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by Steve R. Johnson

A statute will not be applied according to the literal meaning of its words if to do so would produce absurd results. Cases considering this principle have never been in short supply,[1] but the rule has appeared in a striking number of cases in recent months.[2] Accordingly, it is timely to explore this doctrine in this installment of Interpretation Matters.

The first part describes the doctrine generally. The second part identifies a critical question — and point of dispute — about the doctrine: What results can be considered to be absurd enough for the doctrine to apply? The third part illustrates use of the doctrine in state and local tax cases.

Absurdity Doctrine Generally

The absurd results precept is of ancient standing. It was already well known in Blackstone's time[3] and came to be known as the "Golden Rule" of interpretation.[4] The doctrine continues to be of importance and interest to modern lawyers, judges, and commentators.[5]

For the most part, even textualist judges and commentators relax their usual commitment to text in the face of absurdity. For example, Justice Antonin Scalia[6] and Judge Frank Easterbrook[7] have endorsed the doctrine. However, a leading textualist academic has challenged use of the doctrine on the grounds that it cannot be justified by legislative intent and is contrary to the separation of powers and other constitutional principles.[8]

If the absurdity of the result is established, what should a court do? There are at least two approaches. The stronger response — and the majority view — is that absurdity frees the court of an obligation to text. That is, the judge will look to other, nontextualist indicators of meaning, usually the perceived purpose of the legislature in enacting the statute.[9] Proceeding in that fashion, courts in

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[1]Among older state cases applying the doctrine, see *People v. Anzalone*, 969 P.2d 160, 163 (Cal. 1999); *Wetzler v. Roosevelt Raceway, Inc.*, 208 A.D.2d 120, 129 (N.Y. App. 1995); *Discargar v. City of Seattle*, 171 P.2d 205, 209 (Wash. 1946).

[2]Among recent state cases applying the doctrine, see *Washington v. Harrison*, 2009 WL 2184540, *3 (Ga. App. July 23, 2009); *Board of Commissioners v. Town of Plainfield*, 909 N.E.2d 480, 489-90 (Ind. App. July 14, 2009); *Summit Township Ind. & Econ. Dev. Auth.*, 2009 WL 243993, *15 (Pa. Cmwlth. Aug. 10, 2009); *Department of Transportation v. Ivers*, 2009 WL 2568107, *5 (Utah Aug. 21, 2009) (not yet released for permanent publication).

[3]*See* William Blackstone, *Commentaries on the Law of England*, 58, 91 (1765); *see also Riggs v. Palmer*, 22 N.E. 188, 189-190 (N.Y. 1889) (reviewing other old authorities).

[4]William D. Popkin, *Materials on Legislation: Political Language and the Political Process*, 31-32 (5th ed. 2009).

[5]*See, e.g.*, Veronica M. Dougherty, "Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation," 44 *Am. U.L. Rev.* 127 (1994); Andrew S. Gold, "Absurd Results, Scrivener's Errors, and Statutory Interpretation," 75 *U. Cin. L. Rev.* 25 (2006).

[6]*E.g.*, *City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 122 S. Ct. 2226, 2241 n.4 (2002) (Scalia, J., dissenting); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring).

[7]*E.g.*, *United States v. Seaboard Sur. Co.*, 236 F.3d 883, 885 (7th Cir. 2001); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998).

[8]John F. Manning, "The Absurdity Doctrine," 116 *Harv. L. Rev.* 2387 (2003). *But see* Glen Staszewski, "Avoiding Absurdity," 81 *Ind. L.J.* 1001 (2006) (critiquing Manning's objections).

[9]*E.g.*, *Gard v. Bandera Cty. Appraisal Dist.*, 2009 WL 1227818, *3 (Tex. App. May 6, 2009) (not yet released for publication); *Murphy v. Campbell*, 486 P.2d 1080, 1083 (Wash. 1971) ("this court has long held that a thing within the letter

(Footnote continued on next page.)

effect rewrite the statute. As one commentator has noted,[10] courts have invoked the absurdity rule to hold that the statutory term "less" actually means "more,"[11] that "of" means "or,"[12] and that "unlawful" means "lawful."[13]

If the absurdity of the result is established, what should a court do?

