Now suppose that the single meaning is mischievous or absurd. If mischievous and the only meaning, it must be followed; if absurd, it is probably not the only meaning; but if it is, the statute must be regarded as unenforceable."). De Sloovère posited that the potential for misuse is inherent in the absurdity principle because it is fundamentally a matter of judicial discretion. *Id.* at 601. As such, its proper use is dependent upon the skill, good faith, and common sense of the judge. *Id.*

85. *See supra* note 81 and accompanying text.

To illustrate the kind of absurdity that would allow a judge to legitimately follow this third alternative and reconstrue a legal rule in order to avoid its application in a particular situation (thereby achieving *not q* while avoiding the illogic of *If p then q; p, but not q*), substitute for the speeding driver the man who drew blood in the streets in medieval Bologna. Recall that the legal rule involved there was essentially the following:

> Anyone who draws blood in the streets shall be punished with the utmost severity.[86]
> Or:
> If a person draws blood in the streets, then that person shall be punished with the utmost severity.
> Or:
> *If p, then q.*

The surgeon involved in this case apparently was considered to have "drawn blood in the streets" by opening the vein of the man who had fallen down in a fit.[87] (Otherwise, the case would not have generated debate and we would never have heard of it.) *P* apparently existed and yet, "after long debate,"[88] the law was held not to apply.[89] Thus we have:

> *If p then q.*
> *P.*
> *But not q.*[90]

This is precisely the formulation proposed in this section as a form of logical absurdity. And yet the resolution has been justified as having been necessary to avoid an absurd result.[91] Why? We do not have the details of the long debate that led to that resolution. We do know that the surgeon was not punished under the statute. And we know that this very outcome has been consistently and continually used as an archetypal example of legitimate statutory construction to avoid an absurd result.[92]

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86. *See* 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *60 (reciting classic application of absurd result principle).

87. *See* 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *60 (distinguishing surgeon who opened vein of ill person from other actors who might "draw blood in the street").

88. 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *60.

89. *See* 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *60 (stating that punishment did not extend to surgeon in this situation).

90. 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *60.

91. *See* 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *60 (remarking that "absurd significations" require deviations from literal meaning of text); *see also supra* note 51 (citing cases supporting this result).

92. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988); Resolution Trust Corp. v. Westgate Partners, 937 F.2d 526, 529-30 (10th Cir. 1991); United States v. Wooden, 832 F. Supp. 748, 751 (S.D.N.Y. 1993); *supra* note 51 (citing additional cases).

If there is an absurdity here that legitimizes, via the absurd result principle, a judge's reinterpretation of a legal rule in order to avoid a particular outcome (and the authority is overwhelming that there is), that absurdity is not a matter of formal logic. For it was absurdity in the sense of formal logic that would have resulted had the penalty not been imposed (*but not q*). And if we wish to secure just that outcome (*not q*) on the ground that imposing the penalty in this situation would be absurd, we cannot look to formal logic for a definition of this sense of absurdity.[93]

Yet this situation and others like it seem to have called out for resolution, and judges have found justification for their resolution in the absurd result principle.[94] What sort of justification does that principle represent? Though consistent with logic (through an implicit reconstruction of the rule), this avoidance of absurd results does not find its justification in logic, as would be the case where the absurdity avoided was of the type inhering in either *If p then q; p, but not q*,[95] or *If p then q; and if p then not q*.[96] Instead, the justification for the absurdity principle seems to lie elsewhere.

The traditional justification links the principle to legislative intent.[97] This Article has already alluded to several reasons why it seems unlikely that legislative intent provides the justification for the absurd result principle.[98] Another is indicated by the reasoning

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93. This is not to suggest that in avoiding an absurd result in this way a court violates the principles of logical reasoning. The illogic of *If p then q; p, but not q* can be said to be avoided by an implicit reconstruction of the statute to provide If *p* then *q*. But, whereas in most situations it would be considered illegitimate for a judge to alter because of outcome considerations the interpretation that would otherwise be preferred, in the case of the absurd outcome, it is not only considered legitimate to do so, it is in fact generally agreed to be illegitimate not to do so. *See* Central States, S.E. & S.W. Areas Pension Fund v. Lady Baltimore Foods, 960 F.2d 1339, 1345 (7th Cir. 1992) (stating Judge Posner's position that, if result of strict interpretation is absurd, judge is compelled to depart from that interpretation in direction of sense); Hsam Inc. v. Gatter, 814 S.W.2d 887, 891 n.4 (Tex. Ct. App. 1991) (quoting Blackstone and stating that if law as interpreted would bring about absurd result, courts "*must* deviate from its perceived interpretation") (emphasis added).

94. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 509, 527-29 (1988) (Scalia, J., concurring) (using principle to resolve problems posed by literal reading of FED. R. EVID. 609(a)(1)); Church of the Holy Trinity v. United States, 143 U.S. 457, 459-61 (1892) (justifying judicial interpretation of legislative intent via absurd result principle); United States v. Kirby, 74 U.S. 482, 486-87 (1868) (using principle to resolve problem posed by statute that, if applied literally, would punish sheriff for arresting man indicted for murder merely because man was carrying mail at time); United States v. Mendoza, 565 F.2d 1285, 1288-89 (5th Cir. 1973) (stating principle in support of court's looking to purpose or intent of act when language would lead to results "devastatingly and arbitrarily fortuitous").

95. *See supra* text accompanying notes 79-81 (discussing definition of absurdity as illogic in sense of flaw in deduction reasoning).

96. *See supra* Part II.B.1.a (discussing definition of absurdity as illogic in sense of internal contradiction).

97. *See supra* notes 36-37 and accompanying text.

98. *See supra* notes 11-23 and accompanying text.

above that led to this last notion of absurdity.[99] The naming of a particular outcome as absurd does not arise from an initial attempt to determine the meaning of a statute. Rather, it springs almost as a reflex from the facts of the case *after* an initial determination of probable meaning has been made. The sense that something was wrong with punishing the surgeon for aiding a person in physical distress no doubt led to the long debate about whether the law was to be enforced against him, and not vice versa.[100] It was not initially a search for the intent of the lawmakers that led the Court in *Kirby* to bridle at the prospect of punishing the sheriff for arresting a suspected murderer merely because the suspect happened to be carrying the mail at the time.[101] It was rather the rejection, for some reason, of that outcome that led the court to assert that it could not have been intended.[102]

What inspired that initial rejection? As suggested by the discussion above, it could not have been the constraints of formal logic. It seems that the justification lay rather in the second type of meaning indicated by the dictionary definitions.

