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Rationalizing "Absurdity"

ABSTRACT. Critiqued as a blank check for judicial intervention, the absurdity canon has been all but abandoned by modern textualists. But this Note argues that its total dismissal is unwarranted. By dissecting the multiple meanings of "absurdity," this Note reframes the absurdity canon as a form of constitutional avoidance. Properly understood, the absurdity canon enforces constitutional values of rationality embedded in the Equal Protection Clause. This conception should have broad appeal to both textualists and nontextualists alike, calibrating judicial deference with traditional rule-of-law values.

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INTRODUCTION

Few substantive canons of statutory interpretation have as longstanding a pedigree as the absurdity canon.[1] Imported from the British legal tradition into American courts, the absurdity canon loosely instructs that statutes ought not be interpreted as to lead to absurd results.[2] But what exactly does "absurd" mean, and how can judges consistently administer such an open-textured concept? The canon's vagueness is the focal point of most critiques of absurdity, and both scholars and judges have long pointed out that the definition of "absurd" turns on highly subjective, contested, and inconsistent assessments of how unreasonable an outcome must be in order to qualify.[3] As a result, finding any singular formulation of absurdity to satisfactorily explain all manners of its historical application continues to elude scholars today.[4]

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1. *See infra* Section I.A (tracing discussions of the absurdity principle to Blackstone and early English courts).

2. As explained later on, subtle variations in this formulation can lead to drastically different applications and justifications—hence, "loosely." *See infra* Part II.

3. For variations of judicial and academic critiques centered around this basic problem, see, for example, *infra* notes 98-103, 133-138, 166-172, and accompanying text.

4. Most scholarship on the absurdity canon has focused on teasing out its normative underpinnings and applications in light of more general theories of statutory interpretation, rather than explaining its historical application. *See, e.g.*, Michael D. Cicchini, *The New Absurdity Doctrine*, 125 PENN ST. L. REV. 353, 376 (2020) (endorsing a strictly consequentialist definition of the absurdity doctrine that, as applied to criminal statutes, looks only at the outrageous unfairness of a case outcome, rather than any notion of legislative intent); Tara L. Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 286-87, 304 (2020) (observing the compatibility of a certain strand of "flexible textualism" with canons like the absurdity canon, but ultimately concluding that the absurdity canon should be discarded); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1320-23 (2020) (describing instances where textualist Justices invoked absurdity to avoid hewing too closely to text); Linda D. Jellum, *But That is Absurd!: Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 927-38 (2011) (exploring the differences between specific and general absurdity and the potential acceptability of the latter, but not the former, to textualists); Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 60-74 (2006) (arguing that the absurdity canon is consistent with textualism insofar as its application is limited to situations where the plain meaning contradicts any reasonable notion of Congress's "objectified" intent, rather than "subjective" intent or historicized motive); John C. Nagle, *Textualism's Exceptions*, 2 ISSUES LEGAL SCHOLARSHIP 1, [i] (2002) (purporting that textualism "would be better served by always adhering to the statutory text rather than defending any exceptions" like the absurdity canon); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 348-49 (2001) (concluding that handling a scrivener's error requires a form of "contextualism" about linguistic meaning); Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 165-66 (1994) (concluding that the absurdity canon complements legislative supremacy in a democratic system by promoting a penumbra of unspoken rule-of-law values).

Despite this paradoxical quality of being both historically entrenched yet normatively unsettled, scholars have not yet attempted to systematically explain how the absurdity canon has evolved over time in American courts and how those changes connect to larger jurisprudential moments in American legal history. This Note fills this gap by offering a descriptive taxonomy of how the Supreme Court has justified and applied the absurdity canon over time. After constructing a descriptive framework for making sense of the absurdity canon's various use cases, the Note then connects each use case to a corresponding set of theoretical justifications rooted in debates about the proper relationship between Congress and the courts.[5]

This descriptive contribution advances the scholarly conversation in two ways. First, taxonomizing past practices sheds light on our current ones by revealing throughlines previously unnoticed. Frameworks, even imperfect ones, facilitate the formation of explanatory narratives that clarify how we have arrived at our current intellectual moment. The descriptive framework herein breaks from current academic accounts of the absurdity canon's history—opening up space for normative contestation of its current applications.[6]

Second, taxonomizing uses of the absurdity canon itself rebuts the common critique that the concept of absurdity is too amorphous to be useful. I posit that the concept of absurdity actually does have definite shape, but that its nature must be understood as a mix of distinct, though overlapping, concepts that have evolved through time to fit the historical moment.[7] If the absurdity canon can actually be made sense of in a purely descriptive way, then the allegation that it is undefinable is not itself a sufficient reason to reject the canon's use. Instead, any rejection of the absurdity canon must be grounded in more substantive notions about what the role of courts ought to be in modern democracy.[8] This topic—the relationship between courts and Congress—remains central to debates about interpretive method. As such, a careful parsing of the absurdity canon intersects with foundational normative questions with which the Court consistently grapples, even when it does not explicitly invoke the absurdity canon.

In addition to clarifying these muddy waters, this Note leverages its descriptive account to raise a normative defense of why absurdity ought to be understood as a weak form of constitutional avoidance. To the extent that scholars have engaged with the normative desirability of employing the absurdity canon

5. *See infra* Part II.

6. *See infra* Section I.B.

7. *See infra* Sections II.A, II.B.

8. *See infra* Part III.

in recent decades, they have mostly denied its continued relevance.[9] Critics' basic argument roughly goes: "If the absurdity canon authorizes judges to ignore the plain meaning of the text, then it would allow judicial usurpation of the legislative role." John F. Manning — who has provided the most extensive academic analysis of the absurdity canon to date — argues that "the Court should permit such displacement only when the legislature's action violates the Constitution."[10] Many other scholars have observed similar theoretical tensions between the absurdity canon and basic tenets of textualism — though scholars vary in their normative takeaways.[11]

This Note also proposes that the absurdity canon can and ought to be understood as a weak form of constitutional avoidance, anchored in the norm of rationality review — a familiar technique in both constitutional and administrative law.[12] Specifically, this Note reinforces the commonsense notion that when courts encounter ambiguity in interpreting the statute's plain text, they ought to attend to the likely effects of their interpretations. Only when those foreseeable effects do not plausibly serve any legitimate government end should another interpretation of the law be favored. This assessment parallels rational-basis review in constitutional law and hard-look review in administrative law. It emphasizes courts' unique competency to determine relationships between means and ends, but does not ask courts to set political ends themselves.

This defense of the absurdity canon is both modest and bold. It is modest because it advances a commonsense notion of statutory interpretation that even the staunchest textualists could plausibly endorse.[13] But it is bold because it points out that appealing to "common sense"[14] in statutory interpretation necessarily invokes substantive questions about constitutional values. One's view of

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9. One exception to this general agreement is Laura R. Dove, who identified the phenomenon of "absurdity in disguise" — how courts use results-oriented thinking to impute ambiguity onto an otherwise unambiguous text. *See* Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 NEV. L.J. 741, 767-87 (2019) (offering examples from the courts of appeal and Supreme Court). But unlike this Note, Dove's descriptive account does not seek to recuperate the absurdity principle in a normative sense, nor does Dove's account attempt to salvage a strong distinction between the absurdity canon and other forms of overtly consequentialist reasoning.

10. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2486 (2003).

11. *See supra* note 4; *infra* Section I.B.

12. *See infra* Section III.B.

13. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2378-80 (2023) (Barrett, J., concurring) (citing a string of prominent textualist scholars to argue that textualism requires commonsense, contextual readings).

14. For more discussion on how "common sense" has come to occupy a central role in this Court's textualism, see *infra* Section III.B.2.

when and how the courts ought to "load the dice"[15] by determining what "common sense" requires depends on what the proper role of courts is. And more often than not, talk of "common sense" lays bare a need for unprincipled consequentialism—the exact kind of move that textualism was purportedly designed to avoid in the beginning, but to which it is increasingly becoming accustomed.[16]

This Note offers a middle path. The absurdity canon does not need to be an "all-purpose backstop to the principle that judges must follow a clear text"[17] nor does it need to be completely jettisoned. Rather, it can be narrowly understood to avoid irrational judicial outcomes while exemplifying the courts' appropriately deferential role in statutory interpretation. Using *Van Buren v. United States*[18] and *Biden v. Nebraska*[19] as examples, I show how the Supreme Court could have used this version of the absurdity canon—which I term "absurdity-as-irrationality"—to engage in this balancing act later on.[20]

Though my proposed understanding of absurdity departs from existing accounts,[21] it can nonetheless be traced to modern case law and is more theoretically consistent with popular approaches to statutory interpretation—both textualist and nontextualist.[22] By being specific about the ways that absurdity has been used and can be used moving forward, I hope to rebut the characterization of absurdity as some ill-defined boogeyman of statutory interpretation. While it is true that the absurdity canon has been used by courts to justify unprincipled judicial rewriting of laws, the notion of absurdity still occupies an important role in our jurisprudence—a role deeply connected to constitutional norms.[23] The critical question is whether there is a definition of absurdity that minimizes its risks and promotes its virtues. This Note sketches out a tentative answer to that question while acknowledging the potential risks.

This discussion is timely, and the stakes are high. For years now, both this Court and the legal academy have been deeply divided about what "textualism"

15. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE Law 27 (1997).

16. *See infra* Section III.B.2 and notes 115-117 and accompanying text.

17. *See infra* note 110 and accompanying text.

18. 593 U.S. 374 (2021).

19. 143 S. Ct. 2355 (2023).

20. *See infra* Section III.B.

21. Some scholars have entertained the idea that the absurdity canon can implement constitutional values rooted in rationality review, but these scholars have either dismissed the idea or articulated very different ways in which they envision absurdity's application. *See infra* notes 235-243, 257-259 and accompanying text.

22. *See infra* Section II.C.

23. *See infra* Section III.A.

demands,[24] so much so that in the final Supreme Court decision of the October 2022 Term, Justice Barrett—a well-established scholar of statutory interpretation prior to her judicial roles—penned a concurrence that read more like scholarship than judicial opinion. In *Biden v. Nebraska*, in which the Court held that the Department of Education did not possess statutory authority to forgive student loans nationwide, Barrett argued that the major questions doctrine is neither a substantive canon nor a clear-statement rule, but a corollary to commonsense textualism.[25] The major questions doctrine, she suggested, is merely semantic. Unlike other substantive canons, the major questions doctrine does not necessarily enforce extratextual values, such as nondelegation; it is a natural extension of "contextual" readings of the plain text. By distinguishing the major questions doctrine from substantive canons, Barrett indicated that substantive canons lack the legitimacy that the major questions doctrine actually possesses.[26]

In making her argument, Justice Barrett cited Manning's *The Absurdity Canon*.[27] This reference speaks volumes. Manning's article, though written in a different time and thus situated in a different jurisprudential context, showed how the absurdity canon touches upon foundational questions about textualism's imagination of the judicial role—questions that this Court continues to grapple with.[28] Thus, read in its full context, Barrett's concurrence can be understood as an attempt to bring coherence to the Court's varying approaches to textualist analysis. But it also signals trouble beneath the water.[29] It is both a recognition that this Court's approach to reading statutes raises eyebrows and a plea to embrace a more capacious (though puzzling) version of textualism tuned in

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24. *See infra* note 102 and accompanying text; *see also* Bostock v. Clayton Cnty., 590 U.S. 644 (2020) (leading to a fragmented set of opinions, all of which purported to be textualist).

25. Biden v. Nebraska, 143 S. Ct. 2355, 2377-81 (2023) (Barrett, J., concurring) (citing Manning, *supra* note 10, at 2457).

26. *See infra* Section III.B. For a deeper dive into the multiple ways in which the major questions doctrine can be interpreted after the October 2023 Term, see generally Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251 (2024), comparing Justice Gorsuch's and Justice Barrett's respective descriptions of how the major questions doctrine operates.

27. *Biden v. Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring).

28. This Court has recently been characterized by partisan controversy, fueled not only by the fact that it has deviated from longstanding constitutional precedent, but also by its narrow readings of watershed statutes on which agencies rely to make public policy. *See Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling [https://perma.cc/C96D-5U77]; Cooper Burton, *The Supreme Court Is Getting Less Unpopular*, FIVETHIRTYEIGHT (June 13, 2023, 6:00 AM), https://fivethirtyeight.com/features/supreme-court-approval-rating-polls [https://perma.cc/3RDL-3YEM].

29. *See infra* Section III.B.1.

to "context." Her attempt raised more questions than answers. Justice Barrett's appeals to contextualism in *Biden v. Nebraska* and *Van Buren* provide more examples of how this Court facially disavows substantive reasoning yet covertly engages in it[30]—a trend that other scholars have also observed.[31]

This Note offers a vision of what a more principled method of consequentialist reasoning in statutory-interpretation cases might look like. In the process, I identify constitutional values that justify a limited form of consequentialist decision-making for both textualists and nontextualists alike. By taking seriously the notion that "[a]ny theory of statutory interpretation is at base a theory about constitutional law,"[32] this Note makes the case that screening for absurd interpretations is a fundamental responsibility of the modern judiciary. And contrary to what critics suggest, this responsibility is consistent with a highly deferential vision of the judicial branch.

I also use the specific history of a particular canon of interpretation to intervene more generally at textualism's crossroads. It suggests a path forward that translates insights from the purposivist theories of the past into the textualist language of the present. By doing so, it charts a middle ground that might appeal to textualists who endorse "fair"[33] or "contextual"[34] readings. At the same time, it remains transparent about its relationship to the substantive values that animate judicial decision-making.

Part I surveys historical and academic discussions about the absurdity canon to distill common themes that led to its adoption in American courts. In doing so, Part I also clarifies how absurdity—like broad references to structure or purpose or even text itself—is an inherited term that has been distinguished, parsed, and refined over time to gain multiple sedimented meanings. In making this point, I rely not only on case law, but also on general trends in how scholars and judges thought about statutory interpretation as an enterprise. I point out, for example, how the hyperspecification of semantic canons was part of an attempt to better systematize the general goals of textualism as an interpretive movement. Similarly, I show how the development of substantive canons might give

30. *See infra* Section III.B.

31. *E.g.*, Krishnakumar, *supra* note 4, at 1278-79 (showing how judges have regularly used pragmatic reasoning and traditional textual canons to impute specific policy goals to Congress); Dove, *supra* note 9, at 758; William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1689-91 (2023) (explaining how the absurdity canon functions as a textualist "escape hatch" for the Roberts Court).

32. Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988).

33. *E.g.*, Bond v. United States, 572 U.S. 844, 857 (2014); King v. Burwell, 576 U.S. 473, 491 (2015) (rejecting the semantic canon of surplusage on grounds that it does not lead to a "fair construction").

34. *E.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

official names to otherwise inchoate intuitions that some judicial outcome would be unacceptable to the constitutional order.

Part II then uses this history to propose a taxonomy of the absurdity canon. By analyzing the multiple ways that absurdity has been defined in Supreme Court opinions over the past two centuries, I identify three distinct variations of the absurdity canon, each with overlapping, but nonetheless distinguishable, use cases and justifications. First, I analyze the origins of absurdity as a natural-law concept—that a statutory construction is absurd when its consequences egregiously violate some metaphysical desiderata of what does and does not count as "law." I then explain why this formulation has been handily rejected as incompatible with the fundamental axioms of democratic pluralism and legal positivism. Second, I examine absurdity as evidence of Congress's subjective intent, a statute's objectified purpose, or both. Here, I note the historical entanglement between the absurdity canon and the unrestrained purposivism of the late nineteenth-century courts, which partially motivates modern textualists' skepticism about the canon. This discomfort with the absurdity canon persists despite Scalia-era textualists' attempts to rescue the absurdity canon through the lens of objectified purpose. Third, I consider the absurdity canon as a statutory parallel to the rational-basis test in constitutional law and rationality review in administrative law. Though this conception has not yet been popularized, it is doctrinally consistent with the language of well-known opinions and forms the foundation for my normative intervention.

Part II also offers some explanations for why this Court may have declined to explicitly invoke absurdity—or, for that matter, other constitutional-avoidance canons—nearly as often as its predecessors. First, textualists might be wary of being perceived as too interventionist. Absurdity's historical association with both natural-law theories and purposivist theories of interpretation gives it a bad reputation. Second, textualists might have other tools in their repertoire that do the same work that the absurdity canon used to.[35] But intentionally refusing to use the labels "constitutional avoidance" or "absurdity" does not change the substance of what this Court has done. The ascendance of the major questions doctrine—and Justice Barrett's attempt to reframe it as an offshoot of "contextual" textualism—proves this point.[36] Understanding the intellectual history behind this move reveals that the Court is not abandoning the logic of constitutional avoidance or even absurdity, as much as it is invoking substantially similar concepts under separate cover.[37] As such, "rejecting the absurdity doctrine would not change the understanding of the constitutional relationship between

35. *See infra* notes 113-117 and accompanying text.

