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But That Is Absurd!

WHY SPECIFIC ABSURDITY UNDERMINES TEXTUALISM*

Linda D. Jellum[†]

INTRODUCTION

With 2010 being the twenty-fifth year since Justice Scalia joined the Supreme Court and revived textualism,¹ I could not resist exploring and critiquing the absurdity doctrine,² a doctrine used by Justice Scalia and other

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[†] Associate Professor of Law, Mercer University School of Law. I would like to thank Lawrence Solan, Rebecca Kysar, and the *Brooklyn Law Review* for inviting me to contribute to this symposium. I would also like to thank Shelia Scheuerman, Charleston Law School, and the participants in Southeastern Law Scholars Conference for offering me an opportunity to present this article while it was still a work in progress. Finally, David Ritchie and Suzianne Painter-Thorne provided valuable suggestions. Invaluable research assistance was provided by Courtney Ferrell, J.D. expected 2011, and John Nick Phillips, J.D. expected 2012. Any remaining errors are mine alone.

¹ Adherents of textualism, a theory of statutory interpretation, look for the objective meaning of statutory language primarily in the text of the statute. Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 31 (2006). In contrast, adherents of intentionalism look for the subjective intent of the legislature when it enacted the statute. *Id.* at 32. "To be sure, the border between textualism and intentionalism is not always obvious. By and large, however, intentionalists are interested in the meaning a statute actually had to its authors, while textualists are interested in the meaning it would have to a competent reader." *Id.* at 32-33. As some have posited, the justices do not always do what theory suggests they should. See generally Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006) (finding a strong relationship between a justice's political views and his or her *Chevron* rulings).

² When the ordinary meaning of a statute would lead to absurd results, courts will seek an alternative reading of the statutory text pursuant to the absurdity doctrine. Relatedly, when a statute contains a drafting error, courts will correct the statute pursuant to the scrivener's error doctrine. While related, these doctrines are distinct. For a more thorough discussion of the absurdity doctrine, see Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). For a more thorough discussion of the scrivener's error doctrine, see Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001).

textualists³ to counter the sometimes harsh results of applying clear statutory language. In this article, I explore an aspect of the absurdity doctrine not yet explored in legal scholarship:⁴ namely, the difference between specific and general absurdity.⁵ Statutes that are specifically absurd are those statutes that are absurd as applied to the facts of a particular case, but not absurd as applied generally. For example, a statute that penalizes individuals from escaping from prison is absurd as applied to an individual who escaped from a prison that was on fire, but is not absurd in general.⁶ In contrast, statutes that are generally absurd are those statutes that are patently absurd as written and, thus, as applied generally, to a group of individuals. For example, a statute that creates a waiting period rather than a deadline for a litigant to file an appeal is absurd in all cases, not just one isolated case.⁷

This distinction has not been noticed in either the jurisprudence or scholarship; however, the difference matters. Accepting for the moment that the absurdity doctrine has force when the legislature drafts a statute that as written “would lead to patently absurd consequences that Congress could not possibly have intended,”⁸ the question is whether the absurdity doctrine should have force when Congress drafts a statute that Congress intended but that has unintended consequences in only one particular case. Arguably no, as I explain below. Textualists should be particularly loath to apply the doctrine in cases of specific absurdity because specific absurdity, unlike general absurdity, is not readily apparent from the text of the

³ See Manning, *supra* note 2, at 2420 n.123 (cataloguing opinions by noted textualists Justice Scalia and Judge Easterbrook that rely on the absurdity doctrine); see, e.g., *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 n.4 (2002) (Scalia, J., dissenting) (“A possibility so startling (and unlikely to occur) is well enough precluded by the rule that a statute should not be interpreted to produce absurd results.”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (Easterbrook, J.) (stating that “a court should implement the language actually enacted—provided the statute is not internally inconsistent or otherwise absurd”).

⁴ While the absurdity doctrine has come under fire recently from some noted textualist scholars, none have addressed the specific versus general distinction. See, e.g., Manning, *supra* note 2.

⁵ The definitions that follow are my definitions. I explain both definitions in more detail *infra* text accompanying notes 72-101.

⁶ See, e.g., *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868) (discussing this medieval case).

⁷ See, e.g., *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1096 (9th Cir. 2006).

⁸ *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (quotations omitted).

statute alone and the statute, as written and generally applied, was exactly what Congress intended. Yet it is precisely when statutes are specifically absurd that judicial intervention is most essential. In my view, absurdity and textualism are simply incompatible; indeed, the absurdity doctrine undermines the very foundation of textualism.⁹

In Parts I and II of this article, I briefly describe first textualism and then absurdity. In Part III, I discuss the development of the absurdity doctrine. Then, in Part IV, I create and explore the differences between specific and general absurdity, an aspect currently unidentified in the literature. Finally, in Part V, I explain why absurdity, and most notably specific absurdity, undermines textualism.

I. TEXTUALISM: A BRIEF PRIMER

To understand the role that absurdity plays in interpretation, you must first understand textualism. Textualism is a method of statutory interpretation that focuses almost exclusively on the text of the statute and other intrinsic sources of meaning.¹⁰ Textualists “look for the public meaning of the words used in the statute as of the time the statute was drafted.”¹¹ They are deeply skeptical of non-text-focused methods of interpretation—particularly those methods that seek the enacting legislature’s intent—for three principal reasons.¹² First, textualists doubt that only one such intent

⁹ See Manning, *supra* note 2, at 2391 (arguing that “[i]f one accepts the textualist critique of strong intentionalism, it is difficult to sustain the absurdity doctrine on alternative grounds as some have attempted to do”).

¹⁰ Intrinsic sources include materials that are part of the official text being interpreted. The statute’s words are the most important intrinsic source. John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 338 (1976) (stating that the first step in the interpretation process is always “Read the statute. Read the Statute. Read the Statute.”). For a discussion of the types of sources, see LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 13-15 (2008).

In contrast to textualism, intentionalist-based theories are based on the notion that the legislature’s intent or purpose should guide the court’s interpretive process. Hence, intentionalists seek out the specific intent of the enacting legislature, while purposivists seek out the general purpose of the statute. *Id.* at 22, 27.

¹¹ JELLUM, *supra* note 10, at 17. For a general discussion of textualism, see John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000).

