Avoiding Absurdity†

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American courts have always interpreted statutes contrary to their plain meaning to avoid absurd results. John Manning, a prominent new textualist scholar, has recently challenged the legitimacy of the "absurdity doctrine" on the grounds that it cannot be justified by legislative intent or squared with principles of constitutional law. His critique relies, however, upon deeply contested economic theories of the legislative process and constitutional structure that view lawmaking as a market in which self-interested participants compete for resources.

This Article provides a comprehensive theoretical defense of the absurdity doctrine that relies instead upon significant aspects of civic republican theory, as well as liberal and pragmatic values, to suggest that while American lawmakers have broad authority to regulate in the public interest, our constitutional republic also has a responsibility to avoid needless harm to the extent fairly possible. When courts interpret laws to avoid absurd results—or privilege a statute's "spirit" over its "letter"—in circumstances that were unanticipated by the legislature, they are justifiably seeking to serve the common good that legislation is presumed to embody, rather than undermining a fragile compromise struck in back-room deals by economic theory's proverbial "rent-seekers." The absurdity doctrine also promotes specific constitutional norms of fairness and equal treatment in a manner that avoids most of the institutional concerns that would arise from more aggressive approaches to judicial review. Not only is Professor Manning's critique of the absurdity doctrine therefore mistaken, but his apparent willingness to incorporate the same underlying principles into his "kinder and gentler" version of textualism demonstrates both the undeniable validity of those principles and the fundamental shortcomings of the economic theories of the legislative process and constitutional structure that underlie the new textualism.

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INTRODUCTION

Aristotle recognized the difficulty of reconciling "life by strict law with equity in the particular case" and the potential need for "a rectification of law where law falls short by reason of its universality."[1] The perennial problems of legislative generality have been alleviated throughout the history of Western society by the judiciary's recognition of a doctrine of statutory interpretation that authorizes departures from the plain meaning of statutory text when its literal application would lead to an "absurd" result in a particular case.[2] Despite the impressive pedigree of the absurdity doctrine, its continued use by federal courts has recently been attacked by "new textualist" scholars who claim that the doctrine cannot be squared with legislative intent, with the competitive nature of the legislative process, or with the structure of American constitutional law.[3] Particularly because seemingly less controversial approaches are sometimes available to avoid results that might otherwise be characterized as "absurd," new textualist scholars have argued that the absurdity doctrine cannot be justified.[4]

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1. ARISTOTLE, NICOMACHEAN ETHICS 142 (Martin Ostwald trans., 1962).

2. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) [hereinafter Manning, *Absurdity Doctrine*] ("From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results."); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 29 (2001) [hereinafter Manning, *Equity of the Statute*] ("The idea of equitable interpretation builds upon the Aristotelian premise that equity should mitigate the defects of generally worded laws."). It bears noting that Manning expressly rejects a "literal" interpretation of statutory text in favor of a more contextual approach. *See* Manning, *Absurdity Doctrine*, *supra*, at 2456–65; Manning, *Equity of the Statute*, *supra*, at 105–15. This potential distinction and its implications for the absurdity doctrine are explored at length in the closing Part of this Article. *See infra* Part IV.B.

3. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2387; John C. Nagle, *Textualism's Exceptions*, ISSUES LEGAL SCHOLARSHIP, 2002, at 2–12, http://www.bepress.com/ils/iss3/art15 (follow "View the article" hyperlink) (claiming that "when the statutory text admits of no ambiguity, then the results of that interpretation—absurd or otherwise—become irrelevant to the textualist"). The "new textualism" is one of the leading approaches to statutory interpretation, which is championed by Justices Scalia and Thomas on the Supreme Court and by Judge Easterbrook on the Seventh Circuit.

4. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2485–86 (explaining that the absurdity doctrine "has become increasingly difficult to justify" in intentionalist terms and that "treating the absurdity doctrine, in the alternative, as a normatively justified element of the

Professor John Manning, in particular, has recently described the difficulty of justifying the absurdity doctrine based on legislative intent and identified the interrelationships among the absurdity doctrine, the constitutional structure, and the rational basis test that is used by courts to assess the constitutional validity of "ordinary" legislation.[5] Based on these insights, Professor Manning mounts a three-pronged challenge to the continued use of the absurdity doctrine. First, he claims that "recent intellectual and judicial developments"—namely the rise of public choice theory and the new textualism—have undermined the traditional notion that courts are furthering congressional intent and thereby acting as faithful agents of the legislature when they deviate from statutory language to avoid absurd results.[6] Second, he argues that efforts to justify the absurdity doctrine on non-intentionalist grounds fail because the exercise of judicial discretion to temper the harsh results that are sometimes mandated by applying general rules to particular circumstances conflicts with the constitutional structure and principles of separation of powers.[7] Finally, Professor Manning claims that the absurdity doctrine cannot be reconciled with the highly deferential and forgiving nature of the rational basis test.[8]

Although it may appear at first glance that Professor Manning "is in the process of hitting [another] normative home run,"[9] the persuasiveness of his critique of the absurdity doctrine ultimately depends upon the ambitiousness of his claim. His article can be read, on one hand, as merely setting forth the relevant theoretical commitments of the new textualism and explaining that their principled application should lead adherents of the methodology to abandon the absurdity doctrine.[10] Fair enough.

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federal judiciary's law-declaration power not only violates important assumptions underlying our constitutional structure, but also creates an unexplained incongruity between the constitutional assumptions applied in the Court's statutory cases and those applied in constitutional cases involving rationality review"); *cf.* Nagle, *supra* note 3.

5. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2393–431.

6. *Id.* at 2390.

7. *See id.* at 2431–46; Manning, *Equity of the Statute*, *supra* note 2, at 56–102.

8. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2446–54; Manning, *Equity of the Statute*, *supra* note 2, at 115–19.

9. *Cf.* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1105–06 (2001) (responding to Manning's claims about the original understanding of the judicial power in a previous article and concluding that "I am pretty confident that Manning is factually off-base but worry that he is in the process of hitting a normative home run" in the eyes of "an ostensibly originalist but dedicatedly textualist or conservative Supreme Court").

10. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2392 (explaining that "for those who accept (as I do) the textualists' premises about the legislative process and the constitutional structure, a principled understanding of textualism would necessarily entail abandoning the absurdity doctrine"). This relatively moderate objective is significant because even the most prominent textualist jurists have expressly endorsed the absurdity doctrine. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (interpreting the word "defendant" in one of the Federal Rules of Evidence contrary to its "ordinary meaning" to avoid "an absurd, and perhaps unconstitutional, result"); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 20–21 (Amy Gutmann ed. 1997) [hereinafter A MATTER OF INTERPRETATION] (justifying his opinion in *Bock Laundry* because "[t]he objective import of such a statute is clear enough, and I think it not contrary to sound principles of interpretation, in such extreme cases, to give the totality of context precedence over a single word"); Manning, *Absurdity Doctrine*, *supra* note 2, at

Professor Manning's article can also be read, however, as a call for the abandonment of the absurdity doctrine by all courts charged with interpreting federal statutes.[11] If that is his goal, the competing theoretical commitments that could affirmatively support the absurdity doctrine must be unpacked and evaluated because the empirical and normative assumptions underlying public choice theory and the new textualism are vigorously contested.[12]

Upon closer examination, the larger problem of legislative generality and the absurdity doctrine's particular response provide an ideal vehicle for testing the competing political and constitutional theories that underlie the most interesting contemporary debates in statutory interpretation.[13] Indeed, this Article shows that contrary to Professor Manning's claims, the absurdity doctrine has identifiable constitutional underpinnings that justify its thoughtful use by the judiciary to avoid arbitrary or inequitable applications of facially valid rules in exceptional circumstances that were not anticipated by the legislature. This defense of the absurdity doctrine incorporates significant aspects of civic republican theory, as well as liberal and pragmatic values, to suggest that while American lawmakers have broad authority to regulate in the public interest, our constitutional republic also has a responsibility to avoid needless harm to the extent fairly possible.

2419–20 & n.123 (citing cases in which Justice Scalia or Judge Easterbrook has endorsed the absurdity doctrine). Scholars with competing perspectives have recognized the tension between the absurdity doctrine and the theories underlying the new textualism. *See* Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 325 (2001) (describing the absurdity doctrine as "textualism's escape device"); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 45–47, 134 (1994) (noting the incoherence of Justice Scalia's invocation of the absurdity doctrine in light of his textualist theory of statutory interpretation).

11. Although Manning does not expressly argue that the absurdity doctrine should be abandoned, this conclusion would follow from bis claim that the doctrine cannot be justified in a manner that is compatible with constitutional structure and doctrine. *See supra* note 4. This Article will therefore periodically refer to his call for the abandonment of the doctrine.

12. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2413 (acknowledging that "[t]he public choice assumptions underlying textualism are not uncontroversial"). For some of the leading discussions of these controversies, see William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) [hereinafter Eskridge, *Unknown Ideal*] (book review); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE THE LAW (1997); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*]; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); Abner J. Mikva, Foreword, *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

13. *See generally* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) (identifying a new conception of democratic legitimacy in statutory interpretation whereby the court assigns meaning to a contested statutory term by using interpretive rules that are designed to produce "democratizing effects" that correspond to a particular image of democracy).

The Article begins by describing recent critiques of the absurdity doctrine by new textualist scholars in greater detail. Part I explains that Professor Manning's challenge to the traditional intentionalist justification for the absurdity doctrine relies upon economic theories of the legislative process that emphasize the self-interested conduct of participants and the opportunities for strategic behavior and incentives for bargaining that are inherent in the system.[14] Similarly, his claim that the absurdity doctrine conflicts with the constitutional structure is based upon formal notions of the separation of powers that incorporate the same underlying theories, along with functionally compatible ideas about the rule of law and legislative supremacy. Finally, Professor Manning's claim that the absurdity doctrine cannot be squared with existing constitutional doctrine is premised upon an apparent belief that the rational basis test fully enforces the norms underlying the Due Process and Equal Protection Clauses.

Part II explains that the absurdity doctrine is justified by a competing theory of the legislative process in which elected representatives are expected to engage in reasoned deliberation to promote the common good. The other structural safeguards of the Constitution are understood, in turn, as means of promoting republican principles of government even when elected representatives are less than virtuous. Successfully enacted laws are not seen merely as unprincipled bargains between competing interest groups, but are viewed instead as instrumental efforts to address existing social problems or otherwise improve the public welfare. When courts interpret statutes contrary to their plain meaning to avoid absurd results—or privilege a law's "spirit" over its "letter"—in circumstances that were unanticipated by the legislature, they are justifiably seeking to serve the public good that statutory law is presumed to embody, rather than illegitimately undermining a fragile compromise struck in back-room deals by self-interested parties.

Part III explains that there is no inconsistency between this understanding of the absurdity doctrine and existing constitutional doctrine because both are concerned with the accuracy of legislative classifications. The rational basis test, however, only weakly enforces underlying constitutional norms of equal treatment and fundamental fairness based on legitimate institutional concerns regarding the appropriate role of courts and the limitations of judicial competence.[15] The absurdity doctrine, in contrast, provides a relatively restrained approach to safeguarding these constitutional principles without requiring the judicial invalidation of legislative classifications.

Part IV explains that Congress's constitutional authority and the competitive nature of the legislative process should ordinarily be respected by the implementation of clearly expressed deals, even when they result from compromises that moderate the overarching statutory purpose or lead to known imprecision. Remaining ambiguities (including those created by the absurd results mandated by otherwise "plain"

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14. Although Manning has more recently tempered his position by suggesting that legislative bargaining need not be narrowly self-interested, he has neither articulated nor expressly endorsed any significant normative limitations on such tendencies. *See* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1713–15 (2004); *infra* note 36.

15. *See* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

statutory language)[16] should be resolved, however, in favor of the public good reflected by statutory goals and constitutional norms of fairness and equality. In short, legislative classifications should be interpreted to avoid absurd results, unless a contrary outcome was fully anticipated and clearly manifested by the statutory language or its legislative history. Contrary to the implications of the new textualism, the judiciary in a deliberative democracy that values individual rights should not privilege speculative back-room deals over the sensible articulation and implementation of public policy.

The Article concludes by pointing out that this theoretical justification for the absurdity doctrine proves so irresistible that even Professor Manning incorporates its essential attributes into his "kinder and gentler" version of textualism.[17] Once this step is taken, however, it becomes very difficult to square his interpretive approach with his own articulated theoretical commitments. Accordingly, in addition to casting further doubt on the fundamental tenets of the new textualism, this overwhelming urge to avoid absurd consequences confirms a few things about the true nature of our legal system. In sum, the consequences of applying the law matter; individuals should not be needlessly harmed, and legislation should be viewed as an effort to promote the common good that is reflected by its underlying purposes and other widely accepted public values, rather than merely as an unprincipled bargain executed by self-interested actors. Because the existing version of the absurdity doctrine promotes all of these constitutionally-inspired values in a legitimate manner, the judiciary should continue to invoke it in a candid and unapologetic fashion.

I. RECENT CHALLENGES TO THE ABSURDITY DOCTRINE

A. The Doctrine and a Potential Justification

In 1868, the Supreme Court reviewed a challenge to an indictment charging a sheriff and members of his posse with violating a criminal statute that prohibited "knowingly and wilfully obstruct[ing] or retard[ing] the passage of the mail, or of any driver or carrier . . . ."[18] Although the defendants appeared to have violated this provision by arresting a postal carrier who was wanted for murder while he was on duty, the Court dismissed the indictment and explained:

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16. *See* Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (quoting Chemical Mfr. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116 (1985)) (stating that "where a literal meaning of a statutory term would lead to absurd results" that term "has no plain meaning"); Cass R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law*, 32 ENVTL. L. REP. 11,126 (2002) (explaining that "excessive generality is a form of ambiguity, and that where a statute produces absurdity, it is reasonable to say . . . that it lacks a plain meaning").

17. *See* Eskridge, *supra* note 9, at 1093 (describing Manning's approach as a "[k]inder, [g]entler [t]extualism" and claiming that it differs from that of "his mentor," Justice Scalia); Manning, *Absurdity Doctrine*, *supra* note 2, at 2486 ("[M]odern textualism provides a more contextual reference point—a 'reasonable user of language' approach that eliminates many putative absurdities that would arise under a literal meaning framework."); *infra* Part IV.B.

18. United States v. Kirby, 74 U.S. (7 Wall.) 482, 485 (1868).

> 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.[19]

The Court favorably cited Puffendorf's approval of a judicial decision from medieval Italy that exempted a surgeon "who opened the vein of a person that fell down in the street in a fit" from a law punishing "whoever drew blood in the streets," and Plowden's approval of an English court's decision to exempt a prisoner from prosecution under a law that prohibited jail breaks (apparently upon penalty of death) because the prison was on fire.[20] These decisions classically illustrate the time-honored doctrine of statutory interpretation that authorizes the judiciary to deviate from the plain meaning of statutory language when a particular application would otherwise lead to an "absurd" result.[21]

The conventional wisdom has been that the absurdity doctrine is compatible with the judiciary's obligation to follow legislative intent and thereby serve as "faithful agents" of Congress during the process of statutory interpretation.[22] While statutory language is ordinarily considered the best evidence of legislative intent, general rules of this nature—which are framed in advance of their application to particular circumstances—have inherent shortcomings based on the imprecision of language and limitations on foresight.[23] If an application of plain statutory language would undermine sufficiently important values of the legal system, courts presume that the legislature would not have intended such a result.[24] According to Professor Manning, the absurdity doctrine therefore rests on the premise that if legislators had foreseen the problems raised by a specific statutory application, "they could and would have revised the legislation to avoid such absurd results."[25] He therefore claims that the

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19. *Id.* at 486–87.

20. *Id.* at 487.

21. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2403 (referring to the above decisions as "the classics" and claiming that "[f]ew absurdity cases . . . are as intuitively compelling"); *id.* at 2388–89 (describing the Supreme Court's consistent adherence to the absurdity doctrine since "the earliest days of the Republic"); Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 986 (1995) ("Language will never, or almost never, be interpreted so as to apply in ways that would produce absurdity or gross injustice.").

22. Whether a "faithful agent" approach to statutory interpretation is constitutionally required is a matter of ongoing debate. *Compare* Manning, *Absurdity Doctrine*, *supra* note 2, at 2393–94 ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents."), *with* Eskridge, *supra* note 9, at 991 ("Academic debates about statutory interpretation methodology have increasingly involved competing 'faithful agent' versus 'cooperative partner' understandings of the role of federal judges."). Because this Article concludes that the absurdity doctrine is justified under both "faithful agent" and "cooperative partner" assumptions, it does not attempt to resolve this dispute.

23. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES (1991); Sunstein, *supra* note 21.

24. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2389–90, 2393–409 (describing "the standard justification for the absurdity doctrine").

25. *Id.* at 2394.

doctrine is "merely a version of strong intentionalism, which permits a court to adjust a clear statute in the rare case in which the court finds that the statutory text diverges from the legislature's true intent, as derived from sources such as the legislative history or the purpose of the statute as a whole."[26]

B. The New Textualist Critique

Professor Manning challenges this potential justification for the absurdity doctrine based on the commitments of the new textualism and its underlying theories of the legislative process.[27] First, he claims that the teachings of public choice theory have undermined the traditional notion that courts are furthering congressional intent and thereby acting as faithful agents of the legislature when they deviate from statutory language to avoid absurd results.[28] Instead, the complex and competitive nature of the legislative process, which suggests that "the precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision," renders a conception of legislative intent distinct from the enacted statutory language "meaningless" and leads new textualists to "believe that the only safe course for a faithful agent is to enforce the clear terms of the statutes that have emerged from that process."[29]

Second, Professor Manning claims that efforts to justify the absurdity doctrine on normative grounds fail because the exercise of judicial discretion to temper the harsh results that are occasionally mandated by applying general rules to particular circumstances conflicts with the constitutional structure and principles of separation of powers.[30] Specifically, he claims that "[t]he Constitution's sharp separation of lawmaking from judging reflects a rule-of-law tradition that seeks to preclude

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26. *Id.* at 2390.

27. *See id.* at 2390, 2408–31. For some of the leading works of new textualist scholars, see generally SCALIA, A MATTER OF INTERPRETATION, *supra* note 10; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) [hereinafter Easterbrook, *Original Intent*]; Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Statutes' Domains*].

28. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2390.

29. *Id.* The textualist critique of intentionalism therefore applies equally to purposive approaches to statutory interpretation, which Manning characterizes as a brand of "strong intentionalism." *See id.* at 2400–02, 2440; Manning, *Equity of the Statute*, *supra* note 2, at 10–15; *see also* Zeppos, *supra* note 12, at 1602–03 (explaining that while legal process theory "posited a purposive and coherent legislature contributing to the overall rationality of law, public choice describes just the opposite"). In particular, Manning claims that "a legislative classification can seem absurd (in a policy sense) but still be rational (in a process sense) as a means of assuring passage of the overall legislation. Thus, avoiding absurd results may not implement, but may instead undermine, the only relevant expression of legislative intent." Manning, *Absurdity Doctrine*, *supra* note 2, at 2395.

30. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2431–46; Manning, *Equity of the Statute*, *supra* note 2, at 56–102 (describing the limits of "judicial power" allegedly reflected by the constitutional structure). For a powerful critique of this view on historical grounds, see Eskridge, *supra* note 9, at 1038–39.

[governmental officials] from making ad hoc exceptions to generally worded laws."[31] Moreover, the absurdity doctrine "disturb[s] the lines of compromise reflected in a clear statute" and thereby risks diluting the protections provided to political minorities by the bicameralism and presentment requirements of Article I, Section 7.[32]

Third, Professor Manning claims that the absurdity doctrine cannot be reconciled with the rational basis test that is used by the Supreme Court to assess the constitutional validity of ordinary legislation.[33] The Court frequently emphasizes that "perfection" is not required of the means chosen by the legislature to accomplish its policy objectives and therefore routinely upholds legislative classifications that are significantly over- and underinclusive, so long as they are rationally related to a legitimate governmental purpose.[34] Professor Manning claims that the absurdity doctrine "threatens to upset the balance between legislative and judicial power struck by modern constitutional doctrine" to the extent that it "authorizes judges to disturb statutory classifications that would easily survive rationality review."[35]

The absurdity doctrine is an easy target for the new textualists in light of their underlying theoretical commitments. As Professor Manning makes clear, his critique of the traditional intentionalist justification for the absurdity doctrine is premised upon a view of the legislative process as a marketplace in which self-interested participants compete for resources.[36] His understanding of the constitutional

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31. Manning, *Absurdity Doctrine*, *supra* note 2, at 2391; *see also* Nagle, *supra* note 3, at 4 ("The textualist reluctance to accept judicial correction of statutory mistakes emphasizes the legislature's ability to correct its own mistakes.").

32. Manning, *Absurdity Doctrine*, *supra* note 2, at 2391.

33. *See id.* at 2446–54; Manning, *Equity of the Statute*, *supra* note 2, at 115–19 (discussing the relationship between the rational basis test and the absurdity doctrine).

34. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485–86 (1970).

35. Manning, *Absurdity Doctrine*, *supra* note 2, at 2391.

36. *See id.* at 2410–11 (explaining that textualism's emphasis on compromise "is loosely based on interest group theory, which argues that legislation is often an economic good purchased from legislators by competing interest groups"); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) ("One of the implications of modern economic thought is that many laws are designed to serve private rather than public interests."). Manning has subsequently attempted to limit the negative implications of public choice theory for his approach to statutory interpretation by describing a more optimistic version of pluralist compromise. *See* Manning, *supra* note 14, at 1713–15. Specifically, he acknowledges that "[g]iven the influence of public choice scholarship, it is common enough to think of 'compromise' pejoratively as 'unprincipled compromise'—that is, as a set of deals struck by economically self-interested groups." *Id.* at 1714. Manning explains, however, that he currently endorses the notion that "[w]hile such conditions may describe some legislation, . . . a more general (and less cynical) understanding of compromise" that was favorably articulated by Jeremy Waldron posits that such action "is routinely to be expected whenever enacted texts reflect 'the product of a multimember assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds.'" *Id.* at 1714–15 (quoting JEREMY WALDRON, LAW AND DISAGREEMENT 125 (1999)).