36. *See infra* Section III.B.1.

37. *See infra* notes 113-114 and accompanying text.

Congress and the federal judiciary; rather, it would only change the understanding of what it takes to implement that relationship in light of the realities of the legislative process."[38]

Part III evaluates each of Part II's definitions of the absurdity canon in light of broader methodological debates about the proper relationship between Congress and the courts. I conclude that although all these senses of the absurdity canon share common ancestors and thus each has a historical claim to legitimacy, only absurdity as a form of constitutional avoidance anchored in rationality review ought to remain as one of the tools of statutory interpretation in the modern courts. Moreover, it is highly deferential, triggered only to enforce familiar rule-of-law and constitutional values. Contrary to prior scholarship, this Note argues that theorizing the absurdity canon as a form of rationality review exemplifies judicial restraint, capitalizes on the courts' institutional competence, and harmonizes statutory interpretation with other areas of public law. And importantly, it is something that both textualists and nontextualists can justify. Defining absurdity as irrationality, taken at its best, is a limited intervention that anchors otherwise unprincipled deviations from the text in well-established constitutional norms.

To emphasize this point, I illustrate potential applications of absurdity-as-irrationality using two recent Supreme Court cases: *Van Buren v. United States* and *Biden v. Nebraska*. In both cases, the Court could have noted the ambiguity of the statutory text to employ the absurdity canon instead, assessing the respective statutes through a modified form of rationality review. In doing so, the Court could have reached the same outcome in *Van Buren* and a different outcome in *Biden v. Nebraska* — both with more straightforward reasoning that leverages ordinary tools of judicial construction. Rationality review is the bread and butter of the judicial role — and the absurdity canon is its manifestation in the domain of statutory interpretation.

I. ABSURDITY IN CONTEXT

Substantive canons are presumptions about statutory meaning that judges have drawn from policy-based, constitutional, or common-law values.[39] They differ from semantic canons because they do not rely on linguistic conventions.[40] Instead, they are explicitly consequentialist in nature, weighing in favor of

38. Manning, *supra* note 10, at 2445 n.213.

39. Substantive canons are also known as normative or policy canons. WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 447-48 (2014).

40. *Id.*

certain legal outcomes regardless of the specific language at issue. In other words, they "load the dice" toward a particular result.[41]

The absurdity canon is but one example of many substantive canons. Others include the rule of lenity,[42] modern constitutional avoidance,[43] the federalism canon,[44] the Indian canons,[45] and arguably now the major questions doctrine.[46] Substantive canons have traditionally been justified in two ways: first, they can function as evidence for inferring Congress's (un)intended effects; and second, they can function as the judicial enforcement of superimposed values, independent of congressional intent.[47] Supporters of purposivist, legal-process, and dynamic approaches to statutory interpretation generally endorse the use of substantive canons as one of many permissible tools, depending on the relevant context.[48]

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41. SCALIA, *supra* note 15, at 27.

42. The rule of lenity instructs courts to narrowly construe ambiguous criminal statutes in favor of criminal defendants. *See* Liparota v. United States, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.").

43. "'[I]t is a cardinal principle' of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). This canon is applicable to a wide range of constitutional concerns. The constitutional concerns cited need not be rooted in any particular provision but can also concern broad structural issues.

44. "In the face of [statutory] ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

45. "[I]n construing this admittedly ambiguous statute, we must be guided by that eminently sound and vital canon that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Bryan v. Itasca Cnty., 426 U.S. 373, 392 (1976) (internal quotations and citations omitted); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[2] (2012 ed.).

46. The major questions doctrine indicates that, in the absence of a clear statement by Congress, judges ought not read ambiguous statutes to confer deference to an implementing agency's interpretation if the law implicates questions of vast economic or political importance. *See* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 716 (2022).

47. Benjamin Eidelson & Matthew Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 136 HARV. L. REV. 515, 535-37 (2023).

48. For examples of such endorsements, see generally Dougherty, *supra* note 4; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); and William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001).

But there are deep tensions between textualism and substantive canons. Though there are many versions of textualism, one of its more consistent theoretical throughlines is that the four corners of the text are the sole source of legal authority: "Only the written word is the law."[49] The words of the statute are what pass the constitutional processes of bicameralism and presentment—not the extrinsic aids that judges might use to decipher the law's meaning.[50] That is the theoretical core of the new-textualist rejection of legislative history, but it is applicable to substantive canons as well. Since substantive canons draw their authority from outside the four corners of the text, some suggest that they functionally operate as atextual evidence about what Congress *would have wanted* or *ought to have wanted* or as exercises of judicial policymaking—neither of which are permitted in textualist interpretation.[51]

It is arguable that a more pragmatically minded textualist, who accepts that language acquires meaning through social context, might reply that substantive canons are not always impermissible.[52] Substantive canons are merely disfavored and may be permissibly used when the text itself fails to suggest a clear-cut outcome. That is why textualists only use substantive canons when they are "trigger[ed]" by textual ambiguity.[53] Under this account, substantive canons are pieces of evidence about what content the text conveys, but the text remains prime.[54]

This response walks into an even more trenchant critique. There is no consistent way to determine how ambiguous is ambiguous enough to merit the use of substantive canons. Analytically, ambiguity is difficult to quantify, and empirically, judges are inconsistent about when they find statutes sufficiently ambiguous.[55] Like the concept of risk tolerance, the decision about how much ambiguity one can swallow can be chalked up to highly subjective and idiosyncratic

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49. Bostock v. Clayton Cnty., 590 U.S. 644, 653 (2020).

50. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 652-53 (1990); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675-76 (1997) (analyzing textualism as a special application of the nondelegation doctrine that sees interpretive reliance on legislative history as creating a constitutionally impermissible opportunity for legislative self-delegation).

51. Eidelson & Stephenson, *supra* note 47, at 586.

52. In fact, this is what Justice Barrett argues both in her writings and in her most recent judicial opinions. *See infra* notes 290-293 and accompanying text.

53. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016).

54. *See infra* Section II.B.

55. Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 258 (2010). This observation has since been used to reexamine how courts apply substantive canons. *See* Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 U. PA. J. CONST. L. 593, 616-22 (2021) (questioning the usefulness of ambiguity as a "trigger" for substantive canons).

preferences. And evidence suggests that judges can find or manufacture ambiguity when they want to avoid their disfavored outcome.[56] As a result, this wishy-washy view of textualism essentially instructs: "Follow these rigid principles until they do not work, in which case, employ contrary principles." Such a hybrid view is, at best, just another form of purposivism, and, at worst, deeply unprincipled and at odds with the mandate of faithful agency.[57] In sum, conventional wisdom suggests that textualists should disavow substantive canons, absurdity is a substantive canon, and textualists should therefore disavow the absurdity canon.[58]

However, this syllogism only follows if one assumes that faithful agency to Congress demands that judges remain within the four corners of the text—a premise that is hotly contested. Prominent textualist scholars like Amy Coney Barrett have rebutted this straightforward characterization. Barrett argues that "to the extent a canon is constitutionally inspired, its application does not necessarily conflict with the structural norms that constrain judges from engaging in broad, equitable interpretation."[59] After all, the theoretical foundations of textualism are constitutional in kind. Textualist methods are justified as most consistent with broad mandates of constitutional structure (in which courts are faithful agents of the legislature), but "[j]udges do not act as faithful agents of Congress in exercising judicial review; they act as faithful agents of the Constitution" itself.[60] As such, Barrett concludes that textualists ought to also pay attention to substantive canons that enforce deeply rooted constitutional values. I agree and further suggest that the absurdity canon can be recast in constitutional terms.

Before presenting a new taxonomy of the absurdity canon and proposing its use as a method of constitutional avoidance, it is important to situate the way that absurdity has been characterized in the past. Section I.A delves into the historical roots of the absurdity canon. Section I.B then reviews the current state of the scholarly literature and judicial discourse to anchor the discussions that follow in Parts II and III.

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56. Farnsworth, Guzior & Malani, *supra* note 55, at 258; Dove, *supra* note 9, at 760 ("[T]he absurdity doctrine essentially allows a court to treat clear text *as if* it were ambiguous, opening the door to a broad array of interpretive tools that would otherwise not be available.").

57. Past scholarship has even suggested that judges who self-identify as textualists are more likely than their counterparts to "find" ambiguity in order to covertly justify outcome-motivated reasoning. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 353-54 (1994).

58. This is the basic thrust of Manning's argument. *See generally* Manning, *supra* note 10.

59. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 111 (2010).

60. *Id.* at 169.

A. Absurdity in History

The absurdity canon has occupied a persistent place in the Anglo-American common-law tradition. William Blackstone—whose *Commentaries* holds "so great a role" in "the history of American institutions" that it has been compared to the Bible of legal analysis[61]—acknowledged multiple ways that absurdity enters into the judicial calculation, though these connections evince a pre-legal-realist association between developing common law and "discovering" fundamental precepts of natural law.[62] For example, on the concept of *stare decisis*, Blackstone wrote, "if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law; but that it was not law; that is, that it is not established custom of the realm, as has been erroneously determined."[63] He made similar statements regarding the private law of estate and property.[64]

On construing legislation in particular, Blackstone recognized that "if there arise out of [acts of Parliament] collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void."[65] Short of the high standards of moral unacceptability and manifest injustice as to render a government command no longer law, however, Blackstone offered little guidance on how to operationalize this principle.

But this ambiguity did not stop judges from applying the absurdity canon as part of their generally accepted powers of equitable interpretation.[66] Over the next couple of centuries, some variation of the "golden rule" of statutory interpretation—that interpreters should "adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that . . . leads to any manifest absurdity or repugnance, in which case the language may be varied or

61. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW, at iii-iv (1958).

62. ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS 46-69 (2019). For an account that problematizes the conventional histories of Blackstone as a natural-law theorist, see Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491, 495 (2009). For an explanation of the distinctions between theorizing law itself, its interpretation, and the facts to which it applies, see generally Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

63. 1 WILLIAM BLACKSTONE, COMMENTARIES *70.

64. *See id.* at *70-71 (articulating some variation of the absurd-results principle as applied to common-law decision-making).

65. *Id.* at *91.

66. *See generally* Eskridge, *supra* note 48 (marshalling historical evidence in support of the proposition that courts had the power to interpret statutes in reference to equitable concerns).

modified, so as to avoid such inconvenience"—was repeatedly invoked.[67] Designed to "avoid the harshness of literal interpretation and at the same time to prevent the courts from legislating,"[68] judges on both sides of the Atlantic continued to invoke this natural-law conception of absurdity to modify and even rewrite statutory provisions.[69]

If the beginnings of absurdity were rooted in the natural-law theory that some man-made laws are so repugnant that they could not possibly be "law" in the most metaphysical of senses, legal positivists' and realists' subsequent rejection of any "brooding omnipresence in the sky"[70] recentered the debate around legislative *authority*—the source of positive law. This shift in methodology retained the judicial mandate to "discover" law, but the law to be discovered was "the rule which the law-maker intended to establish," not the metaphysical ether.[71] Under this theory of interpretation, appeals to absurdity "are not covers for the making of new law. They are ways of arriving at the real intent of the maker of existing law."[72] This broader reorientation instigated a shift in the way absurdity was defined. Starting in the late-nineteenth and early-twentieth centuries, both American and English jurists began defining absurdity in reference to legislative intent. In particular, judges adopted the presumption that the legislature could not have intended manifest injustice, despite the plain meaning of the statute.

In the United States, *United States v. Kirby* was the earliest explicit reference to the absurdity canon. There, the Court explained:

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67. Becke v. Smith (1836) 150 Eng. Rep. 724, 726 (Exch. of Pleas). A more specific account of this multicentury history can be the subject of a later scholarly project. The important takeaway for the limited purposes of this Note is that the absurdity principle did not come from nowhere. Its roots are deep enough to form at least a weak presumption against leaving its history completely unexplained.

68. J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 299 (1935).

69. *See id.* at 299-300 (tracking jurisprudential debates among English jurists about the absurdity principle). U.S. courts have also endorsed and refined the absurdity principle in a variety of ways. *See, e.g.*, United States v. Hammond, 26 F. Cas. 96, 97 (C.C.D.C. 1801) ("No repugnancy or absurdity shall be presumed, especially in a statute, if the words will bear such a construction as to avoid it."); Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634, 638 (1876); Territory of Hawaii v. Mankichi, 190 U.S. 197, 214 (1903) (quoting Plumstead Dist. Bd. of Works v. Spackman, L.R. (1884) 13 Q.B.D. 878, 887 (Eng.)).

70. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

71. Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

72. *Id.* I quote Roscoe Pound here to describe what the overall mood was of that time period about statutory interpretation. Pound himself vehemently disagreed with this normative position. He believed that though spurious interpretation might be temporarily advantageous where there is legislative dysfunction, it cannot be "permanently remedied by wrenching the judicial system to obviate [its] mischievous effects." *Id.* at 386.

> 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.[73]

This articulation of absurdity as evidence of congressional intent carried the day for the better part of a century[74] and is still dominant in modern case law.[75]

As the role of the judiciary changed over time in the United States, so did American jurists' attitudes about absurdity. For example, citing mid-nineteenth-century British influences, Justice Sutherland wrote in a case interpreting the tax code: "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."[76] He then held for the majority that though faithful adherence to the text of the law resulted in extremely undesirable effects, it was the legislature's duty—not the Court's—to resolve the issue.[77] This rejection of the absurdity canon reflects the clear tensions between it and legislative supremacy. Invoking the absurdity canon implies 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."[78] The early influence of these disagreements is clear. Formalism about legislative supremacy reverberates across modern debates on statutory interpretation, such that modern academic discussions of the absurdity canon traverse these same theoretical fault lines about the proper relationship between courts and Congress.[79]

Despite these commonplace reservations about judicial lawmaking, some version of the absurdity canon has flourished and achieved near-universal

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73. United States v. Kirby, 74 U.S. 482, 486-87 (1868) (emphasis added).

74. The same jurisprudential moves can be seen in contemporaneous English cases. *See, e.g.*, Hill v. E. & W. India Co. (1884) 9 App. Cas. 448 (Eng.).

75. *See infra* Section II.B.

76. Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

77. *Id.*

78. Dougherty, *supra* note 4, at 132.

79. The same position staked out in *Crooks* has been rehashed in more modern Supreme Court opinions, too. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." Lamie v. U.S. Tr., 540 U.S. 526, 542 (2004) (quoting United States v. Granderson, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)).

recognition in the United States[80] and globally in both civil-law and common-law countries.[81] To this day, variations of this "golden rule" are still repeated by courts and casebooks, even as the absurdity doctrine teeters on uncertain theoretical grounding.[82] One explanation could be that the absurdity canon's long history cautions against its disposal. But regardless of the reason, the fact is that U.S. courts at all levels — especially the state level — have continued to employ the absurdity canon in resolving difficult cases, albeit at a lower frequency than before.[83] And even when they do not invoke absurdity by name, they still engage in consequentialist reasoning that might be better explained by applying the absurdity canon.[84] The next Section explores the academic critiques and attempts to reconcile absurdity with textualist schools of thought in the United States.

B. Absurdity in the Academic Literature and Judicial Discourse

Absurdity's transformation through time reflects the fact that the "term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense."[85] The sheer breadth of these values lends itself to pluralist interpretation and finds expression in an extraordinarily wide-ranging set of legal principles.[86] Veronica M. Dougherty

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80. There are simply too many cases in every single state and in the federal system at both the trial and appeals levels that have appealed to "absurdity" to cite comprehensively. For a general statement of its historical and continued relevance, see *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 & n.3 (1993) (characterizing the canon as a "common mandate" and citing Supreme Court cases that have invoked it).

81. *See* Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 461, 485 (D. Neil MacCormick & Robert S. Summers eds., 1991) (finding that some variation of the absurdity canon has been adopted in the legal systems of Argentina, Germany, Finland, France, Italy, Sweden, the United Kingdom, and the United States).

82. *See, e.g.*, ESKRIDGE, GLUCK & NOURSE, *supra* note 39, at 463 (characterizing a "golden rule" as a "catch-all rule providing a mental check for the technical process of word-parsing and grammar-crunching").

83. *See* Dougherty, *supra* note 4, at 129 n.9 (collecting cases).

84. *See infra* Section III.B.2.