2. *Absurdity as irrationality, unreasonableness or an affront to common sense*

The set of dictionary definitions of absurd that relates to common sense or reasonableness, rather than formal logic,[103] seems to apply to the classic illustrations of the absurd result principle. It would be absurd in terms of formal logic, at least according to a literal reading of the law, if the man who "drew blood in the street" were not "punished with the utmost severity." Yet the penalizing of the surgeon who opened the vein of the person who had fallen down in

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99. *See supra* notes 81-96 and accompanying text.

100. *See supra* notes 86-92 and accompanying text.

101. *See supra* notes 39-52 and accompanying text.

102. *See* United States v. Kirby, 74 U.S. 482, 486-87 (1868) (first rejecting literal interpretation of statute because of outcome it would require in this case, then stating that it will "be presumed that the legislature intended exceptions" when literal application of statutory language would lead to absurd results). Just as the logical problems are tidied up (after curing the absurd outcome) by reconstruing the rule (to *If p' then q*), the problem of a perceived threat to legislative supremacy is often disposed of by a statement that there is no evidence that the court's result conflicts with the intent of the legislature. *See, e.g.*, Ambassador Div. of Florsheim Shoe v. United States, 748 F.2d 1560, 1564-65 (Fed. Cir. 1984) (stating that "supposed absurdity" arises not from congressional shortcomings but from overbreadth that judiciary can correct with reference to intent); *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (stating that it is "entirely appropriate to consult all public materials, including . . . legislative history . . . to verify that what seems to us an unthinkable disposition . . . was indeed unthought of").

103. *See supra* text accompanying notes 61-63.

the street in a fit is taken by all those citing the case to be a classic example of absurdity.[104]

This absurdity is seemingly of the same genre as another classic example. Take the law stipulating that a person breaking out of prison is guilty of a felony. That law was held not to extend to the person who broke out because there was a fire in the prison, "'for he is not to be hanged because he would not stay to be burnt.'"[105] Again, under a literal reading of the statute, formal logic would require punishment in this situation, and reconstruing the legal rule merely in order to avoid a particular outcome is generally considered illegitimate.[106] Yet the application of the penalty in this situation is called absurd, and this interpretation rejecting plain meaning is traditionally regarded as entirely legitimate.[107]

Why? The initial outcome offends us at some gut level; it offends our sense not only of fairness, but of rationality and common sense. And it offends, not simply, but radically. Our reaction goes beyond, "That's not fair." It is more like "That's ridiculous; it makes no sense at all; it's totally illogical."[108]

In both these examples, the absurdity was resolved by withholding enforcement of the rule in the particular situation.[109] In effect, the rule of law is held inapplicable in situations where absurdity would result. The judicial approach in these two examples is not to reconstrue the facts.[110] Instead, the focus is on the rule itself, the

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104. *See Kirby*, 74 U.S. at 487 (suggesting that penalizing surgeon goes against "common sense"); *see also* cases collected in *supra* note 51.

105. *See id.* (quoting Plowden's reference to statute of 1st Edward II); *supra* note 50 and accompanying text.

106. *See supra* notes 79-83 and accompanying text.

107. *See Kirby*, 74 U.S. at 487 (characterizing ruling as condoned by common sense).

108. This notion of absurdity corresponds roughly with that listed as an "evaluative" argument by Zenon Bankowski and D. Neil MacCormick in their work *Statutory Interpretation in the United Kingdom*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY, *supra* note 8, at 359, 370-73. They distinguish this use of absurdity from a "linguistic" argument, *id.* at 364-66, further explaining:

> [A]part from strict logical absurdity (self contradiction), courts sometimes reject proposed interpretations of Acts as 'absurd,' even when on the face of it the proposed interpretation seems to satisfy the 'plain meaning' test. This is no more than a strong way of expressing a negative evaluation of the Act so interpreted; the significance of the strength of the negative is that it justifies departure from the normal priority in favor of a more obvious over a less obvious meaning.

Id. at 373. The "linguistic" absurdity argument corresponds with the first variety of formal logic absurdity previously discussed. *See supra* Part II.B.1.a.

109. *See Kirby*, 74 U.S. at 487 (ruling that Act punishing obstruction of mail or its carrier does not apply when mail carrier is arrested following indictment for murder); 1 BLACKSTONE'S COMMENTARIES, *supra* note 30, at *60.

110. Recall that this was one of the possible approaches to resolving the logical problem facing the judge who did not want to find guilty the man who was caught speeding. *See supra* Part II.B.1.b (setting out example of man caught speeding).

judge apparently concluding that, in the particular factual circumstances, the rule cannot mean what it appears to mean.[111] That is, its plain meaning cannot be its actual meaning.[112]

The declaration by a judge that a statute's plain meaning cannot be its actual meaning is itself subject to two interpretations. The word "cannot" may be understood either descriptively or prescriptively. In refusing to apply the rule as written, the judge may be stating that the rule in fact does not mean what it appears to mean.[113] Alternatively, the judge may be stating that, regardless of any argument about actual meaning, a statute will not be allowed to have a meaning resulting in an absurdity.[114] This latter understanding of what the court means by implying that the plain meaning cannot be the actual meaning supports the view that intent does not provide the justification for the absurd result principle.[115] The question of just what the justification is remains for the moment unanswered. The foregoing discussion demonstrates, however, that the universally agreed upon archetypes reflect a definition of absurdity related primarily to rationality, reasonableness and common sense, rather than formal logic. This

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111. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989) (stating that FED. R. EVID. 609(a)(1) "'can't mean what it says'") (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987)); *Kirby*, 74 U.S. at 487. As outlined previously, there must be an implicit rewriting of the rule in order to avoid creating a logical problem in the course of resolving the outcome absurdity. *See supra* note 93 and accompanying text. The court, in effect, reads into the statute an unwritten exception that makes the rule inapplicable to the situation before it. *See id.*

The exception usually is not explained by the court, however, and, in fact, often would not be capable of being spelled out by the legislature either, at least not without creating an immensely cumbersome statute. Rather, the absurd result principle is a general limitation, an invisible exception clause in all statutes, necessarily having to be explicated in each individual case. *See Kirby*, 74 U.S. at 485-87 (stating that there is always presumption that "legislature intended exceptions" that would avoid absurd results).