It is hardly surprising that Manning would endorse a positive characterization of compromise in light of its overriding significance in his theory of statutory interpretation. Nonetheless, a vision of the legislative process in which diverse participants openly deliberate

structure, which allows him casually to dismiss other normative perspectives, is based on functionally compatible views of the separation of powers and the requirements of bicameralism and presentment.[37] Finally, his claim that the absurdity doctrine is incompatible with existing constitutional doctrine is premised on an assumption that the rational basis test fully enforces the norms of equal treatment and fundamental fairness that underlie the Equal Protection and Due Process Clauses.[38] Not only have conservative judges (including most textualists) generally taken a narrow view of the scope of the rights protected by these open-textured constitutional provisions, but commentators who view the legislative process from an economic perspective have expressly argued that the rational basis test should be abandoned because there is no reason to believe that the outcomes of self-interested bargaining will—or, indeed, should—be capable of "rational" explanation.[39] Professor Manning's belief that the rational basis test fully enforces the relevant constitutional norms is therefore ultimately less surprising than his concession that the doctrine has any legitimate role to play, given his underlying theoretical perspective.[40]

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in a good-faith pursuit of a plausible conception of the public good would be fully compatible with this Article's defense of the absurdity doctrine. *Cf.* William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558 (2000) (book review) (claiming that Waldron's view of the legislative process is consistent with purposive approaches to statutory interpretation and the thoughtful use of legislative history); *see also infra* Parts II–IV. Moreover, Manning's apparent effort to distinguish sharply between self-interested compromise and pluralist bargaining is ultimately unavailing for several reasons. First, while pluralism is generally more optimistic than public choice theory about the benign motives and balanced interests of participants in the legislative process and the desirability of competitive bargaining, it is still a market-based theory of legislation which anticipates that citizens and legislators will seek to satisfy their own pre-political preferences (which *is* a form of self-interested behavior). *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985). Second, Manning at least implicitly accepts that participants in the legislative process can legitimately pursue even more narrow self-interests because he fails to articulate any normative theory of political behavior. When this notion that virtually "anything goes" in the legislative process is combined with an extraordinary emphasis on the judiciary's purported obligation to respect *unrecorded* compromise, an important measure of political accountability is lost and the decision-making benefits of the ideals of civic virtue and public deliberation are largely forsaken. *See infra* Part II.B. Finally, it is difficult to see how Manning could entirely disclaim the negative implications of public choice theory for his approach to statutory interpretation when his approach is expressly built upon the premises of public choice theory. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2410–13 (describing "[t]he public choice assumptions underlying textualism"). Judge Easterbrook, for example, has asserted that "unprincipled" outcomes are simply "the way of compromise." Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994). Accordingly, a kinder and gentler vision of compromise cannot free Manning's approach from unduly respecting self-interested, back-room deals or the unprincipled outcomes that would thereby be facilitated.

37. *See infra* Part II.

38. *See infra* Part III.

39. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 28–29.

40. Although Manning recognizes that "some have questioned the rational basis test on

In any event, the new textualism's rejection of the absurdity doctrine does not mean that it cannot be defended under alternative theoretical frameworks.[41] Those frameworks must therefore be closely examined before any definitive conclusions can be drawn. The remainder of this Article identifies the constitutional underpinnings of the absurdity doctrine and explains that the competing vision of government that

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public choice grounds similar to those on which [he has] questioned the absurdity doctrine," he makes little effort to square the rationality requirement with his own underlying theoretical positions. Manning, *Absurdity Doctrine*, *supra* note 2, at 2480–81. On the contrary, he implicitly acknowledges that rationality review is best explained by competing republican theories of the legislative process and constitutional structure. In this regard, he contrasts "the absurdity doctrine's largely unintelligible attempt to derive specific legislative intent from background social values" with modern rationality review's position that "one cannot defend legislative classifications solely on the ground that they represent a raw (and thus arbitrary) exercise of political power; rather, the government must be able to articulate—or, more accurately, the court must be able to conceive of—*some* plausible public policy to justify a legislative classification." *Id.* at 2481 (emphasis in original). These competing theories, however, also suggest a very different view of the validity of the absurdity doctrine than is described by Manning. *See infra* Parts II–IV.

41. This Article focuses primarily on the normative issues, but it is important to recognize that the descriptive accuracy of public choice theory is vigorously contested as well. *See, e.g.*, Kelman, *supra* note 12; Mikva, *supra* note 12. Indeed, the empirical evidence appears to provide at least as much support for civic republican theories of the legislative process as it does for competing economic perspectives. *See infra* note 72 (summarizing the empirical data); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 925 (1987) (canvassing the social science literature and acknowledging that they "were somewhat surprised by the strong empirical evidence indicating that many members of Congress do indeed care about the public interest and act accordingly").

New textualism has been criticized on a variety of normative grounds. *See supra* note 12; WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 230–36 (2000) (summarizing critiques of the new textualism and citing some leading sources). First, a number of commentators have pointed out that its claims of objectivity are largely false and potentially misleading in light of the inherent ambiguity of language. *See, e.g.*, Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1323–35 (1990). Second, commentators have recognized that the new textualism's refusal to consult legislative history is in tension with a constitutional structure that is designed to facilitate reasoned deliberation. *See* Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998). Third, commentators have argued that a more equitable approach to statutory interpretation that considers the consequences of particular statutory applications was anticipated by the Framers and is, in any event, more attractive than the relatively mechanical approach that is mandated by the new textualism. *See* Eskridge, *supra* note 9, at 997 (claiming that "the original materials surrounding Article III's judicial power assume an eclectic approach to statutory interpretation, open to understanding the letter of a statute in pursuance of the spirit of the law and in light of fundamental values"). Finally, commentators have suggested that the new textualism fails to respect lawmaking as a purposive enterprise carried out by elected representatives of the people. As the leading scholars in the field have colorfully posed the question, "[s]houldn't it make a normative difference that a statute was enacted by legislators seeking to solve a social problem in the face of disagreement, and not by a drunken mob of legislators with no apparent purpose or who had agreed to adopt any bill chosen by a throw of the dice?" ESKRIDGE, ET AL., *supra*, at 235.

emerges has a normatively attractive and perhaps inevitable influence on statutory interpretation that should be candidly embraced.

II. SEPARATION OF POWERS AND THE COMMON GOOD

A. Legislative Intent Revisited

To begin with, Professor Manning's description of the traditional intentionalist justification for the absurdity doctrine seems wrong. It is highly improbable that courts actually believe that Congress could and would have amended the statutory language that was enacted if the problem posed by a specific application had been brought to its attention.[42] Instead, courts presume that the legislature wants the judiciary to alleviate the inevitable absurdities that would otherwise result from the application of general rules to unforeseen circumstances as a normal function of the interpretive process.[43] Not only does Congress draft statutes with this background rule in mind, but courts and other officials who are responsible for interpreting and applying legislative rules in specific circumstances are far better situated than the legislature to implement the doctrine's *raison d'etre*.[44] Those officials are therefore presumably acting as faithful agents of the legislature when they apply the absurdity doctrine, regardless of whether Congress could and would have amended specific statutory language to avoid a particular problematic application.

The most instructive lesson of public choice theory—that we can never know for certain how the legislative process would have responded to a particular hypothetical problem[45]—is therefore insufficient to establish that the absurdity doctrine is unsupported by legislative intent. On the contrary, a persuasive critique of the doctrine's intentionalist justification would also need to establish that Congress does not want the judiciary to use its authority over the interpretive process to avoid absurd results in the general run of cases. Not only does Professor Manning marshal no basis for reaching this latter conclusion, but he expressly acknowledges that "the absurdity doctrine has long formed a part of the interpretive background against which Congress enacts statutes—a fact that may indicate that the doctrine has secured

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42. *See supra* text accompanying note 25 (describing Manning's reliance on this claim).

43. *See, e.g.*, Sorrells v. United States, 287 U.S. 435, 450 (1932) ("To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is . . . a traditional and appropriate function of the courts."); United States v. Kirby, 74 U.S. 482, 486–87 (1868) ("It will always therefore, be presumed that the legislature intended exceptions to its language, which would avoid [injustice, oppression, or absurd consequences].").

44. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17–20 (St. Louis, F. H. Thomas and Co. 3d ed. 1880) (describing the futility of excessively detailed legislation and pointing out that experience has taught that "little or nothing is gained by attempting to speak with absolute clearness and endless specifications, but that human speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words").

45. *See* Easterbrook, *Statutes' Domains*, *supra* note 27, at 547–48 (claiming that the lessons of public choice theory make it "impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact").

implicit legislative acceptance by force of prescription."[46] He also predicts that abandoning the doctrine "might compel Congress to legislate at an excessive level of detail, thereby raising the procedural costs of bargaining over legislation."[47] Even if the imposition of those costs were theoretically defensible,[48] the problems posed by legislative generality could not be eliminated because "absurd" results are, by definition, unforeseen by the legislature.[49] It stands to reason that Congress would want courts to interpret statutory language to avoid unforeseen problems as they arise when the law is applied to particular situations, rather than trying to anticipate and resolve every conceivable—and, indeed, inconceivable—problem on its own at the outset.

Because this intentionalist justification for the absurdity doctrine is undoubtedly to some extent a fiction,[50] the normative basis for the doctrine must still be closely examined. Not only does Professor Manning reject the absurdity doctrine as a legitimate normative presumption based on his understanding of the legislative process and constitutional structure, but he even argues that Congress could not lawfully authorize the judiciary to exercise discretion to interpret statutory language contrary to its plain meaning to avoid absurd results.[51]

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46. Manning, *Absurdity Doctrine*, *supra* note 2, at 2440.

47. *Id.* at 2438.

48. Manning suggests that abandoning the absurdity doctrine would increase legislative accountability by forcing Congress to make difficult policy choices. *See id.* at 2437. His critique of the absurdity doctrine therefore displays the same antipathy toward delegations of discretionary authority to non-legislators that is reminiscent of calls to reinvigorate the nondelegation doctrine in administrative law. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). Theories that view government as an effort to promote the common good, in contrast, tend to be more sympathetic to delegations of legislative authority to non-legislators in appropriate circumstances. *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (explaining that "civic republicanism is consistent with broad delegations of political decisionmaking authority to officials with greater expertise and fewer immediate political pressures than directly elected officials or legislators").

49. *See infra* Part IV.A (describing the general parameters of the absurdity doctrine).

50. First, there is admittedly no way to know for certain that Congress does, in fact, want courts or agencies to exercise interpretive discretion to avoid absurd results. The difficulties of ascribing an intention to a multi-member body are not only real, *see* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930), but they are perhaps exacerbated when a question of institutional boundaries becomes involved. *Cf.* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2638–39 (2003) ("Although they tend to justify their decisions by reference to congressional intent, in the absence of such intent or without effective methods to ascertain it, the judicial branch decides whether or not to defer to agencies based on judges' views of policy, institutional competence, and other factors."). Moreover, legislators could rationally prefer that their bright-line rules be enforced in a literal fashion if they do not trust courts and agency officials to exercise their discretion responsibly. *See, e.g.*, SCHAUER, *supra* note 23, at 98–99, 158–62 (describing the role of rules in allocating power among institutions). It bears noting, however, that numerous states have enacted codified rules of statutory interpretation that endorse the absurdity doctrine. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2440 n.193.

51. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2440–45. In particular, Manning

The remainder of this Article suggests that Professor Manning's conclusions on this score are precisely backwards. First, the judiciary's authority to interpret statutes contrary to their plain meaning to avoid absurd results that were not expressly anticipated by Congress is thoroughly supported by a more public-spirited understanding of the legislative process and constitutional structure. Second, the absurdity doctrine promotes equal protection and due process norms in a manner that avoids most of the institutional concerns that animate the Supreme Court's rationality jurisprudence. Finally, although the absurdity doctrine inherently authorizes official discretion to recognize exceptions to general rules on a case-by-case basis, it is certainly not devoid of limitations or "intelligible principles" to guide the discretion of judicial officials.[52] Thus, the enactment of a legislative measure that was designed to strip courts of their inherent interpretive authority to avoid absurd results in particular cases would itself pose serious constitutional difficulties.[53]

B. Civic Republican Understandings

1. The Legislative Process

The notion of an economic market in which self-interested participants compete for scarce resources is, of course, not the only available paradigm of the legislative process. Its leading competition, for some time now, has consisted of theories of public law falling within the civic republican tradition.[54] That tradition, which dates

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claims that the absurdity doctrine does not provide the "intelligible principle" necessary to sustain a conventional delegation of "law-elaboration" authority because of its "broad applicability to all statutes at all times and the openly legislative nature of the discretion it confers." *Id.* at 2440–43. Moreover, he points out that the Supreme Court's refusal to enforce the nondelegation doctrine in other contexts is based in large part on the absence of a "judicially manageable standard," which results from the inevitable exercise of discretion by those charged with implementing ambiguous statutes. *Id.* at 2444. Because the absurdity doctrine is only invoked when statutory language plainly compels a particular result, it is not "an inevitable part of the interpretive function." *Id.* Thus, in contrast to "the intractable line-drawing concerns posed by conventional delegations," Manning argues that the Supreme Court "could readily police the constitutional structure simply by categorically rejecting the absurdity doctrine." *Id.*

52. *See infra* Part IV.A.

53. For an interesting model to evaluate the constitutional status of various rules of statutory interpretation, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). There are perhaps good reasons to be skeptical of the extent to which Congress can adopt general rules of statutory interpretation that are binding on the federal judiciary; however, this would be the subject of another article. For present purposes, it is sufficient to note that the remainder of this Article suggests that under the Rosenkranz model, the judiciary's use of the absurdity doctrine is at least a constitutional starting-point rule (meaning that courts must use it in the absence of congressional instructions to the contrary) and probably an immutable constitutional default rule (meaning that although Congress can overrule the results of a particular case, it cannot abrogate the doctrine itself). *See id.* at 2092–102.

54. *See, e.g.*, Sunstein, *supra* note 36, at 31–35 (describing the choice faced by the Framers between the political theories of repuhlicanism and pluralism); FARBER & FRICKEY, *supra* note 12, at 42–47 (describing the historical contrast between liberalism and republicanism and recognizing that "[t]he republican vision of government is strikingly unlike

back to ancient Rome and influenced the thinking of the Framers of the United States Constitution,[55] views the legislative process as a means of promoting the common good.[56]

The first essential feature of civic republican theory is the capacity of citizens to display "civic virtue" when they participate in the political process.[57] Whereas economic theories view the political process solely as a mechanism for aggregating preexisting preferences, civic republicans believe that society's preferences are shaped by the political process.[58] The notion of civic virtue requires citizens to be capable of distinguishing between their own self-interests and the common good of the political community.[59] This capacity is supported, in turn, by "the intuition that if one asks individuals what is good for society and what is good for them personally, one will usually get different answers."[60] Each individual forms a conception of the common good by considering the perspective of others and identifying shared values that can be promoted within the community.[61] "Civic republicanism requires that the government base its actions on these public values rather than on the private desires that citizens bring into political discourse."[62]

The second essential attribute of civic republican theory is a commitment to reasoned deliberation within the political process.[63] Although individuals may have their own notions of what is in the public interest, the common good of the political community cannot be ascertained until public discourse occurs.[64] Deliberation provides the additional information and alternative perspectives that allow participants to critically examine their initial views and to potentially revise their

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that animating public choice").

55. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 19 (1997) (noting that the republican tradition had its origins in classical Rome, was resurrected during the Renaissance, and "provided a language which dominated the politics of the modern West and had a particular salience . . . in the period leading up to the American and French Revolutions"). For influential arguments that republican principles played a significant role in the framing of the American Constitution, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 46–90, 430–67 (1969); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1558–64 (1988). It should be noted, however, that the degree to which civic republican theory influenced the drafting and ratification of the Constitution is controversial. *See* FARBER & FRICKEY, *supra* note 12, at 44.

56. *See, e.g.*, Seidenfeld, *supra* note 48, at 1528.

57. It therefore follows that citizens in a republic must be able to participate on a free and equal basis in the political process. *See* Sunstein, *supra* note 55, at 1552–53 (describing political equality, "understood as a requirement that all individuals and groups have access to the political process," as a central commitment of modern republicanism). Given this underlying commitment, the exclusionary nature of traditional civic republican theory is particularly problematic. *See id.* at 1539–41 (acknowledging certain regrettable aspects of classical republican theory and describing the first goal of the "republican revival" as the identification of "those aspects of republican thought that have the strongest claim to contemporary support").

58. *See* Sunstein, *supra* note 36, at 31–32.

59. *See id.* at 31.

60. Seidenfeld, *supra* note 48, at 1536 (footnote omitted).

61. *See id.* at 1536–37.

62. *Id.* at 1537.

63. *See* Sunstein, *supra* note 55, at 1548.

64. *See* Seidenfeld, *supra* note 48, at 1529.

preferences.[65] The requirement of reasoned deliberation is therefore designed "to ensure that political outcomes will be supported by reference to a consensus (or at least broad agreement) among political equals" on which courses of action will serve the common good.[66]

The ideal of civic virtue also informs the very nature of legitimate deliberation within a civic republican legislative process. Because it is designed to promote broad agreement on the common good, participants in the legislative process are expected to give reasoned justifications for their positions that could be freely accepted by political equals.[67] Moreover, governmental officials must be able to justify policy outcomes with reference to the common good.[68] The enactment of public policy therefore cannot be justified under civic republican theory solely on the grounds that it was the result of the majority's prepolitical preferences or bargaining by self-interested actors.[69]

The civic republican emphasis on the political process's capacity to promote the common good suggests that laws will ordinarily be designed to serve an instrumental purpose. Civic republicans do not, however, deny the existence of bargaining in the legislative process or reject the validity of all compromise. Rather, they recognize that some bargaining and compromise can promote the common good, even when it moderates a statute's overarching purpose or results in a division of benefits among interest groups.[70] Under civic republican theory, the relevant question for purposes of evaluating the validity of any particular compromise is whether the deal is an exercise of raw political power based solely on the selfish interests of those affected or whether the resulting legislative classifications can be defended as a rational means of promoting a plausible conception of the public good.[71]

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65. *See* Sunstein, *supra* note 55, at 1548–49.

66. *Id.* at 1550.

67. *See* Seidenfeld, *supra* note 48, at 1531 ("Decisionmakers should evaluate the positions of participants in the political process by the persuasiveness of their arguments and not by the identity, status, or number of individuals supporting each position.") (footnote omitted).

68. *See id.* at 1530.

69. *See id.* at 1531–32 ("It is not enough that a decision garners popular support or that it accurately reflects a political bargain that furthers the private interests of a majority of citizens; to be legitimate, a decision must respect the positions of all interest groups and respond to their arguments in terms of the good of the community."); Sunstein, *supra* note 55, at 1549–50 (noting that republicans "will be hostile to systems that promote lawmaking as 'deals' or bargains among self-interested private groups," and that "[t]he antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups").

70. *See* Seidenfeld, *supra* note 48, at 1532. For example, Professor Popkin has pointed out that although the federal food stamps program "achieved its modern form in national law as a result of logrolling between farm and urban interests," it would be a mistake to view that law merely as a compromise between selfish interests. William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 567 (1988). According to Popkin, the law advanced the public good in a manner that "indicated a significant shift in the concept of public responsibility for the needy." *Id.*

71. *See infra* Parts III–IV.

Civic republicans also recognize that their characterization of the legislative process is an aspirational ideal that does not perfectly match existing reality.[72] In particular, they understand that participants in the legislative process will sometimes seek to promote their own selfish interests. Participants are also likely to presume that their own interests correspond with the public good and to exhibit reluctance to revise their initial positions.[73] These tendencies increase the difficulty of achieving the republican goal of reaching broad consensus on courses of action that will advance the good of the community.

The difficulty of achieving republican ideals of civic virtue and reasoned deliberation in the legislative process does not mean that these ideals are misplaced. First, as indicated above, the very existence of the ideal of civic virtue informs the nature of acceptable discourse in a republican democracy. A requirement that citizens and governmental officials be capable of justifying their positions with reference to the common good is likely to enhance the quality of collective decision making.

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72. *See, e.g.*, Seidenfeld, *supra* note 48, at 1532 ("Although civic republicanism makes optimistic assumptions about the government's capacity to act deliberatively, it recognizes that the natural tendency of human beings, at least in large measure, is to act in their self-interest.") (footnote omitted); Sunstein, *supra* note 55, at 1549 ("Modern republicans do not claim that existing systems actually embody republican deliberation."). It is important to recognize, however, that public choice theory is also subject to serious criticism on empirical grounds. *See* FARBER & FRICKEY, *supra* note 12, at 24–33 (reviewing empirical studies and concluding that the support for public choice theory is weaker than is commonly believed); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 88 & n.56 (1990) ("[A] good deal of empirical evidence disputes [public choice] claims, suggesting that ideology and voter preferences are in fact not overwhelmed by interest group pressures in the legislative process."); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 2 & nn.3–4 (1991) (citing empirical evidence supporting competing theories of legislation); *supra* note 41. Perhaps not surprisingly, the empirical evidence suggests that participants in the legislative process display a combination of self-interested, ideological, and altruistic motivations. *See* Farber & Frickey, *supra* note 41, at 925 (identifying strong empirical support for the view that many members of Congress seek to promote the public interest but recognizing that the influence of interest groups "threatens to push the political process in the direction of a self-interested search for economic gain"); Manning, *Absurdity Doctrine*, *supra* note 2, at 2413–14 & n.100 (acknowledging that "certain empirical findings suggest that legislation is not a mere 'commodity' sold to interest groups; rather, legislators base their votes on an array of factors, including ideology, institutional ambitions, and even conceptions of the public good"). The recent empirical evidence, in particular, appears to provide at least as much support for civic republican theories of the legislative process as it does for the competing economic perspectives. *See, e.g.*, Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425 (1996) (relying upon twenty years of data to conclude that ideology is overwhelmingly the most important determinant of roll-call voting patterns in the Senate); Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361, 376 (2001) (finding that separated powers can lead to strategic voting but that members of Congress are also concerned about securing the best policy outcome).