85. Dougherty, *supra* note 4, at 133.

86. The extent to which scholars have attributed traditionally accepted judicial powers with such free-floating values differs. *Compare* Eskridge, *supra* note 48, at 992 (contending that statutory interpretation is not confined to the meaning of the plain text), *with* John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1648 (2001) (arguing that the original understanding of the judicial power fits better with the faithful-agent theory of statutory interpretation). Analyses of the courts' proper role in "equitable interpretation," as opposed to strict construction, appear even earlier in the

explicitly diagnosed nearly three decades ago that "the difficulty of defining absurdity, and the historical lack of attempts to do so, can . . . 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."[87] For Dougherty, however, the judicial enforcement of such rule-of-law values is critical to the functioning of any legal system. In her view, the absurdity canon is thus "complementary" to the principle of legislative supremacy and "legitimizes the legislative role" by "appropriately remain[ing] in dynamic tension" with the vices of excessive literalism about the text.[88]

Understanding the absurdity principle as a tool to maintain a Congress-court partnership is most persuasive under some version of legal-process theory.[89] There is much appeal to the vision that "the courts, *partners* in the enterprise [of lawmaking], will interpret a statute's open language accordingly."[90] The American legal system evolved from one dominated by judge-made common law to one "in which statutes, enacted by legislatures, have become the primary source of law."[91] Judges can thus only fulfill their role if the judicial power also includes some equitable leeway to play with statutory text.[92] This is even more important now that federal statutes have become much more difficult to pass, and where hyperpolarization of American politics and the rise of "unorthodox lawmaking"[93] to get things done have made it even harder to strike bipartisan deals.[94]

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literature. *E.g.*, S.E. Thorne, *The Equity of a Statute and* Heydon's Case, 31 ILL. L. REV. 202, 208-11 (1936) (discussing types of statutes that courts have interpreted equitably in the history of the common law).

87. Dougherty, *supra* note 4, at 165.

88. *Id.* at 134.

89. Legal-process theory relies heavily on descriptive and normative notions of reasonability. Legal-process theorists are commonly imagined to believe that legislatures are reasonable actors made up of reasonable people who act reasonably. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 714-17 (1958). *See generally* William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of* The Legal Process, 107 HARV. L. REV. 2031 (1994) (situating the development of legal-process theory in its intellectual and historical contexts).

90. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 98 (2010) (emphasis added).

91. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1999).

92. *See id.* at 2-3.

93. *See* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 3-5 (2000) (coining the term).

94. *See* Christopher Ingraham, *Congressional Gridlock Has Doubled Since the 1950s*, WASH. POST (May 28, 2014, 1:01 PM EDT), https://www.washingtonpost.com/news/wonk/wp/2014/05/28/congressional-gridlock-has-doubled-since-the-1950s [https://perma.cc/UW3E-UNCV]. *See generally* SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF

Under these circumstances, a theory of interpretation capable of accounting for "societal, political, and legal context" as statutes age over time seems especially welcome.[95] The absurdity canon occupies a special role under theories like these, which emphasize the role of judges in enforcing the fundamental yet unspoken values that make law possible.

Classical versions of new textualism, developed by jurists like Justice Scalia, are also receptive to the absurdity canon.[96] In his book, *Reading Law: The Interpretation of Legal Texts*, Scalia defined the absurdity canon as the principle that "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve."[97] Though this formulation is narrower than what purposivists and legal-process theorists might endorse, it shares common theoretical throughlines. For example, implicit in Scalia's formulation of the absurdity canon is the idea that laws ought to "make sense" and that laws that do not are presumptively legislative *errors* that ought to be corrected.[98] Accordingly, theorists like Scalia imagine the absurdity canon as a modest extension of the idea that courts ought to correct scrivener's error: "[W]hen a statute obviously suffers from a drafting error, courts will correct the statute to comport with the text Congress presumably intended to write."[99] One knows it

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LEGISLATIVE GRIDLOCK (2003) (discussing different factors that have contributed to legislative gridlock).

95. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-81 (1987).

96. *See generally* SCALIA, *supra* note 15 (providing his view on how courts should interpret statutes). In his Supreme Court opinions, Justice Scalia has often appealed to some notion of absurdity to reach his conclusions. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 (1988); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989); Brown v. Plata, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting).

97. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234 (2012). "Consider, for example, a provision in a statute creating a new claim by saying that 'the winning party must pay the other side's reasonable attorney's fees.' That is entirely absurd, and it is virtually certain that winning party was meant to be losing party. May the court read it that way, in defiance of the plain text? We agree with those authorities who say that it may." *Id.* at 235.

98. *Id.* However, he attempts to cabin this appeal to objectified purpose: "[I]n the rare case of an obvious scrivener's error, purpose—even purpose as most narrowly defined—cannot be used to contradict text or to supplement it. Purpose sheds light only on deciding which of various textually permissible meanings should be adopted. No text pursues its purpose at all costs." *Id.* at 57.

99. Gold, *supra* note 4, at 27; *see also* Michael S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV. 589, 590-92 (2000) (describing how courts will correct obvious "scrivener's error[s]" in statutes). The case law supporting the courts' correcting scrivener's errors also dates back to the early nineteenth century. *See* Schooner Paulina's Cargo v. United States, 11 U.S. 52, 59

when one sees it.[100] This appeal to what is reasonable for legislatures to do resonates with the kind of rule-of-law values implicit in the standard account of the absurdity canon.[101]

Yet, it is precisely this extrinsic connection to "reasonability" that new textualists[102] find so problematic.[103] To them, the basic question about all substantive canons remains: "[I]f the statutory text is the law, why is it sometimes not the law? Why does it cease to be the law when it is absurd, or obviously mistaken?"[104] If the answer is that some policy concerns are so potentially harmful that courts must avail themselves of their equity powers to correct them, then the doors to more unmoored forms of atextual, consequentialist reasoning open — an unwelcome invitation for judicial discretion.[105] But if the answer, from a faithful-agency perspective, is that Congress simply could not have intended courts to give legal force to errors, then one must begin drawing difficult lines between permissible and impermissible inferences into congressional intent.[106]

(1812) ("If the legislature meant this, it is well, if they did not, there is no meaning in the sentence; nothing upon which the reference can operate.").

100. "The threshold for true absurdity typically presents itself straightforwardly." SCALIA & GARNER, *supra* note 97, at 236.

101. In fact, one appeal of textualism is its purported provision of a consistent and simple way to promote rule-of-law values in a predictable and transsubstantive way across all statutes.

102. Admittedly, there is no universal understanding of new textualism. *See* Grove, *supra* note 4, at 267-68 (using *Bostock* as an entry point for describing the many theoretical disagreements within the textualist camp). New textualism is not necessarily a single coherent school of thought, so much as it is a historically inherited label of individuals roughly inspired by the same premise. As such, I use this generalized term here to describe the new vanguard of Scalia's disciples who advance various nuanced conceptions of what it means to adhere to text. I conceive of new textualism as an expansive school of both academic and judicial thought, whose overarching commitment is to interpreting statutes within the four corners of the text (though, as acknowledged throughout this Note, what makes new textualism so difficult to describe is that even among self-professed new textualists, there is no consensus about which interpretive moves are and are not permissible). *See generally id.* (explaining how scholars conceive of new textualism in its current form).

103. *See* Manning, *supra* note 10, at 2390; *see also* Barrett, *supra* note 59, at 168-69 (critiquing the open-endedness of the absurdity canon in contrast with other, more constitutionally grounded substantive canons).

104. Siegel, *supra* note 4, at 333 (emphasis omitted).

105. For a deeper historical and normative discussion of substantive canons and the problems they pose for textualist interpretation, see generally Barrett, *supra* note 59.

106. The general observation that new textualism's search for objectified intent through semantic canons is not so different from more traditional intentionalist methods of statutory interpretation has been extensively described in the textualist literature. *See, e.g.*, Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348-49 (2005) (indicating the common appeals to legislative intent in both methodological philosophies); John F. Manning, *Textualism and Legislative*

Put differently, how can judges consistently tell whether statutory language is merely undesirable versus a legislative "error"?

While Scalia thought that he could escape what he himself identified as the "slippery slope"[107] of absurdity by treating the absurdity canon as a traditional tool of error correction, some new textualists argue that "objectified" legal standards are just normative fictions and cannot override the carefully negotiated legislative deals adopted under Article I, Section 7.[108] Yet, this proposal is quite extreme. Judges must still exercise their individual discretion to determine the correct result — often in circumstances when principled textualists should be particularly wary of straying too far from the four corners of the text.[109] As Manning explained: "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. But this version of textualism is, I believe, wrong."[110] Manning ultimately concluded that the correct way to identify absurdity is in reference to what a "reasonable user of language" would understand the meaning of a statute to be, rather than overt literalism. And in cases where such a contextual understanding of the statutory language is clear, Manning posited that "the Court should permit such displacement only when the legislature's action violates the Constitution, rather than an ill-defined set of background social values identified on an ad hoc basis by the Court."[111] In other words, Manning all but rejects the absurdity canon in its traditional form.[112]

Intent, 91 VA. L. REV. 419, 423-26 (2005) (distinguishing objectified intent as a normative construct from a historicized inquiry into subjective intent demanded by traditional variants of intentionalism or purposivism); *see also* SCALIA, supra note 15, at 17 (explaining the textualist notion of "objectified" intent).

107. *See* SCALIA & GARNER, *supra* note 97, at 237.

108. *See* Manning, *supra* note 50, at 675 (emphasizing the importance of bicameralism and presentment in theorizing the constitutional role of the courts in statutory interpretation); Manning, *supra* note 10, at 2485-86 (highlighting the absurdity canon's incompatibility with realism about the legislative process).

109. *See* Manning, *supra* note 10, at 2388; Eskridge, Slocum & Tobia, *supra* note 31, at 1695-97; *see also* Jellum, *supra* note 4, at 919 (critiquing textualism on the theory that the situations where absurdity exists most sorely are precisely the situations when principled textualists ought to adhere most strongly on their inflexible principles).

110. Manning, *supra* note 10, at 2392. This critique lives on. *See* Eskridge, Slocum & Tobia, *supra* note 31, at 1689-91 (explaining how the absurdity canon functions as a textualist escape hatch for the Roberts Court).

111. Manning, *supra* note 10, at 2486.

112. *Id.* Granted, Manning was writing over twenty years ago, and a lot has changed since then. The Court's composition has changed, and, as a result, so, too, have the law and the scholarly conversation about statutory interpretation. Yet, as indicated by Justice Barrett's citing to *The*

However, the absurdity canon is worth reconsideration. First, absurdity has remained relevant in courts today, albeit more covertly. For instance, Laura Dove has identified how both federal circuit courts and the Supreme Court have used consequentialist reasoning to reach outcome-driven holdings in a manner that tracks with how the absurdity canon traditionally operates.[113] In line with other scholars of statutory interpretation, Dove observes the inconsistent ways that courts might impute ambiguity to a text by referencing an undesirable outcome, rather than resorting to substantive considerations only after carefully ascertaining whether semantic ambiguity already exists within the four corners of the text.[114]

The absurdity canon's internal logic implicates other canons, too, as well as weighty concepts about the proper role of the judiciary, limits to the legislative power, and the relationship between coequal branches. As Anita Krishnakumar has shown through her study of almost 500 opinions from the Roberts Court between 2006 and 2017, the Roberts Court (at least, prior to its newest additions) has often used textualist interpretive tools to reach holdings that have decidedly purposivist (or at least, nontextualist) undertones.[115] Her observations thus raise more foundational questions about what the actual differences between textualism and purposivism are in practice.[116] From this larger perspective, reconstructing a more nuanced view of the absurdity canon does more than salvage one traditional tool in the toolbox. It helps shed light on the enterprise

Absurdity Doctrine in a recent concurrence, the basic thrust of Manning's argument remains relevant. And, though much has been written on the relationship between absurdity and textualism since then, Manning's exegesis remains the most cited treatment of the absurdity canon to date. Analyzing Manning's arguments about absurdity thus requires a generous eye, as it is likely that Manning would have framed or recast his arguments in a different light to account for newer contributions in the literature. But this Note's focus on Manning's specific contribution in *The Absurdity Doctrine* is nonetheless warranted. One feature of *The Absurdity Doctrine* that distinguishes it from other treatments of the absurdity canon is its move from the specific to the general. Manning delves deeply into the justification and application of the absurdity canon to make a broader point about statutory interpretation; other scholars make the broader point first and use absurdity as a passing example. *Cf. supra* note 4. This Note engages on Manning's terms.

113. Dove, *supra* note 9, at 767-86.

114. *Id.*; *see also supra* notes 55-57 and accompanying text (explaining how courts interpret ambiguous language through an absurdity-doctrine lens).

115. Krishnakumar, *supra* note 4, at 1279 ("[T]he Court, and its textualist Justices in particular, regularly employ pragmatic reasoning as well as supposedly neutral textualist tools to divine — or manufacture — congressional purpose and intent.").

116. Anita Krishnakumar empirically verifies the hypothesis that modern textualists and purposivists actually converge on what they deem as acceptable indicia of statutory meaning. *See id.* at 1295-1304; *see also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 90-91 (2006) (describing how purposivism and textualism both treat the attribution of meaning as a construct).

of interpretation itself and connects divergent units of legal analysis into a more holistic constitutional vision. Ultimately, this Note builds upon Dove's and Krishnakumar's observations by assuming that judicial consequentialism in statutory interpretation might be somewhat inevitable, but it is more legitimate when grounded in principles consistent with constitutional structure.[117]

In the following Parts, I build upon the idea that absurdity is a constitutional concept that can be embraced by both textualists and nontextualists alike. Part II excavates the contested meanings of absurdity over time and connects them to broader jurisprudential debates about modern governance. And Part III makes the case that absurdity-as-irrationality can be interpreted to enforce constitutional values anchored in rationality review.[118]

II. THREE CONCEPTIONS OF ABSURDITY

As explained in Part I, the standard account of absurdity — characterized by absurdity's relationship to inferences of congressional purpose — has prevailed in the academic literature and judicial discourse.[119] But the standard account is not the *only* sensible reading of the Court's historical precedents.[120] Though having this standard account as a working definition is useful in advancing the literature, it also masks some recurring patterns. This Part reexamines the underlying case law to complicate the scholarly "consensus" on what absurdity means.

The absurdity canon's indeterminacy is not a result of excessive vagueness, as most sources suggest, nor is it purely a case of ambiguity. Rather, absurdity is polysemous. It has *multiple* sensibly distinct yet conceptually overlapping definitions.[121] Casebooks on statutory interpretation differentiate between vague

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117. *See infra* Part III.

118. To be explicit, I do not suggest that courts are likely to adopt my reading of the absurdity canon. Rather, my goal is merely to point out an approach to interpreting absurdity that has conceptual roots in existing authority and potential theoretical merits, but whose implications have not yet been fully sketched out. In doing so, I aim to contribute to the literature by showing what one possible recuperated version of the absurdity canon might look like, though it is by no means the only view.

119. *See generally* Manning, *supra* note 10 (dedicating the entire Article to defining and refuting the so-called "standard account of absurdity").

120. In presenting this standard picture, Manning recognized that "the absurdity doctrine is too open-ended to permit meaningful generalization." *Id.* at 2402. But for the purposes of his critique, he proceeded with what he deemed a workable, "standard" definition of absurdity.

121. This conclusion is unsurprising, as normative language is often polysemous. In Andrei Marmor's words, "general evaluative concepts are typically *super-polysemous*; such concept-words have a very wide semantic range . . . ." ANDREI MARMOR, THE LANGUAGE OF LAW 149 (2014). In its broadest sense, the term "absurd" is equally superpolysemous. This Note, however,

terms, which carry such general meanings that the precise contours of their application are indeterminate (e.g., fairness, justice, morality), and ambiguous terms, which carry alternative concrete meanings (e.g., cool, hot, blue).[122] This dichotomy, however, is inexhaustive. Linguists have also recognized polysemy as a third category, "where there is clearly a meaning common to the sub-meanings in question . . . but nevertheless there are strong enough differences in meaning to produce equivocal results or judgments of ambiguity from the linguistic tests."[123] The following Sections excavate absurdity's multiple yet overlapping meanings to draw out their legal implications.

Noting absurdity's polysemy is generative because such recognition makes it easier to disentangle more nuanced accounts of absurdity's multiple usages. The taxonomy offered in the next three Sections is nonsensical if one assumes that absurdity must have a singular correct meaning that has persisted through history. Like ordinary vernacular, "legalese" also grows over time, and words carry with them context-specific histories. So, recognizing polysemy helps resolve seemingly intractable contradictions. The following Sections show that scholars and courts alike have argued about whether the absurdity canon is really about injustice, subjective legislative intent, or some other concept of purpose. But what if all of the above have been true, just in different factual contexts and at different points in time? What can we learn from this sedimentation, and what ought we salvage from these multiple meanings?