112. *See Bock Laundry*, 490 U.S. at 510 (stating that Court cannot accept plain meaning interpretation of FED. R. EVID. 609(a)(1)); *Kirby*, 74 U.S. at 487 (asserting that in exceptional cases, "[t]he reason of the law . . . should prevail over its letter").

113. If intent is taken as the primary referent of interpretation, this case might be described as one in which the words do not accurately reflect the legislature's intent. *See* Ambassador Div. of Florsheim Shoe v. United States, 748 F.2d 1560, 1564-65 (Fed. Cir. 1984) (implying that "true intent of Congress" can be different from its "literally stated intent").

114. This dual possibility is mirrored in the language often used by courts to justify in terms of legislative intent their construal around plain meaning. *See Bock Laundry*, 490 U.S. at 535 (Blackmun, J., dissenting) (arguing that result in case was not one that "Congress conceivably could have intended"). A judge will often attach to his or her declaration about what the statute cannot mean some gesture toward the legislature, such as "for it cannot have been intended by the legislature that" or "it will not be presumed that Congress." *See id.* Again, this language may be read as reflecting a view that Congress is made up of rational people who could not intend an absurdity. On the other hand, it may be read as a declaration that Congress will not be permitted to legislate absurdity, or at least, not with any effect, for any such meaning will be rejected by the Court. *See supra* note 98 and accompanying text.

115. *See supra* notes 11-23 and 98 and accompanying text. This Article refers here to intent as usually understood in the United States legal system—the actual intent of actual legislators—and not to a constructive notion of intent. Further, it does not here refer to a broadened notion of intent that would include the purpose behind the legislation.

gives some indication of the likely authority for the absurd result principle. This point will be revisited in Part III. First, however, the definition will be tested in light of a recent Supreme Court case.

C. *An Application of the Proposed Definition:* Green v. Bock Laundry Machine Co.

In *Green v. Bock Laundry Machine Co.*,[116] the Supreme Court dealt with a legal standard that all nine Justices regarded as being unworkable as written, and as meaning something other than what its plain language said.[117] Federal Rule of Evidence 609(a)[118] deals with the admissibility of evidence of prior convictions for the purpose of impeaching a witness.[119] At the time, the rule provided for the

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116. 490 U.S. 504 (1989).

117. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989) (stating that Rule 609(a)(1) "'can't mean what it says'") (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987)).

118. FED. R. EVID. 609(a) (1988) (appearing as promulgated in 1987, *see* 28 U.S.C. app. 759 (1988), but amended in 1990 as reflected in 28 U.S.C. app. 539 (Supp. II 1990)). Federal Rule of Evidence 609(a) then provided:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Id.

The Federal Rules of Evidence are statutory. Prior to legislative development of the rules in 1973, however, the Supreme Court had transmitted its own proposed rules to Congress. RULES OF EVIDENCE, COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 46, 93d Cong., 1st Sess. (1973) [hereinafter RULES OF EVIDENCE]. Congress responded by enacting a statute the result of which was that the rules were to be legislatively, rather than judicially, formulated. *See* Federal Courts, Proposed Rules of Evidence, Congressional Approval Requirement, Pub. L. No. 93-12, 87 Stat. 9 (1973) (suspending Rules of Evidence for U.S. courts and magistrates and requiring congressional approval of Rules, Amendments to Federal Rules of Civil Procedure, and Amendments to Federal Rules of Criminal Procedure ordered by Supreme Court on Nov. 20, 1972 and Dec. 18, 1972); *see also* JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, 1994 Rules Pamphlet Pt. 2, at 6-7 (1993). Although the rules passed by Congress were based in substantial part on the draft as approved by the Supreme Court, Congress did not enact the Court's version of Rule 609(a). *See* RULES OF EVIDENCE, *supra*. The Court's proposed rule did not provide for a balancing of prejudice, and it was this provision in Congress' version of the rule that was at issue in *Green v. Bock Laundry Machine Co.*

Both because the federal rules are obviously important to the judicial branch, and because the Court had submitted its own formulation of the rules prior to Congress' decision to reformulate them, it is possible that the Court was inclined to take a more aggressively critical stance in this case than it might with respect to a different subject matter. *See generally Bock Laundry*, 490 U.S. at 514-24 (documenting legislative history of Rule 609). It might therefore be argued that this is a special case, and not one that illustrates a typical approach to statutory interpretation. It is much more likely, however, that the background of the rules would make the Court particularly conscious of separation of powers issues when deciding interpretive questions regarding the rules, and that therefore this case is one in which the Court's approach to statutory construction is shown in particularly sharp relief.

119. FED. R. EVID. 609(a).

mandatory admission of such evidence in two situations: one leg of the rule involved so-called "*crimen falsi*" evidence (evidence of crimes involving dishonesty or false statement), and was not at issue in *Bock Laundry*;[120] the other leg of the rule involved crimes punishable either by death or by more than a year's imprisonment, and required the judge to apply a balancing test.[121]

It was the wording of the phrase calling for the balancing test that was central to *Bock Laundry*.[122] That phrase directed that the evidence was to be admitted if "the court determines that the probative value of admitting [it] outweighs its prejudicial effect to the defendant."[123] The question presented was whether the rule applied to civil trials, and, if so, whether it provided for a balancing of prejudice to the civil defendant, but provided no such benefit to the plaintiff.[124]

As written, the rule did not specify whether it applied to civil trials, criminal trials, or both.[125] The court of appeals followed Third Circuit precedent, which had interpreted the rule to apply in both civil and criminal trials, and to allow the court to balance prejudice only for defendants.[126] So interpreted, the rule left a judge no discretion to balance prejudice to a civil plaintiff, but rather mandated the admission of a plaintiff's felony convictions on the issue of credibility.[127] Third Circuit precedent had criticized such a result,

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120. *See id.* 609(a)(2); *Bock Laundry*, 490 U.S. at 505 (stating that case concerned Rule 609(a)(1)).