73. *Cf.* FARBER & FRICKEY, *supra* note 12, at 46 (describing the thin line between the personal interests of citizens and public values and noting that "republicans may . . . overestimate the capacity of dialogue to transform" individual preferences).

Second, lawmaking procedures can be designed to promote reasoned deliberation, even when certain participants in the legislative process are less than virtuous. The following Part explains that the Constitution's structural safeguards are best understood as relatively sophisticated devices to encourage deliberation and reasoned decision making within the legislative process, thereby promoting republican principles of government.

2. The Constitutional Structure

It is commonly recognized that the Framers of the American Constitution were particularly concerned with avoiding the problem of "faction," or what we might describe today as "special interest" domination of the political process.[74] James Madison defined a "faction" in strikingly republican fashion as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[75] Madison believed that "minority factions" would normally be restrained "by regular vote" and the related principle of majority rule.[76] The tyranny of the majority, however, was a cause for greater concern because majority factions could sacrifice "the public good and the rights of other citizens" to their "ruling passion or interest."[77] The rights and interests of minorities would be insecure "[i]f a majority [were] united

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74. Although the leading opponents of the Constitution, the anti-federalists, relied upon traditional republican theory to oppose a dramatic expansion of national authority and to favor more direct forms of democracy, those positions were largely rejected based on the federalists' skepticism regarding the capacity of ordinary citizens to exhibit civic virtue and the dangers associated with the official inculcation of values. *See* Sunstein, *supra* note 36, at 35–45. Republican theory was therefore viewed as "loser's history" for many years by historians and political theorists. As part of the "republican revival" that has occurred in recent decades, however, scholars in a variety of fields have recognized that the federalists also embraced the ends of civic republican theory; they simply devised innovative structural means of promoting deliberative democracy in an extended republic. *See id.* at 47 ("A significant element in federalist thought was the expectation that the constitutional system would serve republican goals better than the traditional republican solution of small republics, civic education, and limited reliance on representatives."); Sunstein, *supra* note 55, at 1540–41 (describing the "republican revival" and claiming that "[o]ne of the largest accomplishments of modern historical scholarship has been the illumination of the role of republican thought in the period before, during, and after the ratification of the American Constitution"). For some of the other leading works that have contributed to the republican revival, see PETTIT, *supra* note 55; MICHEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998); Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Seidenfeld, *supra* note 48; Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

75. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). There is, however, an unresolved debate over whether this document should be understood in a pluralist or republican fashion. *See supra* note 55.

76. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 75, at 80.

77. *Id.*

by a common interest."[78] Madison famously warned that "there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn."[79] Because civic virtue and public education were insufficient to guard against this form of tyranny, the Framers recognized that the Constitution needed to incorporate structural safeguards to counteract majority passions.[80]

One of the primary structural mechanisms adopted to promote republican principles of government in the lawmaking process was the election of representatives. Madison therefore distinguished representative democracies from the "pure democracies of Greece," and explained that "the total exclusion of the people in their collective capacity" from directly making policy for the national government had a number of perceived advantages.[81] First, the diversity inherent in an extended republic would protect against the possibility that sufficient numbers of people would develop a common desire to oppress minorities.[82] Second, the process of representation would itself "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[83] Representatives in an extended republic would necessarily be exposed to a host of different perspectives that would prevent them from becoming unduly attached to parochial concerns.[84] Moreover, professional representatives would have the leisure to learn about the problems of the day and reflect upon appropriate solutions through a process of deliberation and debate.[85] In short, elected representatives would be capable of engaging in a process of reasoned deliberation from which the common good would emerge.

The Constitution, of course, also divides the enumerated powers of the national government into three distinct branches.[86] Congress's legislative authority is subject, in turn, to Article I's requirements of bicameralism and presentment.[87] A bill therefore cannot become law unless there is either majority support for the measure in both chambers of Congress and executive approval or an unusually high level of congressional demand for the proposed legislation. In other words, the passage of a law requires "a consensus (or at least broad agreement)" that a particular course of action will serve the common good.[88]

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78. THE FEDERALIST NO. 51 (James Madison), *supra* note 75, at 323.

79. THE FEDERALIST NO. 63 (James Madison), *supra* note 75, at 384.

80. *See, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1511–12 (1990); Sunstein, *supra* note 36, at 31–49.

81. THE FEDERALIST NO. 63 (James Madison), *supra* note 75, at 386–87.

82. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 75, at 82–84; Sunstein, *supra* note 36, at 40.

83. THE FEDERALIST NO. 10 (James Madison), *supra* note 75, at 82.

84. *See id.* at 83.

85. *See* Sunstein, *supra* note 36, at 41.

86. *See* U.S. CONST. arts. I–III.

87. *See* U.S. CONST. art. I, § 7, cl. 2.

88. *See supra* text accompanying note 66.

Professor Manning has recognized the plausibility of a civic republican understanding of the requirements of bicameralism and presentment.[89] Some of the leading authorities he relies upon for his arguments expressly conclude that one of the primary purposes of the separation of powers was "to assure that statutory law is made in the common interest."[90] Nonetheless, Professor Manning claims that if "one examines more closely the precise means by which bicameralism and presentment protect the legislative process from capture by factions, the process seems to cut decidedly in favor of respecting the lines of legislative compromise."[91] In sum, he contends that Article I, Section 7 imposes a supermajority requirement on the legislative process that facilitates bargaining and therefore prevents the domination of otherwise vulnerable political minorities, particularly the residents of smaller states.[92] According to Professor Manning, by giving "minorities, in general, and the minority consisting of small-state residents, in particular, exceptional power to block legislation as a means of defense against self-interested majorities," the constitutional structure "makes it more crucial for interpreters to respect the lines of legislative compromise," even if those decisions might otherwise seem incoherent or unprincipled.[93]

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89. *See* Manning, *Equity of the Statute*, *supra* note 2, at 73–74 (acknowledging that "one might argue [from the Framers' understanding of the purposes of bicameralism and presentment] that judges should interpret legislation to resist the seemingly unprincipled compromises struck by interest groups (factions) and, instead, to give statutes the coherence that one would expect from a well-functioning deliberative process").

90. *See id.* at 66 n.262 (quoting W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 127 (1965)); *see also* WOOD, *supra* note 55, at 46–90, 430–67 (describing the role of civic republican thought in the framing of the Constitution); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 376 (1976) (claiming that by adopting a constitutional system of separated powers, "it was hoped that the public interest could be served and that, at the same time, liberty could be proteeted from tyranny"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432–37 (1987) (noting that the separation of powers was meant to promote deliberation and ensure that governmental officials act in the interest of the public as a whole).

91. Manning, *Equity of the Statute*, *supra* note 2, at 74.

92. *See id.* at 74–78; Manning, *Absurdity Doctrine*, *supra* note 2, at 2437–38 (citing JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 233–48 (1962)).

93. Manning, *Equity of the Statute*, *supra* note 2, at 76–78. Manning's argument has interesting implications for conventional understandings about the nature of judicial review. In essence, he claims that the constitutional structure was designed to protect political minorities from factional domination by increasing their bargaining power in the legislative process. The judiciary undermines this protection when statutes are interpreted contrary to their plain meaning because the precise deal agreed upon by the participants is no longer being enforced according to its terms. This practice therefore has the potential to create a "majoritarian difficulty" that the constitutional structure was designed to avoid. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2437–38 & nn.187–88 (claiming that because political minorities "may insist on the protection of statutory generality" or bargain for "limits on statutory scope . . . the safest course is for courts to adhere strictly to the clear lines, however awkward, drawn by enacted legislation"). Although this insight suggests that courts should utilize their interpretive discretion carefully, it does not mean that such discretion should be

Professor Manning and the political scientists he relies upon are undoubtedly correct that the constitutional structure imposes a supermajority requirement on successfully enacted legislation. The notion that this requirement operates to protect political minorities is also uncontroversial. These observations, however, do not even begin to bridge the gap between economic and civic republican theories of the legislative process and the constitutional structure. Professor Manning accepts that participants in the legislative process can legitimately pursue their own self-interests; bicameralism and presentment merely alter the balance of political power. A supermajority requirement, however, can also be viewed as a mechanism to facilitate deliberation in an effort to achieve consensus on ways of advancing the common good that take the views of political minorities into account.

Professor Manning also ignores the role of representation in the constitutional structure and implicitly assumes that legislators are expected to respond mechanically to constituent pressures. This view has been persuasively challenged on the grounds that "national representatives were to be above the fray of private interests" and that by engaging in reasoned deliberation, elected legislators could come very close to fulfilling "the task of the citizen legislator in the traditional republican conception."[94] As Alexander Hamilton explained, "[w]hen occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection."[95]

This reflective role was particularly appropriate for members of the Senate who, by virtue of their long terms in office and relative independence from the voters, were expected "to be the impartial umpires and guardians of the general good."[96] Although the Senate would presumably protect the citizens of the least populous states from factional domination, this function could be accomplished by a deliberative pursuit of the common good of the entire community as well as by the execution of self-interested bargaining. The federalism concerns reflected by Article I are thus

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precluded altogether. *Compare infra* Parts III.C. & IV.A. (describing the appropriate parameters of the absurdity doctrine), *with* Manning, *Absurdity Doctrine*, *supra* note 2, at 2438 n.188 ("Because it is impossible to determine whether judges applying the conventional absurdity doctrine are more likely to promote or harm the interests of such minorities, the most reliable way to protect those interests is to adhere closely to [the results of] a constitutional process that was carefully designed to serve them.") (internal quotations omitted) (alteration in original). In any event, Manning's argument ignores that the absurdity doctrine often operates in a fashion that protects individual rights in particular cases. *See infra* Part III.

94. Sunstein, *supra* note 36, at 46 (claiming that "the federalists did not believe that representatives would or should respond mechanically to private pressure"). At the same time, however, "[t]he mechanisms of accountability would prevent representatives from acquiring interests distinct from those of their constituents" and separation of powers would provide a safeguard against factional domination even where "one set of representatives" was captured by particular special interests. *Id.* at 47. Sunstein therefore characterized the resulting scheme as "Madisonian republicanism" because it "occupies an intermediate position between interest-group pluralism and traditional republicanism." *Id.* at 47–48.

95. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 75, at 432.

96. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 32 (1989).

perfectly compatible with a civic republican understanding of the constitutional structure.[97]

That said, one of the geniuses of the constitutional structure is that bicameralism and presentment operate to protect political minorities even when elected representatives fail to perform their ideal functions. Indeed, the lawmaking process described by Professor Manning may be what would result if elected representatives lacked civic virtue and strayed from their obligation to promote the common good. Although the system he describes is considerably better than one lacking any structural safeguards, it is not the highest ideal to which our Constitution aspires. It therefore remains to be considered whether the judiciary has a legitimate role to play in helping to fulfill the Constitution's more public-spirited aspirations.

3. The Role of the Judiciary

Professor Manning relies upon judicial independence and the separation of legislative and judicial functions contemplated by the Constitution to challenge the legitimacy of exercises of judicial discretion that deviate from plain statutory meaning. He initially utilized this argument to reject the relatively significant judicial discretion authorized by the common law practice of using interpretive authority to promote the "equity of the statute,"[98] and he subsequently claimed that the same considerations compel the conclusion that the judiciary's use of the absurdity doctrine conflicts with the constitutional structure.[99] Although Professor Manning's arguments may have some force in the former context, judicial independence and a separation of legislative and judicial functions are entirely compatible with a thoughtful application of the absurdity doctrine.

It seems far-fetched at first glance to conclude that the Constitution's efforts to promote judicial independence and eliminate legislative involvement in the judicial process were designed to reduce, rather than bolster, the scope of the judicial power.[100] Professor Manning's reasoning, however, is that if the legislature knows

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97. *See* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 33–39 (1994) (describing benefits of the deliberative democracy that was designed by the Framers).

98. *See* Manning, *Equity of the Statute*, *supra* note 2, at 56–70. Manning explains that "[a]lthough the concept of equity may connote many things, in the sense important here it reflects the idea that judges should adjust the positive law to ensure that like cases are treated alike." *Id.* at 29–30.

99. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2434–37.

100. Professor Eskridge's competing study of the original intent regarding equitable interpretation concluded that Manning's claims in this regard were entirely unsupported by the historical record. Eskridge explained:

> It is noteworthy that Manning was unable to find a single Framer or a single judge of the period who expressed the link he insists upon. In an article brimming with quotations, unearthed in what must have been a massive research program, it is amazing that he was not able to come up with even one quotation supporting the central claim of his paper. The reason is that lawyers of the period, including important Framers, did not . . . view the role of equity in statutory interpretation as judicial legislation, as Manning seems to do.

Eskridge, *supra* note 9, at 1038–39.

that it will have no role in implementing the laws it enacts, Congress will be more likely to craft bright-line rules that reduce the discretion of the executive and judicial officials who possess that authority.[101] The enactment of bright-line rules, rather than open-ended standards, will, in turn, promote the advantages associated with the rule of law and reduce the potential for the arbitrary exercise of discretionary authority.[102] Moreover, if Congress really wants to provide preferential treatment to a favored interest, it will need to make this decision explicit on the face of a statute, thereby promoting political accountability.[103] Professor Manning claims that by interpreting statutes contrary to their plain meaning and thereby exempting particular citizens from the plain scope of bright-line rules, the judiciary necessarily undermines the Constitution's sophisticated process of reducing arbitrary decision making and promoting political accountability.[104]

Professor Manning has made a strong case that the constitutional structure has the potential to harness the "rule-of-law" advantages associated with bright-line rules and thereby prevent arbitrary governmental action.[105] The problem is that he dramatically overstates the implications of this insight. Most fundamentally, judicial independence and the removal of legislators from the judicial process are not designed to prevent courts from exercising judgment when they decide statutory cases. Professor Manning claims that "[o]ne would hardly expect the legislative and judicial powers to be so carefully demarcated if their functions were, at bottom, functionally identical."[106] But virtually no one believes that the functions of courts and legislators are identical; indeed, nearly everyone agrees that courts need a very good reason to deviate from plain statutory language. The relevant question is whether avoiding absurd results is a defensible reason within the American constitutional structure for deviating from plain statutory meaning.

The primary justification for the absurdity doctrine is that it can counteract the serious disadvantages of mechanically applying bright-line rules to a wide variety of unforeseen factual situations. As Professor Manning acknowledges, virtually all

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101. *See* Manning, *Equity of the Statute*, *supra* note 2, at 67–68. It is just as likely, however, that abandoning the absurdity doctrine could have the opposite effect. As Professor Daniel Farber observed in reviewing a draft of this Article, if Congress cannot count on courts and agencies to avoid absurd applications of rules and instead to apply them in a sensible way, Congress is more likely to use standards that leave room for sensible application.

102. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2434–36.

103. *See id.* at 2436.

104. *Id.* at 2437.

105. Those advantages include the utilitarian benefits of providing notice of the law's requirements, predictability, stability, and an ability to overcome collective action problems. *See* Sunstein, *supra* note 21, at 969–77 (describing these and other related benefits of rule-based decision making). Moreover, as Manning suggests, the uniform application of bright-line rules reduces potential abuses of discretion stemming from a decision maker's biases or incompetence. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2434–37. Finally, a rigid application of bright-line rules is arguably consistent with the notion of legislative supremacy, which is the most commonly held understanding of the appropriate allocation of lawmaking power in our representative democracy. *See* Schacter, *supra* note 13, at 594 ("Our legal culture's understanding of the link between statutory interpretation and democratic theory verges on the canonical and is embodied in the principle 'legislative supremacy.'").

106. Manning, *Equity of the Statute*, *supra* note 2, at 60.

statutes are over- and underinclusive with respect to their animating purposes because legislative classifications are typically imperfect proxies for the actual traits that are relevant for accomplishing regulatory goals.[107] The inaccuracy of legislative classifications is only exacerbated as statutes age because changes in the world tend to render bright-line rules obsolete, or at least less precise over time.[108] Moreover, a wooden application of statutes may further the legislature's regulatory goals in some places but not in others.[109] As explained below, foreclosing any deviation from legislative rules and their classifications would inevitably result in the disparate treatment of similarly situated persons, in addition to other undesirable consequences.[110] Because the absurdity doctrine is designed to respond directly to these legitimate concerns,[111] it should not be confused with the "arbitrary" exercise of official discretion that the constitutional structure was designed to prevent.[112]

In this regard, Professor Manning plausibly claims that the Constitution's removal of legislators from the judicial process reflects "an important traditional belief that liberty is more secure when a legislature cannot direct an adjudicator to exempt favored interests from the scope of a general law."[113] He then concludes that "if the absurdity doctrine authorizes the courts to recognize exceptions that the legislature necessarily would have made, it stands to reason that the doctrine will work to benefit powerful or politically favored interests, to the apparent detriment of others who must then live under the putatively general laws."[114] This argument, however, erroneously assumes that the absurdity doctrine authorizes the judiciary to exempt "favored interests" from the scope of a general law in the absence of a legitimate explanation.

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107. *See, e.g.*, Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949); SCHAUER, *supra* note 23, at 31–34.

108. *See* Sunstein, *supra* note 21, at 993–94 ("Rules are often shown to be perverse through new developments that make them anachronistic."); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

109. *See* Linde, *supra* note 39, at 219–20 (providing an example of this phenomenon and describing its potentially problematic implications for the rational basis test).

110. At least partly for these reasons, our legal system contains numerous instances where the laws "on the books" are not literally enforced by those who implement the rules in particular situations. Prosecutorial discretion and jury nullification present two of the most notable examples of this phenomenon. While unconstrained discretion of this nature can certainly be abused to the detriment of the "rule of law," the absurdity doctrine can be implemented in a manner that takes precautions to guard against these dangers. *See infra* Parts III–IV.

111. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2407 (noting that the absurdity doctrine serves the function of "offering reassurance that the problem of statutory generality will not compel the acceptance of deeply troubling outcomes"). For an argument that the absurdity doctrine is justified because judicial discretion to avoid these problems is inherent in the rule of law, see Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994).

112. Indeed, the following Part explains that by alleviating the inherent problems associated with legislative generality, the absurdity doctrine avoids certain "arbitrary" governmental action that would otherwise be in tension with constitutional norms. *See infra* Part III.

113. Manning, *Absurdity Doctrine*, *supra* note 2, at 2436.

114. *Id.* at 2437.

On the contrary, the absurdity doctrine is specifically designed to exempt individuals—whether "favored" by the legislature or not—from generally applicable rules only in unforeseen circumstances where no statutory purpose would be served or where other highly undesirable consequences would result.[115] The removal of legislators from the judicial process guards against arbitrary decision making and political faction precisely because it precludes powerful members of Congress from favoring certain constituents in adjudication, irrespective of the merits of a case. That does not mean, however, that the constitutional structure forecloses the exercise of this authority by an impartial and independent judiciary that is well-situated to alleviate the problems associated with bright-line rules as they are applied in particular situations. Because courts must provide legitimate reasons for recognizing statutory exemptions under the absurdity doctrine, there is absolutely no basis for concluding that this approach to statutory interpretation inherently condones arbitrary decision making.

Of course, a potential tension exists between judicial decisions that deviate from plain statutory meaning in order to alleviate the problems associated with bright-line rules and the legislature's perogative to enact those rules in the first place. The legislature adopts bright-line rules, in part, to avoid the costs associated with case-by-case decision making and perhaps to limit the discretion of the officials responsible for implementing them.[116] Although Professor Manning contends that this potential tension and an underlying notion of legislative supremacy compel the conclusion that the judiciary's exercise of this form of interpretive discretion is always illegitimate, he ignores the crucial distinction between cases involving known statutory imprecision and those involving unusual circumstances that were not anticipated or consciously resolved by the legislature.

Cases involving known statutory imprecision pose a direct conflict between the idea of legislative supremacy and judicial efforts to alleviate the shortcomings of bright-line rules by engaging in strongly purposive methods of statutory interpretation.[117] On the other hand, the same sharp conflict does not exist in cases

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115. *See infra* Part IV.A; Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) ("I think it entirely appropriate to consult all public materials, including . . . the legislative history . . . , to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the [statute]."); Manning, *Absurdity Doctrine*, *supra* note 2, at 2400 n.43 (recognizing that "the Court has made clear that one can answer an absurdity claim with legislative history showing that Congress in fact intended to use statutory language in its ordinary sense").

116. *See supra* note 50.

117. Consider, for example, a law requiring airline pilots to retire at the age of sixty-five. This law, which is designed to promote transportation safety by grounding incompetent or potentially unhealthy pilots, is dramatically over- and underinclusive with respect to its animating purpose because many older pilots are capable of flying safely while some younger pilots are not. The legislature undoubtedly knew that the law contained these imprecisions and nonetheless enacted a bright-line rule hased on concerus about the accuracy, costs, and potential biases associated with case-by-case decision making in this area. The judiciary, therefore, would be undermining the legislature's policy decisions if it exempted individual pilots over the age of sixty-five who did not pose the relevant dangers. Thus, in the absence of other overriding considerations, the notion of legislative supremacy would suggest that courts

where legislative generality produces a problematic outcome that was unforeseen by the legislature. For example, the medieval Italian legislature that imposed criminal penalties upon "whoever drew blood in the streets" almost certainly did not anticipate the law's application to a surgeon who responded to an emergency medical condition. Because the animating purpose of this statute was apparently to reduce public violence, applying the law to a good Samaritan would not advance the legislature's policy objectives. On the contrary, because the legislature presumably never thought about this potential application, a mechanical application of the plain statutory language would lead, at best, to an arbitrary result and, at worst, to one that is flatly contrary to virtually any reasonable conception of the public good.