This Part posits that there are roughly three distinct yet overlapping ways of defining absurdity grounded in the Court's jurisprudence. First, absurdity can refer to potential consequences of reading a law in a way that is too outrageous to accept, regardless of whether or not the legislature so intended. This is the classical, natural-law account of absurdity—the kind that Blackstone referred to when he stated that some positive laws are so absurd that they cannot be law at all.[124] Second, absurdity can be defined as a particular type of evidence of congressional purpose. This has become the standard interpretive account today. Third, absurdity can be understood as the lack of rational connection between the means prescribed and the set of plausible legislative ends. Ultimately, I conclude that this latter version—a form of rationality review—is the most justified use of the absurdity canon in modern statutory interpretation.

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looks exclusively into the *legal* meaning of absurdity, such that its polysemy is confined to the ways in which courts have invoked the concept—not ordinary speakers.

122. *See* ESKRIDGE, GLUCK & NOURSE, *supra* note 39, at 449; *see also* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97-98 (2010) (differentiating between vagueness and ambiguity and defining ambiguity).

123. David Tuggy, *Ambiguity, Polysemy, and Vagueness*, 4 COGNITIVE LINGUISTICS 273, 275 (1993).

124. 1 BLACKSTONE, *supra* note 63, at *70.

To reiterate, these categories are not mutually exclusive. Many cases decided on absurdity grounds can be interpreted in multiple of the above ways. My goal is instead to describe how each sense of absurdity appears throughout the Supreme Court's case law and differs in its theoretical and legal implications.[125] In doing so, I aim to inject structure and clarity into debates about absurdity in particular, but also draw parallels to other ongoing debates in the field of statutory interpretation.

A. Absurdity as a Natural-Law Concept

"[A]ll laws are to be so construed as to avoid an unjust or an absurd conclusion; and general terms are to be so limited in their application as not to lead to injustice, oppression or an absurd consequence."[126] This natural-law formulation of the absurdity canon is explicitly consequentialist and appeals to notions of justice that are not only extratextual, but also entirely outside the legislative process.

Though this conception has largely fallen out of favor, the understanding that some laws (or applications thereof) are so outrageously unjust that they could not possibly be considered "law" dates back centuries. The natural-law tradition straightforwardly epitomizes this view.[127] Blackstone illustrated this concept citing German jurist Pufendorf's example: "[T]he Bolognian law . . . which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit."[128] In this prototypical case, refusing to apply the literal meaning of a (admittedly poorly worded) statute prohibiting violence to a surgeon saving lives is a matter of "common sense."[129] To punish the surgeon under that particular

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125. Though much can be learned from other courts' applications of the absurdity canon, I focus exclusively on U.S. Supreme Court cases for a couple of reasons. First, the Court's reasoning about statutory interpretation, even if not "precedential," inevitably trickles down to lower courts and provides a unique mirror into the prevailing jurisprudential attitudes of the era. Second, because the Court has had a discretionary docket since 1891, the cases for which the Court grants certiorari are often the "most difficult" to resolve through text alone, occupying the exact interpretive space in which substantive canons become relevant.

126. Lau Ow Bew v. United States, 144 U.S. 47, 61 (1892).

127. *See supra* Section I.B.

128. 1 BLACKSTONE, *supra* note 63, at *60.

129. "Common sense" in the natural-law tradition has deep roots in philosophy more generally and has taken on a more technical meaning over time. "Common sense" here is not the set of all intuitions. Intuitions in general vary in their strength, substance, and social contingency; but common sense here specifically refers to the first-order epistemological and moral

statute would shock and offend one's moral sensibilities so deeply that the positive law loses its normative force. On important moral issues like these, natural-law theorists posit, positive law ought to cohere with the law written upon our hearts.[130]

These ideas were not atypical before the ascendence of legal realism. The idea that judges discovered, rather than made, law was rather commonplace.[131] Though common-law methods are distinct from statutory interpretation, the intricate relationship between the development of American common law and theories of natural law cannot be overlooked.[132] This is especially true in the context of the absurdity canon since, as mentioned above, the fundamental justifications for avoiding absurdity are vested in the judicial role itself—regardless of whether the judge is interpreting common law or statutes.

To my knowledge, not a single U.S. court has ever explicitly used the words "natural law" to invalidate congressional legislation.[133] And no U.S. court has

principles constitutive of human life. They are, by nature, axiomatic and inescapable. What those axioms are (and whether they even exist), of course, are heavily debated topics. For two classical Enlightenment-era examples of philosophical debates on "common sense," compare THOMAS REID, INQUIRIES AND ESSAYS (Ronald E. Beanblossom & Keith Lehrer eds., 1983) (defending "common sense" and natural-law views on epistemology, metaphysics, and morality), with DAVID HUME, A TREATISE OF HUMAN NATURE (David Fate Norton & Mary J. Norton eds., 2007) (emphasizing the limits of "common sense" approaches and introducing alternative theories that heavily resonate with the precepts of modernity and legal positivism). *See generally* ALEXANDER P. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY (2017) (distinguishing the influences and implications of different varieties of natural-law theories). But more recently, Justice Barrett has used the exact same example to argue that substantive notions like this are part of a commonsense application of "contextual" textualism. *See infra* Section III.B.2.

130. The metaphor of natural law being the law "written on [our] heart[s]" has deep roots in Christian religious traditions, which happen to be the contemporary forebearers of natural-law theory today. *See* J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 11 (1997).

131. *See* Gerald J. Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 594-95 (Jules Coleman & Scott Shapiro eds., 2004); *see also* Bruce Wardhaugh, *From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws Since 1830*, 41 ME. L. REV. 307, 308-15 (1989) (analyzing Justice Story's writings to exemplify early American trends in thinking about discovering natural law, prior to the ascendance of legal realism). But the ascendance of legal realism had not gone completely undisputed, even by the twentieth century. *E.g.*, Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 522-23 (1942) (arguing that legal realism's displacement of natural-law theories of human value is ultimately destructive to democracy).

132. FORSYTH, *supra* note 62, at xi-xiii.

133. But many scholars have traced early American legal practice to conclude that Founding Era legal thought did incorporate a shared conception of natural or customary right; they suggest

ever interpreted the absurdity canon to stand for the proposition that *any* unjust law is no longer binding positive law. After all, the term "absurdity" impliedly contains its own high, though ill-defined, threshold; something must be *so* unreasonable, unjust, or outrageous to qualify as absurd.[134] The crucial takeaway here is that early notions of absurdity do not rely on positive-law constructs, such as legislative intent. In fact, what the legislature intended or the law's purpose as inferred through the text is irrelevant when determining whether the outcome is consistent with a more transcendent source of authority. As one relatively modern defender of natural-law theory argued: "[T]o save a statute's ordinary meaning from leading to really absurd or unjust consequences, we cannot look to anything else *but* real sensibility and justice. In particular, the legislature's formally expressed purposes will be just as riddled with absurd extensions as is the language chosen for the statute."[135]

To see this dynamic in an actual Supreme Court opinion, consider *Sorrells v. United States*, where the government prosecuted a defendant charged with possession and sale of whiskey under Prohibition-era laws, even though the defendant was entrapped by government agents.[136] Defending the conviction, the government argued that the literal meaning of the criminal statute at hand did not mention entrapment as a statutory exception to finding guilt and that the purpose of the statute was categorically to punish bootlegging—even if the government tricked someone into acting illegally.[137] Disagreeing with the government and reversing the conviction, the Court considered that "such an application is *so shocking to the sense of justice* that it has been urged that it is the duty of the court to stop the prosecution in the interest of the [g]overnment itself, to protect it from the illegal conduct of its officers and to preserve the purity of its

that this view might inform how we interpret the scope of constitutional rights. *See, e.g.*, STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 11-45 (2021); R. H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE, at vii (2015) (investigating "what the link between the natural law and human rights amounted to in practice"). *See generally* Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992) (examining further historical evidence in support of the conclusion that the Founders expected judges to enforce unenumerated as well as enumerated rights); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) (addressing the question of the historical legitimacy of noninterpretative judicial review). Forthcoming legal scholarship also illuminates how the prevailing American legal culture that shaped elite thought in the Founding Era has theoretical implications for how judges now apply constitutional law. *See* Jud Campbell, *Determining Rights* (manuscript on file with author).

134. *See* Chapman v. United States, 500 U.S. 453, 463-64 (1991); Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510, 516 (1997).

135. Moore, *supra* note 62, at 354.

136. 287 U.S. 435, 438-39 (1932).

137. *Id.* at 445-46.

courts."[138] And though it maintained that there was no right to "judicial nullification" of a law, the Court concluded that it is a "traditional and appropriate function of the courts" to "construe statutes so as to avoid absurd or glaringly unjust results."[139] It is notable here that the Court did not conduct a long inquiry into the purposes of Congress or even entertain the possibility that there was a conceivable purpose for government officers to be able to engage in such problematic behavior. Instead, it appealed to an innate sense of justice—a commonsense judgment that it is beyond the pale for government agents to set up an otherwise innocent person to go to jail.[140]

Sorrells is not a one-off case. The Court has emphasized that "to construe statutes so as to avoid results glaringly absurd[] has long been a judicial function."[141] This expansive view of the judicial function has connected the natural-law view of absurdity to an aggressive and generalized version of purposivism:

> When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.[142]

Though mostly discredited by the arrival of legal realism and other movements that sought to free judges from excessive formalism, appeals to natural law in the United States have remained common in political debate. That is because the language of natural law draws its force from lofty ideals of justice and morality, not the nitty-gritty details of the political process. The rhetorical strategies most successful in the civil rights movement are illustrative. Venerated leaders like Martin Luther King, Jr. drew a sharp distinction between natural and positive law, concluding that the latter cannot be binding if it is inconsistent with

138. *Id.* at 446 (emphasis added).

139. *Id.* at 450.

140. At least, innocent of that particular instance of the crime—it is unknown whether the agents entrapped the defendant because they could not otherwise prove his engagement in criminal enterprises more generally. Either way, such egregious entrapment was illegal then, according to the Court, and certainly illegal now, under widely adopted principles of criminal procedure.

141. Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938).

142. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) (footnotes omitted) (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)); *see also infra* Section II.B (discussing the relationships between absurdity and congressional intent).

the former.[143] These rallying cries touched on deep themes about law in general; they evinced the intuitive appeal of classical absurdity—it is an idea that anyone with deep moral conviction can get behind, given the right causes.

Nonetheless, a natural-law view of the absurdity canon has long fallen out of favor and was never the most common or even a widely accepted formulation of the absurdity canon. The standard interpretive account, explored in the next Section, remains dominant. And it is not difficult to see why. The natural-law conception of absurdity gives judges far too much discretion to replace statutory law with their own policy judgments. Allowing unelected judges to strike down properly enacted laws based on their moral sensibilities violates core tenets of modern democracy.

But the critique runs much deeper than the American separation-of-powers tradition alone. A natural-law conception of absurdity is disturbing to modern audiences because a strong view of natural law is fundamentally incompatible with ideological pluralism. Though theories of democracy have always been contested throughout history, even now, the modern consensus is roughly that individuals differ in their values and preferences, that their beliefs are oftentimes irreconcilable, and that democracy is a functional space for ongoing political contest.[144] Those premises cannot be true if there were a metaphysically real yet intangibly abstract law that somehow binds us all, despite being only accessible to

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143. To see the appeal of natural-law theory during the civil rights movement, consider Martin Luther King, Jr.'s Letter from Birmingham Jail:

> One may well ask, "How can you advocate breaking some laws and obeying others?" The answer is found in the fact that there are two types of laws: there are just laws, and there are unjust laws. I would agree with St. Augustine that "An unjust law is no law at all." . . . A just law is a man-made code that squares with the moral law, or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. . . . So I can urge men to obey the 1954 decision of the Supreme Court because it is morally right, and I can urge them to disobey segregation ordinances because they are morally wrong.

Martin Luther King, Jr., *The Negro Is Your Brother*, ATL. MONTHLY 78, 80-81 (Aug. 1963).

144. For histories, taxonomies, and critiques of various democratic theories over time, see generally ROBERT A. DAHL, ON DEMOCRACY (2020); CHRISTOPHER H. ACHEN & LARRY M. BARTEIS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (2016); DAVID HELD, MODELS OF DEMOCRACY (2006); and WALTER LIPPMANN, PUBLIC OPINION (1922).

judges. For any judge to insist that they have unique authority to enact such transcendent principles is, in realist terms, a raw exercise of power.[145]

Nonetheless, it is critical to understand these theoretical roots of absurdity. Although justifications for the absurdity canon have taken on more realist and process-based veneers, its new articulations carry with it the consequentialist logic of the natural-law tradition. In other words, courts have exercised similar discretion in interpreting the law by employing substantive presumptions about what Congress intended. By displacing natural law with the vocabulary of the legislative process, courts are empowered to reach almost identical consequentialist conclusions through a more politically legitimizing framework. The next Section illustrates this point in detail.

B. Absurdity as Evidence of Congressional (Non-)Intent

The standard account "defines an 'absurd result' as an outcome so contrary to perceived social values that Congress could not have 'intended' it. So understood, the absurdity doctrine is *merely a version of strong intentionalism . . .*."[146] This articulation has deep roots in American case law that is well-canvassed by Manning.[147] I do not revisit this well-trodden doctrinal history here. Instead, I focus on the theoretical dimensions of this shift away from absurdity's natural-law foundations.

Consider the earliest known case in which the Supreme Court rested its decision on grounds of absurdity. In *United States v. Kirby*, a postal officer charged with murder argued that government prosecutors violated a law criminalizing the obstruction of mail carriage by charging him with a crime.[148] Specifically, the postal officer argued that federal prosecutors illegally arrested him because they violated an Act stating: "[I]f any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier . . . carrying the same, he shall, upon conviction, for every such offence, pay a fine not exceeding one

145. These debates have, of course, also recurred throughout history. *See, e.g.*, 1 ROBERT W. DYSON & PETER STIRK, NATURAL LAW AND POLITICAL REALISM IN THE HISTORY OF POLITICAL THOUGHT: FROM THE SOPHISTS TO MACHIAVELLI (Garrett Ward Sheldon ed., 2005) (tracing the intellectual history of legal realism's and natural law's basic premises from the ancient Greeks to pre-Enlightenment Europe); Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory*, 2006 MICH. ST. L. REV. 385 (tracing the pendulum swings from realism to natural law in the wake of atrocities like the Holocaust).

146. Manning, *supra* note 10, at 2390 (emphasis added).

147. *Id.* at 2400-01.

148. United States v. Kirby, 74 U.S. 482, 485-87 (1868).

hundred dollars . . . ."[149] Ultimately, the Court sided against the postal officer on grounds of absurdity. Federal prosecutors do not "obstruct or retard the passage of mail" when they prosecute murderers. They explained: "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."[150]

This formulation of the absurdity canon is similar to the natural-law definition in that the starting point of analysis is whether an "injustice, oppression, or an absurd consequence" has occurred. But it differs in its legal implication. Under the natural-law account, the identification of an absurd consequence is alone enough to construe — or even revise — the statute. In other words, because natural law operates as a side constraint, outcomes that violate natural law are themselves sufficient to override conflicting positive laws.

In *Kirby*, however, absurdity was discussed as one of many factors in discerning legislative intent. Absurdity creates the *presumption* "that the legislature intended exceptions to its language, which would avoid results of this character."[151] This additional layer of analysis insulates and disconnects the identification of absurd consequences from some higher-order moral command. By appealing to more neutral, process-based theories of legal legitimacy, the Court framed itself as a faithful agent of Congress: it is Congress's own intent that overrides the text, not any higher law that only courts can access.

This conceptual move is noteworthy because it reframes substantive canons, like absurdity, on the same level as other nonsubstantive canons. Strong intentionalism treats most canons as pseudo-evidentiary, rebuttable rules about the meaning of a text.[152] *Kohlsaat v. Murphy* exemplifies the evidentiary role that both semantic and substantive canons might share. In *Kohlsaat*, the Court explained that "whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which *should never be imputed to the legislature*, except when the language employed will admit of no other signification."[153] In other words, the presumption that Congress does not intend "absurd and irrational conclusions" functions as evidence of Congress's intent, which counterbalances contrary evidence presented by the "words employed" and "surrounding circumstances."[154] Therefore,

149. *Id.* at 483.

150. *Id.* at 486 (emphases added).