The alternative, weaker view is associated with Chief Justice John Marshall. It amounts to a "plain statement" view.[14] That is, at least in cases when fundamental rights are not at stake, Marshall would apply the statute as written, accepting its dubious results, "if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind" as to the statute's meaning.[15] In spirit, that approach is similar to occasional state decisions holding that absurdity analysis is a legitimate tool of statutory construction but that construction itself is an unnecessary or impermissible exercise when the statutory language is plain and "clear on its face."[16]

Not every case that uses the language "absurd results" is an absurdity doctrine case. When the language of a statute is ambiguous, courts look at other things such as policy consequences in their effort to apply the law to the facts at hand.[17] Policy consequences are among those considerations. Thus, courts in many state and local tax cases, confronted with otherwise plausible competing interpretations of a statute, have rejected one of them because of its expected absurd consequences.[18] Those cases are not the principal focus of this installment. Instead, I am mainly concerned here with "true" absurd results cases, that is, cases in which the courts have refused to apply clear statutory text because of anticipated absurd effects.

What Constitutes Absurdity?

There is considerable judicial variation regarding the level of infelicity necessary to trigger the absurdity doctrine. There are loose to strict versions of the rule. The most stringent view would assert the rule only when the statute is incoherent,[19] internally inconsistent,[20] or would, literally applied, be unconstitutional.[21]

The middle view invokes the doctrine when the literal statutory language is irrational or illogical because it makes a nonsensical distinction, undercuts the purposes of the statute itself, or, without apparent necessity, threatens fundamental values or policies.[22] For example, a Washington case involved a challenge to a state scheme for redemption of foreclosed-on property. The petitioner asked the court to adopt a procedure allowing a prospective redemptioner to obtain judicial determination — before paying any money — of the sum required to redeem the property. The court rejected the requested remedy, saying:

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of the law, but not within its spirit, may be held inoperative where it would otherwise lead to an absurd conclusion").

[10]Gold, *supra* note 5, at 25.

[11]*Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005).

[12]*Stanton v. Frankel Bros. Realty Co.*, 158 N.E. 868, 870 (Ohio 1927).

[13]*Scurto v. Le Blanc*, 184 So. 567, 574 (La. 1938).

[14]Courts often say that before it will be accepted that the legislature intended to depart from some legal tradition or weighty policy, the legislature must unmistakably signify that intention through "plain" or "clear" statement of it. *See, e.g.*, William N. Eskridge Jr. and Philip P. Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 *Vand. L. Rev.* 593 (1992); Patricia M. Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term," 68 *Iowa L. Rev.* 195, 206-14 (1983).

[15]*United States v. Fisher*, 6 U.S. 358, 390 (1805); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 (2002) (saying that the Supreme Court "rarely invokes [the absurdity] test to override unambiguous legislation").

[16]*AOL, LLC v. Department of Revenue*, 205 P.3d 159, 168 (Wash. App. 2009) (the court hedged its bet by adding: "nonetheless, neither the Department's interpretation nor our reading of the legislature's statutory scheme lead to absurd results"); *see also Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 184 (2007) ("there is no rule of statutory construction that authorizes a court to declare that the legislature did not mean what the plain language of the statute says").

[17]"Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *United States v. Fisher*, 6 U.S. 358, 386 (1805) (Marshall, C.J., writing for the Court).

[18]*E.g.*, *Aspetuck Country Club, Inc. v. Town of Weston*, 2009 WL 2224728, *2-3 (Conn. Aug. 4, 2009); *Chatham Cty. Bd. of Tax Assessors v. Bock*, 2009 WL 2096282, *4 (Ga. App. July 17, 2009); *Oberhand v. Director, Div. of Tax'n*, 940 A.2d 1202, 1208 (N.J. 2008); *Timkovsky v. 56 Bennett, LLC*, 881 N.Y.S. 2d 823, 827 (N.Y. Sup. Ct. 2009). For discussion of *Oberhand*, see Paul H. Frankel and Amy F. Nogid, "The Manifest Justice of the Manifest Injustice Doctrine: The Time Has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases," *State Tax Notes*, Sept. 1, 2008, p. 599, *Doc 2008-17198*, or *2008 STT 171-2*.

[19]*E.g.*, *United States v. Pabon-Cruz*, 391 F.3d 86, 105 (2d Cir. 2004).

[20]*E.g.*, *Kamalu v. ParEn, Inc.*, 132 P.3d 378, 387 (Hawaii 2006).