The theoretical differences between the new textualism and civic republican understandings of the legislative process and constitutional structure lead to competing conceptions of the judicial role in these latter circumstances. If statutes are merely bargains struck by self-interested participants, as modern textualists believe, there is apparently no basis for courts to assess the normative desirability of any particular statutory outcome.[118] Moreover, the alleged unreliability and illegitimacy of judicial reliance upon legislative history and the unrecorded nature of many legislative compromises leave courts unable to distinguish between unforeseen statutory outcomes and the routine consequences of congressional decisions about the appropriate level of statutory generality.[119] Thus, at the end of the day, new textualists conclude that "the Court should hesitate to employ interpretive rules that threaten to disturb clear legislative outcomes, lest such rules unmake unrecorded compromises."[120]

In contrast, civic republican theory posits that statutes should have an instrumental purpose that promotes the common good. Because representatives are obligated to deliberate about appropriate statutory means and ends, legislative history should be a useful source of information about what Congress sought to accomplish. Moreover, "unrecorded compromises" are disfavored because they deprive third parties of important information and undermine their ability to evaluate and respond to—much less, potentially influence—the positions taken by leading decision makers. These considerations suggest that the judiciary can and should identify the animating purposes underlying legislation and assess whether the application of plain statutory

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should apply the plain statutory language under these circumstances, even if they were convinced that a law's substantive purposes would not be furthered in a particular case. *See infra* Part IV.A.

118. *See* FARBER & FRICKEY, *supra* note 12, at 41 (pointing out that under the premises of public choice theory, the very idea "that statutes have purposes or embody policies becomes quite problematic, since the content of the statute simply reflects the haphazard effect of strategic behavior and procedural rules").

119. One of the hallmarks of the new texualism is a general refusal to rely on legislative history for interpretive guidance. *See* Eskridge, *New Textualism*, *supra* note 12, at 623.

120. Manning, *Absurdity Doctrine*, *supra* note 2, at 2438. Manning has recently acknowledged that "[n]ot every turn of phrase is bargained for; many are surely the product of happenstance or insufficient foresight." John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 111 (2006). He argues, however, that "[i]f the Court feels free to adjust the semantic meaning of statutes when the rules embedded in the text seem awkward in relation to the statute's apparent goals, then legislators cannot reliably use words to articulate the boundaries of the frequently awkward compromises that are necessary to secure a bill's enactment." *Id.*

language would further Congress's substantive goals under the circumstances presented in a particular case.[121] If not, courts can and should ascertain from the statutory scheme and the legislative history whether a specific problematic application is the result of known statutory imprecision or the presence of unusual circumstances that were not anticipated or consciously resolved by the lawmaking body. When a court concludes that the latter is true, a sound basis for considering the invocation of the absurdity doctrine or other purposive approaches to statutory interpretation likely exists. In any event, a civic republican understanding of separated powers would flatly reject an approach to statutory interpretation that brazenly privileges speculative back-room deals (that is, "unrecorded compromises") over the judiciary's exercise of judgment regarding whether the common good that is reflected by a statute would be served by its application in particular cases of this nature.

It bears emphasis that one need not believe that the legislative process actually operates in a civic republican fashion in order to accept the absurdity doctrine and its underlying approach to statutory interpretation.[122] Rather, such a presumption allows courts to facilitate the outcomes that would most likely be generated by a properly-functioning political process. Although Congress is not foreclosed from achieving results that a court would otherwise characterize as "absurd" under this approach, the legislature is encouraged to engage in public deliberation about seemingly problematic statutory applications on the record in order for the judiciary to verify that the matter was consciously anticipated and resolved by elected representatives. The absurdity doctrine therefore has the capacity to promote the common good that is presumably reflected by statutory purposes, while encouraging focused deliberation on particularly troubling outcomes in ways that are central to republican theory.

In any event, it is certainly well established that the judiciary does have the authority to protect individuals from violations of their constitutional rights under our system of government.[123] The constitutional underpinnings of the absurdity doctrine are therefore bolstered when its application protects individual rights that are provided by specific constitutional provisions. Indeed, the next Part explains that the absurdity doctrine promotes judicially underenforced constitutional norms of equal treatment and fundamental fairness in a manner that avoids most of the institutional concerns that would arise from more aggressive approaches to constitutional adjudication. While this emphasis on individual rights and institutional concerns

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121. *But cf. infra* note 206 and accompanying text (discussing and responding to criticisms of purposive approaches to statutory interpretation).

122. *See* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1688 (1988) (explaining that civic republican theory suggests that individual canons of statutory interpretation should be understood "as if" they supported republican principles of government); Schacter, *supra* note 13, at 618–22 (describing civic republican theory's use of interpretive principles to reconstruct politics in the republican vision); Sunstein, *supra* note 55, at 1581–83 (advocating the use of interpretive canons to "promote actual deliberation in the lawmaking process" and to guard against or minimize the pathologies of pluralism). *But cf. supra* notes 12, 72 and accompanying text (explaining that while the empirical evidence is mixed, it does provide support for civic republican theories of the legislative process).

123. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

underscores the absurdity doctrine's incorporation of liberal and pragmatic values, modern civic republican theory can easily accommodate the notion that the common good is better served by recognizing exceptions to bright-line rules under appropriate circumstances than it would be by always adhering mechanically to plain statutory language and thereby imposing unwarranted or counterproductive sacrifices upon members of society.

III. THE CONSTITUTIONAL NORMS OF FAIRNESS AND EQUALITY

Professor Manning argues that the absurdity doctrine cannot be squared with the Supreme Court's use of the rational basis test to assess the constitutional validity of ordinary legislation. Contrary to his analysis, however, the initial question is not whether the absurdity doctrine is consistent with the rational basis test, but whether this approach to statutory interpretation promotes the norms underlying the relevant constitutional provisions. By skipping over this prior question, Professor Manning implicitly assumes that the rational basis test accurately reflects the full meaning of the Equal Protection and Due Process Clauses. Several prominent commentators have recognized, however, that this is plainly not the case.[124] Rather, the rational basis test is a judicially created doctrine that underenforces the relevant constitutional norms of equal treatment and fundamental fairness based primarily on institutional concerns.

If, as explained below, the judiciary's use of the absurdity doctrine promotes equal protection and due process norms, the next question would be whether this approach can be justified on institutional grounds. In this regard, there are significant differences between the judiciary's invalidation of a legislative classification under the rational basis test and its use of interpretive authority to recognize an exception to plain statutory language based on the circumstances presented in a compelling case. Because the absurdity doctrine largely avoids the institutional difficulties that would be posed by more aggressive constitutional adjudication, it is a relatively restrained and, indeed, ingenious solution to the constitutional problems posed by legislative generality.

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124. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 64–65 (1997) (recognizing that concerns about the undesirable consequences of stringent judicial review, rather than a decision about "constitutional meaning," have led the Court to develop an equal protection doctrine "that prescribes broad judicial deference to legislative decisions"); Sager, *supra* note 15, at 1218 (offering equal protection "as a prominent example of a constitutional norm which is underenforced to a significant degree by the federal judiciary"); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 205–06 (1988) (claiming that the "real" Equal Protection Clause would invalidate legislation that is currently upheld under the rational basis test based on the judiciary's limited competence to "assess the complex factual issues underlying social and economic legislation").

A. Equal Protection of the Laws

While there is obviously no consensus on the meaning of "the equal protection of the laws,"[125] it has long been recognized that the Equal Protection Clause embodies a principle that similarly situated people should be treated alike and differently situated people should be treated differently.[126] As applied to legislation, however, this formulation of the equal protection principle begs the question of the appropriate basis for assessing relevant similarities and differences. If the inquiry focused directly on the legislative classifications drawn, a principle of "formal equality" would be tautological.[127] The equal protection principle therefore relies instead upon the insight that most statutes are not drawn for their own sake, but rather as a means to some instrumental end or public good that is capable of justifying the statute.[128] Whether persons are similarly or differently situated in this context depends upon whether applying a statute to those persons will further the purposes of the legislation.[129] The existence of "misfit" between a legislative classification and the statute's underlying purposes therefore constitutes a prima facie violation of an equal protection principle of "accurate classification."[130] It follows that concerns arise

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125. U.S. CONST. amend. 14, § 1.

126. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (recognizing that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike") (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)); *cf.* Royster Guano Co. v. Virginia, 253 U.S. 412, 415–16 (1920) (declaring that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike"). Tussman & tenBroek, *supra* note 107, at 344–45 (setting forth an equal protection principle of "reasonable classification" and explaining that "[a] reasonable classification includes all who are similarly situated and none who are not").

127. *See* Tussman & tenBroek, *supra* note 107, at 345 (recognizing that "'similarly situated' cannot mean simply 'similar in the possession of the classifying trait'" because "[a]ll members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test").

128. *See id.* at 346.

129. *See* Ry. Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (recognizing that the Equal Protection Clause incorporates the principle that government "must exercise [its] powers so as not to discriminate between [its] inhabitants except upon some reasonable differentiation fairly related to the object of regulation"); Tussman & tenBroek, *supra* note 107, at 346–47.

130. *See* Tussman & tenBroek, *supra* note 107, at 348 (describing underinclusive legislative classifications as prima facie violations of an equal protection principle of "reasonable classification"); *id.* at 351 (explaining that "[t]he prima facie case" against overinclusive "departures from the ideal standards of reasonable classification is stronger than the case against under-inclusiveness" because the former variety of classificatory misfit "reach[es] out to the innocent bystander, the hapless victim of circumstance or association"). Modern-day commentators seemingly equate the principle of "reasonable classification" that was set forth by Tussman and tenBroek with the rational basis test that the Supreme Court currently applies to evaluate the validity of ordinary legislative classifications. *See, e.g.*, Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367, 370 (2003) ("It should be obvious that the Tussman and tenBroek view

under the Equal Protection Clause when statutory classifications impose burdens upon individuals or deprive them of benefits without advancing the purposes underlying the legislation.

The equal protection principle of accurate classification is unintelligible under economic theories of the legislative process and constitutional structure that view lawmaking solely as the aggregation of competing private interests.[131] As Joseph Tussman and Jacobus tenBroek explained in their classic work on the subject,

> the requirement that laws be equal rests upon a theory of legislation quite distinct from that of pressure groups—a theory which puts forward some conception of a "general good" as the "legitimate public purpose" at which legislation must aim, and according to which the triumph of private or group pressure marks the corruption of the legislative process.[132]

In other words, the principle of accurate classification rests firmly upon the same theory of the legislative process and constitutional structure that justifies the absurdity doctrine.

Professor Manning's assumption that the rational basis test fully reflects equal protection norms is unpersuasive in part because the mere existence of rationality review conflicts with his theory of the legislative process and constitutional structure.[133] Conversely, the rational basis test is easily compatible with civic republican theories because it ties the validity of legislative classifications to the public good that the statute was presumably enacted to further.[134] The rational basis test is also consistent with the equal protection principle of accurate classification because it reinforces the notion that disparate treatment resulting from legislative classifications should serve an instrumental purpose that promotes society's

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of equal protection as a limitation on classification provides no protection for individuals who are harmed by a classification, so long as the classification satisfies the requirement of reasonableness."). Although there is an obvious relationship between the two, *see infra* notes 135–37 and accompanying text, the principle of reasonable classification is more demanding than a requirement that legislative classifications be rationally related to a legitimate governmental purpose. *See supra* note 126. Indeed, Tussman and tenBroek were perhaps the first to recognize that the Equal Protection Clause contains a judicially underenforced norm. *See* Tussman & tenBroek, *supra* note 107, at 350–51, 372–73 (acknowledging that the institutional concerns raised by the principle of reasonable classification suggest that "self-limitation can be seen to be the path to institutional prestige and stability" for the judiciary). This Article refers to the principle they identified as one of "accurate classification" in order to avoid this confusion.

131. *See* Tussman & tenBroek, *supra* note 107, at 350.

132. *Id.*

133. *See* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 55 (1992) ("[I]t is quite clear that if we take rationality review as our starting point, the Constitution favors the public value model of government and is inconsistent with interest group theory."); Sunstein, *supra* note 36, at 49 (explaining that the rational basis test "has been puzzling to those who understand the political process as a series of unprincipled bargains among competing social groups"); Tussman & tenBroek, *supra* note 107, at 350 (claiming that "the pressure theory of legislation and the equal protection requirement are incompatible"); *supra* notes 39–40 and accompanying text.

134. *See* Sunstein, *supra* note 36, at 49–50.

welfare.[135] In the absence of such a requirement, courts could simply always conclude that legislative classifications are a rational means of accomplishing whatever they purport to accomplish, thereby rendering the rational basis test itself tautological.[136] A civic republican understanding of the legislative process therefore provides a cogent explanation for the requirement that statutory classifications be a rational means of promoting their public purposes.[137]

As Professor Manning points out, the Supreme Court has applied the rational basis test in a manner that is extremely deferential to the legislature.[138] This jurisprudence plainly tolerates widespread departures from the equal protection principle of accurate classification. The limited reach of the doctrine does not mean, however, that the principle is not valid to its full conceptual limits.[139] Rather, the judiciary

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135. *See* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 131 (claiming that "the Court require[s] differential treatment to be justified by reference to some public value"); Tussman & tenBroek, *supra* note 107, at 350 (concluding that "legislative submission to political pressure does not constitute a fair reason" for violations of a principle of reasonable classification).

136. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting) ("It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose.").

137. This particular understanding suggests that the "means" component of the rational basis test has independent significance and does not serve merely to flush out improperly motivated laws. *Compare* Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 451–52 (1989) (claiming that classificatory fit has intrinsic value "in moral philosophy as well as in law" and that "[a] person ordinarily has the right to demand a plausible, nontautological explanation for why she has been treated differently from another whom she believes is similar, or for why she has been treated the same as another whom she believes is different"), *with* Sunstein, *supra* note 135, at 131 ("Scrutiny of the relationship between permissible ends and statutory means serves to 'flush out' impermissible ends, albeit imperfectly when the most deferential forms of rational basis review are employed."). This assumption is consistent, in turn, with the notion that the Equal Protection Clause requires a level of statutory precision, in addition to prohibiting certain forms of "invidious discrimination." *See* Tussman & tenBroek, *supra* note 107, at 353 (explaining that "[t]he bearing of the equal protection clause on the problem of classification is not exhausted by the reasonable classification requirement;" rather, other forms of discrimination are prohibited because certain traits "should not be made the basis for the classification of individuals in laws"). Both of these propositions are subject to conflicting treatment under the Court's jurisprudence. *Compare* Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) ("The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."), *with* Bush v. Gore, 531 U.S. 98 (2000) (concluding that "arbitrary" discrimination between similarly situated persons violates the Equal Protection Clause without requiring an "invidious" intent); Willowbrook v. Olech, 528 U.S. 562 (2000) (same); Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989) (same). It seems fair to say, however, that the Court's ambivalence about the appropriate treatment of the principle of accurate classification stems largely from institutional concerns.

138. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2446–54.

139. *See* Fallon, *supra* note 124, at 57 (claiming that to implement the Constitution successfully "the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely"); Sager, *supra* note 15, at 1213 ("It is part of

routinely avoids more strongly enforcing the principle of accurate classification based on institutional concerns.[140] Courts therefore commonly declare that it is not their role to second-guess the policy judgments of the legislature.[141] Even if "second-guessing legislative policy judgments" was the judiciary's proper role, courts often recognize that they are not competent to perform this function effectively.[142] Because courts do not enforce the principle of accurate classification more aggressively based on institutional concerns, commentators have recognized that the Equal Protection Clause contains a judicially underenforced constitutional norm.[143]

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the intellectual fabric of constitutional law and its jurisprudence that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues."). *But see* Linde, *supra* note 39, at 206 (claiming that the rational basis test is fundamentally flawed, in part, because "government must be shown to have failed in some respect to comply with the Constitution before a court can invalidate a law").

140. *See supra* note 124 and accompanying text; Sager, *supra* note 15, at 1217 (recognizing that the judiciary's restraint in enforcing the Equal Protection Clause turns generally "on the propriety of unelected federal judges' displacing the judgments of elected state officials, or upon the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them").

141. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981) (stating that "it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation") (quoting Ferguson v. Skrupa, 372 U.S. 726, 729 (1963)).

142. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 247–48 (1970) (Brennan, J., concurring in part, dissenting in part) (declaring that "the nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of a kind so often involved in constitutional adjudication," but that those limitations have "no application to Congress"); Strauss, *supra* note 124, at 205 ("One of the principal justifications for rational basis review is that the legislature is best able to assess the complex factual issues underlying social and economic legislation; courts, lacking the legislature's fact-finding capacities, are ill-equipped to second-guess its judgments.").

143. *See supra* note 124. Professor Sager argued that this situation could be remedied, in part, by more vigorous enforcement of equal protection norms by state courts and Congress. *See* Sager, *supra* note 15, at 1228–63; Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311 (1987) (recognizing that the rational basis test underenforces equal protection norms and arguing that legislatures should test statutory classifications by different, stricter standards).

The Supreme Court has apparently rejected these proposals in subsequent decisions that have limited the ability of state courts and Congress to enforce equal protection norms more aggressively than the federal courts. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–91 (2000) (confirming that the rational basis test allows imprecise generalizations based on age and invalidating congressional efforts to prohibit age discrimination by states because such legislation exceeded the scope of Congress's authority under Section 5 of the Fourteenth Amendment); *Clover Leaf Creamery*, 449 U.S. at 463 n.6 (declaring that "when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than [the Supreme Court] has imposed"). Although these decisions are based on controversial notions of federal judicial supremacy in the area of constitutional interpretation, they also reflect institutional concerns regarding potentially undue interference by courts of any jurisdiction with the policy choices of state governments. Because similar institutional concerns underlie the deferential nature of

The institutional concerns posed by more rigorous enforcement of the principle of accurate classification are especially significant in light of the severe consequences of judicial invalidation of legislative classifications on constitutional grounds under existing doctrine. A decision that a legislative classification violates the Equal Protection Clause results in the facial invalidation of the statutory provision at issue,[144] which typically has the effect of rendering that provision of the statute unenforceable in any future proceedings.[145] Depending on the application of severability principles, it is conceivable that the facial invalidation of a legislative classification could negate an entire law enacted by Congress or a state legislature.[146]

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the rational basis test, such decisions do not invalidate Sager's broader thesis.

144. The precise distinction between facial and as-applied challenges has been the subject of considerable debate in recent years. *See, e.g.*, Janklow v. Planned Parenthood, 517 U.S. 1174 (1996) (mem.) (denying certiorari); *id.* at 1176 (Scalia, J., dissenting); Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) ("Both within the Supreme Court and among scholarly commentators, a debate rages over when litigants should be able to challenge statutes as 'facially' invalid, rather than merely invalid 'as applied.'"). Fallon argued that much of this debate rests upon conceptual confusion and explained that, in essence, "the availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity." *Id.* at 1324 (emphasis omitted). In this regard, commentators seem to agree that successful equal protection challenges to legislative classifications under the rational basis test almost uniformly result in the facial invalidation of the statutory provision at issue. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 476 (1985) (Marshall, J., concurring in the judgment and dissenting in part) ("[T]o my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis."); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 37 & n.144 (1998) (claiming that "[a]s-applied challenges virtually never arise under the Equal Protection Clause" and identifying *City of Cleburne* as "the exception that proves the rule"); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 430–31 & n.319 (1998) (explaining that "[t]he fact that a potential constitutional defect inhering in the statutory terms ordinarily triggers equal protection review structures most equal protection adjudication in the facial challenge mode," and identifying *City of Cleburne* as the lone exception to this generalization). In contrast, equal protection challenges to the administration of facially valid statutory provisions can result in the invalidation of those provisions as applied to the plaintiffs. *See* Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991) (holding that racially motivated use of peremptory challenges by civil litigants violates the equal protection rights of prospective jurors without calling into question facially neutral statutes that authorize litigants to exercise peremptory challenges); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating a facially neutral law that was administered in a manner that discriminated against Chinese immigrants); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 242 (1994) (describing the racially discriminatory application of a facially neutral statute "as a straightforward equal protection violation").

145. *See* Dorf, *supra* note 144, at 236 (explaining that "[i]f a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances," unless an appropriate court interprets the law in a manner that avoids the constitutional difficulty).

146. *See, e.g.*, Dorchy v. Kansas, 264 U.S. 286, 289–91 (1924) (stating that if one provision of a statute is invalidated, an unobjectionable provision "cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand" if other provisions of the statute were declared

A judicial decision of this nature would often be unduly strong medicine, particularly where the alleged constitutional violation was likely unintentional and may not even cause significant harm.[147]

Another way of responding to statutory misfit that raises equal protection concerns would be for the judiciary to recognize a need for individualized consideration of whether a challenged law would advance its purposes under the circumstances presented in a particular case. Much like the absurdity doctrine, the Equal Protection Clause could serve as a basis for recognizing specific exceptions to generally applicable rules in particular cases, without invalidating the legislative classifications at issue on their face. The Supreme Court experimented with a version of this approach to judicial review during the early 1970s when it applied an "irrebuttable presumptions doctrine" to several legislative classifications that posed equal protection and due process concerns based on their imprecision.[148] A similar type of

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unconstitutional). For a general discussion of the judiciary's treatment of this issue, see John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).

147. As noted above, the principle of accurate classification suggests that the role of the Equal Protection Clause is not limited to protecting unpopular groups against "invidious discrimination." *See supra* note 137. Nor does the principle, taken to its conceptual limits, apply only to deprivations of fundamental rights or important individual interests. Any effort by the judiciary to enforce the principle more aggressively would, however, need to take the importance of the individual interests at stake into account along with other criteria. *See infra* notes 153–54 and accompanying text.