151. *Id.*

152. Manning, *supra* note 10, at 2400.

153. 96 U.S. 153, 160 (1877) (emphasis added).

154. *Id.*

Congress's intent reigns supreme; and the words themselves, the context surrounding them, and the consequences are just supporting considerations that feed into that primary inquiry.

This pseudo-evidentiary, intentionalist view is consistent with the maxim that canons of statutory interpretation are all but "thumbs on the scale," as opposed to black-letter doctrines.[155] Accordingly, all canons can be seen as shorthand principles that inform inferences about what Congress might have meant.[156] Take, for example, the commonly repeated refrain that "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[157] This statement presents a rebuttable presumption about congressional meaning through the operation of two commonly invoked canons: the whole act rule[158] in combination with *exclusio*

155. The merits of instituting some form of methodological stare decisis have been debated but remain unadopted by state and federal courts. *Compare* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1846-61 (2010) (analyzing the use of methodological stare decisis in state courts and advocating for its adoption), *with* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1575 (2014) (arguing that courts should not apply methodological stare decisis because of the difficulty for "federal courts to tailor their interpretive methodologies to the expectations of different congresses").

156. Manning has identified uses of semantic canons in this intentionalist fashion as "the new purposivism." John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2012). For specific examples in the case law, see *id.* at 175 & n.288.

157. Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 724 (1995) (Scalia, J., dissenting) ("Congress's explicit prohibition of habitat modification in one section would bar the inference of an implicit prohibition of habitat modification in the other section.").

158. The whole act rule is the idea that "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (citations omitted).

unius.[159] Grammatical canons like *noscitur a sociis*[160] and *ejusdem generis*[161] operate similarly. For some textualists, semantic canons might be the "only reliable indication of congressional intent."[162] For nontextualists, they serve as longstanding judicial presumptions that congressional draftsmen use grammar and syntax in similar ways that fluent speakers of the English language would understand.[163] Such judicial presumptions have long predated any empirical verification.[164]

Granted, the above account is necessarily incomplete. There are many other ways to make sense of canons that are not intentionalist. But that is exactly the point. The Court's reasoning about statutory meaning throughout history shows how background assumptions about who the "reasonable participants" in the legislative conversation are affect choices in statutory construction. In deciding statutory-interpretation cases, the Court must make presumptions about the nature of the conversation (i.e., the relevant speakers, audiences, sources of meaning) and the corresponding conventions that govern.[165] These implicit

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159. "Words omitted may be just as significant as words set forth. The maxim *expressio [or inclusio] unius est exclusio alterius* means expression [or inclusion] of one thing indicates exclusion of the other. The notion is one of negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent to include things not listed or embraced." ESKRIDGE, GLUCK & NOURSE, *supra* note 39, at 456.

160. "'*Noscitur a socii*' translates as '[i]t is known from its associates.' Light may be shed on the meaning of an ambiguous word by reference to words associated with it." *Id.* at 454.

161. "'*Ejusdem generis*,' a sibling of *noscitur a sociis*, translates as '[o]f the same kind, class, or nature.' Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. Where the opposite sequence is found, i.e., specific words following general ones, the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated." *Id.* at 455.

162. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010).

163. "In other words, even if purposivists define the task of interpretation as that of attributing a sensible purpose to the legislature, they take seriously the *entire range of semantic cues* in doing so." John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 90 (2006) (emphasis added).

164. For one of the few and most extensive empirical studies to date on how Congress thinks about canons of statutory interpretation, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); and Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

165. For discussion about the proper interpretive audience of statutory interpretation, see generally Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193 (2017); David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137 (2019); and Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213 (2022).

conventions, along with usage of their associated canons, have thus shifted over time as the composition of the Court has changed.[166]

Another takeaway from these examples is that the absurdity canon's polysemy makes it resistant to critique from any singular perspective. Just as the use of semantic canons cannot be discredited from critiquing their intentionalist accounts, the absurdity canon cannot be categorically rejected based on an intentionalist critique alone. Nonetheless, the literature generally imagines absurdity as unidimensionally intentionalist, rather than polysemous.[167] This impulse is understandable, as the standard account of absurdity is closely associated with the most egregious liberties of purposivism. Long-disapproved cases like *Holy Trinity Church v. United States* exemplify the worst excesses of the absurdity canon as an unrestrained vehicle for judicial policymaking.[168] In *Holy Trinity Church*, the question before the Court was whether a federal statute that proscribed "the importation or migration of . . . foreigners, to perform labor or service of any kind in the United States" applied to the petitioner, who paid for a rector and pastor to move from England to serve in the States.[169] Abrogating the text, the Court concluded that it did not and instead issued a narrowing construction of the broad statutory language to exclude clergymen.[170] In its freewheeling purposivist analysis about the spirit of the law, the Court invoked the absurdity canon at length.[171] Some scholars have thus characterized *Holy Trinity Church* as "anchor[ing] the textualist anti-canon."[172]

Still, the standard account of absurdity can and should be divorced from this unflattering picture of purposivism. An evidentiary view of the absurdity canon does not necessarily presuppose the primacy of — or even the possibility of — subjective legislative intent. Modern textualists and nontextualists both readily accept that words have contextual meanings distinct from the speaker's subjective intent.[173] This type of purpose has been coined "objectified" intent — the notion

166. *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018) (observing the revival and obsolescence of various canons in the Roberts Court in response to changing background presumptions about judicial methodology).

167. *See supra* Section I.B.

168. 143 U.S. 457 (1892).

169. *Id.* at 458.

170. *Id.* at 472.

171. *Id.* at 459-61 (utilizing "absurd" or "absurdity" five times within three pages).

172. William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1739 (2021) ("*Church of the Holy Trinity v. United States* anchors the textualist anti-canon.").

173. *See* Manning, *supra* note 163 and accompanying text (acknowledging the many theoretical overlaps between modern textualists and purposivists in their treatment of "purpose").

that there are discernable ends in law whose source is not the specific mental contents of any particular speaker.[174] Absurdity can thus function as evidence of objectified intent because a court can ask: "How could a reasonable person write/read a law in a way that results in such egregiously unjust or absurd consequences?"[175] The absurdity of the statute's construction then becomes one data point to be weighed among many to discern the most plausible objective meaning.

For a more modern example, consider *Griffin v. Oceanic Contractors*.[176] In that case, Griffin alleged that he suffered injury while working on a ship, for which he had to undergo surgery two days after.[177] His supervisor denied that Griffin's injury was work-related and refused to pay for the medical expenses and transportation back home. Instead, the supervisor deducted the money needed to transport Griffin back to Houston from Griffin's paycheck. Two years later, once Griffin was healthy enough to work again, he brought suit under the Jones Act, "seeking damages for respondent's failure to pay maintenance, cure, unearned wages, repatriation expenses, and the value of certain personal effects lost on board respondent's vessel."[178] In addition, Griffin sought penalty payments under the provision: "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods."[179] The amount of penalty payments owed by Oceanic Contractors centered the legal dispute. If Griffin prevailed, he would be owed over $300,000 — over 750 times the withheld amount of $412.50. If Oceanic Contractors prevailed, then the amount would reduce to a little under $7,000.[180]

The Court held in Griffin's favor, reasoning that though it was "probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute,"[181] it was "enough that Congress intended that the language it

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174. SCALIA, *supra* note 15, at 17.

175. For an example of the Court asking a similar question, see *United States v. Brown*, 333 U.S. 18, 27 (1948), which applied the absurdity canon to override "strict construction" in reference to an objectified purpose of deterrence due to having no legislative history addressing the legal issue.

176. 458 U.S. 564 (1982).

177. *Id.* at 566.

178. *Id.* at 567.

179. *Id.* at 570 (quoting Act of Dec. 21, 1898, ch. 28, § 4, 30 Stat. 756).

180. *Id.* at 578-79 (Stevens, J., dissenting).

181. *Id.* at 576 (majority opinion).

enacted would be applied as we have applied it."[182] In reaching the conclusion that the objectified purpose of the Jones Act was to deter bad actors (and not necessarily to compensate injured seamen), Justice Rehnquist calibrated the evidentiary value of the plain meaning of the text with the evidentiary value of the legislative history: "Nothing in the legislative history of the 1898 Act suggests that Congress intended to do anything other than what the Act's enacted language plainly demonstrates: to strengthen the deterrent effect of the statute by removing the courts' latitude in assessing the wage penalty."[183]

The debate between the majority and the dissent about the proper application of the absurdity canon is particularly illuminating. In dissent, Justice Stevens construed the penalty statute to "avoid the absurd result the Court sanctions today," maintaining that the majority's reading was inconsistent with "the *specific purposes* achieved by the amendments in 1898 and 1915."[184] The dissent then leveraged statutory, legislative, and precedential history to rebut Justice Rehnquist's prioritization of the plain text over a more "reasonable" meaning.[185] The disagreement between Rehnquist and Stevens in *Griffin* shows that absurdity as evidence of congressional (non-)intent is compatible with both subjective and objective understandings of purpose.

Yet, neither formulation can successfully escape the main thrust of the new-textualist critique because they both still define absurdity vis-à-vis "purpose."[186] If anything, refocusing on objectified intent exacerbates the issue of judicial discretion. What happens, for example, when traditional tools of statutory interpretation yield equally strong yet countervailing claims about the objectified purposes of the text?[187] The ease with which courts can use textualist tools to manufacture intractable disagreements functionally acts as an open invitation for judicial policymaking in a way that might be even worse than searching for subjective congressional intent. At least when appeals to subjective intent were argued, real-world evidence from legislative materials would be required. In an even more abstract search for the objectified purpose, however, unelected and unrepresentative judges must rely even more on their own value judgments, which may deviate significantly from those of the general population. In those

182. *Id.*

183. *Id.* at 573-74.

184. *Id.* at 578 (Stevens, J., dissenting) (emphasis added).

185. *Id.* at 578-90.

186. Krishnakumar, *supra* note 4, at 1320-24 (explaining how the Court's invocation of the absurdity canon forms the same "kind of move that purposivist judges typically make and that textualists usually criticize as inconsistent with the judicial role").

187. *See* Eskridge & Nourse, *supra* note 172, at 1761-86.

circumstances, how is either side any less arbitrary than courts purporting to "discover" the natural law?[188]

The inability to satisfactorily answer this question poses significant obstacles to reconciling a view of absurdity as evidence of purpose to any modern theory of textualism. Because "the absurdity doctrine directs the judiciary to identify previously unspecified social values and to determine their interpretive relevance on an ad hoc basis" with no clear limiting principle, its invocation constitutes unconstitutional judicial lawmaking under the guise of faithful agency.[189] In other words, the absurdity canon invites judges to stray away from merely announcing what the law is and toward vetoing laws they deem unacceptable.[190]

C. Absurdity-as-Irrationality

Finally, the absurdity canon can be understood as the principle that a construction of a statute ought to be rejected when there is no plausible reason why Congress would have enacted the statute to have the construction's effect.

This conception of absurdity differs from the versions explained in Sections II.A and II.B in critical ways. Unlike the natural-law formulation introduced in Section II.A, viewing absurdity as irrationality focuses on the relationship between congressionally enacted means and their intended ends. But unlike the standard account articulated in Section II.B, this third version remains agnostic about whether a law has any *singular* discernable purpose. Instead, it requires judges to consider the entire universe of reasons that the legislature might have and then identify a disconnect between the means and ends for any rationally conceivable purposes.

Consider scrivener's errors—a subset of absurdity claims concerning "obvious mistakes, typos, or 'cutting and pasting' errors in the transcription of statutes into the law books."[191] In practice, one identifies a scrivener's error when the absurdity is so patently obvious that any reasonable person would admit that the language was a mere mistake in drafting. Take, for example, the 1934 Louisiana statute whose plain text encouraged illegal behavior by allowing impeachment during cross-examination "in any unlawful way."[192] The outcome is so utterly unjustifiable that one knows it when they see it.

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188. *See supra* notes 81-82 and accompanying text.

189. Manning, *supra* note 10, at 2443.

190. *Id.* at 2445.

191. ESKRIDGE, GLUCK & NOURSE, *supra* note 39, at 463; *see also supra* notes 50-52 and accompanying text (describing textualism and its limiting principles).

192. Fried, *supra* note 99, at 589.

Yet, the definition of scrivener's errors cannot be limited to "typos." After all, typos are not the only kind of errors with potentially enormous consequences; in theory, all sorts of common scenarios can be reframed as drafting errors.[193] In that sense, there is no functional difference between a scrivener's error and other types of extreme absurdity. Scrivener's errors thus cast the absurdity doctrine in its most sympathetic light. Correcting scrivener's errors is something that virtually any judge can get behind because it does not rely on any specific theory of natural law or even robust notions of congressional intent. The scrivener's error is an "objective" legal concept that can be faithfully identified regardless of one's ideological priors. As such, scrivener's errors should be understood as a subset of absurdity, and they tend to best exemplify the view of what this Section calls "absurdity-as-irrationality."

Consider *Green v. Bock Laundry Machine Co*. In *Bock Laundry*, the Court was asked to interpret Rule 609(a)(1) of the Federal Rules of Evidence.[194] At that time, the text of Rule 609(a) stated:

> [E]vidence 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.[195]

The key phrase at issue was "to the defendant." In this case, Paul Green, the plaintiff, brought a product-liability action against Bock Laundry after a heavy rotating drum caught and tore off Green's right arm at work.[196]

At trial, defendant Bock Laundry impeached Green's testimony during cross-examination with evidence that Green had previously been convicted of both conspiracy to commit burglary and actual burglary.[197] Ordinarily, Green would have been able to argue that the probative value of his prior felonies did not

193. "Sometimes Congress writes statutes with language that produces unintended consequences, sometimes Congress fails to resolve an issue because of an oversight or a failure of will, sometimes courts and agencies interpret statutes in a manner unintended by the enacting Congress, and sometimes courts and agencies interpret statutes in a manner that produces an undesirable result. In the broadest sense, *these are all statutory mistakes*." John C. Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1268 (1996) (emphasis added).

194. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 505 (1989).

195. *Id.* at 509 (emphasis added).

196. *Id.* at 506.

197. *Id.*

outweigh their prejudicial effect. Yet, despite the fact that it is usually arbitrary who the plaintiff or defendant is in a civil suit, the plain meaning of Rule 609 limited the balancing test to defendants only. As a result, Green unsuccessfully challenged this prejudicial use of evidence, and the jury ultimately found in favor of Bock Laundry. The Supreme Court affirmed this outcome.

Though the majority acknowledged that a "literal reading would compel an odd result in a case like this" because "impeachment detrimental to a civil plaintiff always would have to be admitted" yet only sometimes admitted for civil defendants, the Court corrected the legal asymmetry in a way that limited judicial discretion and so ultimately disfavored Green.[198] Drawing upon decades of legislative history, the Court held that "Federal Rule of Evidence 609(a)(1) requires a judge to permit 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."[199] Scalia concurred in the judgment, echoing that the statute, "if interpreted literally, produces an absurd, and perhaps unconstitutional, result."[200]

Bock Laundry is a compelling example of when absurdity is so undeniable that the only reasonable conclusion is that the text is a product of mistake. Though they disagreed on the remedy, the majority, concurrence, and dissent all agreed that "petitioner has not produced, and we have not ourselves discovered, even a snippet of support for this absurd result."[201] In other words, the reason why this outcome is absurd is because there is no plausible reason to connect the legislative means with any legitimate ends. Note that under this formulation of absurdity, one need not determine what the precise purposes of the law actually are. Though the majority and dissent both engaged in purposive examinations of Congress's intent to justify their view of what the remedy ought to be, no Justice needed to reach that stage of the inquiry to conclude that something odd was afoot. This feature distinguishes absurdity-as-irrationality from the standard account set forth in Section II.B, where a statutory construction was absurd only when considered in light of the statute's identified purposes.

The same reasoning process observed in *Bock Laundry* can also be seen in other modern cases. Consider *Barnhart v. Thomas*, where the Court addressed the thorny question of whether the Social Security Administration "may determine that a claimant is not disabled because she remains physically and mentally able to do her previous work, without investigating whether that previous work

198. *Id.* at 509. The language of "odd result" has been used as a synonym for absurdity. *Cf.* Public Citizen v. U.S. Dep't of Just., 491 U.S. 440, 453-54 (1989).

199. *Bock Laundry*, 490 U.S. at 527 (emphasis added).

200. *Id.* (Scalia, J., concurring in the judgment).