¹² These reasons are typically characterized as institutional, constitutional, and pragmatic reasons. See, e.g., Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1027-28 (2006).

exists.¹³ And even if it did, textualists doubt that judges can correctly identify that intent.¹⁴ Second, textualists are concerned about two aspects of the federal Constitution.¹⁵ They are concerned about separation of powers, as the Constitution grants the legislature the power to create laws¹⁶ and the judiciary the power to interpret laws.¹⁷ Textualists argue both that non-text-focused approaches to interpretation allow the judiciary to invade the legislature's power and that they allow the legislature to invade the judiciary's power.¹⁸ Additionally, textualists are anxious that the constitutionally prescribed legislative process—bicameralism and presentment—be followed.¹⁹ Because nontext sources, such as legislative history, do not go through this process, determining meaning from sources other than the text would be unconstitutional.²⁰ Third, and finally, textualists suggest that textualism best

¹³ Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body." (citation omitted)) [hereinafter Easterbrook, *Text, History, and Structure*]; Manning, *supra* note 2, at 2410-13; Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

Textualists accept public choice theory, which cautions that legislation is the product of many different interest groups working in a chaotic environment to work out deals. Statutes generally reflect the compromises of this complex bargaining process. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988); Gold, *supra* note 1, at 34-35; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001); see *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) ("[N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. . . . [A] change in any individual provision could have unraveled the whole.").

¹⁴ Gold, *supra* note 1, at 37.

¹⁵ Easterbrook, *Text, History, and Structure*, *supra* note 13, at 68 ("[T]he structure of our Constitution . . . requires agreement on a text by two Houses of Congress and one President."); Gold, *supra* note 1, at 38-39; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 27 (2006).

¹⁶ U.S. CONST. art. I, § 1.

¹⁷ *Id.* art. III, § 1.

¹⁸ Gold, *supra* note 1, at 38 ("[T]he concern with intentionalism is that the legislature would be encroaching on the judicial branch. . . . [and that judges are] abdicating their responsibility to interpret the text if they defer to the manner in which individual legislators interpret it.").

¹⁹ See U.S. CONST. art. I, § 7.

²⁰ Jerry L. Mashaw, *Textualism, Constitutionalism and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 843-44 (1991) (arguing that legislative history should not be used because "continuous and constant referral to legislative history tends to engage the Court in the interpretation of texts—committee reports or the utterances of various senators and representatives—that have never been enacted by both Houses of Congress or presented to the President").

discourages judicial activism.²¹ For all these reasons, when interpreting statutes, textualists focus on intrinsic sources of meaning and avoid nontextual sources of meaning. But legislatures can be imperfect and text imprecise; thus, textualists have safety valves, doctrines that allow them to avoid the meaning of statutory text even when that text is very clear. One such safety value is the absurdity doctrine.²²

II. THE ABSURDITY DOCTRINE: A BRIEF PRIMER

The plain meaning canon of statutory interpretation directs that statutes should be interpreted according to the ordinary meaning of their words.²³ The absurdity doctrine, also known as the Golden Rule doctrine,²⁴ is an exception to the plain meaning canon. The absurdity doctrine allows judges to ignore the ordinary meaning of statutory text when that ordinary meaning would lead to absurd outcomes.²⁵

²¹ One famous quote from Judge Leventhal notes that using legislative history is like “looking over a crowd and picking out your friends.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quoting Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

²² See *supra* note 2.

²³ This article will use the term “plain meaning canon” to refer to the canon of interpretation and “ordinary meaning” to refer to the meaning of the text as determined after the plain meaning canon is applied. These terms are used interchangeably in the case law and by scholars.

²⁴ Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and the Law*, 84 NOTRE DAME L. REV. 1529, 1530-31 (2009) (explaining why the absurdity doctrine is also known as the Golden Rule doctrine).

²⁵ Absurdity is not consistently defined in the jurisprudence. Dougherty, *supra* note 2, at 133. *But see* Manning, *supra* note 2, at 2390 (“[S]tandard interpretive doctrine (perhaps tautologically) defines an ‘absurd result’ as an outcome so contrary to perceived social values that Congress could not have ‘intended’ it.”). Rather, judges often attempt to define absurdity by simply identifying, without explaining, other cases in which absurdity has been found. Dougherty, *supra* note 2, at 139-40; *see, e.g.*, *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring).

Even in the case that spawned this exception, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), the Supreme Court never explicitly defined absurdity. Instead, the Court merely suggested that a meaning that conflicted with congressional intent would be absurd. *Id.* at 459-61. Typically, the Court equates absurd with “odd” and “in conflict with Congressional intent.” *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989) (identifying the result as “odd”). Other courts identify absurdity as requiring a higher standard. Gold, *supra* note 1, at 78 (“[N]o principled distinction separates grossly absurd applications from merely odd results.”). For example, in *Robbins v. Chronister*, the majority adopted *Holy Trinity Church’s* broad definition of absurdity, contrary to congressional intent, 402 F.3d 1047, 1050 (10th Cir. 2005), *rev’d en banc*, 435 F.3d 1238 (10th Cir. 2006), while the dissent adopted a much narrower definition—“lead[ing] to results so gross as to shock the general moral or common sense.” *Id.* at 1055. Which opinion in *Robbins* had a more accurate definition of absurdity? The majority’s definition of absurdity was so broad

Absurdity arises for a number of reasons, stemming from the difficulty of drafting precisely during a nonlinear legislative process. Thus, legislators draft generally applicable statutes that tend to be over- or underinclusive. That reality can produce odd outcomes that are seemingly inconsistent with legislative intent.²⁶ Moreover, language is inherently imperfect and imprecise; hence, unintended errors may result.²⁷ Finally, the legislative process is full of compromises and legislative jockeying, which can also lead to unanticipated results.²⁸ In response, the absurdity doctrine recognizes and adjusts for the fact that sometimes the ordinary meaning of a statute is not what the enacting legislature intended.

Proponents of the doctrine justify its use by arguing that Congress would never intend to enact a statute that has absurd consequences.²⁹ Thus, when a statute would be absurd if implemented according to its ordinary meaning, a judge can legitimately refuse to follow the plain meaning canon simply by noting that applying the statute as written would be absurd. The absurdity doctrine then allows that judge to look to

that it would essentially open the door for consideration of extratextual evidence in almost every case. This broad definition might be appealing to less strict textualists and nontextualist judges willing to look to extratextual sources relatively readily, but less appealing to others. But the dissent's definition of absurdity is not much better. It sets such a high standard—a result that “shock[s] the general moral or common sense”—that it will be rarely, if ever, met. *Id.* The correct definition of absurdity must lie between these two extremes. Just where is not clear, and the jurisprudence is of little help. Most commonly, instead of defining absurdity, judges simply list other cases that have found absurdity, an “I know it when I see it” analysis.

²⁶ Manning, *supra* note 2, at 2394; see, e.g., *Holy Trinity Church*, 143 U.S. at 459 (“[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of . . . the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”).

²⁷ See Manning, *supra* note 2, at 2400 (noting that “[l]egislators not only enact statutes within the constraints of limited time and bounded foresight, but also must rely on the imprecise medium of human language to express their intentions”).

²⁸ For example, a statute may be:

deliberately imprecise to accommodate political interests. . . . [C]areful draftsmanship is all too often absent; perhaps it is impossible in the crush of competing interests and activities that occur in the final moments of legislative enactments. Mistakes are made. In addition, a case that comes before the court . . . may present an issue that was not in the minds of . . . the legislators.