148. *See* Turner v. Indus. Comm'n of Utah, 423 U.S. 44, 45–46 (1975) (rejecting a blanket disqualification for unemployment benefits during an eighteen-week period immediately preceding and following childbirth because the Constitution required "more individualized" consideration of whether the statutory purposes would be served in a particular case); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647–48 & n.13 (1974) (rejecting regulations adopted by two local school boards that imposed mandatory leave on pregnant school teachers beginning approximately midway through their pregnancies and requiring the school boards to provide individualized consideration of a particular teacher's circumstances or to adopt regulations that were more precisely tailored); USDA v. Murry, 413 U.S. 508, 511–13 (1973) (invoking the irrebuttable presumptions doctrine and rejecting a provision of the Federal Food Stamps Act, which automatically rendered an entire household ineligible for the program for two years if the household contained an adult who was claimed as a dependent for federal income tax purposes by a taxpayer in another household who was ineligible for food stamps); Vlandis v. Kline, 412 U.S. 441, 453 (1973) (holding that a state statute, which defined prospective college students as non-residents for tuition purposes if they lived outside the state during the previous year or at the time of their application, violated due process by depriving those students of the opportunity to demonstrate that they were bona fide residents of the state); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that a state law that presumed that unwed fathers were unfit parents for purposes of child custody decisions, while making the opposite presumption for married parents and unmarried mothers, violated the Equal Protection Clause and therefore concluding that an unwed father's parental unfitness must be established on the basis of individualized proof); Bell v. Burson, 402 U.S. 535, 540 (1971) (holding that a state law that suspended the driver's license of an uninsured motorist who was involved in an accident unless he or she posted security to cover the amount of damages claimed by aggrieved parties in reports of the accident violated procedural due process because the driver was not given an opportunity to refute his potential fault or liability).

The doctrine obtained its name because the Court "held that the government could not establish an 'irrebuttable presumption' which classified people for a burden or benefit without

individualized consideration could be provided by the judiciary's recognition of the viability of "as applied" challenges to the rationality of ordinary legislative classifications.[149] These doctrines would enable the judiciary to promote the equal protection principle of accurate classification more aggressively without invalidating the legislature's substantive policy decisions.

The foregoing doctrines and their logical implications do, however, raise formidable institutional difficulties. For starters, the notion that particular applications of imprecise legislative classifications could state actionable federal constitutional claims would dramatically expand the jurisdiction of federal courts and result in substantially increased judicial review of legislative decision making at every level of government.[150] As a corollary, the constitutional right to individualized consideration suggested by the doctrines would severely undermine the utilitarian advantages of bright-line rules.[151] Because lawmakers frequently make conscious

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determining the individual merit of their claims." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.6, at 580 (6th ed. 2000). One budding scholar noted at the time that the doctrine's defining characteristic was that it proscribed "certain laws and regulations that place[d] individuals in disadvantageous categories without giving them some opportunity to demonstrate that they d[id] not belong there," but that it did not "reach the question whether the underlying categorization [was] itself unconstitutional." Bruce L. Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761 (1977). The doctrine was ultimately abandoned by the Court based on institutional concerns in *Weinberger v. Salfi*, 422 U.S. 749 (1975).

149. *See* Britell v. United States, 204 F. Supp. 2d 182 (D. Mass. 2002) (holding that the refusal of the federal government's health care program to cover the medical expenses associated with the abortion of an anencephalic fetus (one with no forebrain or cranium) violated the Equal Protection Clause because the legitimate statutory goals of promoting potential life and protecting maternal health would not be served under the circumstances), *rev'd*, 372 F.3d 1370 (Fed. Cir. 2004); Doe v. United States, No. C02-1657Z (D. Wash. 2003) (following the reasoning of the district court in *Britell* and issuing a declaratory judgment that the statute and regulation that precluded the government from funding the abortion of an anencephalic fetus violated the Fifth Amendment and the Administrative Procedure Act), *rev'd*, 419 F.3d 1058 (9th Cir. 2005). The Supreme Court had already upheld the facial validity of an indistinguishable statutory provision under the rational basis test in *Harris v. McRae*, 448 U.S. 297, 324–25 (1980).

150. *See LaFleur*, 414 U.S. at 652 (Powell, J., concurring) ("As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of 'irrebuttable presumptions.'"); *id.* at 658 (Rehnquist, J., dissenting) ("Countless state and federal statutes draw lines such as those drawn by the regulations here which, under the Court's analysis, might well prove to be arbitrary in individual cases."); *Vlandis*, 412 U.S. at 460 (Burger, C.J., dissenting) ("We ought not try to correct 'unseemly results' of state statutes by resorting to constitutional adjudication."); *id.* at 462 (warning that "literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case").

151. *See supra* note 105. In his dissenting opinion in *LaFleur*, Justice Rehnquist described the individualized consideration that was prevalent early in English history and claimed that "[m]ost students of government consider the shift from this sort of determination, made on an *ad hoc* basis by the King's representative, to a relatively uniform body of rules enacted by a body exercising legislative authority, to have been a significant step forward in the achievement of a civilized political society." *LaFleur*, 414 U.S. at 657–58 (italics in original).

decisions to enact bright-line rules rather than discretionary standards, such doctrines would create a sharp conflict between the idea of legislative supremacy and the idealized norms underlying the Constitution's most open-textured provisions.[152]

These difficulties could be alleviated to some extent by the judiciary's recognition of the advantages of rule-based decision making when assessing the validity of applying general legislative classifications to the circumstances presented in a particular case.[153] The goal would be to develop workable limiting principles that respect the advantages of bright-line statutory rules and the legislature's considered judgment to adopt them, while simultaneously refusing to sanction rigid enforcement of statutes when it makes no sense to do so, and without straining the judiciary's capacity to render fair and accurate decisions. In light of the obvious challenges posed by this task, such an approach would almost certainly need to be reserved for exceptional cases where the importance of the individual interests at stake, the unforeseen nature of the equities involved, the relative simplicity of the regulatory program, and the minimal difficulties of crafting and applying a sufficiently narrow exception suggest that the doctrine's use would be judicially manageable and adequately deferential to the legislature.

A multi-factored balancing test of this nature could provide a theoretically defensible manner of enforcing constitutional norms,[154] but a decision to provide individualized consideration under the Equal Protection Clause in certain cases would undoubtedly require the judiciary to draw some fine distinctions. Members of the Court have warned in an arguably analogous context that "the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative,"

According to Justice Rehnquist, it was "a little late in the day for [the] Court to weigh in against such an established consensus." *Id.* at 658.

152. *Cf. LaFleur*, 414 U.S. at 660 (Rehnquist, J., dissenting) ("The Court's disenchantment with 'irrebuttable presumptions,' and its preference for 'individualized determination,' is in the last analysis nothing less than an attack upon the very notion of lawmaking itself.").

153. *See* SCHAUER, *supra* note 23, at 97 (describing the concept of "rule-sensitive particularism").

154. For proposed balancing tests to preserve narrow versions of the irrebuttable presumptions doctrine, see *USDA v. Murry*, 413 U.S. 508, 517–19 (1973) (Marshall, J., concurring) (describing the analytical underpinnings of the irrebuttable presumptions doctrine and advocating a balancing test that would require the judiciary to "assess the public and private interests affected by a statutory classification and then decide in each particular case whether individualized determination is required or categorical treatment is permitted by the Constitution"); Ackerman, *supra* note 148, at 774–80 (claiming that the irrebuttable presumptions doctrine could be used to correct imprecise legislative classifications in cases "involving constitutionally preferred interests that do not warrant a fundamental interest/suspect classification review," and suggesting that workable principles could be developed by drawing upon procedural due process limitations that "serve to balance procedural safeguards against legitimate program goals"); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 303–04 (1975) (suggesting that principles of "structural due process" may require an "individualized hearing" at which the government is obligated to provide "an articulated rationale" for infringing upon an individual's liberty that relies upon "norms or factual assumptions that are widely shared" when imprecise legislative classifications implicate "both a set of interests about whose importance there is very broad social agreement, and a set of values and understandings about which there is the deepest disagreement and flux").

and the federal judiciary, "in any event, lacks the institutional capacity to maintain such a regime for very long." [155] The Court's usual reluctance to provide individualized consideration of the constitutional validity of particular statutory applications, which is vividly demonstrated by the rational basis test, is therefore certainly understandable and not without substantial justification.[156]

Despite the legitimacy of the institutional concerns animating the rational basis test, the blanket rejection of a constitutional doctrine that provides individualized consideration of the rationality of particular statutory applications should not necessarily be a foregone conclusion. As the preceding discussion illustrates, the principle of accurate classification and its underlying notion that similarly situated people should be treated alike has widespread appeal. Moreover, the notion that the law should not adversely affect individuals without a rational justification that is related to its underlying purposes is strongly ingrained in our legal culture and consistent with theories of the legislative process and constitutional structure that emphasize the government's obligation to promote the common good. Those intuitions are significantly heightened when an unforeseen problem has arisen, important individual interests are at stake, and it would be relatively easy for the judiciary to craft a narrow exception to an otherwise unobjectionable bright-line rule. Although there are no easy answers to these problems from a constitutional perspective, the legitimate considerations on both sides of the equation strongly suggest that sub-constitutional responses to the equal protection concerns that are posed by legislative generality—such as the absurdity doctrine—should be graciously welcomed.

B. Due Process of Law

The Supreme Court often declares that "arbitrary" governmental action is constitutionally prohibited.[157] The most influential judicial opinion ever written about the meaning of substantive due process proclaimed that "the liberty guaranteed by the Due Process Clause . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints." [158] Yet, the Court's decisions reflect

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155. United States v. Morrison, 529 U.S. 598, 655 (2000) (Souter, J., dissenting) (suggesting that the difficulties of drawing coherent distinctions in the Commerce Clause area render meaningful judicial review counterproductive).

156. *Cf.* Fallon, *supra* note 124, at 66 ("When judicial competence is lacking or the costs of particular forms of judicial involvement would be too great, the Court does not necessarily betray its obligation of constitutional fidelity if it fails to craft judicially enforceable rules that fully protect constitutional norms.").

157. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."); Dent v. West Virginia, 129 U.S. 114, 123–24 (1889) (explaining that the Constitution's guarantee of due process of law was intended "to secure the citizen against arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property").

158. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); *see also* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 845 (2003) (claiming that Justice Harlan's dissent in *Poe* "is probably the most influential in modern substantive due process").

considerable confusion about what constitutes arbitrary governmental action and the appropriate limitations on the underlying constitutional norm.[159] Its substantive due process decisions, in particular, have interchangeably described the prohibited governmental conduct as that which is "arbitrary and irrational," "conscience-shocking," "fundamentally unfair or unjust," "particularly harsh and oppressive," or "arbitrary in the constitutional sense."[160] These alternative formulations of what the Court appears to believe are the same standard, however, have very different implications for the scope of constitutionally forbidden governmental conduct. As Peter Rubin has recently explained, "the 'shocks the conscience' test," for example, "is not the same thing as the 'irrationality' test—although each applies where no other independently articulated fundamental right is infringed and each can be understood as a prohibition on 'arbitrary' conduct, albeit conduct that is arbitrary in two different senses."[161]

The foregoing confusion has been compounded by the fact that when courts and commentators describe arbitrary governmental action, they are frequently referring to certain abuses of discretion by officials who are responsible for implementing the law.[162] The Supreme Court has expressly recognized, however, that the guarantees of the Due Process Clause also operate as "bulwarks . . . against arbitrary legislation."[163] The Court therefore reviews ordinary legislation under the rational basis test and examines whether a challenged provision is rationally related to a legitimate governmental interest.[164] As noted in the previous Part, this test is extremely deferential to the legislature and effectively results in the invalidation of a challenged provision only when it lacks any conceivable public purpose or is entirely irrational.[165]

Statutory provisions that are properly upheld under the rational basis test will, however, frequently result in "substantial arbitrary impositions and purposeless restraints" when they are applied in a particular case. This would be true, for example, when a mechanical application of the statutory language would not advance any of the goals underlying the legislation. Not only would the statute's application impose a "purposeless restraint" on an individual's liberty under these circumstances, but such

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159. *See* Rubin, *supra* note 158, at 841–49.

160. *Id.* at 845–46.

161. *Id.* at 846.

162. The most influential scholarship regarding the problem of arbitrary governmental action focuses primarily on abuses of discretion by administrators. *See generally* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1969); HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965). For a compelling argument regarding the constitutional values served by prohibitions of various forms of arbitrary governmental action, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 492–503 (2003).

163. *Poe*, 367 U.S. at 541 (Harlan, J., dissenting) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)).

164. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938); Nebbia v. New York, 291 U.S. 502 (1934).

165. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2446–54.

governmental action could also be characterized as "arbitrary" to the extent that it does not advance the public interest.[166]

If pressed on this point, the government would undoubtedly claim that it was simply enforcing the plain language of a duly enacted statute. It could also point out that the statutory provision was facially valid under well-settled constitutional doctrine and that recognizing ad hoc exceptions to bright-line rules would eviscerate their advantages and undermine the idea of legislative supremacy that underlies our representative democracy. It would therefore follow that applying the plain language of the statute, despite the fact that its substantive purposes would not be furthered in a particular case, would not be arbitrary at all. Indeed, the government could point out that this sort of argument is probably what Justice Harlan had in mind when he described the concept of "ordered liberty."[167] Citizens who are adversely affected by imprecise legislative classifications must sacrifice a small portion of their liberty to promote the common good of the community and secure the advantages of living in an organized society.[168]

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166. Some commentators have recognized that requiring the government to have a public-regarding reason for its actions is central to democratic legitimacy under the Constitution. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 17 (1993) ("In American constitutional law, government must always have a reason for what it does."); Bressman, *supra* note 162, at 498 n.167 (describing "[g]overnmental decisions that lack an adequate, public-regarding purpose" as "tyrannical or arbitrary" and noting that "[a] decision that seeks to achieve a permissible public-regarding purpose through disproportionate or otherwise unreasonable means might also be tyrannical or arbitrary" in this sense); *id.* at 547 (recognizing that "uniform rules might produce arbitrariness when a regnlatory problem demands individualized attention").

167. *See Poe*, 367 U.S. at 542 (Harlan, J., dissenting). Justice Harlan objected to providing heightened judicial scrutiny of laws that adversely affected fundamental rights under the Equal Protection Clause on the grounds that this practice would turn the Court into a "super-legislature." Shapiro v. Thompson, 394 U.S. 618, 660–62 (1969) (Harlan, J., dissenting); NOWAK & ROTUNDA, *supra* note 148, § 11.7 at 435 ("Harlan did not advocate overturning laws merely because they offended his individual sense of reasonableness."). The concept of "ordered liberty" was first coined by Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

168. *See Poe*, 367 U.S. at 542 (Harlan J., dissenting). Although this proposition is consistent with classic civic republican theory, one can simultaneously maintain that the legislature should have broad authority to enact facially valid laws that promote the common good and that such authority entails a responsibility by the government to avoid needlessly harming individuals to the extent fairly possible. Indeed, society as a whole does not benefit from the purposeless or unduly harsh application of legislative classifications in unanticipated circumstances. The common good is therefore arguably better served by recognizing exceptions to bright-line rules under appropriate circumstances and thereby promoting individual rights than it would be by mechanically adhering to the plain meaning of bright-line rules and thereby imposing unwarranted or counterproductive sacrifices upon its citizens. From this perspective, the constitutional structure and the Bill of Rights can easily accommodate both liberal and republican values that are often thought to conflict. *See, e.g.*, William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969, 970 (1998) (describing the "liberal commitment to private rights versus the republican commitment to public liberty" as one of constitutional scholarship's "most absorbing theoretical conflicts").

Although this is a powerful argument that should prevail in most cases, it is important to recognize that its persuasiveness stems almost entirely from institutional concerns. The rational basis test itself reflects a constitutional norm that prohibits legislative restraints upon individual liberty in the absence of a rational justification. The primary reason that this underlying principle is not enforced at the case-specific level is that routinely doing so would undermine the utilitarian advantages of having bright-line rules and directly conflict with the legislature's legitimate decision to enact them. These formidable institutional concerns become far less persuasive, however, when (1) the individual interests at stake are especially important, (2) the problematic statutory application was unanticipated by the legislature, (3) the regulatory scheme at issue is relatively simple, and (4) the judiciary could easily craft a narrow exception to the statutory language that would not undermine its operation in the ordinary run of cases. When these criteria are present, the constitutional objectives of promoting the common good and avoiding arbitrary restraints upon individual liberty suggest that invalidating a particular application of a challenged statute under the Due Process Clause would be a legitimate option.

The difficulty, of course, is that the same floodgate concerns and line-drawing problems that counsel hesitation with respect to strong efforts to enforce the equal protection principle of accurate classification are present in this context as well. Arbitrary governmental action is ubiquitous and typically occurs at the "retail" level, while constitutional adjudication is ordinarily thought to be reserved for relatively "momentous" occasions.[169] It is therefore not surprising that the federal judiciary has not only refused to adopt the foregoing approach, but it has also limited the extent to which it will enforce the Due Process Clause's prohibition of arbitrary governmental action in other areas.[170] One of the primary reasons for this development is that sub-constitutional avenues for challenging arbitrary governmental action are often available. For example, principles of administrative law authorize the invalidation of certain actions by regulatory agencies that are deemed "arbitrary, capricious, an

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169. *Cf.* R.R. Comm'n of Tex. v. Pullman Co., 313 U.S. 496 (1941) (holding that federal courts should abstain from exercising jurisdiction when a state court's resolution of uncertain state law issues could render a constitutional decision unnecessary); Ashwander v. TVA, 297 U.S. 288, 356 (1936) (Brandeis, J., concurring) (claiming that the Supreme Court should avoid constitutional issues where possible); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 34–49 (2d. ed. 1986) (describing various "rules of limitation" that counsel against constitutional adjudication).

170. Thus, for example, the Court recognized at one point that negligent deprivations of liberty and property constituted violations of the Fourteenth Amendment and could therefore be the basis for constitutional tort liability under 42 U.S.C. § 1983. *See* Parratt v. Taylor, 451 U.S. 527, 541–42 (1981). This decision was subsequently reversed in a pair of cases, which concluded that due process is only violated if there is an intentional deprivation of a plaintiff's liberty or property interests. *See* Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986). The Court opined that "[n]ot only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not open the federal courts to lawsuits where there has been no affirmative abuse of power." *Daniels*, 474 U.S. at 328, 330. The Court has generally made it more difficult to obtain a remedy in federal court for governmental conduct that is also actionable as a tort under state law based on the explicit premise that § 1983 is not a "font of tort law to be superimposed upon whatever systems may already be administered by the states." Paul v. Davis, 424 U.S. 693, 701 (1976).

abuse of discretion, or otherwise not in accordance with law."[171] Moreover, state law sometimes provides remedies for torts and other illegal conduct by state and local governmental officials that could also be characterized as arbitrary.[172] Although these causes of action are typically available for challenges to executive action rather than to legislation, courts can also use doctrines of statutory interpretation to avoid arbitrary applications of legislative provisions that would otherwise conflict with the norms underlying the Due Process Clause.

This analysis suggests that courts interpret statutes to avoid absurd results in order to bolster the judicially underenforced norm against arbitrary governmental action that underlies the Due Process Clause.[173] The analysis explains why courts would apply the absurdity doctrine in certain cases, like the one involving the good Samaritan, in which no statutory purpose would be served by a mechanical application of the plain statutory language.[174] In this sense, the Due Process Clause provides additional constitutional support for a strongly purposive approach to statutory interpretation that could also be justified by efforts to bolster the judicially underenforced equal protection principle of accurate classification.[175]

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171. 5 U.S.C. § 706(2)(A) (2000); *see also* Bressman, *supra* note 162, at 473–74 (explaining that "whatever else the [APA] set out to achieve, it aspired to strengthen administrative procedures and judicial review to prevent arbitrary agency action"). Nonetheless, judicial review of potentially arbitrary administrative action is sometimes precluded by the APA, typically for institutional reasons. *See, e.g.*, 5 U.S.C. § 701(a)(2) (declaring that judicial review is not authorized when "agency action is committed to agency discretion by law"); *id.* § 704 (providing that only "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review"); Heckler v. Cheney, 470 U.S. 821 (1985) (holding that an agency's refusal to take enforcement action is not subject to judicial review under the APA).

172. *See, e.g.*, *Parratt*, 451 U.S. at 543–44 (holding that due process is not violated if state law provides an adequate post-deprivation remedy); Snowden v. Hughes, 321 U.S. 1, 8 (1944) (holding that the unlawful application of state law to the petitioner did not violate the Federal Constitution); Hudson v. Palmer, 468 U.S. 517 (1984) (extending this aspect of *Parratt* to intentional misconduct of state officials that is "random and unauthorized"); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 344 (1993) (noting that *Parratt* was justified, in part, based on the availability of state court remedies); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 980 (1986) (describing the Court's approach as part of "an ongoing effort by the Supreme Court, particularly Justice Rehnquist, to reorient fourteenth amendment jurisprudence" in order "to keep the lower federal courts out of the business of monitoring the routine day-to-day administration of state government in areas that only marginally implicate constitutional values").

173. *See* Sager, *supra* note 15, at 1219–20 (identifying "the due process clause of the fourteenth amendment, particularly in its substantive application," as a "likely candidate[]" for characterization as a judicially underenforced constitutional norm); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 S. CT. REV. 34 (claiming that the mistakes of the *Lochner* era do not require abandoning meaningful judicial review of economic legislation, but concluding that the Court should nonetheless forego doing so based on its limited political capital).

174. *See supra* text accompanying note 20.

175. *See supra* Part III.A.; *infra* note 178 (describing relevant distinctions between equal

Unlike the equal protection principle of accurate classification, however, the norms underlying the Due Process Clause also provide support for a balancing of interests in cases in which the underlying statutory purposes *would* be served. Due process is, after all, quintessentially about the need to balance the legitimate interests of the state and its chosen means of effectuating them against the significance of the restraints on individual liberty that result.[176] Even if legitimate state interests would be advanced to some degree by applying plain statutory language, due process norms could be violated if there were overwhelming countervailing interests pointing in the opposite direction. Due process norms therefore help to explain why a court would deem a criminal statute that prohibited "obstructing the mail" inapplicable to the members of a sheriff's posse who executed an arrest warrant for murder against a postal carrier who was on duty.[177]

In sum, both the Equal Protection and Due Process Clauses contain underlying norms that are not fully enforced by the judiciary for institutional reasons.[178] The

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protection and due process).