201. *Id.* at 528 (Scalia, J., concurring in the judgment).

exists in significant numbers in the national economy."[202] Under the Social Security Act, persons with a "disability" are entitled to disability insurance payments and supplemental income.[203] A person is considered disabled, however, "only if his physical or mental impairment or impairments are of such severity that he is not only *unable to do his previous work* but cannot, considering his age, education, and work experience, *engage in any other kind of substantial gainful work which exists in the national economy*."[204] "Work which exists in the national economy" is legally defined to mean "work which exists in significant numbers either in the region where such individual lives or in several regions of the country."[205]

Thomas, who was disabled by heart disease and cervical and lumbar radiculopathy, applied for disability benefits under the Act in 1996 — one year after her prior position as an elevator operator was entirely eliminated in 1995.[206] Though Thomas was still capable of being an elevator operator, she claimed that that kind of work no longer existed in significant numbers in the national economy, thereby qualifying her for benefits under the Act. The Social Security Administration denied her claim, as did the administrative law judge (ALJ) who decided the administrative appeal.[207] The district court in New Jersey affirmed the ALJ's decision, only to be reversed by the Third Circuit sitting en banc.[208]

In his unanimous opinion, Justice Scalia clarified that the key interpretive question centered around whether the adjectival clause "which exists in the national economy" only modified the phrase "gainful work," or whether it also modified the preceding phrase "previous work."[209] If the adjectival clause modified both nouns, then Thomas would prevail since her previous work no longer existed. But if the adjectival clause modified only "gainful work," then the fact that her prior position was eliminated would be immaterial because she theoretically was still capable of performing the nonexistent role, despite her disabilities.[210] Citing *Chevron*, the Supreme Court ultimately ruled against Thomas and deferred to the agency's reasonable interpretation of the statute.[211]

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202. Barnhart v. Thomas, 540 U.S. 20, 22 (2003).

203. *Id.* at 21.

204. *Id.* at 21-22 (emphasis added) (citation omitted). The italicized portions are the key provisions at issue.

205. *Id.* at 23-24 (citation omitted).

206. *Id.* at 22.

207. *Id.*

208. *Id.* at 22-23.

209. *Id.* at 24.

210. This latter position is the one that agency regulations maintained. *Id.* at 25 n.1 (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (2003)).

211. *Id.* at 29-30.

The courts' treatment of the absurdity canon here is particularly illuminating. Before analyzing Scalia's reasoning, it is important to highlight the relevant features of the Court of Appeals opinion. Though the Third Circuit relied on textual reasons to hold in favor of the plaintiff, it opined:

> [E]ven if the statutory language were ambiguous . . . a statute should be read to avoid absurd results. Here, there is *no plausible reason* why Congress might have wanted to deny benefits to an otherwise qualified person simply because that person . . . could perform a previous job that no longer exists.[212]

Note that this language, also percolating in other circuits at the time,[213] is a shift away from the Supreme Court's own prior articulations of the absurdity canon. Historically, absurdity has been defined in reference to either a consequence so unreasonable that it violates the constitutive precepts of natural law or a consequence that deviated too much from the identifiable purposes of a statute.[214] The language here, however, does not fully comport with either test. It asks whether there is *any* connection between the legislative means and the universe of plausible ends, leading to a much more permissive and deferential posture more akin to constitutional rational-basis review or even administrative hard-look review.

The Supreme Court's ultimate response to the Third Circuit highlights this conceptual difference. After summarizing the lower court's reasoning, Scalia rebutted by pointing out that there was at least one plausible reason for this seemingly absurd result—a reason that the Third Circuit itself had identified and rejected.[215] He explained, "in the vast majority of cases, a claimant who is found to have the capacity to perform her past work also will have the capacity to perform other types of work."[216] Therefore, Congress "could have determined that" this result was a reasonable use of a proxy for Social Security claimants' ability to work.[217] "There is good reason" for such proxies, even if the overall fit between the proxy and what is being proxied is imperfect.[218]

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212. Thomas v. Comm'r of Soc. Sec., 294 F.3d 568, 572-73 (3d Cir. 2002) (emphasis added), *rev'd sub nom.*, Barnhart v. Thomas, 540 U.S. 20 (2003).

213. *See, e.g.*, Kolman v. Sullivan, 925 F.2d 212, 213 (7th Cir. 1991) (assessing the same issue through the lens of whether there was any "rational ground" for the policy and separating that term from the actual "intent[ion] [of] the regulations").

214. *See supra* Sections II.A and II.B.

215. *See Barnhart*, 540 U.S. at 28.

216. *Id.* (quoting 294 F.3d at 574 n.5).

217. *Id.*

218. *Id.* at 28-29.

The tone and style of this analysis is the hallmark of judicial deference. Justice Scalia's reasoning substantially limits the judge's role by eliminating the need to inquire into the subjective intent of Congress or even discern the actual objective purposes of the act at issue. As such, this formulation of absurdity is much more akin to the rational-basis test applied in equal-protection jurisprudence.[219]

In other words, the Court is no longer asking whether an outcome is absurd vis-à-vis the judicially determined purposes of the statute in question. Instead, the Court remains agnostic about what those purposes might be, satisfying itself with its ability to conceive of any plausible reason why there might be any connection between the legislated means and ends. Comparing this treatment of absurdity with the example of *Griffin v. Oceanic Contractors* in Section II.B, one can see that this way of looking at absurdity is even *more* deferential than the already fairly deferential search for Congress's objectified intent. And this style of thinking in statutory interpretation cases can be seen even in opinions that do not explicitly reference the term "absurd."[220]

One might argue that *Barnhart v. Thomas* is unrepresentative since the Court's statutory analysis was mediated by controlling administrative-law doctrines, like *Chevron*.[221] But for our purposes here, this is a distinction without difference. The Court's *Chevron*[222] analysis always begins with a judicial determination of whether the statute at issue is ambiguous, and the Court makes that judgment by employing the traditional tools of statutory construction.[223] The

219. "Under the rational basis test, the challenger of a law has the burden of proof. That is, the law will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose, or that it is not a reasonable way to attain the intended end." Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402 (2016); *see also* United States v. Carolene Prod. Co., 304 U.S. 144, 152 & n.4 (1938) (outlining the basic contours of the judiciary's role in rational-basis inquiries and setting the stage for the Court's later jurisprudence on tiers of scrutiny).

220. For instance, in a dissenting opinion concluding that Alaska Native Corporations (ANCs) were not eligible for emergency aid set aside for tribal governments under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Justice Gorsuch reasoned: "But all this history illustrates why it is hardly implausible to suppose that a rational Congress in 1975 might have wished to account for the possibility that some of the Alaskan entities listed in ISDA [the Indian Self-Determination and Education Assistance Act] might go on to win recognition." Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434, 2459 (2021) (Gorsuch, J., dissenting). For our purposes, the relevant takeaway from this language is some Justices' willingness in some select circumstances to speak of the universe of plausible congressional ends in a highly deferential way.

221. *Barnhart*, 540 U.S. at 29.

222. It is important to note that at the time of this publication, the Court is poised to consider the future of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429, 2429 (2023) (granting certiorari in part).

223. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 & n.9 (1984).

absurdity canon is one of those traditional tools. As the prior Parts have shown, absurdity—like other substantive canons—has always been a powerful thumb on the scale when the application of semantic canons results in ambiguity. And even when the term "absurdity" has not explicitly been invoked, the Court has always paid attention to the presence of arbitrariness in legislation.[224] This is all the more true in the *Chevron* context because the very concept of absurdity inherently implicates notions of reasonability.[225] The fact that judicial review in administrative law often raises questions about what "rationality" means independent of ordinary tools of statutory interpretation does not displace the importance of the Court's analysis of absurdity in *Barnhart*.[226] If anything, it reinforces the notion that the underlying constitutional reasons that animate doctrines like *Chevron* are coextensive with the constitutional reasons that ground choices about one's interpretive methodology.[227] The next Part further elaborates upon this connection to familiar constitutional debates.

III. JUSTIFYING THE ABSURDITY CANON

So far, this Note has been primarily descriptive; Parts I and II traced the threads of absurdity's intellectual history and identified cases that exemplified broader attitudinal shifts about the role of courts in U.S. democracy. They showed that a primary driver of absurdity's polysemy is the shift in jurisprudential philosophies over time. Just as natural-law theories of traditional legal principles have fallen out of fashion, theories built upon subjective legislative purpose are on shaky ground today. As the current Court continues to disrupt these jurisprudential foundations, new questions arise: what do we make of our current tools of statutory interpretation in light of our new theories? What canons are still consistent with a new model of the Court-Congress relationship?

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224. *See, e.g.*, BP Am. Prod. Co. v. Burton, 549 U.S. 84, 99 (2006) (noting the "disharmony" between the government's approach in one domain of Federal Indian law versus another if the dissent's interpretation were authoritative); United States v. Rodriquez, 553 U.S. 377, 396 (2008) (Souter, J., dissenting) (opening his argument with the observation that the majority's approach to distinguishing offender-based sentencing adjustments is "arbitrary").

225. *See, e.g.*, Comm'r v. Asphalt Prods. Co., 482 U.S. 117, 121 (1987) (rejecting the lower court's application of the absurdity canon by arguing that judicial determination that a result is "unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided").

226. For example, debates regarding the right standard for rationality review under the Administrative Procedure Act are longstanding. *See generally* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (discussing the Court's approach to rationality review).

227. This connection is examined further alongside the examples offered in Section III.B.

This Part makes the normative case for why—even for this new generation of textualists (perhaps all of us?[228])—the absurdity canon ought to remain. However, its application ought to be precise. Of the three archetypes of absurdity outlined in Part II, only absurdity-as-irrationality merits a sustained place in our constitutional structure. This Part justifies its continued role through the lens of constitutional avoidance. Section III.A outlines the theoretical framework through which I approach the issue, and Section III.B illustrates those principles in action by analyzing two recent Supreme Court cases.

A. Absurdity-as-Irrationality's Enforcement of Constitutional Values

The absurdity canon can be understood as a way to enforce constitutional norms inherent in the Due Process and Equal Protection Clauses. Recall the proposition that textualists may use extrinsic aids like substantive canons when they are sufficiently rooted in constitutional values.[229] At first glance, this theory seems almost boundless in its scope, especially since Justice Barrett concluded that "sheer longevity" of historical usage cannot distinguish the use of some canons over others.[230] But she offers two limiting principles. First, substantive canons are only permissible when choosing between two reasonable interpretations of the text.[231] This principle operates as an ambiguity trigger, as discussed in the prior Section; substantive canons trigger to enable an informed choice between two plausible readings of the text, but not to deviate from it entirely. Second, the "specificity of the norm at stake" must be sufficiently high such that the courts' intrusion on the legislative process is minimal.[232]

Though these succeed in narrowing the universe of permitted extratextual tools, the first condition is too limiting. The "baseline principle" that "a substantive canon can never be applied to overcome the plain language of a statute"[233] is internally inconsistent with the admission that courts are faithful agents to the Constitution, not just Congress, and that courts' fidelity to Congress is a manifestation of deeper constitutional principles. While Barrett's proposal suggests that, in all cases, fidelity to the text instantiates process-based democratic values

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228. It now seems obligatory in any statutory-interpretation piece to cite Justice Kagan's now infamous quote: "We're all textualists now." Harvard Law School, *The 2015 Scalia Lecture, A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE at 8:28 (Nov. 25, 2015), https://youtu.be/dpEtszFToTg [https://perma.cc/D7RV-W76G].

229. *See supra* notes 59-60 and accompanying text.

230. *See* Barrett, *supra* note 59, at 111.

231. *See id.* at 181.

232. *Id.* at 182.

233. *Id.* at 111.

that ought to predominate, the reality is that there are many other constitutional principles that should also be considered, like rationality.

Absurdity-as-irrationality can be defined as the principle that a construction of a statute ought to be rejected when there is no plausible reason why Congress would have enacted the statute to have the construction's effect.[234] This definition invokes familiar concepts of means-end rationality embedded in both constitutional and administrative law.[235] Barrett herself admits: "One could cast the absurdity doctrine as constitutionally inspired by characterizing it as a means of overprotecting the norm of rationality required by the Due Process and Equal Protection Clauses."[236] But both Manning and Barrett ultimately reject the possibility for slightly different reasons.

To the extent that Manning considers the relationship between the absurdity canon and rational-basis review, he considers them to be in direct opposition. He writes:

> [T]he rational basis test . . . functions as a strong constraint on judicial power. . . . In contrast, the absurdity doctrine allows judges to displace clear legislation on the ground that a classification, however rational, contradicts some purpose to which a broad majority of society, and thus the legislature, would presumably subscribe. To the extent that the absurdity doctrine permits judges to displace legislation that would easily survive rationality review, that doctrine threatens to disturb the careful balance between legislative and judicial power struck by the modern rational basis test.[237]

Though persuasive, Manning's critique misses the mark.[238] By framing the absurdity canon and rationality review in opposition, Manning addresses absurdity only through the standard account.[239] But his arguments do not apply to a version of absurdity that coheres with and is informed by rationality review—the version that this Note is the first to identify through its taxonomy.[240] Further, by extoling the virtues of modern rational-basis review, Manning's argument

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234. *See supra* Section II.C.

235. For an analysis of the courts' rationality requirements for agency regulations, see generally Gersen & Vermeule, *supra* note 226.

236. Barrett, *supra* note 59, at 179.

237. Manning, *supra* note 10, at 2446-47.

238. Admittedly, Manning was writing in a much different intellectual environment and responding to very different concerns. For more discussion on this temporal element of our respective critiques, see *supra* note 112.

239. *See supra* Section II.B.

240. *See supra* Section II.C.

bolsters this Note's normative thesis: it is important to find tools of statutory interpretation that promote a healthy amount of deference while allowing the courts to act within their institutional competencies. Conceiving of absurdity as irrationality does both.

In her rejection of the absurdity canon as a form of constitutional avoidance, Barrett makes the same argument as Manning.[241] But Barrett also advances a different critique. She argues that "[o]verenforcement of the rationality requirement" through the absurdity canon "undercuts rather than advances the balance struck by the Due Process and Equal Protection Clauses."[242] In her view, substantive canons can be understood to "overenforc[e]" constitutional norms that are typically underenforced, but "[t]he rationality requirement of the Due Process and Equal Protection Clauses is not susceptible to overenforcement because the whole point of rationality review is to emphasize that courts must defer to, not police, the legislature."[243]

However, the term "overenforce" prematurely presumes that something suspicious is afoot. Some forms of substantive canons, like the Indian canons, may very well "overenforce" norms of tribal sovereignty that are otherwise abrogated.[244] Defining absurdity as irrationality enforces (not "overenforces") rationality values implicit in the Due Process and Equal Protection Clauses without violating well-established norms of deference. It does this in multiple ways. First, the modern absurdity canon remains agnostic about what any given law's purpose actually is. Conceiving of absurdity in this way gives space for multiple purposes, thereby taking pressure off courts to determine any singular meaning behind a statute, much less in reference to "widely held social values."[245] Defining absurdity in this way thus minimizes the need for judicial policymaking and forces courts to satisfy an extremely high burden before invalidating properly enacted laws.

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241. Barrett, *supra* note 59, at 179-80 & n.333.

242. *Id.* at 180.

243. *Id.*

244. *See id.* at 151-52. For other accounts of the Indian canons, see generally Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300 (2021) (describing the Supreme Court's application of the Indian canons); and Meredith Harris, *Analyzing the Implications of the Supreme Court's Application of the Canons of Construction in Recent Federal Indian Law Cases*, 10 AM. INDIAN L.J. 21 (2022) (describing the resurgence of the Indian canons in recent Supreme Court cases).

245. Barrett, *supra* note 59, at 113 n.7; *see also supra* Section II.C (clarifying absurdity-as-irrationality); *cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517-18, 521 (justifying judicial deference to administrative interpretations of law through a textualist lens).

Second, it limits the absurdity canon's use cases. In reality, few laws are irrational enough to be struck down on rational-basis review. So, the absurdity canon as a check against legislative irrationality will be sparsely invoked. This is a feature of my theory, not a bug. Courts should limit judicial interventions based on substantive policy grounds, but they should not be impotent to check their coequal branches. Creating a high barrier for overriding countervailing constitutional norms, like faithful agency or legislative supremacy, thus creates a healthy system of checks and balances. Finally, employing the absurdity canon in this way is much less disruptive than fully striking down a statute on constitutional grounds. Conceiving of absurdity as a form of constitutional avoidance is thus more deferential to the legislative process than rejecting the entirety of a statute, especially since Congress can later accept or reject the courts' interpretation as it sees fit.