121. FED. R. EVID. 609(a)(1); *see also supra* note 118 and accompanying text.

122. FED. R. EVID. 609(a)(1); *see Bock Laundry*, 490 U.S. at 505-11 (documenting lower court struggles with wording of Rule 609(a)(1)). Paul Green, the petitioner in *Bock Laundry*, had obtained work-release employment at a car wash while in custody at a county prison. At work, Green reached inside a large dryer and had his arm torn off by a large rotating drum. He brought a civil products liability suit against Bock Laundry Machine Co., the manufacturer of the machine. At trial, Green testified that he had been inadequately instructed about the dangerous character of the machine. Bock Laundry impeached Green's testimony with evidence that he had been convicted of two felonies, conspiracy to commit burglary and burglary. The jury found in favor of the defendant, Bock Laundry, and Green appealed, arguing that the impeaching evidence should have been excluded. The Third Circuit affirmed the District Court's ruling allowing the impeachment.

123. FED. R. EVID. 609(a)(1).

124. *See Bock Laundry*, 490 U.S. at 505 (questioning whether Rule 609(a)(1) may be interpreted to benefit civil litigants). The rule has since been amended. While it still contains a balancing test, it now provides a different test for witnesses generally than for an "accused" as a witness. FED. R. EVID. 609(a) (amended 1990). The word "defendant" has been dropped from the rule. *Id.*

125. *See* FED. R. EVID. 609(a) (1988); *see also Bock Laundry*, 490 U.S. at 508-09 (discussing ambiguity of rule).

126. *Bock Laundry*, 490 U.S. at 506-07 (referring to Diggs v. Lyons, 741 F.2d 577, 580-91 (3d Cir. 1984), which cited precedent applying Rule 609(a) to both civil and criminal trials).

127. *See id.* (summarizing court of appeals' ruling that Rule 609 "forecloses judicial exercise of . . . discretion" to exclude evidence of plaintiff's prior felony convictions); *see also* FED. R. EVID. 609(a)(1) (requiring judge to balance prejudice only to defendant, and containing no

calling it potentially "unjust and even bizarre,"[128] and "ridiculous."[129]

The Supreme Court agreed with these criticisms.[130] Justice Stevens' majority opinion stated that the rule's plain language "compel[s] an odd result in a case like this."[131] A plain reading of the rule would result in the mandatory admission of impeachment evidence detrimental to a civil plaintiff, while providing a civil defendant the benefit of a balancing test.[132] The Court stated that it "cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant."[133] It called such a result "unfathomable,"[134] concluding that, as far as civil trials were concerned, Rule 609(a)(1) "'can't mean what it says.'"[135] The Court went on to examine the background and legislative history of the rule,[136] and concluded that the balancing test of Rule 609(a)(1) was only intended to protect from unfair prejudice the defendant in a criminal trial.[137] Thus the Court held that Rule 609(a)(1) required a judge "to permit the impeachment of a civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony,"[138] and affirmed the appellate ruling.[139]

Justice Scalia's concurring opinion took a different approach to the same outcome. He criticized the majority for its lengthy exploration of legislative history to determine the correct interpretation of the

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language limiting its application to criminal cases).

128. *Bock Laundry*, 490 U.S. at 507 (quoting *Diggs*, 741 F.2d at 582). The Third Circuit decided *Bock Laundry* based on *Diggs* and without a published opinion.

129. *Id.* (quoting *Diggs*, 741 F.2d at 583) (Gibbons, J., dissenting)).

130. *See id.* at 509-10.

131. *Id.* at 509.

132. *Id.* at 510.

133. *Id.*

134. *Id.*

135. *Id.* at 511 (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987)). In addition to its own reactions to Rule 609(a) as written, the majority opinion noted a number of reactions from lower courts and commentators. *See Diggs*, 741 F.2d at 582 (calling results of plain meaning interpretation of Rule "unjust and even bizarre"), *quoted in Bock Laundry*, 490 U.S. at 507; *Diggs*, 741 F.2d at 583 (Gibbons, J., dissenting) (asserting that result "makes no sense whatever"), *quoted in Bock Laundry*, 490 U.S. at 508; 3 DAVID W. LOUISELL, FEDERAL EVIDENCE § 316, at 324-25 n.26 (1979) (noting inconsistency arising from allowing exclusion of evidence of convictions of civil defendants), *quoted in Bock Laundry*, 490 U.S. at 511 n.9; 10 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 609.14[4], at VI-148 (1966) (stating that "subsection (a)(1) is deficient, in that it cannot be sensibly applied in civil cases"), *quoted in Bock Laundry*, 490 U.S. at 511 n.9.

136. *Bock Laundry*, 490 U.S. at 511-24.

137. *Id.* at 523-24.

138. *Id.* at 527.

139. *Id.*

rule.[140] He explicitly called the results of 609(a)'s plain meaning "absurd."[141] He described the outcome of a literal reading, whereby "civil defendants but not civil plaintiffs receive the benefit of weighing prejudice," as "unthinkable" and "bizarre,"[142] contending that the rule "cannot have been meant literally."[143] Justice Scalia continued, asserting that the word defendant in the rule "cannot rationally . . . mean to provide the benefit of prejudice-weighing to civil defendants and not civil plaintiffs."[144]

The fact that all nine Justices concluded that Rule 609(a) was unreasonable or absurd as written[145] makes this an interesting example to consider in light of the previously proposed definitions of absurdity.[146] It gives some sense of what kind of absurdity was thought by these and many lower court judges not only to justify, but in fact to require, an exception to plain meaning.

The first proposed definition of the term absurd was "illogical" or "logically contradictory."[147] Rule 609(a) can be examined in order to determine whether it is illogical or logically contradictory. The first prong of 609(a) can be stated in the following simplified form:

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140. *Id.* at 527-28 (Scalia, J., concurring).

141. *Id.* (stating that literal interpretation produced absurd result and adding that result may be unconstitutional as well).

142. *Id.* at 527.

143. *Id.* at 528.