176. For recognition of the balancing of interests that is inherent in due process, see Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (declaring that due process rights are "determined by balancing [an individual's] liberty interests against the relevant state interests") (quoting Youngberg v. Romero, 457 U.S. 307, 321 (1982) (citing Mills v. Rogers, 457 U.S. 291, 299 (1982)); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). The Supreme Court, of course, only routinely engages in meaningful consideration of the competing interests when a fundamental right is at stake. *See* NOWAK & ROTUNDA, *supra* note 148, § 11.7, at 438. There is, however, no magic distinction between fundamental and non-fundamental rights. *See id.* Rather, the Court imposes a high barrier to the recognition of additional fundamental rights largely because of institutional concerns.

177. *See supra* notes 18–21 and accompanying text (discussing United States v. Kirby, 74 U.S. (7 Wall.) 482, 487 (1868)).

178. Whether a particular constitutional claim should be analyzed under the Due Process Clause or the Equal Protection Clause has been a persistent source of confusion and disagreement for courts and commentators. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). The primary distinction is that the Equal Protection Clause limits the government's ability to classify persons, while the Due Process Clause imposes limits on governmental restrictions of liberty. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 148, § 11.4, at 419. Although the Equal Protection Clause was once derisively characterized by Justice Holmes as "the last resort of constitutional arguments," Buck v. Bell, 274 U.S. 200, 208 (1927), the Supreme Court has focused on equal protection rather than due process in the majority of constitutional challenges to ordinary legislation since the New Deal because "most laws do not regulate all persons evenhandedly but, instead, involve classifications of persons." NOWAK & ROTUNDA, *supra* note 148, § 11.4 at 419. Because the Supreme Court has applied the same rational basis test to ordinary challenges brought pursuant to both Clauses, the practical significance of this distinction has been significantly diminished under existing case law. *See id.* ("Regardless of whether a court is employing substantive due process or equal protection analysis, it should use the same standards of review.").

The Due Process Clause may, however, have a few advantages over the Equal Protection Clause as the primary source of constitutional authority for the judiciary to avoid absurd results. First, the Due Process component of the Fifth Amendment, which was included in the Constitution's original Bill of Rights, helps to explain why federal courts were interpreting statutes contrary to their plain meaning to avoid absurd results prior to the Fourteenth Amendment's ratification in 1868. Second, the Due Process Clause's prohibition of

absurdity doctrine provides a mechanism for promoting those norms without engaging in constitutional adjudication. Because the problems associated with legislative generality cannot be alleviated without the exercise of a fair amount of judicial discretion, however, it is fair to ask whether the absurdity doctrine avoids the institutional concerns that courts have found overwhelming in the constitutional context. The next Part explains that because the absurdity doctrine almost entirely avoids these concerns, it is an institutionally appropriate and, indeed, ingenious solution to the constitutional difficulties that are posed by legislative generality.

C. The Ingenious Solution of the Absurdity Doctrine

Doctrines of statutory interpretation are frequently used to promote judicially underenforced constitutional norms without invoking the Constitution.[179] The absurdity doctrine is best understood in this fashion because it enforces the equal protection principle of accurate classification and the due process norm against arbitrary governmental action without invalidating statutory provisions–either on their face or as applied. The absurdity doctrine therefore promotes constitutional norms of equal treatment and fundamental fairness in a relatively restrained manner.

Indeed, the absurdity doctrine is an ingenious solution to the problems posed by legislative generality for a number of reasons. By addressing those problems in a sub-constitutional fashion, courts have substantially avoided the floodgates concern that would be generated by providing individualized consideration of the rationality of particular statutory applications under the Due Process Clause or Equal Protection Clause. Because challenges to problematic applications of facially valid statutory provisions do not state a federal constitutional claim under the Supreme Court's traditional rationality jurisprudence, it is likely that relatively few of those cases will be litigated. Moreover, lawsuits that do assert constitutional challenges to applications of facially valid statutory provisions will typically be resolved in favor of the government at the earliest stages of litigation. The judiciary's refusal to accept constitutional challenges of this nature is consistent with the common notion that the heavy artillery of constitutional invalidation should only be used as a last resort, rather than as an ordinary tool for resolving routine or ubiquitous problems of government.

"arbitrary" governmental action may provide a more intuitively appealing explanation for the judiciary's practice of avoiding "absurd" results than does the relatively abstract notion of equality described in the previous Part. Finally, as explained above, the balancing of interests that is inherent in due process suggests that certain applications of plain statutory language would be constitutionally problematic even though the statutory purposes would be served by applying the law to those cases. The same cases would not appear to violate the equal protection principle of accurate classification because this principle does not expressly balance the strength of the competing interests under these circumstances.

179. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) (explaining that "[a] good many of the substantive canons of statutory construction are directly inspired by the Constitution"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 466 (1989) (recognizing that "[u]nderstandings about constitutional arrangements provide a significant amount of the background against which statutory construction occurs").

A corollary of the judiciary's refusal to accept constitutional challenges to problematic applications of facially valid statutory provisions in this context is that the implementation of state and local laws will not ordinarily present a federal question.[180] In the absence of another basis for federal jurisdiction, a decision regarding whether to recognize an "exception" to the plain meaning of those laws in particular circumstances will necessarily be made by the courts of the jurisdiction in which they were enacted pursuant to ordinary principles of statutory interpretation. The absurdity doctrine therefore promotes federalism principles by preserving the authority of state courts to review the implementation of ordinary state and local laws.

In addition to avoiding the "constitutionalization" and "federalization" of problematic applications of ordinary statutory provisions, the absurdity doctrine inherently strikes an appropriate balance between the promotion of broad constitutional norms and respect for the advantages of bright-line rules and a legislature's conscious decision to enact them. The preceding Parts explained that judicial efforts more strongly to enforce equal protection and due process norms would ultimately need to be limited to cases in which (1) the individual interests at stake are especially important, (2) the regulatory scheme at issue is relatively simple, (3) the problematic statutory application was unanticipated by the legislature, and (4) the judiciary could easily craft a narrow exception to the statutory language that would not undermine its operation in the ordinary run of cases. The absurdity doctrine's application will, by its very nature, tend to be limited to cases in which the foregoing criteria are met.

First, if the individual interests at stake are not especially important, a problematic application of plain statutory language is unlikely to be litigated in the first place. Even if the case ended up in court, the party who was adversely affected would probably not be inspired to invoke the absurdity doctrine. In any event, an argument that the statute's literal application would be "absurd" is unlikely to persuade the court unless the statute's adverse effect on a litigant is severe. Accordingly, the importance of the individual interests at stake in cases of this nature appear directly related to the likelihood that the absurdity doctrine will ultimately be invoked.

A similar conclusion would seem to apply with respect to the complexity of the regulatory scheme at issue. It is not uncommon for the provisions of complex regulatory programs to be applied literally even though no statutory purpose would be served in a particular case.[181] Regulated parties in these cases are perhaps more likely than marginally affected individuals to pursue legal redress that could result in

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180. Although federal equal protection claims are viable when a facially neutral law is administered in a discriminatory fashion against members of a suspect class or perhaps when executive officials exercise their discretion in a manner that results in arbitrary discrimination, *see* Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (holding that a plaintiff states a claim under the Equal Protection Clause, without regard to the subjective motivation of the decision makers, "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment"), the validity of a literal application of a facially valid statutory provision would potentially present a distinct constitutional question.

181. *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).

the recognition of exceptions to generally applicable rules.[182] Nonetheless, the more technical and complex a regulatory program becomes, the less likely it is that a court will independently declare that applying the plain statutory language under the circumstances would be absurd. The judiciary routinely defers to the views of administrative agencies charged with implementing technically complex programs in cases of this nature.[183] On the other hand, the judiciary is more likely to invoke the absurdity doctrine based on its own interpretation of a challenged provision if it believes that the statutory scheme is sufficiently easy to understand.

Finally, the absurdity doctrine respects the advantages of bright-line rules and prevailing notions of legislative supremacy because it naturally applies only in exceptional circumstances that were unforeseen by the legislature.[184] For example, although the application of a mandatory retirement law to a skilled and healthy pilot who attained the requisite age would pose problems under the equal protection principle of accurate classification, enforcing the statute in a literal fashion under these circumstances could not fairly be characterized as "absurd" because the legislature was undoubtedly aware of the statutory imprecision and fully anticipated that the provision would nonetheless be applied in precisely this fashion. The same analysis would also preclude the judiciary's use of the absurdity doctrine in the cases decided by the Supreme Court under the irrebuttable presumptions doctrine.[185] On the other hand, an American court's invocation of the absurdity doctrine would be entirely justified in the classic cases involving the good Samaritan and the sheriff's posse because those statutory applications would implicate constitutional norms and involve extraordinary circumstances that were almost certainly not anticipated by the lawmakers. Moreover, crafting exceptions to the plain language of the statutes in those circumstances would not undermine their application in the ordinary run of cases. In other words, interpreting statutes contrary to their plain meaning to avoid absurd results can achieve the best of both worlds in a pragmatic fashion by promoting judicially underenforced constitutional norms without undermining the statutory scheme that was contemplated by the legislature.[186]

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182. Procedures are often already available for regulated parties to seek exceptions to administrative rules. *See, e.g.*, Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. 255, 277–78 (1995) (describing the recognition of exceptions to general rules as "an important 'safety valve' in the administrative process" and recognizing that "[a]dministrative equity in the form of waivers or exceptions has become a fairly commonplace regulatory mechanism in federal agencies").

183. *See* Sunstein, *supra* note 16, at 11,126 (describing a "new canon in regulatory law" that authorizes administrative agencies "to interpret statutes so as to avoid absurd or patently unreasonable results," but does not compel them to do so).

184. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 289–90 (1989) (suggesting that the absurdity doctrine is consistent with a legitimate understanding of legislative supremacy); *supra* note 115 and accompanying text; *infra* Part IV.A.

185. *See supra* notes 148–56 and accompanying text.

186. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (advocating an approach to statutory interpretation that relies upon practical reasoning rather than grand theory to resolve concrete disputes involving conflicting values). Cass Sunstein and Adrian Vermeule have recently pointed out that answers to empirical questions, such as the likelihood of judicial mistakes and

It is possible, of course, that the judiciary could occasionally misuse the absurdity doctrine or perhaps unwittingly achieve an outcome with which the legislature strongly disagreed. The legislature remains free, however, to amend the statute to achieve its desired result in future cases.[187] Unlike most constitutional decisions, which limit the subsequent options available to the legislature, the use of doctrines of statutory interpretation to promote constitutional norms leaves the appropriate treatment of an issue in the hands of elected officials who can effectively overrule the judiciary's decision.[188] Although the judiciary's decision undoubtedly shifts the burden of inertia and forces the current legislature to overcome the hurdles associated with passing a new law, "legislative remands" of this nature have the dual advantages of promoting underenforced constitutional norms and forcing legislators directly to confront an issue if they want to achieve a constitutionally suspect result.[189] The absurdity doctrine therefore promotes reasoned deliberation in a manner that is entirely consistent with civic republican theory and relevant principles of due process and equal protection.

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legislative correction, should inform any assessment of the validity of the absurdity doctrine. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 916 (2003). Although this claim is unobjectionable on its face, Sunstein and Vermeule do not provide any concrete guidance regarding how this empirical information could be obtained or, for that matter, objectively measured. Moreover, they seemingly ignore the possibility that various types of "mistakes" could have different degrees of magnitude. For example, one might plausibly believe that "wrongly" sending a criminal defendant to prison would be a more egregious "mistake" than upsetting a speculative, backroom deal among lawmakers. Finally, Sunstein and Vermeule erroneously suggest that institutional concerns are entirely disregarded when the judiciary ascertains whether to apply the absurdity doctrine in a particular case. On the contrary, this Article explains that the absurdity doctrine incorporates most of the relevant institutional concerns and strikes a seemingly appropriate balance among the competing considerations. For a more scathing critique of Sunstein and Vermeule's article on similar and related grounds, see Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952 (2003).

187. *See* Sorrells v. United States, 287 U.S. 435, 450 (1932) ("The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes.").

188. *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (examining the extent to which Congress overruled the Supreme Court's statutory interpretation decisions from 1967 through 1990 and the resulting implications for interbranch relations).

189. *See* Sunstein, *supra* note 179, at 471 (explaining that in a deliberative democracy that requires governmental action to promote public values, the judiciary "should develop interpretive strategies that promote deliberation in government—by, for example, remanding issues involving constitutionally sensitive interests or groups for reconsideration by the legislature or regulatory agencies when deliberation appears to have been absent"). For extensive discussions of the closely related idea of "constitutional remands," see CALABRESI, *supra* note 108; Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281 (2002); Dan T. Coenen, *Structural Review, Pseudo-Second-Look Decision Making, and the Risk of Diluting Constitutional Liberty*, 42 WM. & MARY L. REV. 1881 (2001); Nash E. Lang, *The "Constitutional Remand": Judicial Review of Constitutionally Dubious Statutes*, 14 J.L. & POL. 667 (1998).

IV. AVOIDING ABSURDITY IN A CONSTITUTIONAL REPUBLIC

The foregoing discussion, of course, begs the question of the appropriate parameters of the absurdity doctrine. Because one of the premises of this Article is that bright-line rules are inherently problematic, it should come as no surprise that the propriety of the absurdity doctrine's invocation will depend in large part upon the facts of the case and the statutory scheme at issue. Nonetheless, the constitutional underpinnings of the absurdity doctrine provide meaningful guidance regarding its outer limits and suggest some of the competing considerations in closer cases.

A. The General Parameters of the Absurdity Doctrine

The Supreme Court's most extensive discussion of the absurdity doctrine was set forth in *Public Citizen v. United States Department of Justice*, where all eight justices who participated in the decision endorsed some version of this approach to statutory interpretation. [190] Justice Kennedy's concurring opinion, which criticized the majority's invocation of the doctrine under the circumstances, had "no quarrel" with the "legitimate exception" to the ordinary rule that the judiciary is bound by clear statutory text "[w]here the plain language of the statute would lead to 'patently absurd consequences.'"[191] According to Justice Kennedy, the absurdity doctrine should be limited to those situations in which "it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone."[192]

This narrow version of the absurdity doctrine would plainly encompass the classic cases involving the good Samaritan and the members of the sheriff's posse who were prosecuted for violations of the criminal law.[193] It is nearly certain that the legislature would want the judiciary to avoid absurd results in exceptional circumstances where a court believed that this standard was met.[194] Because there is virtually no question that statutory applications of this nature were unforeseen by the legislature and would lead to highly undesirable consequences that are contrary to the common good, the exercise of judicial discretion to avoid absurd results in these cases is consistent with

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190. 491 U.S. 440 (1989). Justice Scalia did not participate in the decision. *See id.* at 467. As already indicated, however, even he has endorsed a narrow version of the absurdity doctrine in other cases. *See supra* note 10.

191. *Pub. Citizen*, 491 U.S. at 470 (Kennedy, J., concurring) (quoting United States v. Brown, 333 U.S. 18, 27 (1948)). Justice Kennedy's concurring opinion was joined by Chief Justice Rehnquist and Justice O'Connor. *Id.* at 467.

192. *Id.* at 470–71 (citation omitted). For a more colorful formulation of the "narrow version" of the absurdity doctrine, see Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122, 203 (1819) (recognizing that the judiciary should interpret statutes contrary to their plain meaning when "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all of mankind would, without hesitation, unite in rejecting the application").

193. *See Pub. Citizen*, 491 U.S. at 471 (Kennedy, J., concurring) (providing these classic examples).

194. As Justice Kennedy explained, "[w]hen used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way." *Id.* at 470.

a republican understanding of the legislative process and constitutional structure. Finally, the governmental imposition of severe burdens, including criminal sanctions, on individuals where no statutory purpose would be served (e.g., the good Samaritan) or where overwhelming countervailing interests exist (e.g., the sheriff's posse) would conflict with equal protection and due process norms. Contrary to Professor Manning's thesis, the exercise of judicial discretion to interpret statutes contrary to their plain meaning, in order to avoid "patently absurd results" that meet the standard set forth by Justice Kennedy, is easily justified in our constitutional republic.[195]

Although members of the Supreme Court have uniformly accepted a narrow version of the absurdity doctrine, its contribution to statutory interpretation has not—and, indeed, need not—be limited to situations in which the stringent test articulated by Justice Kennedy would be met. Instead, the Court has sometimes invoked a broader version of the absurdity doctrine in unanticipated situations where the statutory purposes would not be served and it is "difficult to fathom" or "disturbingly unlikely" that Congress would have consciously chosen the outcome suggested by the statutory text.[196] The primary difference in degree stems from the narrow absurdity doctrine's limitation to situations where it is *impossible* to believe that Congress would have endorsed a result, while the broader approach focuses more squarely on whether a strikingly problematic application would further the goals that Congress was pursuing when it enacted the law—even if another *conceivable* purpose would be served by the law's application to the unanticipated circumstances.[197] In any

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195. While differences between this narrow version of the absurdity doctrine and the broader version described below are primarily a matter of degree, the relevant considerations for assessing the validity of the broader version of the doctrine suggest that decisions to avoid "patently absurd results" that meet the strict standard articulated by Justice Kennedy are easily justified. It bears noting, however, that the narrow version of the doctrine authorizes the judiciary to recognize statutory exceptions in exceptional circumstances where the statutory purposes would be served, but sufficiently compelling countervailing interests exist. *See supra* note 193 (approving of the Court's decision in *Kirby*). The narrow version of the doctrine has therefore been utilized to promote judicially underenforced due process norms pursuant to a balancing test that weighs the significance of the statutory purposes against the patently absurd consequences of applying the law in a literal fashion. *See supra* Part III.B. Because the broader version of the absurdity doctrine ordinarily applies only when the statutory purposes would not be served, it does not endorse this form of balancing.

196. *Pub. Citizen*, 491 U.S. at 453–55; *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989) (applying the absurdity doctrine where an "unreflective reading" of the statutory text would "compel an odd result").

197. The broader approach to the absurdity doctrine superficially conflicts with the rational basis test because courts are perfectly willing to hypothesize legitimate governmental purposes when they assess the constitutional validity of legislative classifications. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2446–54. Nonetheless, because the rational basis test assesses only the facial validity of a legislative classification, it simply determines whether there was a legitimate reason for enacting a challenged provision. *See supra* note 144 and accompanying text. Once those legitimate purposes (real or hypothetical) are identified, particular statutory applications should at least be measured against them, rather than by assessing whether there is a conceivable basis upon which the legislature could endorse an unanticipated application of a statute that fails to advance its most readily apparent goals. Moreover, a deferential approach to the assessment of a legislative classification's facial

event, the broader version of the absurdity doctrine ordinarily applies only when a challenged statutory application (1) was unanticipated—or, at least, unresolved—by the legislature; (2) would not advance the statute's substantive goals; and (3) would lead to a seemingly harsh or problematic result.[198]

The relatively controversial nature of these cases stems in part from the potential difficulties of accurately identifying the statutory purposes and ascertaining whether a seemingly problematic application *was* anticipated and resolved by the legislature. Thus, for example, in *Holy Trinity Church v. United States*, the Court famously held that a law that prohibited the importation of foreigners into the United States "to perform labor or service of any kind" did not apply to a church's actions in hiring an English rector.[199] Similarly, in *Public Citizen*, the Court held that the Federal Advisory Committee Act, which regulated "any committee" that was "established or utilized" by the federal government to obtain "advice or recommendations," was inapplicable to the American Bar Association's Standing Committee on the Federal Judiciary.[200] In both cases, the Court concluded that the situations at band were not anticipated by Congress and that the statutory purposes, which were evidently narrower than the enacted text, would not be served by the challenged applications.[201] In both cases, however, the Court could plausibly have attributed a broader purpose to the legislation and concluded that the challenged applications fit squarely within the enacting Congress's expectations (pursuant, perhaps, to a politically expedient compromise).[202]

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validity is perfectly compatible with judicial efforts to square particular statutory applications with the "actual" purposes that are reflected by ordinary sources of interpretive guidance. *See generally supra* Part III (discussing the distinction between facial challenges to a statute's constitutional validity and individualized consideration of whether its purposes would be served in a particular case).

198. *See infra* notes 199–205 and accompanying text (describing the Court's decisions in *Holy Trinity Church* and *Public Citizen*). For another example of this version of the absurdity doctrine, see Lau Ow Bew v. United States, 144 U.S. 47 (1892) (interpreting the requirements of the United States Chinese Restriction Act to apply only to Chinese citizens who were entering the country for the first time, and thereby exempting merchants who were already domiciled in the United States but had temporarily left the country).

199. 143 U.S. 457 (1892); *see also* SCALIA, A MATTER OF INTERPRETATION, *supra* note 10, at 18–23 (describing *Holy Trinity Church* as "the prototypical case involving the triumph of supposed 'legislative intent' (a handy cover for judicial intent) over the text of the law").

200. 491 U.S. at 451 (quoting 5 U.S.C. § 3(2) (2000)).

201. *See Pub. Citizen*, 491 U.S. at 451–65; *Holy Trinity Church*, 143 U.S. at 458–65.

202. *See Pub. Citizen*, 491 U.S. at 467–77 (Kennedy, J., concurring); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1845–50 (1998) ("The dominant sentiment of both Houses, expressed on several occasions, was that the Alien Contract Labor Act should apply to any employee, manual or professional, except those specifically exempted."). *But cf.* Laurence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 10, at 92–93 (claiming that the Court reached the correct result in *Holy Trinity Church* because a minister arguably fit within the statutory exemption for "lecturers" and such an interpretation would be justified hased on first amendment concerns); Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity: *Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (arguing that a complete history of the dispute in *Holy Trinity Church* reveals that the Court was correct in its judgment and more broadly demonstrates the soundness of relying on legislative history to interpret statutes); Eskridge, *Unknown Ideal*, *supra* note 12, at 1517–19, 1533–42 (claiming

Although *Holy Trinity Church* and *Public Citizen* are therefore borderline cases, the Court relied on additional considerations that not only bolstered its understanding of the statutory purposes and confirmed that the applications at issue were unanticipated by the legislature—but also suggested that the challenged applications of the law were strikingly problematic in the first instance. Thus, in *Holy Trinity Church*, the Court emphasized that because the United States is a "religious nation," it could not believe that Congress would have consciously made it illegal for a church to have arranged for the hiring of a foreign rector.[203] Similarly, in *Public Citizen*, the Court emphasized that applying the requirements of FACA to a private organization that provided confidential information to the President in order to facilitate the nomination of federal judges would pose serious separation of powers concerns and potentially violate the First Amendment.[204] These additional considerations convinced the Court that application of a broader version of the absurdity doctrine would be appropriate under the circumstances.[205]

The indeterminacy of the requisite inquiries and the potential for the judiciary to bring its own values into the analysis have led some commentators and jurists to reject the broader version of the absurdity doctrine. Because the only readily available alternative is virtually always to adhere to the plain statutory language, however, an approach to the problem of legislative generality that focuses on promoting the public

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that sound textual arguments supported the Court's decision in *Holy Trinity Church* and that the legislative history merely confirmed the same conclusion); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 542–50 (1997) (setting forth three principles that emerge from *Holy Trinity Church* and concluding that "Justice Scalia provides no convincing argument" against them).