In any case, "if the absurdity doctrine cannot rest on the premises of strong intentionalism, then its legitimacy must be grounded, if at all, in a normative conception of how federal judges properly relate to the legislature in our system of government."[246] Such analysis requires justifying a theory about how courts ought to check Congress, but my theory does not predetermine the substance of desirable ends. It merely requires that Congress have *any* coherent conception of what it means to achieve. This permissive conception of purpose should be uncontroversial; "many, if not most, of [the] core assumptions of the contemporary Court's statutory jurisprudence fit not only with the tenets of modern textualism, but also with those of purposivism, properly understood. The key to understanding the potential overlap lies in the fact that neither approach eschews consideration of purpose."[247] Thus, understanding absurdity-as-rationality as a tool to enforce norms against irrationality falls within this overlap and does so in a way that is justifiable via many different theories of interpretation.

Consider once again how courts treat scrivener's errors. It is telling that in her article, Barrett does not address whether courts may correct scrivener's errors.[248] After all, doing so requires courts to do at least some violence to the text. Yet, textualists have traditionally accepted this canon without much trouble for good reasons. First, Congress makes mistakes, and such mistakes are not part of the bargains struck in the legislative process. If faithful agency requires fidelity to the bargain as struck under a realist view of legislation, then the courts ought to account for errors that distort their understandings of that bargain.[249] Second,

246. Manning, *supra* note 10, at 2446.

247. Manning, *supra* note 156, at 132.

248. *See generally* Barrett, *supra* note 59 (remaining silent on the relationship between scrivener's errors and textualism).

249. *See* Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 823-24 (2016).

language takes on meaning in context, and reasonable, fluent speakers of a language do not intentionally convey incomprehensible meanings.[250] Even if they do so, ordinary readers of language will attempt to give meaning to the incoherence, or search for more plausible meanings.[251]

But here, I offer an additional reason grounded in constitutional values. Because scrivener's errors are *irrational*, correcting them through equitable interpretation protects the deeply embedded constitutional norm of rationality without striking down the entire statute. This justification acknowledges that scrivener's errors are an analytical subset of absurdity-as-irrationality. As argued above, there can be egregious absurdities that might not be "drafting errors"; in fact, there might be absurdities that are even more egregious than minor drafting errors.[252] In those instances, courts have compelling reasons to ensure that all laws embody some rational connection between legislative means and plausible ends.

Scholars like Eric Fish have mounted thought-provoking defenses of courts' equitable remedial powers to functionally rewrite statutes through appealing to constitutional values.[253] Fish persuasively indicates that imputing such equitable powers onto American courts would be consistent with powers that courts in other countries like Canada have long been understood to have.[254] But one need not buy into such a robust account of courts' equitable powers to endorse my view of absurdity. Absurdity-as-irrationality can be understood through a much weaker lens than Fish's framing of constitutional avoidance as an equitable remedy because absurdity-as-irrationality actually requires less judicial discretion than any other form of constitutional avoidance.[255] The (over)enforcement of constitutional values often requires a judicial relationship that is antagonistic to Congress, but norms of rationality review encourage a more deferential posture by requiring courts to consider whether the universe of plausible congressional ends is consistent with the challenged action.

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250. Even if Barrett's scholarly writing did not emphasize this point, her opinions as a Supreme Court Justice do. *See infra* Section III.B.

251. *Cf.* Doerfler, *supra* note 249, at 831-32 (highlighting how Roberts's reading of the chemical warfare statute in *Bond* involved consideration of how an "ordinary person" would read the statute's language).

252. *See supra* notes 191-193 and accompanying text.

253. Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1306-08 (2016).

254. *Id.* at 1304-05.

255. *See, e.g.*, Gold, *supra* note 4, at 63-64 (questioning the idea that absurdity can be viewed as a form of constitutional avoidance because constitutional avoidance invites excessive judicial intervention).

Compare this style of questioning with, for example, the rule of lenity, which would simply ask whether the government's interpretation and application of a criminal statute would violate due-process norms.[256] The former style of questioning requires entertaining many possible worlds and striking down an interpretation of law only when no possible worlds satisfy the condition; the latter style of questioning requires the court to identify the most likely outcome and make equitable judgments about whether that particular state of affairs is fair or not. In other words, canons like absurdity pose a much higher bar for plaintiffs than rules like lenity.

Some scholars have observed that even the traditionally deferential language of rationality review has been appropriated to engage in judicial activism.[257] However, my argument is not that rationality norms are impossible to abuse. If courts are committed enough, any idea or doctrine can be twisted to reach a given end. My proposition is merely that constitutional norms of rationality review are *less* susceptible to judicial overreach than other norms, which by nature are more conducive to overriding the policy determinations of the legislative and executive branches. And, when applied in good faith, the absurdity canon would ideally not be triggered in all but the most extreme cases of means-end mismatch between the challenged conduct and the text of the law.

Another counterargument must also be considered. What if law is without some deeper purpose? The normative presumption of rationality review is that legitimate legislation must be, in at least a modest sense, teleological; rationality review imagines that law is *for* something, and that something must be connected to the law. Yet, modern realism about the legislative process might

256. *See supra* note 42 and accompanying text.

257. The most prominent literature on nondeferential invocations of rational-basis review involves courts' protection of nonsuspect classes through Equal Protection Doctrine. *See generally* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015) (identifying common factors among the "small number of Supreme Court cases" that have held laws unconstitutional under rational-basis review); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987) (coining the term "rational basis with bite" to describe the Court's nondeferential application of rational-basis review). Similar, though structurally distinct, observations about the Court's maintaining a nondeferential monopoly over constitutional interpretation have been made with respect to Section Five of the Fourteenth Amendment. *See, e.g.*, Steven A. Engel, Note, *The* McCullough *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 117 (1999) (arguing that the Court in *City of Boerne* "went astray in focusing upon the judicial branch as the ultimate interpreter of the Fourteenth Amendment" and refusing to defer to Congressional legislation that purportedly interpreted the Fourteenth Amendment).

counsel against this view.[258] To public-choice theorists, imputing a means-end connection as a constitutive aspect of law appears to be a milder redux of the natural-law vision that has long been discredited.[259] Just as natural-law theories generate many abstract, substantive desiderata against which to assess the legitimacy of law, even a limited rationality requirement imposes some metaphysical requirement that is equally romantic and unmoored in positive law.

In the narrow context of the absurdity canon, this argument is inapposite. First and foremost, absurdity-as-irrationality derives its authority from constitutional values, and the Constitution is itself a source of positive law — a governing charter that provides legal superstructures for subsequent legislation. Constitutional norms may result from structural inferences, but those inferences have long been accepted moves in constitutional interpretive methodology because constitutions lack the complexity, length, and specificity of modern statutes.[260] As such, any insights that legislative realism has on statutory interpretation is not applicable to constitutional law. And because the absurdity canon's operation as a background check on legislative irrationality is rooted in the positive legal commitments of the Fourteenth Amendment, it does not rely on any abstract, metaphysical teleology.

Even if public-choice theory and its associated theories were applicable here, it is important not to read too much into their realist premises. Legislative realism does not foreclose the desirability or possibility of requiring some rational relationship between means and ends. When interest groups war and our representatives bargain, they, too, act on the basis of reasons. Realism about the legislative process does not imagine that it is possible lawmakers have *no* reasons; it merely suggests that the types of reasons on which they act might be selfish, rather than public, reasons, and that the bundle of mismatched motivations animating each lawmaker might not produce coherent legislation. Employing the absurdity canon as a background tool to check legislative choices that bear no semblance of public reason does not foreclose that insight. It merely draws a constitutional limit on the worst excesses of interest-group politics. In other words, there very well might be many different and sometimes conflicting

258. *See* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1346-47 (1994) ("When Madison's institutions fail to thwart interest groups, and when civic virtue fails to carry the day, statutes reflect the outcome of a bargaining process among factions (and their representatives). Statutes are compromises, and compromises lack 'spirit.'"); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 277 (1988) ("[Public choice theory's] descriptive vision of the legislative process drives a wedge between the aspirations of traditional statutory interpretation (rational policy) and its legitimizing methodology (original legislative intent or purpose).").

259. *See supra* Section II.A.

260. *See* Russell C. Bogue, Note, *Statutory Structure*, 132 YALE L.J. 1528, 1531-32 & n.13 (2023).

reasons for different elements of any piece of legislation, but if there are simply *no* conceivable public reasons for public acts, then courts ought to intervene.

The outsized influence that legal-process[261] theory has had on my explanation of the absurdity canon is clear. Legal-process theory maintains that "every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective,"[262] and that "[t]he idea of a statute without an intelligible purpose is foreign to the idea of law."[263] In fact, *all* versions of the absurdity canon dissected earlier in Part II follow that same basic logic. But another one of legal-process theory's key contributions to the law is the importance of procedure. As summarized by William N. Eskridge, Jr. and Philip P. Frickey:

> Procedure is important in three different ways. To begin, a procedure that "is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions. An unsound procedure invites ill-informed and unwise ones." . . . Additionally, procedure is the means by which each part of the interconnected institutional system works together smoothly. . . . Lastly, process is critical to law's legitimacy. The "principle of institutional settlement" was, for Hart and Sacks, "the central idea of law." In a passage that was the most revised in the materials, the authors insisted that "decisions which are the duly arrived at result of duly established procedures for making decisions of this kind ought to be accepted as binding upon the whole society unless and until they are changed."[264]

So, why should judges who are not legal-process adherents accept and apply the concept of absurdity-as-irrationality? First, whereas the early legal-process theorists like Henry M. Hart and Albert M. Sacks espoused a broadly purposivist[265] orientation toward statutory interpretation in general, this version of the absurdity canon is severable from any overarching interpretive philosophy. Just as purposivists would not reject all textualist canons, even the most devoted

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261. *See generally* HART & SACKS, *supra* note 89 (formally introducing what is now known as the "legal-process theory" of statutory interpretation); *see also* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 383-88 (2012) (engaging with Hart and Sacks' legal-process theory as applied to the interpretation of regulations).

262. HART & SACKS, *supra* note 89, at 166.

263. *Id.* at 1156.

264. Eskridge & Frickey, *supra* note 89, at 2044-45 (footnotes omitted) (quoting HART & SACKS, *supra* note 89, at 4, 173).

265. *E.g.*, HART & SACKS, *supra* note 89, at 166 ("Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living.").

textualists should not reject all substantive canons just because of their affiliation with purposivist schools of thought.[266]

But even more importantly, "textualism draws considerably from the vision of the legislature pronounced by Hart and Sacks."[267] Recall the earlier discussions concerning the concepts of "subjective" versus "objectified" legislative purpose.[268] Although the staunchest new textualists may reject the idea that judges are capable of discerning any purposes of legislation — either subjective or objectified — they would still likely justify their adherence to textualism based on an appeal to the primacy of legislative authority. Put simply, "[o]nly the written word is the law"[269] because only the text is ultimately passed by Congress. But embedded in that strict reasoning is the same underlying reverence for process that Hart and Sacks expounded upon. To the extent that an absurd interpretation of a statute can satisfy *no* conceivably rational legislative ends, none of the values that the legal-process theory purports to serve are furthered by overly strict textual adherence. In fact, the opposite is true: in the circumstances where absurdity-as-irrationality is applicable at all, using it better advances the core political-process-based commitments of new textualism than the literal text itself.

This is not to say that textualism is really just legal-process theory in disguise. There are meaningful differences between the two interpretive philosophies that can sometimes lead to completely divergent outcomes. However, it is important to not overstate those differences. There are common commitments about legislative authority shared by both schools of thought, and those overlaps anchor the basic reasoning behind understanding absurdity as irrationality. One need not believe that judging is just another form of policymaking to make use of absurdity-as-irrationality. Quite the opposite is true. When the canon is applicable, reading statutes through the lens of absurdity amplifies Congress's primacy by disfavoring judicial intervention in all but the most extreme circumstances.

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266. *See, e.g.*, *supra* notes 191-192, 249-251 and accompanying text.

267. Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1599 (1990).

268. *See supra* notes 107, 174-175, 186-188 and accompanying text.

269. Bostock v. Clayton Cnty., 590 U.S. 644, 653 (2020).

B. Applying Absurdity-as-Irrationality

What does enforcing the constitutional norm of rationality look like in practice?[270] I argue that the absurdity canon should be operationalized as a weak form of constitutional avoidance.[271] In addition to requiring courts to first employ the ordinary tools of statutory interpretation, my proposal would ask courts to identify connections between the legislative means and any plausible set of legitimate ends. And even when the plain meaning of the text must be abrogated, it is only because an extremely high bar was cleared — a bar designed to protect deeply embedded constitutional values of rationality. This way of operationalizing the absurdity canon strikes the right balance between displaying judicial deference and enforcing superimposed legal values.

This conception of absurdity can be generative in two distinct ways. First, absurdity-as-irrationality helps explain otherwise unprincipled but necessary deviations from the statutory text in terms of constitutional structure. This

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270. The existing literature outlines a few ways of operationalizing the absurdity canon as a check on irrationality, but they do not all succeed. Consider, for example, Michael Fried's theory. Because substantive canons — like absurdity — were not merely part of the courts' power to interpret statutes, but to rewrite them, Fried argued that courts ought to subject themselves to a form of scrutiny. Fried characterized scrutiny as a transsubstantive constitutional test that permits courts to effectively vary the contours of a constitutional provision, so long as the government's interest was sufficiently compelling and its means narrowly tailored to that interest. *See* Fried, *supra* note 99, at 610. Ultimately, he concluded that correcting scrivener's errors was a form of judicial legislation that passed a type of "strict scrutiny" under Article I, Section 7's requirements of bicameralism and presentment. Fried's theory, however, misses the mark. Not all invocations of absurdity constitute "rewriting." Sometimes there is just genuine ambiguity and, in those cases, using the absurdity canon as a thumb on the scale still invokes constitutional values without requiring judicial lawmaking.

271. The label of "constitutional avoidance" is elusive and has attracted controversy, given its many manifestations. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1573-84 (1999) (summarizing legal critiques of constitutional avoidance); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 182-83 (identifying the Court's inconsistent application of constitutional-avoidance reasoning in two October Term 2009 cases, *Citizens United* and *Northwest Austin Municipal Utility District No. 1*); Slocum, *supra* note 55, at 642-57 (proposing new ways to apply canons of constitutional avoidance that avoid the pitfalls of the Court's inconsistent application of "ambiguity triggers"); Fish, *supra* note 253, at 1279 (distinguishing constitutional avoidance as interpretive method and as remedial technique); Barrett, *supra* note 59, at 139 n.139. But defining or defending constitutional avoidance as a whole is beyond the scope of this Note. Rather, this Note presumes that constitutional avoidance is one of the traditional tools of statutory interpretation available to courts. In any case, even if constitutional avoidance as practiced is problematic, the essential thrust of the argument made here is that courts' default constitutional role in assessing interpretations of statutes should be primarily characterized by deference, and that more essential claim does not require any specific conception of constitutional avoidance.

conceptual move helps soften the most extreme edges of textualism, as the example of *Van Buren* below will illustrate.[272] Self-identified textualist jurists use consequentialist reasons all the time, even when the purest version of their judicial philosophy eschews such usage as "unprincipled." The absurdity canon offers legitimating language to those rare instances where blatant judicial intervention to reconfigure statutory text is justified.

Second, unlike the major questions doctrine, defining absurdity as irrationality also preserves judicial deference. Like the absurdity canon, the major questions doctrine has been justified through both substantive and semantic rationales. But unlike the absurdity canon as defined in this Section, the major questions doctrine justifies judicial intervention when courts instead ought to defer. Although an extended reflection about the major questions doctrine is beyond the scope of this Note, I show here how the Court might have decided *Biden v. Nebraska* differently by invoking the modern absurdity canon instead.

The following examples thus illustrate two virtues of absurdity-as-irrationality: its tendency to defer to more competent policymaking bodies and its ability to justify departures when no such deference is due. The first example of *Van Buren* shows how an outcome could have remained the same, but been reached for better reasons. The second example of *Biden v. Nebraska* shows how an outcome could have gone differently if absurdity-as-irrationality had been applied. Through analyzing both cases, the following Sections highlight the stakes of reviving and reconceptualizing the absurdity canon. Especially as the Court readies itself to reconsider the role of traditional tools of statutory interpretation alongside administrative deference, the proper use of interpretive canons in giving full effect to congressional statutes is more salient than ever.[273]

A recurring theme of this Note is that judicial consequentialism is often necessary, and even desirable, but it must be grounded in principles consistent with our constitutional structure.[274] If textualism—or any principled judicial philosophy—is to succeed, it must allow judges to mitigate disaster without overstepping their role. Defining absurdity as irrationality enables that.