144. *Id.* Justice Scalia's solution, though, does not require looking into the legislative history for the actual meaning of the rule. He criticized the majority for doing just that, *id.* at 527-28, arguing that while it is appropriate to look at all public materials, including legislative history, to verify that Congress did not intend the interpretation that resulted in absurdity, these materials should not be used to attempt to determine what Congress did in fact mean, *id.* Instead, to determine the rule's meaning, Justice Scalia considers the "available alternative" interpretations, and chooses the one that (in his opinion) "[q]uite obviously . . . does least violence to the text." *Id.* at 529. Justice Scalia explained:

> The available alternatives are to interpret "defendant" to mean (a) "civil plaintiff, civil defendant, prosecutor, and criminal defendant," (b) "civil plaintiff and defendant and criminal defendant," or (c) "criminal defendant." Quite obviously, *the last does least violence to the text. It adds a qualification that the word "defendant" does not contain but, unlike the others, does not give the word a meaning* ("plaintiff" or "prosecutor") *it simply will not bear.* The qualification it adds, moreover, is one that could understandably have been omitted by inadvertence—and sometimes is omitted in normal conversation ("I believe strongly in defendants' rights"). Finally, this last interpretation is *consistent with the policy of the law in general and the Rules of Evidence in particular of providing special protection to defendants in criminal cases.*

Id. (emphasis added).

145. *See id.* at 530 (Blackmun, J., dissenting, joined by Brennan, J., and Marshall, J.) (stating that although they disagree with result, they agree with majority that rule cannot mean what it says on its face).

146. *See supra* Part II.B (discussing various definitions of "absurd").

147. *See supra* Part II.B.1.

If:
a witness' prior conviction was punishable at the time of conviction by death or more than one year of imprisonment
And
the court determines that the probative value of admitting the evidence of prior conviction outweighs its prejudicial effect to the defendant,
Then:
the evidence of prior conviction shall be admitted under the circumstances and for the purpose provided.[148]

There is nothing illogical about this rule in the sense of internal contradiction,[149] nor is there anything that would make logical application of this rule impossible. To apply the rule, a court merely checks the potential punishment for the prior conviction and weighs the probative value of the evidence of prior conviction against its prejudicial effect to the defendant.[150] If the evidence passes both parts of this test, the judge is to admit it.

It seems, then, that the rule was workable as written. There was, however, something there that bothered the Justices enough to inspire all of them, even a textualist like Justice Scalia, to reject the plain meaning of the statute and do some reworking of the words that Congress passed into law.[151] Although different members of the Court took different tacks, there was unanimity on this point.

Whatever it was about Rule 609(a) that bothered the Justices, it was not absurdity in the sense of formal logic. It seems rather to fall into the second category that defines absurdity as "ridiculously inconsistent with reason or the plain dictates of common sense,"[152] or "very unsuitable . . . ridiculous, foolish."[153] The comments about the rule made by the various opinions seem to confirm this definition of

148. *See* FED. R. EVID. 609(a)(1) (providing general rule for attacking credibility of witnesses).

149. *See* Central States, S.E. & S.W. Areas Pension Fund v. Lady Baltimore Foods, 960 F.2d 1339, 1345 (7th Cir. 1992) (holding that amendment to ERISA did not violate substantive due process). In *Lady Baltimore Foods*, Judge Posner described Rule 609(a)(1) as "a perfectly straightforward, flawlessly grammatical, syntactically impeccable prose specimen." *Id.*

150. *See* FED. R. EVID. 609(a)(1). Though the majority opinion in *Bock Laundry* raises the problem of unexpected designations of parties in a case, *see Bock Laundry*, 490 U.S. at 510 n.7 (arguing that declaratory judgment and interpleader actions may invert expected designations of plaintiff and defendant), it would not seem to be an insurmountable task for any court to work out the appropriate designation of each of the parties with respect to each of the claims at issue.

151. *See Bock Laundry*, 490 U.S. at 527 (Scalia, J., concurring) (stating that task before Court was to give some alternative meaning to statute in order to avoid absurd result).

152. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, *supra* note 61, at 8; *see also supra* notes 60-63 and accompanying text.

153. OXFORD AMERICAN DICTIONARY, *supra* note 62, at 5; *see also supra* notes 60-63 and accompanying text.

absurd, at least in this instance.[154] As noted,[155] the opinions refer to the result of a literal interpretation of Rule 609(a) as "ridiculous," "unfathomable," and "bizarre," and as "mak[ing] no sense whatever."[156] These are a very close match with those dictionary definitions of absurdity.

III. IMPLICATIONS FOR APPROACHES TO STATUTORY INTERPRETATION

Several points can now be made about the implications of the absurd result principle for theories of statutory interpretation. As suggested above, the principle poses some problems for textualism. Even more importantly, however, the principle seems to be a particular instance of interpretation as the balancing of fundamental values in order to maintain coherence in the legal system as a whole.

A. Some Points About Textualism

1. The primacy of text

The absurd result principle justifies departures from interpretations based on the text of the statute.[157] The fact that even a strict textualist like Justice Scalia has endorsed this principle, allowing exceptions from plain meaning (albeit in limited circumstances),[158] suggests something not only about the uniqueness of this principle among doctrines of statutory interpretation, but also about literalist theories of interpretation.

What the principle suggests about textualism is that even while textualism purports to hold the text as the primary, if not sole, source of a statute's meaning,[159] it acknowledges something as primary even to text, that is, non-absurdity or, using the definitions proposed here,

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154. *See supra* Part II.B.2 (defining absurdity as irrationality, unreasonableness, or affront to common sense).

155. *See supra* notes 128-44 and accompanying text.

156. *See supra* notes 128-42 and accompanying text.

157. *See* Central States, S.E. & S.W. Areas Pension Fund v. Lady Baltimore Foods, 960 F.2d 1339, 1345 (7th Cir. 1992) (stating that general rule is if literal reading would produce absurd results, then interpreter is free to depart in direction of sense).

158. *See Bock Laundry*, 490 U.S. at 527 (Scalia, J., concurring) (explaining that, when literal interpretation would lead to absurd result, court's task is to give statute different meaning that will avoid absurd consequences).