203. *See Holy Trinity Church*, 143 U.S. at 465–72.

204. *See Pub. Citizen*, 491 U.S. at 465–66 & n.13. Because the agency charged with administering this federal program had concluded that the relevant statutory provision should be interpreted in a literal fashion, *see id.* at 463 n.12; *id.* at 477–81 (Kennedy, J., concurring), *Public Citizen* raises an important issue regarding the appropriate role of administrative agencies in avoiding absurd results and the extent to which their decisions are entitled to judicial deference. Although detailed treatment of this issue is beyond the scope of this Article, Professor Sunstein has recently argued that administrative agencies should be given more leeway to avoid absurd results than the judiciary. *See* Sunstein, *supra* note 16, at 11,126. This position seems correct for institutional reasons, but the judiciary should still have a role to play in assessing the reasonableness of those administrative decisions. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). The majority in *Public Citizen* was apparently unpersuaded that there was a good reason for the challenged agency decision. *See Pub. Citizen*, 491 U.S. at 463 n.12.

205. *See Pub. Citizen*, 491 U.S. at 467 (justifying a non-literal interpretation of the statutory language to avoid serious constitutional difficulties "[w]here the competing arguments based on FACA's text and legislative history, though both plausible, tend to show that Congress did not desire FACA to apply to the Justice Department's confidential solicitation of the ABA Committee's views on prospective judicial nominees"); *Holy Trinity Church*, 143 U.S. at 472 (claiming that the Court has a "duty" to avoid unintended results "where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against").

good and protecting individual rights would lead to different conclusions. First, the search for an underlying statutory purpose is not inherently fruitless.[206] While

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206. Although purposive approaches to statutory interpretation have an impressive pedigree, they have been subject to substantial criticism on the grounds that statutes are routinely enacted for a variety of competing purposes. Zeppos, *supra* note 12, at 1599–1614 (describing the "purposive" methodology of Hart and Sacks and criticisms of their legal process theory). Because the manner in which the statutory purpose is defined can control the outcome of a case, commentators have warned that purposivism provides courts with substantial discretion to implement their own policy views. *See id.* at 1612; Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972) (providing a classic statement of similar criticisms of the purpose inquiry mandated by the rational basis test). This discretion is exacerbated by the fact that the judiciary's assessment of whether any given statutory purpose would be served in a particular case is also indeterminate. *See* Zeppos, *supra* note 12, at 1612.

Despite the validity of these observations, the critique of purposivism is to some extent overblown. First, the "objective purposivism" of legal process theory largely avoids the difficulties associated with ascertaining the subjective intentions of the legislators who enacted the law. *See* Manning, *supra* note 120, at 76, 85–91 (describing legal process theory and acknowledging that "one can also cast purposivism as an objective framework that aspires to reconstruct the policy that a hypothetical 'reasonahle legislator' would have adopted in the context of the legislation, and not the search for a specific policy that Congress actually intended to adopt"); Zeppos, *supra* note 12, at 1600–02 (describing the purposive approach of Hart and Sacks). Second, the judiciary can take multiple legislative purposes into account when applying this methodology and thereby recognize, for example, that certain provisions expressly moderate a statute's overarching purpose. *Cf.* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 47 (1972) (recognizing the difficulties of identifying the legislative purpose in equal protection cases and emphasizing that the judicial inquiry "should not be limited to a primary purpose; subsidiary purposes may also support the rationality of means"). Third, it seems fair to presume that laws are—or at least should be—enacted to promote the public good, even if their precise purposes are difficult to identify. *See supra* Part II.B. Finally, to the extent that purposive action by legislatures (or anyone else) is a fictional concept, it is one that is both pervasive in our legal system and capable of being utilized sensibly by the judiciary. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 865 (1992) ("In practice, we ascribe purposes to group activities all the time without many practical difficulties."); Manning, *Absurdity Doctrine*, *supra* note 2, at 2408 & n.75 (endorsing the use of the underlying statutory purpose to resolve ambiguity and declaring that "[f]ew would deny the possibility of gleaning a statute's overall purpose from its structure or from the aims suggested by the text itself").

Perhaps more important, while the critique of purposivism is based largely on its indeterminacy, it is not clear that this is the best available benchmark for assessing competing methodologies of statutory interpretation. No single theory of statutory interpretation is capable of consistently generating determinative results in hard cases. *See* Eskridge & Frickey, *supra* note 186, at 322. Even if eliminating judicial discretion were possible, one might still conclude that implementing governmental policies in an *effective manner* is at least as important as increasing the odds of achieving determinate outcomes. Although textualism has the potential advantage of narrowing the range of difficult cases, it simultaneously poses the danger of rendering governmental regulation less effective. Because purposivism appears to have precisely the opposite attributes, one's willingness to privilege one theory over the other will depend upon one's broader conception of government.

identifying the instrumental goals of legislation and determining whether a seemingly problematic application was consciously anticipated is hardly a mechanical exercise, this observation merely confirms the need for judgment in resolving difficult statutory cases. There is no reason to assume that the judiciary will perform this function in bad faith or refuse to act as a faithful agent of the legislature in making these determinations.[207]

Second, a conscious decision to enact broad statutory language hardly entails a desire to foreclose equitable interpretations of this nature.[208] One reason that the legislature *can* enact general rules and avoid contentious details is that it knows that administrators and courts will exercise their judgment when those directives are implemented. As explained above, the judiciary is far better situated than the legislature to avoid problematic statutory applications as they arise, and delegated authority to exercise this type of discretion can be understood as part of the statutory bargain.[209]

Although courts could potentially avoid unforeseen applications of the law whenever the underlying statutory goals would not be served, they typically rely upon

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In any event, the version of the absurdity doctrine that is defended in this Article alleviates the difficulties associated with unbridled purposivism to a significant extent by acknowledging that identifiable legislative bargains should ordinarily be enforced even if they do not serve the underlying statutory purposes that were recognized by the judiciary. The absurdity doctrine therefore utilizes purposive methodology as a basis for avoiding strikingly problematic outcomes, but allows a presumption of purposive governmental action to be overcome by evidence that those "odd results" were generated by known statutory imprecision or identifiable compromises. The doctrine thereby respects the legislature's deliberate decisions to enact bright-line rules and even to reach "unprincipled" compromises, provided that those compromises are reflected by the legislative record. At the same time, the doctrine minimizes the ability of the judiciary to use a purposive analysis to achieve its own preferred outcomes, irrespective of the "deals" reached during the legislative process. By combining objective and subjective considerations in this way (which is appropriate—and perhaps necessary—when elected representatives enact laws in a deliberative democracy), the absurdity doctrine is capable of bridging the gap between strongly purposive approaches to statutory interpretation and intentionalist or even economic approaches to the enterprise. For a recent debate regarding the role of legislative intent in textualist theory, *compare* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005), *with* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005), *and* Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451 (2005).

207. *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 31–32 (1988) (explaining that "[t]o the extent that a review of the legislative history persuades one that the legislature could not have intended what the 'plain meaning' seems to indicate, a judge is doing the legislature no favor in enforcing the 'plain meaning,'" and recognizing that a contrary view assumes that the dangers of "bad-faith judging" outweigh the benefits of greater judicial discretion); Eskridge, *Unknown Ideal*, *supra* note 12, at 1531 (arguing that Justice Scalia's textualism is both "too cynical" because most judges are not as "result-oriented" as he claims and "not cynical enough" because "any judge who is determined to be willful is unaffected by methodology").

208. *Cf.* Eskridge, *supra* note 9, at 999–1009, 1094 (identifying different variations of the equity of the statute, including an ameliorative approach, and recognizing that "the narrowness of the absurd result exception is an idea more characteristic of the twentieth century than the eighteenth").

209. *See supra* Part II.A.

additional considerations to confirm that these criteria are met and bolster the conclusion that a more literal interpretation would be highly problematic. The judiciary will, of course, rely upon its own values to some extent in making these determinations, but its decisions will only be persuasive to the extent that its views also reflect widely shared public values. When statutory law is viewed as an effort to promote the common good and preserve individual rights, a faithful agent of the legislature would take those considerations into account when carrying out the principal's directives.

The strongest argument against a broad version of the absurdity doctrine is, therefore, not that it conflicts with legislative supremacy, but rather that it operates in a manner that undermines political accountability and the structural safeguards of the lawmaking process. The former concern is raised because the legislature can obtain outcomes that it favors without making the potentially costly political decisions necessary to incorporate its preferred results into the statutory language. Thus, for example, *Holy Trinity Church* arguably allowed Congress to avoid applying a general law to religious groups without paying the political costs associated with decisions that expressly favor particular constituents. The latter concern is raised because allowing some groups to obtain "free" benefits from the courts is unfair to other groups who "paid" for particular statutory language, and upsetting the equilibrium reflected by the statutory text could operate systematically to the detriment of political minorities who only accept legislation based on a decision that the known trade-offs are acceptable. Thus, for example, the judiciary's recognition of an exception for religious groups in *Holy Trinity Church* was potentially unfair to the advocates of professional actors, artists, lecturers, and singers who paid for their statutory exceptions, as well as to the political minorities who accepted the legislation based on their understanding of the precise scope of the statute's coverage.[210]

This critique, however, is premised entirely upon an economic view of the legislative process and constitutional structure. It assumes that everyone who is involved with the legislative process is motivated entirely by self interest and that statutory provisions are merely bought and sold. A competing understanding of the legislative process would presume that participants in the legislative process were seeking to promote the common good.[211] The exceptions that were provided by the statute at issue in *Holy Trinity Church* would, therefore, support the Court's characterization of the legislation's purposes and suggest that the absence of similar exceptions for clergy and other "brain toilers" was either unnecessary or potentially an oversight.[212] Given the difficulties of ascertaining why Congress would treat

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210. *See Holy Trinity Church*, 143 U.S. at 458–59 (recognizing that an express statutory exception for "professional actors, artists, lecturers, and servants, strengthens the idea that every other kind of labor and service was intended to be reached" by the statute).

211. *See supra* Part II.B.

212. *Cf.* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 824 (3d ed. 2001) (providing *Holy Trinity Church* as an example of the Court's refusal to follow the canon of *expressio unius*, and recognizing that "this canon, like many of the others, assumes that the legislature thinks through statutory language carefully" when in reality "the legislature often omits things because no one thinks about them or everyone assumes that courts will fill in gaps"); Eskridge, *Unknown Ideal*, *supra* note 12, at 1533–35 (explaining that textual arguments do not provide

seemingly indistinguishable professionals differently in this context and the widely accepted public value of religious liberty, the Court could reasonably conclude that the common good underlying the statute would be served by a limiting construction. When statutes are interpreted in favor of regulated parties who are seeking to avoid absurd results pursuant to this analysis, the potentially legitimate concerns of political minorities are overwhelmed, if not completely eviscerated.[213]

Rather than undermining political accountability, the absurdity doctrine's approach to the problem of excessive legislative generality encourages Congress to deliberate about highly problematic applications that would otherwise be mandated by broad statutory language.[214] As indicated above, the underlying political and constitutional theory presumes that participants in the legislative process seek to promote the common good when statutory language is enacted. This presumption can be overcome by evidence in the legislative record that clearly demonstrates that a seemingly problematic application was anticipated or that the statutory language reflected a politically expedient compromise that should therefore be enforced according to its terms. If the judiciary errs in favor of protecting individual rights and

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a clear answer to the issue in *Holy Trinity Church*).

213. This use of the absurdity doctrine does not make any regulated parties materially worse off than they would be under the plain statutory language. Indeed, an ameliorative approach of this nature fine-tunes statutory language to avoid inequitable applications of the law in a manner that is consistent with protecting individual rights. *See supra* Part III; *cf.* Eskridge, *supra* note 9, at 999–1003 (describing the judiciary's relatively commonly accepted "ameliorative power to read statutory words narrowly rather than broadly" (emphasis omitted)). In contrast, the use of judicial authority to engage in purposive extensions of statutory language in favor of the government was evidently criticized in the formative years of the American legal system and is more or less roundly rejected today. *See id.* at 1003, 1041 (describing the ambivalence among early commentators about the validity of this "suppletive power"); McBoyle v. United States, 283 U.S. 25, 27 (1931) (concluding that the National Motor Vehicle Theft Act did not apply to aircraft because "[w]hen a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used"); SCHAUER, *supra* note 23, at 161 (recognizing that "there is something that troubles us about granting to a court . . . the power to include within the scope of a regulatory rule something not literally encompassed by its words, no matter how absurd the literal distinction may seem").

214. *See supra* Parts II.B.3 & III.C. Since the statute at issue in *Public Citizen* would most likely have been held unconstitutional in the absence of the Court's decision, *see* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 469 (1989) (Kennedy, J., concurring), the broad version of the absurdity doctrine operated in this context in a manner that avoided serious constitutional difficulties based on the separation of powers. Because it is unlikely that Congress thought about this issue when the law was enacted, the Court's decision effectively resulted in a constitutional remand of the matter to the legislature. Indeed, the absurdity doctrine typically performs this function by remanding seemingly problematic statutory applications to the legislature for express consideration. *See* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 504 (recognizing that certain canons of statutory interpretation "amount to suspensive vetoes—'remands' to the legislature—that may foster legislative deliberation on important constitutional values but ultimately leave the legislature with the authority to override the judicial decision"); *supra* note 189 and accompanying text.

promoting the common good pursuant to this analysis, Congress can always amend the statute to achieve its desired result in future cases.[215] This approach not only avoids the unforeseen problems that periodically arise from the enactment of general statutory language, but it also encourages legislative deliberation (and, hence, political accountability) by refusing to enforce unprincipled backroom deals and instead requiring Congress to focus expressly on how it wants seemingly problematic statutory applications to be resolved.

Reasonable disagreement will sometimes persist regarding the appropriate result in cases like *Holy Trinity Church* and *Public Citizen*.[216] The central point is that the judiciary should engage in the thoughtful analysis required by the broader version of the absurdity doctrine, rather than automatically adhering to the outcomes suggested by a mechanical application of the plain statutory language. If a court concludes that a seemingly problematic outcome would either advance the statute's purposes or reflect the consequences of known statutory imprecision or an identifiable compromise, it should defer to the legislature's decision as long as the resulting statutory classifications are rationally related to a legitimate governmental interest. On the other hand, if the court is confident that a troubling outcome was unanticipated and would not advance the statute's substantive goals, it should apply the broader version of the absurdity doctrine. In closer cases where this dichotomy does not yield a determinative outcome, the judiciary should expressly consider the effects of the statutory application on widely accepted public values, as well as the importance of the individual interests at stake, the complexity of the governing regulatory scheme, and the ease of crafting a narrow exception that would not disrupt the statute's application in the general run of cases. While this analysis provides the judiciary with substantial discretion, it hardly constitutes an unconstitutional delegation of legislative authority to the judiciary as Professor Manning contends.

B. A Kinder and Gentler Textualism?

Although Professor Manning suggests that the federal judiciary's use of the absurdity doctrine should be abolished, he also claims that the negative consequences of this proposal would be tempered by the availability of alternative avenues for achieving sensible results in many statutory cases in which the absurdity doctrine might otherwise be invoked. First, he contends that a contextual approach to modern textual interpretation "should eliminate at the threshold many of the occasions for invoking the absurdity doctrine as traditionally understood."[217] Second, he argues

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215. *See supra* notes 187–88 and accompanying text.

216. It bears noting that even Manning does not resolve these cases. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2463 & n.275 (claiming that textualists would apply the plain statutory language in *Holy Trinity Church* and *Public Citizen* "if the accepted social meaning of 'labor or service of any kind' referred to the service performed by a pastor" and "if the Department of Justice regularly 'utilized' the [ABA] for advice on the qualifications of prospective judicial nominees," but declining to provide any definitive conclusions).

217. *Id.* at 2455. Although Manning characterizes such a contextual approach as a hallmark of the new textualism, the extent to which this approach is actually practiced by new textualist judges is subject to dispute. *See* Eskridge, *supra* note 9, at 1090–96 (describing different types of textualism and claiming that Manning "really has a different theory" than

that the use of certain substantive canons of statutory interpretation "will often enable judges to sidestep putative absurdities without resorting to the ad hoc strong intentionalism that defines the absurdity doctrine."[218] Finally, he points out that some absurd consequences can be avoided by judicial decisions that invalidate challenged governmental action on constitutional grounds, and argues that by codifying certain social judgments as higher law, our constitutional system draws the exclusive boundaries between permissible and impermissible legislation.[219]

The availability of *Marbury*-style judicial review in the American system of government, however, begs the question of what governmental action is unconstitutional. As explained above, the rational basis test dramatically underenforces the equal protection and due process norms that are routinely implicated in absurdity doctrine cases. Limiting the judiciary's authority to avoid absurd results to circumstances in which legislative action is declared unconstitutional would either maintain the current level of (under)enforcement of those constitutional norms or potentially encourage the judiciary to engage in more aggressive constitutional adjudication. For reasons explained earlier, the continued invocation of the absurdity doctrine is a superior option.[220]

Moreover, Professor Manning's ringing endorsement of substantive canons of statutory interpretation is difficult to square with his rejection of the absurdity doctrine. He explains that modern textualists escape "the rigors of literalism," in part, by their unflinching reliance on "legal conventions that instruct courts, in recurrent circumstances, to supplement the bare text with established qualifications designed to advance certain substantive policies."[221] Reliance on these substantive canons is purportedly justified by the assumption that members of a "relevant linguistic community" share certain "background conventions" that should inform the meaning that a "reasonable user of language" attributes to a text.[222] According to Professor Manning, "[t]hese background conventions, if sufficiently firmly established, may be considered part of the interpretative environment in which Congress acts."[223]

Justice Scalia).

218. Manning, *Absurdity Doctrine*, *supra* note 2, at 2467.

219. *See id.* at 2455–56. Professor Nagle also relies expressly on the availability of prosecutorial discretion and jury nullification as additional alternatives to the absurdity doctrine. *See* Nagle, *supra* note 3, at 11. Manning, however, claims that evaluating the legitimacy of prosecutorial discretion is beyond the scope of his article. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2440 & n.285. In any event, it is difficult to see how new textualists can approve of prosecutorial discretion, while simultaneously denying the legitimacy of the judiciary's exercise of similar discretionary authority. Prosecutors are only minimally accountable to voters for decisions of this nature, and jurors are hardly accountable for their decisions at all. In contrast, judicial decisions under the absurdity doctrine require reasoned explanation and can always be overruled by the legislature. *See supra* Parts II.B.3 & III.C.

220. *See supra* Part III.C.

221. Manning, *Absurdity Doctrine*, *supra* note 2, at 2465–66.

222. *Id.* at 2467.

223. *Id.*

He therefore endorses, among other doctrines,[224] the judiciary's practice of reading the common law defense of justification into an otherwise unqualified criminal statute. Professor Manning claims that this practice would provide a legitimate basis for the Court's decision in *United States v. Kirby*. Because "modern legislatures . . . enact criminal and tort statutes in light of established norms of defense, which frame the background social understanding of such statutes among the legal community[,] . . . no textualist would sustain a conviction for willful interference with the mail if a police officer arrested a murderous mail carrier in the middle of his postal route."[225]

Substantive canons of statutory interpretation are, however, subject to the same public choice critique that Professor Manning levies against the absurdity doctrine. There is no way to know, for example, whether some participants in the legislative process (perhaps the U.S. Postal Service) wanted this statute applied in an unqualified fashion and conditioned their assent on the precise statutory language that was chosen (perhaps giving up an increase in the price of stamps in return). Given the complex, competitive, and path-dependent nature of the legislative process, it would appear that the safest course of action for a faithful agent would be to enforce the statutory bargain according to its express terms, lest the judiciary disturb any unspoken compromises.

The response to this argument, of course, is that the substantive canons are not justified on intentionalist grounds, but rather based on the underlying public values that the judiciary attributes to the legislature based on a belief that those values are widely shared in our legal system.[226] This is, however, precisely the same rationale that justifies the absurdity doctrine. Indeed, the legitimacy of the substantive canons of statutory interpretation presupposes a rejection of economic theories of the legislative process in favor of more publicly regarding alternatives. It is therefore

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224. Examples Manning provides include the practice of reading a mens rea requirement into an otherwise unqualified criminal statute, the widespread acceptance of equitable tolling of statutes of limitation, and the practice of reading the common law defenses of entrapment and necessity into criminal statutes. *See id.* at 2466–70.

225. *Id.* at 2468–69. *But see* Nagle, *supra* note 3, at 11 (relying upon allegations that Kirby abused his authority as sheriff to suggest that "there is an excellent explanation for why a federal prosecutor and federal grand jury chose to charge [him] with violating the federal mail statute, and it is the Court's refusal to apply the statute according to its terms that becomes questionable") (citing David Achtenberg, *With Malice Toward Some*: United States v. Kirby, *Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 275–336 (1995)).

226. To the extent that the absurdity doctrine is criticized based on the "overtly legislative discretion" that it transfers to the courts, it bears noting that new textualists tend to endorse substantive canons of interpretation that promote highly contested federalism principles. *See* Manning, *Equity of the Statute*, *supra* note 2, at 121–24 (recognizing that new textualist judges have adopted "clear statement rules" to promote federalism norms). These federalism canons are difficult to justify on the grounds that they reflect "shared background conventions of the relevant linguistic community" (as Manning evidently suggests), especially since they have only recently been recognized and retroactively enforced by the Court. *See* ESKRIDGE, ET AL., *supra* note 212, at 907–08 (discussing the problem of congressional reliance raised by newly-announced clear statement rules).

difficult to see how Professor Manning can embrace other substantive canons while at the same time rejecting the absurdity doctrine.