John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 204 (2001); accord Manning, *supra* note 2, at 2395 (“[B]ecause a statute’s apparently odd contours may reflect unknowable compromises or legislators’ behind-the-scenes strategic maneuvers, judges can rarely, if ever, tell if a law’s specific wording is unintentionally imprecise or was instead crafted to navigate the complex legislative process.”).

²⁹ Manning, *supra* note 2, at 2400.

extratextual sources both to confirm that the absurd meaning was not intended and to identify the intended meaning.³⁰ If, after reviewing the extratextual sources, a judge determines that the legislature did indeed intend the absurd result, then that result should control. But if the judge determines that absurdity was not intended, the judge can ignore the plain meaning canon. In essence, when a statute is absurd, a textualist judge has a choice: interpret the statute as written, which will force the legislature to correct any intended or unintended absurdity, or interpret the statute in a way that eliminates (or at least diminishes) that absurdity.³¹

Absurdity is attractive to textualists precisely because it allows them to avoid the harsh results of their chosen theory. “The currently dominant version of textualism seems relatively attractive precisely because the absurdity doctrine provides an all-purpose backstop to the principle that judges must follow a clear text wherever it takes them.”³² Yet “[i]f modern textualists perceive their methodology to be workable only because of the availability of the absurdity doctrine, then one must question the conceptual foundations of textualism itself.”³³ Viewed from this lens, the absurdity doctrine is merely a way for textualists to cheat.

³⁰ *But see* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., dissenting) (arguing that it is appropriate for judges to look to extratextualist sources to determine whether the absurd result was intended, but not to identify an alternative interpretation).

³¹ As noted by Professor John Manning:

The absurdity doctrine thus rests on a judicial judgment that a particular statutory outcome, although prescribed by the text, would sharply contradict society’s “common sense” of morality, fairness, or some other deeply held value. As Chief Justice Marshall once put it, the doctrine authorizes judges to avoid results that “all mankind would, without hesitation, unite in rejecting.” Thus, despite being reserved only for exceptional cases, the absurdity doctrine serves an important legitimating function, making textualism more palatable by offering reassurance that the problem of statutory generality will not compel the acceptance of deeply troubling outcomes. The doctrine achieves that end, moreover, through seemingly benign presumptions about the legislative process: Why would legislators ever intentionally enact laws that apparently contradict commonly held values? Or, more accurately, why would judges ever presume that legislators intended such results, given the fact that legislators sometimes, perhaps often, express themselves imprecisely? Based on these assumptions, the Court has insisted that correcting apparent infelicities in statutory wording to avoid absurdity does not “substitut[e] . . . the will of the judge for that of the legislator.”

Manning, *supra* note 2, at 2405-08 (alteration in original) (citations omitted).

³² *Id.* at 2392.

³³ *Id.*

III. THE DEVELOPMENT OF THE ABSURDITY DOCTRINE

The absurdity doctrine was first adopted in this country in 1868. In *United States v. Kirby*,³⁴ the Supreme Court dismissed an indictment charging members of the local sheriff's office with violating a statute that prohibited anyone from "knowingly and willfully obstruct[ing] or retard[ing] the passage of the mail, or of any driver or carrier."³⁵ The defendants had arrested a mail carrier who was wanted for murder while that mail carrier was delivering mail.³⁶ Although the defendants had violated the clear terms of the statute, the Court dismissed the indictment. In doing so, the Court adopted the absurdity doctrine, explaining:

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.³⁷

In support of its decision to reject the clear text, the Court referenced two early decisions from Europe, both of which had rejected the ordinary meaning of a statute.³⁸ First, a medieval Italian court had refused to punish a surgeon "who opened the vein of a person that fell down in the street in a fit" for violating a law punishing anyone "who[] drew blood in the streets."³⁹ Second, an English court had refused to punish a prisoner who had escaped from a prison that was on fire under a statute prohibiting prison escapes.⁴⁰ In these two cases, the

³⁴ 74 U.S. (7 Wall.) 482 (1868).

³⁵ *Id.* at 483-84.

³⁶ *Id.* at 484.

³⁷ *Id.* at 486-87.

³⁸ It is not entirely clear whether the cases are real or hypothetical, but that is irrelevant for purposes of this article.

³⁹ *Kirby*, 74 U.S. at 487 ("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."). But note that drawing blood likely had different connotations. Specifically, one can draw blood during a fight or one can draw blood as a medical professional might do. Following the former meaning, as opposed to the latter, is consistent with textualism and does not require a finding of absurdity. *Accord* Gold, *supra* note 1, at 69 (indicating that words may have an established "social nuance" or "meaning").

⁴⁰ *Kirby*, 74 U.S. at 487 ("The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks

courts deviated from the ordinary meaning of the statutes because application of the statute to the particular facts of each case led to a result not intended by the legislature. “[T]he absurdity doctrine therefore rests on the premise that if legislators had foreseen the problems raised by a specific statutory application, ‘they could and would have revised the legislation to avoid such absurd results.’”⁴¹ Relying on the rationale in these prior cases, the Supreme Court in *Kirby* rejected the clear statutory text and adopted the absurdity doctrine.⁴² In all three cases, the courts’ decisions to reject the clear text led to a result that seems just and fair.⁴³

In 1892, in its “most influential absurdity decision,”⁴⁴ *Holy Trinity Church v. United States*,⁴⁵ the Supreme Court broadened the absurdity doctrine in two ways. First, the Court applied the doctrine to a case involving general absurdity. Second, the Court made clear the rationale for absurdity: to avoid a result that was contrary to legislative intent. The Alien Contract Labor Act prohibited businesses from bringing anyone into the country “to perform labor or service of any kind.”⁴⁶ The defendant contracted with an individual from England to immigrate to the United States to serve as a pastor in its church.⁴⁷ In response and pursuant to the ordinary meaning of the Act, the federal government sued the church to recover a statutory penalty.⁴⁸ The Supreme Court rejected the government’s argument that “labor . . . of any kind” covered pastoral services.⁴⁹ Stating that “[i]t 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,” the Court found the statute to be absurd and looked to the legislative history of the Act.⁵⁰ According to the Court, the legislative history was relatively

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.”).

⁴¹ Staszewski, *supra* note 12, at 1007 (quoting Manning, *supra* note 2, at 2394).

⁴² *Kirby*, 74 U.S. at 486-87.

⁴³ Manning, *supra* note 2, at 2402 (“These examples are powerful precisely because the imaginative reconstruction of legislative intent in each requires so little imagination.”).

⁴⁴ *Id.* at 2403.

⁴⁵ 143 U.S. 457 (1892).

⁴⁶ *Id.* at 458.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 458-59.