159. *See generally Textualism*, *supra* note 14. Though even Justice Scalia would look beyond the words of the applicable statutory section to ascertain statutory meaning, the other sources he would consult are all textual ones, i.e., the language of other sections of the same statute and the language of analogous statutes. William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1140 (1992) (stating that Justice Scalia relies on three textual sources of interpretation: ordinary meaning of words at issue, consideration of other words in same statute, and consideration of words of other statutes).

rationality or common sense.[160] Textualists might attempt to place this trump to text in a small corner of their system, and claim that it does not challenge the primacy of text because it comes into play only rarely. The absurd result principle, however, belies this attempt. The principle appears to be a pervasive and encompassing restriction on text, even if it rarely alters the outcome that would obtain in its absence. Furthermore, although non-absurdity and text may clash only rarely, every time they do, text must bow to non-absurdity.[161] Every initial interpretation of a statute is subject to an implicit, and controlling, review to assure that it would not result in absurdity.[162]

The preeminence of non-absurdity over text would seem to pose no problem for traditional approaches to statutory interpretation that regard text as merely the best initial indicator of intent or purpose, the effecting of which is regarded as the primary goal of interpretation.[163] The implications for textualism, however, are considerable. The primacy of the non-absurdity principle implies that, in the realm of statutory interpretation, text is not king, despite sometimes absolutist contentions to the contrary.[164]

2. *The empirical critique of the legal process theory*

Another instance of the absurd result principle's having implications for textualism concerns the theoretical roots of the so-called "new textualism."[165] Although the plain meaning rule has a lengthy history in statutory interpretation,[166] this modern form of literalism arose partially in reaction to the apparent failure of traditional legal process theory to recognize and take account of the empirical realities

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160. *See supra* Part II.B.2 (defining absurdity as irrationality or affront to common sense).

161. *See Lady Baltimore Foods*, 960 F.2d at 1345 (asserting that if literal reading would produce absurd result then interpreter is compelled to depart in direction of sense).

162. *See supra* text accompanying notes 98-102; *see also supra* note 111.

163. *See* Perry v. Commerce Loan Co., 383 U.S. 392, 399-400 (1966) (indicating that, while words are the most persuasive evidence of statute's purpose, and plain meaning is ordinarily to be followed, at times court should not follow plain meaning if it conflicts with reasonableness or congressional intent) (quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940)); *see also Textualism*, *supra* note 14, at 626 (noting that traditional approach to statutory interpretation is for court to implement "original intent or purpose of enacting Congress"); *supra* note 71 and sources cited therein.

164. *See* William D. Popkin, *Judicial Use of Presidential Legislature History: A Critique*, 66 IND. L. J. 699, 699 (1991) (commenting that "constitutional primacy of text is doubtful, given the well-known exception that plain meaning will not be implemented if it produces an 'absurd' result").

165. *See generally Textualism*, *supra* note 14, at 640-44 (explaining that new textualism arose in part as result of realist and historicist critiques of traditional approach to statutory interpretation).

166. *See* Maine v. Thiboutot, 448 U.S. 1, 7 n.4 (1980) (stating that when plain language of statute is clear, there is no need to look beyond words of statute); THE LEGAL PROCESS, *supra* note 71, at 1145 (citing Caminetti v. United States, 242 U.S. 468, 485-86 (1917)).

of the legislative process.[167] Legal process theory is said to be based on an assumption that the legislature is made up of reasonable people pursuing reasonable purposes reasonably.[168] Legislators are presumed to engage in purposeful acts, and courts are to seek out the rational legislative purpose when interpreting a statute.[169]

Modern public choice theory challenges this picture of the legislative process.[170] Public choice theory views the legislature as a market in which disparate interest groups demand various pieces of legislation, and legislators supply legislation to meet these demands, primarily in accordance with their self-interested goal of reelection.[171] The market model is an economic one, and it recognizes only certain kinds of motivations and incentives.[172] In this model, legislators are the familiar utility maximizers of economic theory. Their purposes boil down to dealmaking, and although that may be a rational purpose in the view of economists, it is certainly not the kind of rational purpose that legal process theorists seem to have had in mind.

A picture of the legislative process so different from that allegedly posited by legal process theory has prompted many who subscribe to that picture to reject the legal process approach to statutory interpretation, in part as being founded on false premises.[173] It has led new textualists further to reject, or to treat merely as confirmatory, any

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167. *See Textualism*, *supra* note 14, at 640-44 (discussing realist perspectives on legal process approach to statutory interpretation); *see also* ESKRIDGE & FRICKEY, *supra* note 17, at 571-72 (noting that law and economics scholars have criticized legal process approach as premised on simplistic view of legislative process).

168. THE LEGAL PROCESS, *supra* note 71, at 1157 (stating that statutes should be presumed to be reasonable and never interpreted as directing irrational pattern of particular application). Though this might be taken as an empirical description, Hart and Sacks specifically referred to it as a "benevolent presumption" later in those materials. *See id.* at 1178 (arguing that examination of legislative intent, coupled with "benevolent presumption" that legislature consists of reasonable people with reasonable purposes, resolves many problems of statutory interpretation).

169. *See* THE LEGAL PROCESS, *supra* note 71, at 1157 (arguing that first task in interpretation of statute is to "determine what purpose ought to be attributed to it," in part by presuming legislature pursues reasonable purposes).

170. *See supra* notes 66-69 (explaining that public choice theorists view legislative process as microeconomic system).

171. *See supra* notes 66-69 (discussing economic aspects of public choice theory, which argues that political choices are made primarily by individuals pursuing their own self-interests). *But see* Farber & Frickey, *supra* note 66, at 875 (pointing out that later public choice scholarship has developed richer, less simplistic models).

172. *See supra* note 66 (stating that public choice scholars view legislative process as marketplace, and statutes as merely deals resulting from market's operation).

173. *See supra* notes 66-69 (discussing public choice scholars' economic view of legislative process as opposed to reasonable legislature view of legal process theorists).

source of statutory interpretation other than the words enacted into law.[174]

The legal process presumption of a reasonable legislature looks different when considered in light of the above discussion of the absurd result principle. If the absurd result principle presumes a legislature that closely resembles the one that legal process theorists presumed,[175] and if textualists subscribe to that principle, then they may be required to reconsider their rejection on this ground of the legal process approach to statutory interpretation. More particularly, if the absurd result principle's 'reasonable legislature' is merely a presumption, and if it is one to which textualists subscribe through the absurd result principle, then an approach to statutory interpretation allegedly built on such a presumption cannot logically be rejected by textualists on empirical grounds.