[21]*E.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

[22]*E.g.*, *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004); *Holland v. Kentucky*, 192 S.W.3d 433, 436-37 (Ky. 2005); *Bice v. Petro-Hunt, L.L.C.*, 768 N.W.2d 496, 504 (N.D. 2009).

> This court refrains from adding to, or subtracting from, the language of a statute unless imperatively required to make it rational. The Legislature's omission of a preredemption procedure was likely intentional, but even if inadvertent, the statutory framework is not irrational.[23]

The most permissive version views merely unwise policy as sufficient warrant for application of the rule. Courts of this persuasion equate "unreasonable consequences"[24] and "inconvenience"[25] with absurdity. For instance, a Louisiana court refused to apply a traffic statute on the grounds that improvements in road construction since the statute had been enacted rendered contemporary application of the statute absurd.[26] Unsurprisingly, that permissive approach is highly controversial, the concern being that the separation of powers principle does not authorize the courts to correct a legislature's policy mistakes.[27]

The most permissive version views merely unwise policy as sufficient warrant for application of the rule.

This discussion illustrates another aspect of the absurd results rule: the ease with which it can reinforce, or even morph into, other principles of statutory interpretation. Here are three illustrations. First, in *Bock Laundry*, one of the leading absurd results decisions,[28] the statute, literally read, appeared to be irrational and perhaps unconstitutional. Moreover, it appeared that the statutory defect was the product of drafting inadvertence, not deliberate legislative choice. The procedural irregularity compounded the substantive difficulties,[29] linking the "scrivener's error" doctrine[30] with the absurd results doctrine.

Second, another well-known precept of statutory construction — the avoidance doctrine — requires courts to construe a statute "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[31] Rewriting an actually or potentially unconstitutional statute via the absurdity doctrine — as in *Bock Laundry* — is little different from construing the statute via the avoidance doctrine.

Third, an important debate in contemporary statutory interpretation is the extent to which courts may revise antiquated statutes to adapt them to current conditions.[32] The Louisiana case noted above[33] illustrates that the absurd results doctrine can be used as a vehicle to effect such revision.

Absurdity Doctrine in State and Local Taxation

The doctrine has been invoked in many state and local tax cases. Under the right circumstances, the doctrine may be used by either the taxpayer or the revenue authority. Some invocations of the doctrine are successful; others are not.[34] Here are four 2009 cases in which the doctrine was applied, twice in favor of revenue authorities and twice in favor of taxpayers.

Colorado

Colorado's public schools are funded jointly by local school districts (primarily out of property taxes) and the state (out of general revenue) under a formula set out in the School Finance Act. Taxpayers and county commissioners brought a class action suit against the state challenging the constitutionality of amendments to the act and seeking refund of taxes allegedly unconstitutionally collected. The plaintiffs argued that the state constitution required prior voter approval for "any new tax, tax rate increase, . . . extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain"[35] and that the requisite elections had not occurred.

Reversing the district court, the state supreme court rejected the argument. It read "tax policy change" narrowly, based on the absurdity doctrine, saying:

> To apply the limit in such a broad manner would make any legislative action in the revenue arena nearly impossible and cripple the government's ability to function. In some cases,

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[23] *Millay v. Cam*, 955 P.2d 791, 796 (Wash. 1998) (*en banc*) (citations omitted).

[24] *E.g.*, *Haugen v. Henry Cty.*, 594 S.E.2d 324, 327 (Ga. 2004).

[25] *See* Popkin, *supra* note 4, at 31-32 (citing cases).

[26] *Sanders v. Hisaw*, 94 So. 2d 486, 487 (La. App. 1957).

[27] A legislature "can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former." Antonin Scalia, *A Matter of Interpretation*, 20 (1997).

[28] See *supra* notes 6 and 21.

[29] William N. Eskridge Jr., Philip P. Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation*, 269 (2d ed. 2006).

[30] *See, e.g.*, *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1146 (9th Cir. 2006).

[31] *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see also Jones v. United States*, 529 U.S. 848, 857 (2000).

[32] *See, e.g.*, Guido Calabresi, *A Common Law for the Age of Statutes* (1982); William Eskridge Jr., *Dynamic Statutory Interpretation* (1994).