⁵⁰ *Id.* at 459.

clear that the legislature intended the word labor to mean *manual* labor.⁵¹ Thus, the Court in *Holy Trinity Church* expanded Kirby's narrow absurdity doctrine such that the ordinary meaning of statutory text could henceforth be ignored whenever that meaning contradicted the intent of the legislature, as gleaned from nontextual sources.⁵² Moreover, the Court, for the first time, applied the doctrine to invalidate the general application of a statute—exempting all “brain toilers,” as the Court called them⁵³—rather than exempting one specific case.

The absurdity doctrine was commonly used up until the 1940s as a way to temper the sometimes harsh effects of the plain meaning canon in its literalist formulation.⁵⁴ With the rise of intentionalism, the plain meaning canon fell from favor; and thus, the absurdity doctrine faded briefly into obscurity.⁵⁵ Then, in 1986, Justice Scalia joined the Court. Part of his judicial mission has been to return statutory interpretation to a text-focused analysis. His approach has been dubbed “new textualism”⁵⁶ and “modern textualism.”⁵⁷ With this more text-focused approach, the absurdity doctrine was revived. “A textualism that lacked this safety valve is unpalatable when courts are confronted with cases of true absurdity.”⁵⁸

Yet the revival has been limited. In recent years, the Supreme Court has explicitly relied on the absurdity doctrine only five times.⁵⁹ Moreover, the Court has suggested that the

⁵¹ *Id.* at 463.

⁵² See *Lau Ow Bew v. United States*, 144 U.S. 47 (1892) (applying the absurdity doctrine to narrowly interpret the United States Chinese Restriction Act).

⁵³ *Holy Trinity Church*, 143 U.S. at 464.

⁵⁴ Unlike modern textualism, which allows consideration of textual context to discern ordinary meaning, literalism is a relatively rigid approach that rejects any source other than the words at issue. For a more thorough discussion, see Manning, *supra* note 2, at 2395-96, 2456-58. Cf. Staszewski, *supra* note 12, at 1003-04 (2006) (arguing that “the absurdity doctrine has identifiable constitutional underpinnings that justify its thoughtful use by the judiciary to avoid arbitrary or inequitable applications of facially valid rules in exceptional circumstances that were not anticipated by the legislature”).

⁵⁵ JELLYUM, *supra* note 10, at 74.

⁵⁶ William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (coining the phrase “new textualism”).

⁵⁷ Molot, *supra* note 15, at 2 (identifying Justice Scalia's version of textualism as “modern textualism”).

⁵⁸ Gold, *supra* note 1, at 62.

⁵⁹ *Clinton v. City of N.Y.*, 524 U.S. 417, 428-29 (1998) (invoking doctrine to expand the meaning of “individuals” to include corporations as those who could seek expedited review under Line Item Veto Act); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (holding it would be absurd to apply the term “knowingly” only to relevant verbs in criminal statute and not to elements of the crime concerning minor age of participant and sexually explicit nature of material); *Burns v. United States*, 501

doctrine is one of last resort, “rarely invoke[d] . . . to override unambiguous legislation.”⁶⁰ As Justice Kennedy noted, “the potential of this doctrine to allow judges to substitute their personal predilections for the will of the Congress is so self-evident from the case which spawned it [*Holy Trinity Church*] as to require no further discussion of its susceptibility to abuse.”⁶¹ While the justices of the Supreme Court turn to the doctrine increasingly rarely, to date, they have never rejected the doctrine outright. Indeed, in rejecting the application of the doctrine in particular cases, the justices have reaffirmed the doctrine’s continued vitality.⁶² Furthermore, the doctrine, despite its flaws, is alive and well in the lower federal⁶³ and state courts.⁶⁴

IV. TYPES OF ABSURDITY

One area that has not yet been explored in legal scholarship is whether the type of absurdity, general or

U.S. 129, 135-37 (1991) (relying on absurdity to hold that district courts may not depart upward from sentencing range established by Sentencing Guidelines without first notifying parties of court’s intent to depart); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 451, 454-55 (1989) (relying on absurdity, in part, to narrowly interpret “advisory committee” in the Federal Advisory Committee Act); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-11 (1989) (some justices reasoned that it would be absurd not to apply Federal Rule of Evidence 609(a)(1) to civil as well as criminal defendants).

⁶⁰ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 441 (2002).

⁶¹ *Pub. Citizen*, 491 U.S. at 474 (Kennedy, J., concurring).

⁶² *See, e.g.*, *Inter-Modal Rail Emps. Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 516 (1997); *Ingalls Shipbuilding, Inc. v. Office of Workers’ Comp. Programs*, 519 U.S. 248, 261 (1997); *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 200 (1993); *Chapman v. United States*, 500 U.S. 453, 463-64 (1991); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 108, 120 (1988).

⁶³ *See, e.g.*, *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005) (holding that “less” should be read to say “more”); *accord Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006) (same). *But see Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1099 (9th Cir. 2006) (Bybee, J., dissenting) (disagreeing with the court’s holding and arguing that the majority “ignored the deference we must give to the supremacy of the legislature”).

⁶⁴ *See, e.g.*, *Newman v. Planning & Zoning Comm’n*, 976 A.2d 698, 702 (Conn. 2009) (“When more than one construction is possible, we adopt the one that renders the enactment effective and workable and reject any that might lead to unreasonable or bizarre results.” (quoting *Graff v. Zoning Bd. of Appeals*, 894 A.2d 285 (Conn. 2006)); *Fla. Dep’t of Env’tl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008) (“We have long held that the Court should not interpret a statute in a manner resulting in unreasonable, harsh, or absurd consequences.”); *Staley v. State*, 672 S.E.2d 615, 616 (Ga. 2009) (applying the absurdity doctrine to hold that a statute criminalizing child molestation did not apply just to molestation of lineal descendants of the molester), *cert. denied*, 129 S. Ct. 2737 (2009). *See generally* 73 AM. JUR. 2D *Statutes* § 172 (2009) (collecting cases).

specific, should impact the analysis. While the cases and literature generally do not distinguish between these two types of absurdity, they are different. Specific absurdity refers to a statute that is absurd *only* in the particular situation. General absurdity refers to a statute that is absurd *regardless* of the particular situation.

Let me begin with examples of specific absurdity. *Ohio Division of Wildlife v. Clifton*,⁶⁵ involved a case of specific absurdity. The defendant in that case had rescued a squirrel and kept it for a pet.⁶⁶ The squirrel, Angele Daniel Nicole, had run of the house. All would have been well, except that the defendant entered the squirrel in a parade and won first prize for most unusual pet.⁶⁷ After the squirrel's picture appeared in the newspaper, two officers from the Wildlife Division appeared and told the defendant that the squirrel had to be released to the wild.⁶⁸ She refused and was fined pursuant to a statute prohibiting individuals from owning "fur-bearing animals" without a license.⁶⁹ Despite the clear language of the text, the trial court dismissed the case and chastised the state for fining her, saying, "[t]his makes no sense. Even a child could see that there is no justice or right in the position of the state."⁷⁰ The trial court reasoned that the purpose of the specific statute—and criminal justice generally—would not be furthered by incarcerating or fining the humanitarian defendant.⁷¹

A statute that prohibits people from keeping wild animals as pets might be absurd as applied to a person who

⁶⁵ 89 Ohio Misc. 2d 1 (Mun. Ct. 1997).