On the other hand, if the absurd result principle does not involve merely a "benign fiction"[176] of a presumption about legislative intent, but rather purports to be based on actual intent, a problem of another sort is posed for textualists. For textualism is based in part on a claim that intent is an incoherent concept, impossible to ascertain.[177] And yet, again, textualists do endorse the absurd result principle.[178]

The absurd result principle seems, then, to pose at least two problems for textualism. On the one hand, textualists face criticism for being inconsistent if they reject the concept of intent while endorsing an absurd result principle based on actual intent. On the

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174. Textualist rejection of other sources rests on things other than the perceived flaw in the legal process view of the legislative process. Concerns about constitutional requirements and criticism of other sources of interpretation (such as some forms of legislative history) are also behind the textualist position. *See generally Textualism*, *supra* note 14, at 640-44 (explaining that new textualists have rejected context-based approach of traditionalists).

175. *See* THE LEGAL PROCESS, *supra* note 71, at 1157 (stating that interpreters should presume that legislature is comprised of reasonable people acting reasonably for rational and legitimate purposes); *see also* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 664 (1993) (arguing that workable theory of statutory interpretation can only be formulated by developing coherent and reasoned pattern of applications intelligibly related to general purpose of statute).

176. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1988) (Scalia, J., concurring) (referring not to absurd result principle but to analogous assumption that Congress always intends compatibility between any particular provision of law and surrounding body of law into which provision must be integrated). The phrase that Justice Scalia uses in endorsing such assumptions is similar to that used by Hart and Sacks to describe the presumption of a reasonable legislature. *See* THE LEGAL PROCESS, *supra* note 71, at 1178 (stating "benevolent presumption" that legislature is made up of reasonable people pursuing reasonable purposes reasonably).

177. *See supra* notes 14-15 and accompanying text.

178. *See supra* notes 6 and 158 and accompanying text (noting that textualists explicitly accept validity of absurd result principle).

other hand, if the principle as sanctioned by textualists is based on a constructive or objective notion of intent,[179] then they are employing a "benign fiction" similar to what legal process theorists proposed.[180] If this is the case, it is considerably more difficult for textualists to criticize legal process theory as being based on a misconception of the legislative process.

B. Predictability: The Reliance Interest

The plain meaning approach to statutory interpretation is sometimes explained in terms of the need for the law to be accessible to the common person, and not just to those trained in the law.[181] This reasoning can also be taken to support the absurdity exception to plain meaning. It might be argued that the absurd result principle undermines reliance by the lay reader wishing to conform his or her conduct to the law and plan his or her affairs in accordance with it.[182] Such a layperson would likely look to the plain language of the statute for the rule of law, and be misled if the rule were different from the plain meaning. The premise of this argument, however, is that the lay reader is not aware of the unwritten exceptions familiar to lawyers and judges and is somehow misled by such exceptions.

Is this likely in the case of the absurdity principle? Or is it more likely that this exception to plain meaning is not in fact primarily a principle of the legal profession, but rather one of the lay reader, the so-called "reasonable person"? A lay reader may look at the words of a statute and automatically question, rather than accept, an understanding of the words that would result in absurdity. That person, after reading the statute, may perceive a possible meaning that would lead to an absurd result, and immediately say to himself, "That makes no sense at all—it can't mean that." This is precisely the reaction previously described in the discussion regarding the "common sense" notion of absurdity.[183]

Perhaps the category of absurdity in this instance is not one whose precise requirements in particular cases would be unanimously agreed

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179. *See supra* note 98 and accompanying text.

180. *See* THE LEGAL PROCESS, *supra* note 71, at 1157, 1178 (explaining presumption of reasonable legislature).

181. *See* Farber, *supra* note 28, at 543 (noting revival of formalist approaches, which recommend heavier reliance on plain meaning in statutory interpretation, in part because it provides better notice to public of law's meaning).

182. *See* Scalia, *supra* note 26, at 1179 (arguing that common understanding of statute is plain language interpretation); *see also supra* note 28 and accompanying text.

183. *See supra* text accompanying notes 108-11 (discussing how judicial use of absurd result principle involves notions of rationality and common sense).

upon, either among members of the legal community, or among people generally. However, absurdity, being apparently more a common sense concept than a legal one, is arguably no more within the special knowledge and training of the legal community than it is within the common knowledge and instinct of the community at large.[184]

A second possible critique is that the absurdity principle operates to eliminate a most likely meaning of a statute without directing the reader to a particular alternative meaning.[185] Theoretically, this lack of direction could reduce certainty for the lay reader, thereby undermining reliance.

But how would eliminating the absurdity principle affect reliance? Principally, any hoped for increase in the layperson's ability to read a statute and order her conduct in accordance with it would be more than offset by the uncertainty that would result from knowing that the law can mean something that does not make sense, and further, that it can be enforced against people in ways that cannot be anticipated by a rational reading of the law's words. The absurdity principle leaves a narrower margin of uncertainty in the layperson's reading of the statute than the margin resulting from the alternative principle that the laws, as written, are not necessarily consistent with the laws of reason, rationality, and common sense.[186]

C. Legislative Supremacy and Rule of Law Values

The absurd result principle has been perceived as posing a challenge to legislative supremacy.[187] Some would argue that any judicial inquiry into intent that looks beyond the plain language of a

184. It is true that we reserve to judges the authority to make the final decision about what will be held absurd, but this is no more to say that it is a matter of special judicial ability than it would be to assert that when a judge, rather than a jury, acts as the factfinder in a trial, her final judgment regarding questions of fact is a matter of special judicial ability. Rather, the presence or absence of a jury is a function of constitutional requirements, *see* U.S. CONST. amend. VI, not of the relative expertise of laypersons and judges. More precisely, the absence of a jury in any particular case does not make the judge's factfinding in such cases a matter of special judicial expertise.

185. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-29 (1989) (Scalia, J., concurring) (stating that when literal reading of statute would produce absurd result, some alternative meaning must be given, and discussing several alternatives available).

186. This is not to suggest that the principle's effect on public confidence is a function of the number of cases in which it makes a difference in outcome. Those are admittedly rare. Rather, the above assertions rest on the assumption that the principle's importance lies precisely in the fact that it is in effect at all times and in all cases, an overarching condition of statutory law. *See supra* text accompanying notes 160-61 (arguing that absurd result principle is pervasive and always primary to text).