To his credit, Professor Manning recognizes that his endorsement of substantive canons "raises potentially serious questions about the coherence of any textualist objection to the absurdity doctrine."[227] He therefore seeks to distinguish the absurdity doctrine from other substantive canons on a variety of grounds. At the outset, he supports particular substantive canons based, in part, on their "well-settled" status "in a legal system as old as ours."[228] Although tradition alone is a dubious basis for identifying the public values that should serve as the basis for substantive canons, the absurdity doctrine obviously cannot be rejected based on its novelty.[229] Professor Manning therefore relies instead on normative reasons for excluding the absurdity doctrine from a statute's interpretive context. In particular, he claims that in contrast to the "rather more precise background conventions" that he finds acceptable, "the absurdity doctrine is too broad and unintelligible to give either legislators or the public a realistic basis on which to evaluate the specific outcomes reached through the legislative process."[230]

There are several problems with this argument. First, Professor Manning assumes that courts will apply his own "contexual textualist" methodology to the interpretive question before addressing the potential applicability of the absurdity doctrine.[231] His recommended approach to statutory interpretation is not, however, widely invoked even among the small number of textualist judges.[232] Moreover, it is not clear that there is a meaningful difference between the contextual approach that is advocated by Professor Manning and the absurdity doctrine that is actually invoked by the courts. His efforts to distinguish the "more particular" substantive canons of interpretation that he endorses from the absurdity doctrine are otherwise based on an inaccurate caricature of the absurdity doctrine that is much less sophisticated than his own defense of the other substantive canons.[233] The real question is whether the absurdity

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227. Manning, *Absurdity Doctrine*, *supra* note 2, at 2470.

228. *See id.* at 2468–70.

229. If the baseline is "the shared background conventions of the relevant linguistic community," as Manning suggests, the fact that public values were recently accepted should have little bearing on the court's willingness to incorporate them into substantive canons. Although the provenance of a substantive canon does have a bearing on the legislature's ability to predict the manner in which its language will be interpreted, limiting the substantive canons to values that have already been recognized in judicial precedent would have the unwarranted effect of permanently maintaining the existing status quo. *See id.* at 2474 ("If textualists follow their premises to a logical conclusion, then they must largely accept the world as they find it, treating the existing set of background conventions as a closed set."). In any event, Manning acknowledges that the absurdity doctrine "has been around so long that the Court has called it one of 'the common mandate[s] of statutory construction.'" *Id.* at 2471 (quoting Rowland v. Cal. Men's Colony, 506 U.S. 194, 200 (1993)).

230. *Id.* at 2471.

231. *See id.* ("The absurdity doctrine comes into play only after a court provisionally identifies the statute's clear social meaning in light of more locally applicable conventions for understanding the words in context; that is what courts mean when they speak of using the absurdity doctrine to depart from the clear import of a text.").

232. *See* Eskridge, *supra* note 9, at 998.

233. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2471–73 (claiming that the

doctrine is distinguishable from the other substantive canons under a more sophisticated model whereby its potential application is considered an accepted part of the legislative bargain.

In this regard, the degree of judicial discretion that is authorized by particular substantive canons is a thin basis upon which to reject the absurdity doctrine. As Professor Manning acknowledges, "the more particular background conventions endorsed by textualists often vest the judiciary with a range of discretion that is not apparent from the statutory text."[234] Indeed, some of those substantive canons authorize a degree of judicial discretion that is almost commensurate with that of the absurdity doctrine. For example, application of the common law defense of "justification" essentially replicates the balancing of interests that is authorized by due process norms under the absurdity doctrine. Similarly, Professor Manning claims that "Congress now enacts all statutes against the established principle of *de minimis non curat lex*."[235] This substantive canon, meaning that "the law cares not for trifles," would apparently authorize the judiciary to recognize de minimis exceptions from the statutory text when a law's underlying purposes would not be served.[236] It is therefore difficult to see how those canons authorize judicial discretion that is significantly different in degree—much less than *in kind*—from that which is authorized by the absurdity doctrine.[237]

In any event, although the absurdity doctrine confers significant discretion upon the judiciary, it is not nearly as "broad" or as "unintelligible" as Professor Manning insists.[238] The preceding Part of this Article has articulated the general parameters of the absurdity doctrine, which are largely consistent with existing case law and provide intelligible principles to guide the judiciary's discretion. As Professor Manning has recognized, many of the substantive canons of statutory interpretation are simply particular applications of the absurdity doctrine that have developed into separate subrules based on the fact that the same issues have recurred over time.[239] These substantive canons are justified by the same concerns regarding legislative generality

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absurdity doctrine "asks the court to do no less than imagine whether the legislature would have intended to adopt a particular result, if presented with the precise issue before the court").

234. *Id.* at 2473.

235. *Id.* at 2470.

236. *See id.* at 2470 n.307. Manning points out that Justice Scalia has endorsed this substantive canon, *see* Wis. Dep't of Revenue v. William J. Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) (Scalia, J.), and argues that it could have been used to avoid the D.C. Circuit's strict application of certain food safety legislation to activity that posed a negligible risk of harm. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2470 n.307 (discussing the Delaney Clause of the Color Additive Amendments of 1960, codified as amended at 21 U.S.C. § 379e (2000), which was interpreted literally in *Pub. Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987)).

237. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2473 (recognizing the discretion that is conferred upon the judiciary by substantive canons of statutory interpretation, but claiming that "[t]he absurdity doctrine is different in kind").

238. *See id.* at 2473 n.317 ("The important point is this: Because the absurdity doctrine is available for all statutes at all times, the likelihood of developing any intelligible principle for the doctrine's application through common law reasoning is exceedingly remote.").

239. *See id.* at 2467 ("Where similar problems of textual generality recur over time, the accretion of precedent or the outright importation of common law solutions may solidify ad hoc judicial responses into reasonably precise conventions for resolving like cases.").

and limited foresight that animate the absurdity doctrine.[240] It is therefore difficult to understand why courts should accept the subrules that have already been developed, while rejecting the broader doctrine that justified their adoption in the first place.[241]

The most compelling distinction that Professor Manning offers between the absurdity doctrine and some of the other substantive canons that he endorses is based on the difficulty of predicting the outcomes that might be generated by the absurdity doctrine in advance.[242] If the more specific subrules that he embraces have developed through repetition over an extensive period of time, however, Congress should arguably be capable of expressly resolving those issues by now. Conversely, the exceptional nature of most applications of the absurdity doctrine suggests that Congress could not have addressed the problems that subsequently arise during the legislative process. This distinction therefore seems to cut *in favor* of the absurdity doctrine based on considerations of legislative accountability. At the same time, other considerations strongly support the practice of retaining a safety net that allows the judiciary to avoid absurd consequences in unanticipated situations that have not arisen with any regularity in our country's brief history.

Finally, there is no compelling theoretical difference between the contextual approach to avoiding absurdities that is advocated by Professor Manning and the absurdity doctrine that is actually invoked by the courts. He claims that "[f]rom a textualist perspective, most absurdity decisions start, either explicitly or implicitly, from a faulty baseline question about whether the literal meaning of the text has produced an absurd result."[243] Modern textualism, however, purportedly rejects "literal" interpretation and recognizes that "meaning is a function of the way speakers use language in particular circumstances."[244] According to Professor Manning, "textualists interpret statutory language by asking how 'a skilled, objectively reasonable user of words' would have understood the statutory text, as applied to the prohlem before the judge."[245]

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240. *See id.* (explaining that "one might surmise that many, if not most, such conventions originated as particular judicial responses to the very problem that inspires the absurdity doctrine—the over- and underinclusiveness of general rules").

241. *See id.* at 2474 (acknowledging "the social costs that arise from the textualists' accepting established background conventions while rejecting the more dynamic generation of values associated with the absurdity doctrine").

242. *See id.* at 2472 (claiming that "if a legislator or member of the public wished to assess a statute's meaning, he or she could realistically do so only in terms of the meaning indicated by the more locally applicable and reasonably definite social conventions for understanding language in context"); *id.* at 2473 ("From the standpoint of a legislator or member of the public trying to evaluate a statute, the absurdity doctrine is thus worlds apart from the relatively definite background conventions that textualists readily embrace.").

243. *Id.* at 2456.

244. *Id.* at 2457.

245. *Id.* at 2458 (quoting Easterbrook, *Original Intent*, *supra* note 27, at 65). *See also* Manning, *supra* note 120, at 71–85, 91–110 (clarifying his version of textualism and describing how it differs from legal process purposivism); *but cf.* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 36–59 (2006) (claiming that the real differences between modern textualism and purposivism are narrow and predicting that efforts by extreme textualists to magnify the differences will only render textualism irrelevant or normatively unattractive).

Thus, for example, a criminal prohibition against "draw[ing] blood in the streets" could literally apply to a surgeon who was acting as a good Samaritan. Nonetheless, a savvy textualist would recognize that the appearance of this language in a criminal code would be understood by the relevant audience to describe violent acts.[246] Professor Manning claims that "under a modern understanding of textual interpretation, dismissing the charges against Puffendorf's surgeon would comport with the ordinary meaning of the statute in context."[247] Accordingly, the "correct" result could be achieved in this classic case without reliance on the absurdity doctrine.

Although a contextual approach to statutory interpretation is perfectly desirable, Professor Manning's version of textualism is in serious tension with the theoretical underpinnings of his critique of the absurdity doctrine and other purposive approaches to statutory interpretation. First, the surest way to know whether to interpret language in a "literal" or "contextual" fashion (or, perhaps more accurately, whether those approaches amount to the same thing) is to consider the consequences of a particular statutory application.[248] Moreover, the best way to begin to evaluate the consequences of a particular statutory application is to determine whether it would advance the purposes for which the law was enacted. Because Professor Manning's theory of interpretation is expressly premised on the notion that "people typically try to choose words to effect their desired ends,"[249] it is difficult to understand how he could claim to reject an approach that is avowedly purposive and consequentialist on the grounds that the approach has those very characteristics.

Professor Manning claims that his analysis "does not suggest that one can simply repackage the absurdity doctrine as contextual analysis" because "[t]he antecedent for such analysis is the existence of some ambiguity that confers discretion on the interpreter."[250] As his examples demonstrate, however, the existence *vel non* of the requisite amhiguity—and the appropriate contextual interpretation—is plainly in the eyes of the beholder.[251] Moreover, the absurd consequences that would otherwise

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246. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2461.

247. *Id.* at 2461–62.

248. *But see* Manning, *supra* note 120, at 79–85, 91–110 (clarifying his version of textualism and distinguishing his approach from objective purposivism on the grounds that it gives priority to semantic context rather than policy context); Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 10, at 116 (distinguishing "between what some officials intended to *say* in enacting the language they used, and what they intended—or expected or hoped—would be the *consequence* of their saying it") (emphasis in original).

249. Manning, *Absurdity Doctrine*, *supra* note 2, at 2461; *see also* Manning, *supra* note 120, at 84–85 ("Because speakers use language purposively, textualists recognize that the relevant context for a statutory text includes the mischiefs the authors were addressing.").

250. Manning, *Absurdity Doctrine*, *supra* note 2, at 2462–63; *see also id.* at 2463 ("To be sure, if a given phrase has several relevant social connotations, then an interpreter may use purpose or policy considerations to choose among them.").

251. *See id.* at 2459–61 (claiming that an "airplane" is not a "motor vehicle" and that trading a weapon for drugs does not constitute "using a firearm" during a drug transaction—although "brandishing" the gun would apparently plainly suffice); *supra* note 216 (noting Manning's reluctance to definitively resolve the issues in *Holy Trinity Church* or *Public Citizen*); *cf.* Eskridge, *Unknown Ideal*, *supra* note 12, at 1518 (claiming that Americans at the time would have understood "labor or service of any kind" to apply only to "physical or helper work").

result from plain statutory language can themselves be considered a source of statutory ambiguity.[252] Even if the available range of contextual interpretations could be exhausted to yield unambiguous statutory text, one would still be left with a debate regarding the extent to which speculative statutory bargains should take precedence over the reasoned elaboration of statutory law.[253]

At the end of the day, Professor Manning's analysis incorporates the theory and practice underlying the absurdity doctrine into his approach without a coherent stopping point. He claims that courts should engage in contextual interpretation of the text and resolve any ambiguities in a manner that will promote the statutory purposes and sound public policy. Once this process has been exhausted, courts should apply the plain statutory meaning regardless of the consequences in order to enforce the legislative bargain. Because the first step in his analysis in so open-ended, however, he is able to avoid seemingly absurd results without purporting to apply the absurdity doctrine. Conversely, when most courts interpret statutes, they naturally apply the "literal" statutory meaning unless the resulting outcome appears strikingly problematic. In the latter circumstances, courts will closely examine the statutory purposes and the legislative history to determine whether the challenged application was anticipated and whether there is a sound reason for applying the "plain statutory language" under the circumstances. When both of these questions are answered in the negative, the judiciary will consider interpreting the statute contrary to its plain meaning in order to avoid an absurd result. Regardless of which approach is used to avoid seemingly absurd results,[254] the outcome can only be justified by accepting an understanding of the legislative process and the constitutional structure which presumes that Congress uses language to achieve instrumental goals that will advance the common good.

The stopping point that Professor Manning suggests for purposive approaches to statutory interpretation is, of course, the point at which statutory ambiguity ceases to exist.[255] There are, however, several problems with this purported distinction as well. Given the nature and breadth of the factors that can influence the plain statutory meaning under his approach, the line between clear and ambiguous statutory mandates is exceedingly fine and perhaps nonexistent.[256] His approach therefore

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252. *See supra* note 16 and accompanying text.

253. *See supra* Parts II–III.

254. *Cf.* Molot, *supra* note 245, at 36–38, 43 ("Close examination of when textualists and purposivists look to context reveals not a substantive difference, but merely a question of spin.").

255. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2462–63 ("For textualists, the prerequisite for employing a contextual interpretation to avoid absurdity is the existence of a relevant and established social nuance to the usage of the word or phrase in context.").

256. *See* Molot, *supra* note 245, at 44–53 (criticizing adherents of aggressive versions of textualism, including Manning, for placing excessive emphasis upon arbitrary and unnecessary distinctions between statutory clarity and ambiguity). This observation could also explain why textualists frequently find statutory language unambiguous when they assess the validity of an agency's interpretation of a statute under the two-step framework adopted in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) ("One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for

places an unfortunate premium on the ability of judges to master a highly sophisticated method of statutory interpretation.[257] Simply put, judges who are most adept at manipulating statutory language will have a comparative advantage in achieving the results that they find appropriate and attributing them to the legislature. Because few, if any, judges currently apply contextual textualism, the absurdity doctrine's abandonment would also predictably allow many unwarranted absurdities to stand (even under Professor Manning's view) based on the judiciary's natural tendency to interpret statutes in a relatively literal fashion.

For similar reasons, the existing version of the absurdity doctrine is far more candid than the alternative approach that is recommended by Professor Manning. Although courts frequently attribute their decisions under the absurdity doctrine to legislative intent, they do so in a manner that expressly reflects the predictive nature of the enterprise. The judiciary is also obligated to articulate the relevant statutory purposes and other public values that justify its decisions under the absurdity doctrine. In contrast, modern textualism by definition attributes its results to the "plain meaning" of the statutory language that was chosen by Congress even when those results are ultimately based on the same criteria as the judiciary's decisions under the existing version of the absurdity doctrine. Modern textualism therefore falsely obscures the judiciary's essential role in achieving sensible applications of Congress's general rules.

Perhaps most important, there is no reason to abandon the theoretical approach to statutory interpretation that is reflected by the absurdity doctrine (and apparently accepted, up to this point, by Professor Manning) merely because the statutory language can no longer be characterized as "ambiguous." The conclusion that statutory language has an ordinary meaning in context does not change the fact that Congress typically enacts legislation to accomplish identifiable goals. Nor does it eliminate the problems of limited foresight and excessive generality that plague the legislative process. Accordingly, when plain statutory language would dictate an unanticipated (and, hence, seemingly random) outcome that fails to achieve Congress's goals and leads to other highly undesirable consequences, this "absurd" result should be avoided unless the judiciary can determine that the particular

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Chevron deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt." (emphasis omitted)). In reality, however, this approach allows textualists to resolve ambiguity based on their own views of appropriate policy, which can then be attributed to the legislature based on their express reliance upon "plain statutory language." *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994) ("In effect, the textualist interpreter does not find the meaning of the statute so much as construct the meaning. Such a person will very likely experience some difficulty in deferring to the meanings that other institutions have developed." (emphasis omitted)). *But cf.* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1988) (describing predictions about the effects of interpretive methodology on judicial deference to agency interpretations and concluding that they are not supported by an empirical study of a sample of appellate decisions).

257. Although new textualists tend to give substantial weight to various institutional concerns, they seemingly ignore the extent to which their proposed method of statutory construction would tax the ability of courts. *See* Merrill, *supra* note 256, at 372 (explaining that textualism "seems to transform statutory interpretation into a kind of exercise in judicial ingenuity" that "places a great premium on cleverness").

language was deliberately chosen for a good reason. Although a politically expedient compromise that was reflected in the legislative record would ordinarily count as a valid reason for adhering to the plain statutory language under this analysis, the judiciary should not deviate from the most sensible approach to statutory interpretation solely on the grounds that a backroom deal could conceivably have taken place. Rather, for reasons already explained, courts should continue to invoke the existing version of the absurdity doctrine.

CONCLUSION

This Article has explained that compelling theories of the legislative process and constitutional structure justify the judiciary's continued invocation of the absurdity doctrine. First, the doctrine is supported by general legislative intent because Congress presumably wants the judiciary to avoid absurd results in certain unanticipated circumstances in which the statutory purposes would not be served or other overwhelming interests are at stake. Perhaps more important, because the constitutional structure contains safeguards that are designed to ensure that statutory law promotes the common good, legislative classifications should have identifiable instrumental goals that the judiciary can help to achieve while simultaneously avoiding the serious disadvantages of mechanically applying bright-line rules to a wide variety of unforeseen factual situations. Consistent with this view, the absurdity doctrine promotes equal protection and due process norms without the serious institutional concerns that would be presented by more aggressive approaches to constitutional adjudication. For these reasons, the absurdity doctrine is an ingenious solution to the perennial problems of legislative generality within our system of government.

Although the absurdity doctrine necessarily authorizes substantial judicial discretion, this Article has articulated the doctrine's outer parameters and identified some "intelligible principles" that should guide the judiciary's discretion in closer cases. The most striking aspect of the new textualist critique is undoubtedly the claim that the absurdity doctrine is *never* justified. Professor Nagle has provided a more conventional "rule-of-law" argument for this conclusion, which is based on the overriding value of having a clear and predictable set of strictly enforced rules. He illustrates this point by drawing an analogy to the game of Scrabble, where having a conclusive list of appropriate word usage with no exceptions is "more important than the contents of that list" because any benefit that would be offered by fine-tuning the rules and eliminating their inaccuracies "would quickly be overwhelmed by the ensuing, and unending, arguments about" whether additional deviations from the rules should be recognized.[258]

It is sometimes important to have rules for the sake of having rules, but their content is certainly not always insignificant or even secondary. The adoption of a bright-line rule always to enforce bright-line rules would therefore reflect far too blunt and unambitious of a conception of government. This is partly the case because unlike the officials who adopt the rules of Scrabble, Congress frequently enacts legislation to change the world by addressing serious social problems. The

258. *See* Nagle, *supra* note 3, at 6–8.

application of law is not a word game, and the consequences of statutory interpretation are routinely far more significant than winning or losing for the individuals who are adversely affected.[259] The new textualism's apparent failure to appreciate these concerns helps to explain why non-adherents of the theory often consider it an alienating view of the law.[260] Our system of government can do significantly better by recognizing that Congress has broad authority to enact laws that promote the common good, but our legal system also has a responsibility to avoid causing needless harm to the extent fairly possible. The existing version of the absurdity doctrine does an admirable job of striking the appropriate balance.

Meanwhile, Professor Manning's novel approach to textualism allows him to claim the courage of his convictions by arguing that adherents of his theoretical framework should reject the absurdity doctrine. In the end, however, he essentially incorporates both the theory and practice of the absurdity doctrine into his own version of contextual textualism. His approach therefore casts further doubt on the theoretical foundations of the new textualism. An overwhelming urge to avoid absurd results confirms that the consequences of applying the law matter and that individuals should not be needlessly harmed.[261] It also suggests that legislation should be viewed as an effort to promote the common good that is presumably reflected by its underlying purposes and other widely accepted public values, rather than merely as an unprincipled bargain that was executed by self-interested actors. Because the existing version of the absurdity doctrine promotes all of these constitutionally inspired values in an appropriate fashion, federal courts should continue to invoke it without apology.

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259. *See* William N. Eskridge, Jr., *The Dynamic Theorization of Statutory Interpretation*, ISSUES LEGAL SCHOLARSHIP, 2002, *supra* note 3, at 16 & n.75, http://www.bepress.com/ils/iss3/art16 (follow "View the article" hyperlink) (noting that the Scrabble analogy reveals an "Achilles heal of the new textualism" because "it threatens to reduce important public debates about statutory expectations and policy to mere 'word games' (like Scrabble!)" when lawmaking and statutory interpretation is "among the most serious business" in government).

260. *See id.* at 16–17 (describing "alienating" features of the new textualism and positing that its adherents might accept the absurdity doctrine "as a needed safety valve (or perhaps a spin mechanism)" to avoid the charge that they are "playing word games with the American people").

261. *See* Sunstein, *supra* note 202, at 564 (critiquing Justice Scalia's theory of law and arguing that "any approach to interpretation must be defended partly by reference to its consequences, broadly conceived, and the set of relevant consequences includes emphatically its effects on human liberty and equality").