⁶⁶ *Id.* at 2.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2-3. For additional background information on this case, see *The State of Ohio Persecuted a Squirrel—and It's [sic] Rescuer!*, GODDESSCHESS BLOG (Feb. 8, 2008), <http://goddesschess.blogspot.com/2008/02/state-of-ohio-persecuted-squirrel-and.html>.

⁶⁹ *Clifton*, 89 Ohio Misc. 2d at 3.

⁷⁰ *Id.* at 8, 9.

⁷¹ The court included the following gem:

The court hereby announces a pearl,
 It's sometimes OK to have a squirrel.
 The legislature did a statute create,
 The Wildlife Division obviously did not equate.
 The necessity to be kind, thorough and specific,
 The lack of these is legally terrific.
 The result is this very short epistle,
 The defendant/squirrel is granted a dismissal.

Id. at 9.

rescued an injured squirrel.⁷² But the statute, as generally applied, would not be absurd: for health and safety reasons, we do not want people keeping wild animals, including squirrels, in their homes. Thus, this statute might be absurd in its specific application to the rescued squirrel, but would not be absurd in general.

Many of the Supreme Court's absurdity cases involve specific absurdity, as we saw with the earliest cases identified above, including the surgeon who drew blood, the prisoner who escaped from a burning prison, and the sheriff who arrested the mail carrier who was wanted for murder. There are more recent examples as well. For example, in *Public Citizen v. United States Department of Justice*,⁷³ the Court relied on the absurdity doctrine to avoid the ordinary meaning of the Federal Advisory Committee Act, which imposed detailed registration and open-meeting requirements on federal "advisory committees."⁷⁴ "Advisory committee" was defined in the statute as any committee "utilized by the President . . . in the interest of obtaining advice or recommendations."⁷⁵ At issue in the case was whether a subcommittee of the American Bar Association (ABA) was an "advisory committee."⁷⁶ Pursuant to the ordinary meaning of the Act, the ABA subcommittee was an advisory committee because the President routinely sought its recommendations on judicial nominees.⁷⁷

But the majority refused to adopt the ordinary meaning of the Act, citing *Holy Trinity Church*.⁷⁸ Because the Court found it "difficult to fathom" that Congress would have intended an interpretation of the statute that "compel[led] an odd result," the Court searched "for other evidence of congressional intent to lend the term its proper scope."⁷⁹ According to the majority, the statute was enacted to cure specific ills—namely the wasteful expenditure of public funds for worthless committee meetings and biased proposals by special interest groups.⁸⁰ The Court concluded that it was thus

⁷² See, e.g., *id.* at 3, 8.

⁷³ 491 U.S. 440 (1989).

⁷⁴ *Id.* at 446-47.

⁷⁵ *Id.* at 451 (citing 5 U.S.C. app. § 3(2) (1982)).

⁷⁶ *Id.* at 447.

⁷⁷ *Id.* at 470 (Kennedy, J., concurring).

⁷⁸ *Id.* at 454 (majority opinion) (citing *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

⁷⁹ *Id.* at 454-55.

⁸⁰ *Id.* at 453.

unlikely that Congress intended the statute to cover every formal and informal meeting between the President and a group rendering advice.⁸¹ Ultimately, the Court held that the statute did not apply to this specific ABA subcommittee.⁸²

Now let me turn to examples of general absurdity. A statute is generally absurd when that statute is absurd *regardless* of the particular situation before the court. The facts of a particular case do not matter. Thus, a statute that unduly burdens a civil plaintiff's ability to present his or her case but not a civil defendant's is generally absurd because it would affect all civil plaintiffs and defendants. These are the facts of *Green v. Bock Laundry Machine Co.*,⁸³ in which the Court rejected the ordinary meaning of the word "defendant" in Rule 609(a)(1) of the Federal Rules of Evidence.⁸⁴ When admitting evidence that a witness had been convicted of a felony, that Rule, as then in effect, required a court to balance "the probative value of admitting th[e] evidence [with] the prejudicial effect to *the defendant*."⁸⁵ While the ordinary meaning of "defendant" includes both civil and criminal defendants, the majority held that that meaning would be "odd" because such an interpretation would deny a civil plaintiff the same right to impeach a witness that a civil defendant would have.⁸⁶ Thus, this interpretation would raise due process concerns.⁸⁷ Reviewing the legislative history, the Court concluded that the legislature more likely intended "defendant" to mean "criminal defendant."⁸⁸ Thus, *Bock* involved general absurdity because the facts of the particular case before the Court were irrelevant and the statute was interpreted to exclude an entire class of litigants.

Similarly, *Holy Trinity Church*—the case that broadened the absurdity exception—also involved general absurdity. The Supreme Court held that it was not absurd for

⁸¹ *Id.* at 467.

⁸² *Id.* (noting that the constitutional avoidance doctrine also supported this holding).

⁸³ 490 U.S. 504 (1989).

⁸⁴ *Id.* at 527.

⁸⁵ *Id.* at 509 (emphasis added) (quoting FED. R. EVID. 609(a)(1) (1988)) (internal quotation marks omitted).

⁸⁶ *Id.*

⁸⁷ For this reason, Justice Scalia has indicated that the case would have been better resolved under the constitutional avoidance doctrine. Gold *supra* note 1, at 59 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting)).

⁸⁸ *Bock*, 490 U.S. at 511-24.

Congress to prohibit the importation of any specific individual so much as it was absurd for Congress to prohibit the importation of all “brain toilers.”⁸⁹ A more recent case, *Robbins v. Chronister*,⁹⁰ also involved general absurdity. In *Robbins*, the Tenth Circuit reviewed a prisoner’s request for attorney’s fees under the Prison Litigation Reform Act (PLRA).⁹¹ After entering prison, the prisoner filed a civil rights action for injuries he sustained during his arrest, and won only nominal damages.⁹² The PLRA capped attorney’s fees at 150% of awarded damages “[i]n any action brought by a prisoner.”⁹³ Thus, according to the clear text of the PLRA, the plaintiff was entitled to only \$1.50 in attorney’s fees because he was a prisoner when he filed his case and because he only won one dollar in damages.⁹⁴ The majority found the statute absurd as generally applied because the majority believed that Congress intended to cap damages only for prison-condition litigation, not for prisoner-filed litigation.⁹⁵ The statute was absurd, therefore, as applied to all claims filed by prisoners that related to issues other than prison conditions.⁹⁶ Thus, the statute was generally absurd because the facts of the specific case were not relevant to the disposition of the case and because the court interpreted the statute to exclude an entire class of litigants.