1. Van Buren v. United States *(2021)*

Consider *Van Buren v. United States*, where the Court assessed whether the Computer Fraud and Abuse Act of 1986 (CFAA) applied to Nathan Van Buren, a former police sergeant who ran a license-plate search in a law enforcement

272. Van Buren v. United States, 593 U.S. 374 (2021).

273. For instance, the Court is poised to consider the future of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429, 2429 (2023) (granting certiorari in part).

274. *See supra* Section III.A.

computer database in exchange for money.[275] The CFAA makes it illegal "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled *so* to obtain or alter."[276] The government charged Van Buren with a felony on the ground that running the license plate violated 18 U.S.C. § 1030(a)(2) because Van Buren "exceed[ed] authorized access" when he used his IT credentials to access information for unauthorized purposes.[277] Van Buren responded that the CFFA "applies only to those who obtain information to which their computer access does not extend, not to those who misuse access that they otherwise have."[278] Justice Barrett, writing for the Court, agreed.[279]

The Court identified that the central textual ambiguity is whether Van Buren was "*so* entitled" to obtain the license-plate information. On one hand, Van Buren had valid IT credentials and was authorized to access the system. On the other hand, Van Buren accessed the system for a purpose that was itself unauthorized. Strangely enough, the majority hinged its entire decision on the definition of the word "so," dedicating pages toward analyzing various dictionary definitions and semantic rules of thumb.[280] For our purposes here, the details of the Court's linguistic gymnastics are not relevant. The important point is that the Court in *Van Buren* bent over backwards to assert that its decision had nothing to do with the chaos that would ensue if it had sided with the government:

> To top it all off, the Government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace computer activity. . . . Because the text, context, and structure support Van Buren's reading, [no substantive] canons [are] in play. Still, the fallout underscores the implausibility of the Government's interpretation.[281]

But the "implausibility of the Government's interpretation" is anything but secondary. It was front and center in the coverage[282] of this case and should have been in the Court's reasoning. The Court itself admitted that if the government's

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275. *Van Buren*, 593 U.S. at 378-80.

276. 18 U.S.C. § 1030(e)(6) (2018) (emphasis added).

277. *Van Buren*, 593 U.S. at 378-81.

278. *Id.*

279. *Id.*

280. *Id.* at 381-88.

281. *Id.* at 393-95.

282. *E.g.*, Robert Barnes, *Supreme Court Narrows Anti-Hacking Law, Worries About Criminalizing Common Behavior*, WASH. POST (June 3, 2021, 5:01 PM EDT), https://www.washingtonpost.com/politics/courts_law/supreme-court-hacking-law/2021/06/03/67243be6-c46e-11eb-9a8d-f95d7724967c_story.html [https://perma.cc/TJV7-CM3W].

reading were correct, then "millions of otherwise law-abiding citizens are criminals."[283] For example, anyone who has ever used a work phone to send a personal email, or used a pseudonym on a social media site, or even exaggerated on an online dating profile, could be imprisoned.[284] This set of outcomes obviously does not fulfill any plausible set of legitimate government purposes.

Though the Court in *Van Buren* likely reached the correct outcome, it could have reached the same conclusion through a clearer path. It could have, for instance, acknowledged the textual ambiguity of the CFFA and construed its text narrowly in light of substantive considerations.[285] By employing the absurdity canon, the Court could have instead acknowledged the range of permissible readings of the statute, assessed whether or not the government's reading was within that gray space, and concluded that such an aggressive reading of the CFFA was completely out of step with any set of plausible legislative ends. In this case, it would have been absurd to interpret the CFFA to enable the criminalization of millions of people engaging in completely ordinary activities because the government's reading would not pass any form of rationality review. Not a single purpose in the set of plausible governmental ends would have led to such mass criminalization. So, the Court erred in refusing to "trigger[] . . . constitutional avoidance."[286]

The Court could have instead acknowledged the range of permissible readings of the statute, assessed whether or not the government's reading was within that gray space, and concluded that such an aggressive reading of the CFFA was completely out of the question under the principle of absurdity. Doing so would have enabled the Court to reach the same result while straightforwardly engaging in the actual stakes of the case and grounding the decision in the constitutional value of rationality, as opposed to relying on a somewhat arbitrarily selected dictionary definition.

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283. *Van Buren*, 593 U.S. at 393-95.

284. *Id.*

285. One can rebut that what made *Van Buren* a difficult case was precisely that there was no textual ambiguity. From this perspective, the dissent was correct to observe that the statute's meaning was abundantly clear from the four corners of the text, such that there was no need to appeal to extrinsic guides. Reasonable minds can disagree on whether ambiguity exists. *See supra* note 55 and accompanying text. But the reason I believe that there was clearly semantic ambiguity is because the textual arguments the majority ultimately musters are strong enough to cast the dissent's framing into doubt. When read together, both the majority and dissent engage in a semantic back-and-forth that leaves the reader with the impression that the text can swing either way—even if the reader thinks one reading is more persuasive than the other. The quality of being able to swing either way is what makes a text semantically ambiguous.

286. *Van Buren*, 593 U.S. at 393-95.

2. Biden v. Nebraska *(2023)*

In *West Virginia v. EPA*, the Court announced the arrival of the major questions doctrine, which claimed to "address[] a particular and recurring problem: agencies asserting highly consequential power beyond what *Congress could reasonably be understood to have granted*."[287] So defined, this principle should sound familiar. The major questions doctrine, according to *West Virginia*, is an evidentiary presumption to infer what Congress likely meant—just like the version of the absurdity canon traced in Section II.B.[288] But that is not the only similarity they share. Like the absurdity canon, the major questions doctrine has both substantive (constitutional) and semantic justifications. Scholars have traced the major questions genealogy to a broader project aimed at dismantling the administrative state through long-abandoned constitutional theories of nondelegation.[289]

Recently, in *Biden v. Nebraska*, Justice Barrett proffered a semantic account of the major questions doctrine: "[T]he [major questions] doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way."[290]

The key question on the merits in *Biden v. Nebraska* was whether the statutory language in the HEROES Act authorized the Secretary's plan to forgive almost $430 billion in debt principals nationwide. Is nationwide debt forgiveness a "waiver[]" or "modification[]" necessary to ensure that student debtors are "not placed in a worse position"?[291] Missouri argued that, no, the Secretary's debt-relief plan extended far beyond a "waiver" and also proactively benefited students, rather than just keeping them at a nonworse position. The U.S. government rebutted that debt forgiveness is definitionally a "waiver," and that leaving someone in a better position is one way to "not place[]" them "in a worse position." In light of this ambiguity, the Court sided with the challengers, partially relying on the major questions doctrine.[292] This part of the Court's

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287. 597 U.S. 697, 724 (2022) (emphasis added).

288. *See supra* Section II.B (discussing absurdity as evidence of congressional (non)intent).

289. Clinton T. Summers, *Nondelegation of Major Questions*, 74 ARK. L. REV. 83, 84 n.11, 104 (2021); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011 n.2 (2023).

290. 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring). Justice Barrett went quite far in her explanation; she denied that the major questions doctrine was a clear-statement rule at all. *Id.* at 2378. Notably, no other Justice joined her concurrence—indicating some degree of jurisprudential disagreement about what the major questions doctrine and textualism really mean for this Court.

291. *Id.* at 2358.

292. *Id.* at 2375-76.

argument roughly claimed that $430 billion is a significant amount of money, so Congress would have made a clearer statement if it authorized that large a program.

The majority offered its own textualist reading of the HEROES Act, but for our purposes here, Justice Barrett's concurrence in *Biden v. Nebraska* merits focus. Citing both the first Supreme Court case to ever employ the absurdity canon and Manning's seminal article, Barrett drew comparisons between the major questions doctrine and the absurdity canon:

> Case reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short. Consider the classic example of a statute imposing criminal penalties on "'whoever drew blood in the streets.'" [*United States v. Kirby*, 7 Wall. 482, 487 (1869)]. Read literally, the statute would cover a surgeon accessing a vein of a person in the street. But "common sense" counsels otherwise, *ibid.*, because in the context of the criminal code, a reasonable observer would "expect the term 'drew blood' to describe a violent act," [John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2461 (2003)].[293]

This passage indicates that the Court had a choice in determining what principles it would invoke to determine the Act's nonliteral meaning. After all, if the major questions doctrine is just one of many tools to understand the "context" of what Congress was trying to say, then other tools used to avoid the pitfalls of excessive literalism—like the absurdity canon—can just as easily take its place.

What if the "context" of the Act, in Barrett's terms, was understood through the lens of absurdity instead? If absurdity is understood as irrationality, the absurdity canon would recommend that a construction of a statute ought to be rejected when there is no plausible reason why Congress would have enacted the statute to have the construction's effect.[294] This is a highly deferential test triggered when the text is ambiguous. If applied here, the Court would have had to assess the universe of plausible reasons that Congress may have had in enacting the HEROES Act and determine whether the Secretary's debt-relief plan fell within one of those plausible reasons.

And it does. Drawing from a variety of historical and legal sources, the government's statement of the case outlined why the HEROES Act can be plausibly read to support student-debt relief in response to a global pandemic.[295] Though Congress could not have specifically foreseen the COVID-19 pandemic, the

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293. *Id.* at 2378. I retained citations to show that Justice Barrett was, in part, tracing the genealogy of the absurdity canon in her analysis of the major questions doctrine.

294. *See supra* Section II.C.

295. Brief for Petitioner at 2-15, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535).

permissive text of the Act indicates openness to the idea that the Secretary could rule-make in times of "national emergency"[296] — of which one could plausibly be a pandemic. The inquiry could have ended there, without ever assessing the statutory and legislative history that supports the same conclusion.

The syllogism becomes: the open-endedness of the Act's text suggests a wide universe of plausible legislative means to achieve flexible ends, of which one is explicitly responding to national emergencies. The pandemic is a national emergency to which debt forgiveness responds. Therefore, the Secretary's reading is not an absurd construction of an otherwise ambiguous text, and the Court should have deferred.[297]

Some opponents of the debt-forgiveness plan might point out that the Biden Administration's interpretation of the HEROES Act seemed particularly absurd given the sheer cost of the debt relief. After all, $430 billion is a substantial amount of dollars to spend on an administrative program not specifically authorized by Congress. But this appeal to intuition is precisely what absurdity-as-irrationality is meant to avoid. The question of whether $430 billion is enough to invalidate an administrative decision cannot devolve into a judicial gut-check. It is not the Court's role to act on its instinct about how much an agency is allowed to spend. In other words, whether the Court intuitively thinks $430 billion is too much money for the Department of Education to forgive is irrelevant to underlying questions of statutory authority. To borrow Judge Easterbrook's words, "[the absurdity canon] does not license courts to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved."[298]

Under a modern reading of the absurdity canon, the relevant question is finer-toothed: it is whether forgiving that amount of money is *irrational* with reference to the entire universe of ends that the HEROES Act embodies. To show that forgiving $430 billion is *irrational*, one must point to language that suggests that there is no plausible universe of policy ends that might justify forgiving large sums of money under the text of the Act. Another way to view this aspect of the issue is that the burden of proof is not on the government to show that it is most consistent with the primary purpose of the Act; rather, it is on the plaintiffs to show why the government's action is inconsistent with *any* purpose of the Act.

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296. *Id.* at 5.

297. This debate parallels general debates about *Chevron* deference, especially the discussion on what it means to satisfy the *Chevron* "Step Two" requirement of reasonability. But it is important to keep in mind that the absurdity canon is distinct because it is applicable beyond administrative law. With that being said, this example illustrates how the constitutional values undergirding *Chevron* deference are similar to the version of the absurdity canon endorsed here.

298. Jaskolski v. Daniels, 427 F.3d 456, 461 (7th Cir. 2005).

Statutory silence on the precise issue at stake (i.e., the condition needed to trigger the major questions doctrine) is not evidence strong enough to satisfy such a high burden. That is why my reading of absurdity is in direct tension with approaches to statutory interpretation, like the major questions doctrine, which place the burden on the government.

The same opponents might then ask, what if the administration had forgiven all student debt, amounting to approximately $1.6 trillion?[299] Would the same deferential posture be warranted then? The answer is that it depends. The numerical value assigned to the debt relief is not intrinsically relevant; instead, the relevant questions are what the likely effect of the action is and whether there is no plausible universe of legislative ends imputed by the Act that would justify that effect. To the extent that $1.6 trillion may have substantially more externalities on the economy as a whole, more facts are needed to determine the match between those means and the ultimate legislative ends.[300] But the determination of whether that outcome is absurd cannot be made off the dollar value of the action alone because it is not the judiciary's role to determine what level of spending or forgiveness is politically acceptable. The judiciary's role when applying absurdity-as-irrationality is to ascertain whether the agency acted within its statutory authority, as interpreted in reference to the universe of possible congressional ends — not to impute its own policy judgments about how much money is too much.

The distinctions drawn between semantic and substantive canons are oftentimes razor-thin (and, perhaps, facetious).[301] Contra Justice Barrett's insistence, the core issue raised in *Biden v. Nebraska* was substantive, not semantic, because the Court had to choose whether it or the agency was the better interpreter of the HEROES Act. The choice, then, between approving an interpretation of a

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299. Federal Student Aid, *Federal Student Loan Portfolio Summary*, U.S. DEP'T EDUC., https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls [https://perma.cc/DJF9-9BUJ].

300. Such facts would include those needed to generate well-informed predictions of the likely consequences of official action. For instance, in engaging in this inquiry, litigants would need to brief the expected value of the negative externalities weighed against the expected value of the positive externalities. Courts would then need to ask whether there is a rational connection between the likely consequences of the action and the conceivable purposes of the legislation. Note, however, that this inquiry would be distinct from a balancing test. It is not my contention that courts should do a generalized cost-benefit analysis to strike down official action ad hoc. Rather, the idea is to read statutes broadly enough to give as much credence as is rational to officials tasked with making those policy decisions, but to stop short of allowing completely arbitrary and irrational actions unrelated to the statute invoked.

301. For a similar argument, see Beau J. Baumann, *Let's Talk About That Barrett Concurrence (on the "Contextual Major Questions Doctrine")*, YALE J. ON REG. BLOG: NOTICE & COMMENT (June 30, 2023), https://www.yalejreg.com/nc/lets-talk-about-that-barrett-concurrence-on-the-contextual-major-questions-doctrine-by-beau-j-baumann [https://perma.cc/BJ4G-JP6Y].

statute under the absurdity canon and disapproving it under the major questions doctrine is not one of linguistics or "common sense"; rather, it is a policy decision about the role of the Court and echoes adjacent debates about *Chevron* deference. In light of textual ambiguity, should the Court acknowledge a permissible gray space in which policymakers can operate? Or should the Court identify a fixed meaning of the text that limits discretion in policymaking? By choosing the latter, the Court opens itself up to critiques that early textualists levied against the standard account of the absurdity canon.[302]

CONCLUSION

Once again, textualism is at a crossroads. As Arthur Murphy presciently noted in 1975,

> [T]he courts have no clear idea about what the plain meaning rule is and, what is more . . . they really do not care. Indeed, it frequently seems that some courts feel that recitation of the plain meaning rule in one of its forms is a compulsory rite, the meaning of which is lost in antiquity, and which, since it is essentially meaningless, can be supported by meaningless citation.[303]

It is likely that the Court's repeated insistence on "contextual" textualism will suffer a similar fate.

In that vein, this Note does more than make sense of the history of a longstanding principle of statutory interpretation. By using the absurdity canon as an entry point, it traces the constitutional fault lines that this Court is currently navigating in shaping its interpretive philosophy. This Note also reframes the absurdity canon as a substantive one aimed toward rational means-end lawmaking. It identifies a narrow reading of the absurdity canon that remains relevant to modern ideas about the role of the judiciary and interpretive philosophy. In doing so, it contributes to ongoing debates about the compatibility of textualist theories with traditional tools of statutory interpretation; and it harmonizes these interpretive debates with well-developed insights from familiar constitutional- and administrative-law ideas.

Rationality review is a well-accepted judicial technique and falls within the courts' institutional competence. By linking this practice with the concept of absurdity, my proposal is not an outgrowth of unrestrained purposivism nor a mere outlet for judges to impose their own policy views. Seen in its best light,

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302. *See supra* notes 187-190 and accompanying text.

303. Arthur W. Murphy, *Old Maxims Never Die: The Plain-Meaning Rule and Statutory Interpretation in the Modern Federal Courts*, 75 COLUM. L. REV. 1299, 1308 (1975).

the absurdity canon can exemplify the best virtues of judicial deference and fidelity to the rule of law, thereby appealing to both textualists and nontextualists alike.