187. *See supra* text accompanying notes 35-37.

statute is a threat to legislative supremacy.[188] Yet, even those endorsing the use of extra-textual materials to ascertain legislative intent might have difficulty with an absurd result principle that was based not on actual intent, but on a prescriptive or objective notion of intent.[189] If the judicial reference to legislative intent in the application of the absurd result principle does not involve an actual inquiry but rather a construct, is not judicial power extended at the expense of legislative supremacy?

The discussion in this Article of the possible meanings of absurdity suggests that a set of values other than legislative supremacy is implicated by the absurd result principle and, in fact, justifies it. It is perhaps that set of underlying values, and not the absurd result principle itself, that is in tension with legislative supremacy. In summarizing a comprehensive comparative work on statutory interpretation undertaken by an international group of scholars, D. Neil MacCormick and Robert S. Summers argue that interpretive arguments draw their justificatory force from "pervasive underlying values of great importance to contemporary legal systems."[190] Among the underlying values they discuss are democratic principles, including legislative supremacy, and rule of law principles.[191] They note that the rule of law, among other things, sets "conditions for the proper exercise of legislative power."[192]

I have argued that the absurd result principle acts prescriptively and sets boundaries or conditions on legislative power.[193] I have also argued that the principle fosters the rule of law in at least one way, by serving the reliance interest.[194] My discussion of possible definitions noted that the principle most commonly is not one of formal logic, but rather one of rationality, reasonableness, and common sense. The application of these general values in particular situations

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188. *See Textualism*, *supra* note 14, at 648 (describing position of some critics who argue that judicial inquiry beyond actual words of statute poses risk of judicial usurpation of legislature role).

189. *See supra* notes 35-37 and accompanying text (explaining that principle was designed to strike balance where courts did not have to adhere to strict literal interpretations but could not depart in random directions).

190. *See* MacCormick & Summers, *supra* note 14, at 512; *see also id.* at 532 (stating that ultimate level of justification of interpretive arguments and their directives comes from underlying values).

191. *See* MacCormick & Summers, *supra* note 14, at 534-35 (asserting that democracy, separation of powers, and rule of law constitute underpinning values for statutory interpretation).

192. MacCormick & Summers, *supra* note 14, at 535 (enumerating conditions set by rule of law, such as banning or restricting retroactive laws).

193. *See supra* Part III.A.1.

194. *See supra* Part III.B.

requires a further reference to a variety of underlying values that are deeply embedded in our legal system and in our culture.[195] I have described the archetypal illustrations of the absurd result principle as involving situations that just seemed "wrong."[196] Our sense of wrong, which leads to the almost universal rejection of these situations as absurd, is rooted in some underlying values that are violated by those situations.

This understanding sheds light on two perennial difficulties concerning the absurd result principle.[197] First, the difficulty of defining absurdity, and the historical lack of attempts to do so, can now be explained in part by the fact that the principle represents a collection of values that are fundamental to our legal system, yet seldom made explicit in the course of the principle's application.

Second, the perceived tension between the absurd result principle and the principle of legislative supremacy can now be understood not as conflict, but rather as complimentarily, essential to our legal system. The tension between the two principles should not be taken as a mark against either. Rather, the principles should be understood as each representing an important set of values, legislative supremacy representing democratic ideals, and the absurd result principle representing rule of law values. Therefore, they should be maintained in dynamic tension, as each essential to the legal system.

Although both sets of values are important, democratic values, as represented by the principle of legislative supremacy, are sometimes emphasized almost to the exclusion of rule of law values in discussions of statutory interpretation.[198] For this reason, the absurd result principle and the values it represents are important for the current debate about the proper role of judges with respect to statutes.[199] The growth of literalism may be inspired by a perceived need to

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195. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1988) (rejecting plain language interpretation that would offend fundamental principles of special protection for criminal defendants and equal treatment of civil litigants); *id.* at 529 (Scalia, J., concurring) (noting that chosen interpretation is "consistent with the policy of the law in general . . . of providing special protection for defendants in criminal cases"); *see also supra* Part II.C (discussing how each member of Court viewed Rule 609(a) as unworkable as written).

196. *See supra* text accompanying notes 98-102.

197. *See supra* text accompanying notes 6-16 (discussing both lack of literature on principle and criticisms that principle is threat to legislative supremacy).

198. *See supra* notes 36-38 and accompanying text (discussing efforts by various people to resolve what they perceive as principle's threat to legislative supremacy).

199. *See Bock Laundry*, 490 U.S. at 508 (stating that purpose of Court is not to fashion statute in way that Justices deem desirable, but rather to identify rule fashioned by Congress). *See generally Textualism*, *supra* note 14, at 640-50 (outlining critiques of traditional approach to statutory interpretation, including debate about proper role of judges in interpretation).

restrain judicial activism.[200] But to the extent that literalism emphasizes democratic values and neglects rule of law values, it is detrimental both to the things that literalism is meant to protect and to the legal system as a whole. Although literalism has been defended as promoting rule of law values,[201] it can undermine those values when not tempered with the absurd result principle.[202]

Some commentators assert that a system of interpretation must ultimately balance various underlying values in order to maintain a dynamic coherence within a legal system.[203] The absurd result principle exemplifies an aspect of that necessary balancing. Disagreement about its meaning and application in particular cases should therefore be seen as a concrete example of the maintenance of dynamic coherence in the system, and the principle itself seen as an important key to developing any general theory of statutory interpretation.

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200. *See* Farber, *supra* note 28, at 542-43 (explaining position of those whose concerns about judicial discretion have led them to increased emphasis on plain meaning of words of statute); *see also supra* note 188 and accompanying text (noting concerns of those who feel that interpretation not limited to words allows too much judicial discretion).

201. *See generally,* Scalia, *supra* note 26 (noting that predictability is essential to rule of law, that rules promote predictability, and that plain meaning approach facilitates development of clear rules).

202. *Cf.* Farber, *supra* note 28, at 559 (noting that, though one goal of the legal system is to make law understandable and predictable to citizens, formalist reliance on plain meaning could undermine that purpose, because precise language "may be much less accessible [to ordinary citizens] than an understanding of [the statute's] general purposes, as they relate to shared social norms," and so reliance on plain meaning may "create traps" for citizens, rather than making laws more accessible to them).

203. *See* MacCormick & Summers, *supra* note 14, at 538-39 (stating that interpretation will only be satisfactory if it involves equilibrium between fundamental values).