Finally, in *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*, the Ninth Circuit used general absurdity to hold that “less” actually means “more.”⁹⁷ In that case, the court rejected the plain meaning of the text of the Class Action Fairness Act. That Act provided that “a court of appeals may accept an appeal . . . [in certain cases] if application is made to the court of appeals *not less than 7 days*

⁸⁹ *Holy Trinity Church v. United States*, 143 U.S. 457, 463-64 (1892).

⁹⁰ 402 F.3d 1047 (10th Cir. 2005), *rev’d en banc* 435 F.3d 1238 (10th Cir. 2006).

⁹¹ *Id.* at 1049; 42 U.S.C. § 1997e(d) (2000).

⁹² *Robbins*, 402 F.3d at 1049.

⁹³ *Id.* (emphasis added) (quoting 42 U.S.C. § 1997e(d)).

⁹⁴ *Id.* at 1050.

⁹⁵ *Id.* at 1054-55. The majority and dissent sparred over whether this result was absurd. The majority acknowledged that the language of the statute was clear, but concluded that the statute was absurd because it would produce “an illogical result” at odds with congressional intent. *Id.* at 1050, 1054. “[I]t would be absurd to limit [a plaintiff’s] attorney’s fees merely because he happened to file his pre-existing constitutional claim while he was in prison.” *Id.* at 1054-55. In contrast, the dissent argued that a statute is absurd only when an interpretation “leads to ‘results so gross as to shock the general moral or common sense.’” *Id.* at 1055 (Hartz, J., dissenting) (quoting *United States v. Newsome*, 898 F.2d 119, 121 n.3 (10th Cir. 1990)).

⁹⁶ *Id.* at 1054 (majority opinion).

⁹⁷ 435 F.3d 1140 (9th Cir. 2006).

after entry of the order.”⁹⁸ The ordinary meaning of the text of the statute imposed a seven day waiting period to appeal and contained no upper limit on that waiting period.⁹⁹ The Ninth Circuit found this interpretation “illogical” and turned to the purpose of the Act.¹⁰⁰ The court concluded that Congress had intended the Act to impose a *time limit* for appealing rather than a waiting period.¹⁰¹

V. WHY SPECIFIC ABSURDITY UNDERMINES TEXTUALISM

To be sure, the difference between general and specific absurdity is not bright lined. One could ask: At what point do the specific facts become relevant to an absurdity finding? It is easy in some cases to see that the absurdity is apparent only when the facts of the case are considered. For instance, a statute that prohibits individuals from interfering with the delivery of mail only becomes absurd when it is applied to a sheriff arresting a mail carrier wanted for murder. A statute that prohibits anyone from drawing blood in the street only becomes absurd when applied to a doctor offering medical treatment. A statute that prohibits anyone from owning a fur-bearing animal only becomes absurd when applied to a person who rescued a squirrel that would otherwise die. A statute that prohibits prisoners from escaping from prison only becomes absurd when applied to a prisoner who escaped from a prison that was on fire. In each of these cases, the applicable statutes are perfectly logical in the abstract, but when the statute is applied to the specific facts of the case before the court, the “results [are] ‘so

⁹⁸ *Id.* at 1142 (emphasis added) (quoting 28 U.S.C. § 1453(c)(1) (2000)).

⁹⁹ *Id.* at 1145.

¹⁰⁰ *Id.* at 1146. Notably, the majority found this purpose relying on a senate report that “was not submitted until eighteen days after the Senate had passed the bill, eleven days after the House had passed the bill, and ten days after the President signed the bill into law.” *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1096 (9th Cir. 2006).

¹⁰¹ *Laidlaw Transit Servs., Inc.*, 435 F.3d at 1146. Judge Bybee *sua sponte* called for an en banc rehearing, which was denied. *Laidlaw Transit Servs., Inc.*, 448 F.3d at 1094 (Bybee, J., dissenting). He then wrote a dissent from the order denying rehearing, an unusual occurrence. *Id.* In his dissent, Judge Bybee chastised the majority for rejecting the plain meaning of the statute when the text was so clear. According to the dissent, none of the reasons for avoiding the plain meaning canon applied; hence, Congress, not the courts, should correct the statute. *Id.* at 1096-98. He was particularly concerned that the majority relied on legislative history that no member of Congress or the President ever saw to interpret the statute to mean the exact opposite of what it said. *Id.*

gross as to shock the general moral or common sense.”¹⁰² In other words, as applied to the specific situation before the court, a situation unlikely to repeat itself, the statute is absurd. In these cases, the absurdity is downright shocking.

In contrast, statutes that are generally absurd are absurd not because they are shocking, but because they are simply contrary to congressional intent. Thus, a statute that prohibits the importation of brain toilers is not shocking, just unintended. A statute that imposes a waiting period for filing an appeal rather than a deadline is not shocking, just sloppy. A statute that purports to treat civil defendants and civil plaintiffs differently is not shocking, just poorly considered.

Another important distinction between general and specific absurdity is that general absurdity is often readily apparent from the text of the statute itself. The specific facts of the case will play little, if any, role. While the facts of the case may bring the absurdity to light—a cap on attorney’s fees for prisoner-filed litigation does not seem absurd until that cap limits recovery of fees to \$1.50—the facts are not essential to either the absurdity finding or a court’s interpretation. In other words, the PLRA was not absurd because it limited fees to \$1.50; rather, the statute was absurd because it limited fees in all cases in which the person filing a claim was a prisoner, regardless of whether the claim related to prison-condition litigation. Also, a statute that prohibits the importation of anyone performing labor or service of any kind is absurd, if at all, only when applied to all brain toilers, not just pastors. A statute that allows a judge to weigh the probative versus prejudicial effect of a witness’s prior conviction is absurd when applied to all civil plaintiffs, not just a plaintiff who has lost his arm. A statute that imposes a waiting period for filing an appeal rather than a time limit in which to file is absurd in all cases. In each of these examples, the applicable statute is illogical as written *and* as generally applied. It is not absurd as applied to just the specific individual before the court. You might think of the difference in this way: when a statute is generally absurd, Congress did not intend to draft the statute as written and likely, if given a chance, would redraft. The facts of the case merely bring this point to light. In contrast, when a statute is specifically absurd, Congress intended to

¹⁰² Robbins v. Chronister, 402 F.3d 1047, 1055 (10th Cir. 2005) (Hartz, J., dissenting) (quoting United States v. Newsome, 898 F.2d 119, 121 n.3 (10th Cir. 1990), *rev’d en banc*, 435 F.3d 1238 (10th Cir. 2006)).

draft the statute as written and likely, if given a chance, would not redraft, other than to except the isolated situation before the court. In short, in one case, Congress did its job poorly, while in the other case, Congress did its job well.