[33] *See supra* note 26.

[34] For an example of unsuccessful assertion of the doctrine in a tax case, see *Narmore v. Kawafuchi*, 143 P.3d 1271, 1290 (Hawaii 2006) (Levinson, J., dissenting).

[35] Colo. Const. Art. X, section 20(4)(a).

the cost of the election could exceed the additional revenue obtained, an absurd result that the voters could not have intended when they passed article X, section 20.[36]

Florida

Taxpayers brought suit against a county property tax appraiser, challenging assessed property taxes. State statute provided that, before such an action may be brought, the taxpayer must pay the tax collector the amount that is not contested. Thereupon, "the collector shall issue a receipt for the payment, and the receipt shall be filed with the complaint."[37] The taxpayers paid the amount due. However, the collector did not issue a receipt, thus no receipt was filed with the complaint. Accordingly, the trial court granted the appraiser's motion to dismiss for failure to satisfy the statute. The appellate court reversed, saying:

> The legislature's obvious objective in enacting the [statute] was to ensure the continued flow of tax revenue during the extended period of an assessment challenge. This objective is satisfied when the taxpayer makes his good faith payment in a timely manner. To accept the property appraiser's argument would mean that [the taxpayer] would lose his right to challenge a tax assessment if the tax collector failed or refused, for whatever reason, to timely issue a receipt. We do not believe the Legislature intended such an absurd result.[38]

Illinois

The executor of an estate filed suit seeking declaration that the estate was not liable for state estate taxes. The state's estate tax had been a pickup levy based on the state death tax credit under section 2011 of the Internal Revenue Code. However, the state had decoupled from some reductions of the credit under federal amendments. By statute, the amount of the Illinois estate tax for the relevant period was an amount equal to the federal credit for state death taxes "as the credit would have been computed and allowed under the" IRC as of a certain date with stated modifications.[39]

The estate had chosen not to claim the state death tax credit on its federal estate tax return. The estate argued that since it claimed no state death tax credit, no such credit would have been allowed to it, thus it had no Illinois estate tax liability under the plain language of the above statute. The trial court accepted that argument.

The appellate court reversed. It accepted the state's argument "that the estate's interpretation of the [statute allows] the estate itself to decide whether it owes Illinois estate taxes simply by not claiming [the credit on its federal return and so] is an absurd result, which cannot be the legislature's intent."[40]

Nebraska

A concrete company brought suit against the state Department of Revenue challenging imposition of sales tax on parts assembled into manufacturing machinery and equipment. The trial court held for the department. The state supreme court reversed.

The case turned on statutory exemptions to the sales tax. The state supreme court noted the canon that "tax exemption provisions are strictly construed,"[41] but the force of this canon was diffused by two considerations. First, the court applied only the weak form of the canon.[42] Second, the weak form of the canon was trumped by the absurd results doctrine. The clear existence of related exemptions strongly suggested the applicability of the exemption claimed by the taxpayer. The court held:

> We must assume the Legislature intended a sensible rather than absurd result in enacting a statute. And it would make very little sense to exempt assembled machinery from sales and use taxes, and to exempt each and every part of that machinery from sales and use taxes if it is purchased to replace an original part, but to impose a tax on the purchase of the same parts when they are purchased to assemble the machinery in the first place.[43] ☆

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[36] *Mesa Cty. Bd. of Cty. Commissioners v. State*, 203 P.3d 519, 529 (Colo. 2009) (*en banc*).

[37] Fla. Stat. section 194.171(3).

[38] *Shank v. Havill*, 6 So. 3d 631, 633 (Fla. App. 2009).

[39] 35 Ill. Comp. Stat. 405/2(a) (West 2004).

[40] *Brooker v. Madigan*, 902 N.E.2d 1246, 1252 (Ill. App. 2009).

[41] *Concrete Inds., Inc. v. Department of Revenue*, 766 N.W.2d 103, 107 (Neb. 2009). For further discussion of this canon, see Steve R. Johnson, "Interpreting State Tax Exemptions, Deductions, and Credits," *State Tax Notes*, Feb. 23, 2009, p. 607, *Doc 2009-2323*, or *2009 STT 34-7*.

[42] *Concrete Inds.*, 766 N.W.2d at 107 (notwithstanding the canon, "this court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose").

[43] *Id.* at 109.