With statutes that are generally absurd, the absurdity is often caused by drafting error¹⁰³ or the hubbub of the legislative process.¹⁰⁴ For this reason, cases of general absurdity are rarer than cases of specific absurdity precisely because it is unusual for Congress to get it so wrong. Importantly, even when Congress does err in its drafting, judges have other doctrines they can rely on to avoid the absurd result. For example, a judge could apply the constitutional avoidance doctrine,¹⁰⁵ as the majority should have done in *Green*, or could apply the scrivener's error exception,¹⁰⁶ as the majority should have done in *Amalgamated Transit*. Like the absurdity doctrine, both of these doctrines allow textualists to avoid the ordinary meaning of a clear statute.

For purposes of this article, general absurdity is often apparent and resolvable with intrinsic sources, including the textual context. Illustratively, when I misspeak, my listener often knows what I meant from the rest of the words. Similarly, when a statute provides that litigants have a seven day waiting period to appeal, the absurdity and fix are both readily apparent from the textual context. Because general absurdity can be resolved using intrinsic sources, turning to absurdity to avoid clear language in cases of general absurdity does not undermine textualism, at least not to the same extent that specific absurdity does.

In contrast, specific absurdity is neither facially apparent nor resolvable with intrinsic sources. Again

¹⁰³ See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

¹⁰⁴ See, e.g., *In re Butler*, 186 B.R. 371, 372 (Bankr. D. Vt. 1995) ("It has been said that one should never watch laws or sausage being made."); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1844-50 (1998) (debunking the myth that legislative time pressure created the ambiguity in the Alien Contract Labor Act at issue in *Holy Trinity Church*).

¹⁰⁵ The constitutional avoidance doctrine directs that when there are two reasonable interpretations of statutory language, one of which raises constitutional issues and one of which does not, the statute should be interpreted in a way that does not raise the constitutional issue. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See generally JELLUM, *supra* note 10, at 77-78, 235-37.

¹⁰⁶ The scrivener's error exception to the plain meaning rule allows judges to correct obvious clerical or typographical errors. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993). See generally JELLUM, *supra* note 10, at 75-77.

illustratively, when I speak more broadly or narrowly than I intended, my listener is unlikely to know my boundaries, and my other words are less likely to make those boundaries clear. Similarly, when a statute provides that prisoners should not escape from prison, there is no apparent absurdity. Yet when the statute is applied to a specific case in which a prisoner escaped to save his life, the boundaries become uncertain, and the application clearly absurd. Thus, specific absurdity comes to light only when the facts of a specific case come into play.¹⁰⁷ Resolving specific absurdity often requires a judge to determine whether excepting the situation before the court will further the purpose of the statute or otherwise be consistent with the legislature's intent. For example, a statute that prohibits individuals from drawing blood in the streets is not absurd until applied to a doctor offering medical care. But in deciding whether to except the doctor from the statute's reach, a judge should consider the purpose of the statute. If the purpose of the statute was to prohibit individuals from fighting in the streets, then excepting the doctor would be consistent with that purpose. If the purpose of the statute was to protect public health by keeping blood—which is unsanitary—off the street, then excepting the doctor would be inconsistent with that purpose. Hence, specific absurdity often must be resolved through nontextual sources such as legislative history and unexpressed purpose. Because specific absurdity requires judges to resort to nontextual sources to determine statutory meaning, specific absurdity undermines textualism.

Assuming this analysis to be correct, it results in an oddity: textualist judges can intervene only when judicial intervention is less necessary. Let me explain. When a statute is specifically absurd, Congress is unlikely to amend that statute to correct the absurdity because it is unlikely to recur. Although the absurdity did manifest in one isolated case, the exact circumstances are unlikely to ever occur again; hence, Congress has little incentive to act. Moreover, Congress has a good reason not to act; the statute as generally applied does exactly what Congress intended the statute to do. Why mess with a perfectly good statute? No statutory language can ever be perfect. Thus, there will always be cases that may fit within the ordinary meaning of the text of a statute and to which the

¹⁰⁷ While it is legitimate for all judges to examine the facts of the case before them, textualists assert that people should be able to understand a statute as written without resort to other sources.

statute should not apply. Consequently, it is precisely in these cases that a court should step in and correct the resulting injustice even though stepping in to resolve cases of specific absurdity violates textualist principles.

Moreover, suggesting that, in cases of specific absurdity, judges do not have the power to intervene and prevent injustice is, in a word, absurd! The U.S. Constitution grants the legislature the power to draft and enact laws.¹⁰⁸ It also grants the judiciary the power to interpret those laws:¹⁰⁹

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . This is of the very essence of judicial duty.¹¹⁰

The judiciary interprets laws passed by the legislature only in the course of adjudicating a case.¹¹¹ There is little reason to have a sophisticated judiciary as a coequal branch of government if all that the judiciary is allowed to do is apply statutes blindly without considering the justice of the application. Without a check by the judiciary, those convicted of laws that were not intended to apply to their circumstance will have no recourse. But “[n]o right of the victim is advanced, and no interest of the state served, by incarcerating the innocent.”¹¹² Rather, a court’s fundamental power is “to decide cases according to [its] own legal interpretations and factual findings”¹¹³ and “to render dispositive judgments.”¹¹⁴ To remove this power from judges would elevate the role of the legislature at the expense of the judiciary.

In contrast, when a statute is generally absurd, Congress is more likely to amend that statute to correct the absurdity because it is almost certain to recur. The absurdity

¹⁰⁸ U.S. CONST. art. I, § 1.

¹⁰⁹ *Id.* art. III, § 1.

¹¹⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

¹¹¹ “A fundamental precept of the federal constitutional structure . . . is the distinction between a legislature’s power to enact laws and a court’s authority to interpret them in the course of adjudicating a case.” William D. Araiza, *The Trouble with Robertson: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1055 (1999) (criticizing the Court’s holding in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), for failing to check legislative usurpation of judicial power).

¹¹² *Ohio Div. of Wildlife v. Clifton*, 89 Ohio Misc. 2d 1, 7 (Mun. Ct. 1997) (quoting *State v. Aldridge*, 697 N.E.2d 228, 249 (Ohio Ct. App. 1997)).

¹¹³ Araiza, *supra* note 111, at 1073.

¹¹⁴ Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990).

will manifest in every case, or at least in a large number of cases, because Congress crafted a statute it never intended to draft. The statute, as generally applied, does not do what Congress intended the statute to do. The language is not just imperfect or imprecise, it is wrong; thus, Congress has a good reason to act. Hence, it is less important that a court intervene in cases of general absurdity because Congress has more incentive to fix such a statute. Indeed, that is exactly what happened after the Fifth Circuit's decision in *Mississippi Poultry Ass'n v. Madigan*.¹¹⁵ At issue in that case were the 1985 amendments to § 466(d) of the Poultry Products Inspection Act.¹¹⁶ That Act specifically required that all imported poultry products “be subject to *the same* . . . standards applied . . . in the United States.”¹¹⁷ The relevant agency had promulgated a regulation interpreting this Act to require that the foreign system requirements be “*at least equal to*” U.S. standards.¹¹⁸ A lawsuit ensued, and a three judge panel heard the case.¹¹⁹ The majority found the language “the same” clear—it meant identical—and rejected the agency's interpretation.¹²⁰ Yet the majority's interpretation imposed an unintended trade barrier. No foreign country's poultry could enter the United States because the foreign country's inspection system could never be “identical” to the U.S. system.¹²¹ It is unlikely that Congress

¹¹⁵ 992 F.2d 1359 (5th Cir. 1993), *aff'd en banc*, 31 F.3d 293 (5th Cir. 1994).

¹¹⁶ *Id.* at 1361; 21 U.S.C. § 466(d)(1)(A) (1995).

¹¹⁷ 21 U.S.C. § 466(d)(1)(A).

¹¹⁸ Requirements for Imported Poultry Products, 52 Fed. Reg. 15,963 (May 1, 1987) (codified at 9 C.F.R. § 381.196) (emphasis added).

¹¹⁹ *Miss. Poultry Ass'n v. Madigan*, 790 F. Supp. 1283 (S.D. Miss. 1992); *Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359 (5th Cir. 1993). Later, the court on its own motion ordered a rehearing. *Miss. Poultry Ass'n v. Madigan*, 9 F.3d 1116 (5th Cir. 1993).

¹²⁰ *Miss. Poultry Ass'n*, 31 F.3d at 310. To determine whether the language was clear, the majority in the initial hearing looked first to a dictionary and concluded that “any fair reading of the dictionary definition of ‘the same’ overwhelmingly demonstrate[d] that ‘the same’ [was] congruent with ‘identical.’” *Miss. Poultry Ass'n*, 992 F.2d at 1364. While the majority acknowledged that secondary dictionary definitions included synonyms of “equivalent,” such as “closely similar” and “comparable,” the majority reasoned that substituting “at least equal to” for “the same as” made no sense in this case because Congress used “at least equal to” to mean equivalent in other sections of the Act. *Id.* For example, Congress required states and territories to have poultry processes “at least equal to” the federal system. *Id.* at 1364 n.28 (citing 21 U.S.C. § 466(d) (1988)). Additionally, Congress had used “the same” in other parts of the Act. *Id.* at 1363 n.26. Because Congress had used both “the same” and “at least equal to” in other parts of the Act, the majority reasoned that when Congress wanted to use an equivalency standard, it knew how to do so. *Id.* at 1364.

¹²¹ *See Miss. Poultry Ass'n*, 992 F.2d. at 1378 (Reavley, J., dissenting) (commenting on how “[t]he facts of [the] case provide no basis on which to hold that Congress ‘directly spoke[] to the precise question’ of whether section 466(d) mandates

intended to enact such a trade barrier when it amended this Act.¹²² Simply put, the statute was generally absurd when interpreted according to its ordinary meaning. Yet despite a rehearing before the full panel, the Fifth Circuit clung to its textualist interpretation.¹²³ Not surprisingly, shortly after the case was decided, Congress immediately amended the Act to replace “the same” with “equivalent to,” thereby removing the judicially imposed trade barrier.¹²⁴ Thus, when Congress crafts a generally absurd statute, Congress can and does correct its mistake.

In light of the distinction between specific and general absurdity, textualists should rethink the absurdity safety valve. As demonstrated, they should be especially loath to apply the doctrine in cases of specific, as opposed to general, absurdity because specific absurdity is neither apparent nor resolvable from the text. Yet it is precisely in cases of specific absurdity that judicial intervention is needed most. Textualists neither recognize this distinction nor appreciate how it undermines textualism’s underpinnings.

CONCLUSION

Absurdity is a textualist’s fail-safe doctrine; it provides an out when they are faced with the reality that their approach simply will not work in a given case. Whereas purposivists and intentionalists do not need such a doctrine to reject clear text, textualists do. But the need for this doctrine proves the shortcomings of textualism: judges should apply the clear text, except when they should not.

Because the absurdity doctrine allows judges to avoid the ordinary meaning of the text and rewrite the statute to conform to the intent of Congress, textualists should approach the doctrine with caution and use it sparingly, if at all. Many textualists do advocate a narrow application of the absurdity and scrivener’s error doctrines. But as noted elsewhere:

identity” (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984))).

¹²² The dissent found it inconceivable that Congress would enact a statute with such major trade implications without talking about “why a barrier was justified, what it was supposed to accomplish, or how its effectiveness would be monitored.” *Id.* at 1364.

¹²³ *Miss. Poultry Ass’n*, 31 F.3d at 310.

¹²⁴ Poultry Products Inspection Act § 431(k)(1), 21 U.S.C. § 466(d)(1) (1994).

Even narrow versions of these doctrines undercut textualist principles to the extent courts are permitted to consider policy or legislative intent that runs contrary to unambiguous statutory language. . . . Potentially, the benefits from having these doctrines as an option do not counterbalance the effects of courts and litigators that read them broadly.¹²⁵

Because it is neither apparent nor resolvable from text alone, specific absurdity, in particular, is problematic for textualists. At bottom, specific absurdity and textualism are simply incompatible.¹²⁶ Yet it is precisely when statutes are specifically absurd that judges should be willing to consider nontextualist sources and craft appropriate exceptions because Congress will not do so. Hence, the absurdity doctrine demonstrates the failings of textualism.

¹²⁵ Gold, *supra* note 1, at 60-61 (citing Siegel, *supra* note 2, at 325 n.73 for examples of British cases rejecting the absurdity doctrine and Michael S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV. 589, 596 (2000) for examples of British cases rejecting the scrivener's error doctrine).

¹²⁶ *But see id.* at 61 n.207 (citing JOHN COPELAND NAGLE, *Textualism's Exceptions*, in ISSUES IN LEGAL SCHOLARSHIP (2002)) (disagreeing with those who argue that the absurdity and scrivener's error doctrines contradict textualism). Gold proposes a theory of absurdity that supports textualism:

This article proposes a different solution for absurd results: a clear statutory text is not actually disregarded when the absurdity doctrine is applied. Instead, the absurdity doctrine is triggered by those highly unusual situations in which a presumed legislative intent is in conflict with a "literal" application of statutory language. In those instances, the objective meaning of the statute to a competent user of the language is distinct from its otherwise literal meaning.

Id. at 64. He suggests further that the proper treatment of scrivener's errors requires that "when a drafting error is sufficiently obvious from a reasonable reading of a statute that it could not represent what Congress intended to write, the court should read the statute as if the error had been corrected." *Id.* at 74-75.

So understood, neither the absurdity doctrine nor the scrivener's error doctrine is an exception to textualism. They simply provide additional evidence that textualism diverges from literalism. Textualism's purported exceptions fit nicely with the idea that courts "do not inquire what the legislature meant," but "ask only what the statute means."

Id. at 84-85.