

# ARTICLE

## CULINARY AMBIGUITY: A CANONICAL APPROACH TO DECIPHERING MENUS

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*The canons of statutory construction take on new meaning in the culinary arena. When attempting to decipher the description of an item on a restaurant menu, most casual diners do not automatically think to refer to these tools. However, after a career of statutory interpretation, it became clear that statutory interpretation could be a helpful guide in the face of imprecise menu drafting. By recounting culinary adventures and ambiguities, this article explores the utility of the tools of statutory interpretation in the context of dining out. From plain meaning to legislative history, the article illustrates that the tools of statutory interpretation are a helpful guide to resolving culinary ambiguities.*

It all began at the iconic Fog City Diner<sup>1</sup> in San Francisco, where the Ninth Circuit Court of Appeals is headquartered. As we perused the menu and focused on the fish plate, we were faced with a perplexing question: whether the olive relish was a standalone accompaniment or part of a ratatouille of zucchini, yellow squash and bell peppers. Not an insignificant question for an olive-averse colleague. My colleagues and fellow diners were divided. The answer was so unclear that we went to the nearest source available—the waiter. He didn't know either, and it finally took an inquiry to the expert—the chef—to resolve our dilemma. The menu had all the markings of a poorly drafted statute. But to be fair, the Fog City Diner was not the only offender. Soon, every menu I read sprouted an ambiguity or a culinary conundrum.

After the Fog City Diner experience piqued my curiosity, I caught myself unintentionally applying the canons of interpretation to ordinary restaurant menus. And what I found surprised me: like statutes, menus are rife with ambiguities. For example, we are all familiar with the standard menu protocol of stating the name of the main dish with a list of components directly underneath. Complications arise, however, when that list has little or no punctuation. Are the artichokes incorporated into the pasta sauce or on

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\* Judge, United States Court of Appeals for the Ninth Circuit. My thanks to a dedicated crew of food-loving law clerks, especially Lauren Weinstein (Harvard 2012), Paul Alsdorf (Harvard 2005), Chesa Boudin (Yale 2011), Craig Konnoth (Yale 2010), Aparna Sridhar (Stanford 2006), Margaret Lewis (New York University 2003), and Tara Steeley (Berkeley 2001). I also thank Lior Strahilevitz, Sidley Austin Professor of Law at the University of Chicago Law School, for his review and comment on this essay.

<sup>1</sup> FOG CITY, <http://www.fogcitysf.com> (last visited Feb. 23, 2014), *archived at* <http://perma.cc/9FGJ-V2FL>. After 25 years, in 2013 the Fog City Diner reinvented itself and became, simply, Fog City. Restaurants change hands and flip in-and-out of business like hot cakes. Menus are even more mercurial—often changing daily—so many of the examples are no longer on the menus cited and, in some instances, the restaurants have vanished altogether.

the side? Can you “hold the artichokes,” or would that entail the sous chef diving into a vat of béchamel to remove artichoke fragments? And not only are the ingredients of the dishes themselves often a source of lively debate, but also the prices, side dishes, and the restaurant’s hours of operation. Even the very nature of the menu can be ambiguous. At Moto in Chicago, the edible menu not only describes the meal options but is a part of the meal itself<sup>2</sup>—of course, consuming the menu puts a dent in the hobby of collecting souvenir menus. At Atelier Crenn in San Francisco, the proprietor, poet, and chef, Dominique Crenn, provides diners a poem describing the dishes in lieu of a traditional menu.<sup>3</sup> It is unlikely Congressional drafters will engage in this whimsy, but it brings a smile to imagine the tax code as an edible statute.

The consequences of ambiguity can range from the humorous (“did I really order . . . that?”), to the dire, as anyone allergic to peanuts can attest. But they extend farther than the reader might imagine. From the humble “Lemonade Hot Dog” stand banner familiar to any Washington, D.C. resident or visitor who strolls the National Mall to the more exalted Boulevard Restaurant in San Francisco,<sup>4</sup> which serves “Green Papaya with Crab Knuckles,” ambiguity abounds.

Some restaurants embrace ambiguity as culinary flair. Who knows the genesis of “Fire Cracker Shrimp,” but it is surely more intriguing than simply “spicy fried shrimp.” Others, by contrast, tackle their menu ambiguities head on. In Chicago, Ed Debevic went so far as to include a disclaimer that his restaurant is not responsible for “bad punctuation or misspelled [sic] words.” One wonders whether the diners appreciate the misspelling and whether Mr. Debevic had a prior career in the law, writing disclaimers for

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<sup>2</sup> Mark Caro, *The Chef Who Wants to Save the World*, CHI. TRIB. (Apr. 5, 2012), [http://articles.chicagotribune.com/2012-04-05/features/ct-dining-0405-homaro-cantu-20120405\\_1-miracle-berry-sugar-cane-sour-foods-taste](http://articles.chicagotribune.com/2012-04-05/features/ct-dining-0405-homaro-cantu-20120405_1-miracle-berry-sugar-cane-sour-foods-taste), archived at <http://perma.cc/G9XU-5M2H> (p.1), <http://perma.cc/7C6Y-AH2M> (p. 2), and <http://perma.cc/ZX3H-KLUB> (p. 3). Using an inkjet printer with modified cartridges full of fruits and vegetables, the consumable menu is printed on edible paper. Like its traditional culinary counterparts, the menu can be baked, fried, or frozen—it can even be used as a wrapper for a spring roll. *Id.*

<sup>3</sup> ATELIER CRENN, [http://ateliercrenn.com/food\\_menu.pdf](http://ateliercrenn.com/food_menu.pdf) (last visited Apr. 7, 2014), archived at <http://perma.cc/EM5E-Q3MR>. For example, the winter poem/menu:

Winter has come with its cool breeze  
 Mellow serenades of colors licorice and orange  
 A gentle smell, oceanic, silky and smoky  
 I refreshed as I gazed at your smooth green coat  
 Walking deep in the woods, as the snow might have something to spare  
 These creatures, who move with a slow, vague wavering of claws  
 Where the wild beauty is sleeping under frozen winter leaves  
 Winter has come and is full of sweet surprises

<sup>4</sup> BOULEVARD RESTAURANT, <http://www.boulevardrestaurant.com> (last visited Feb. 23, 2014), archived at <http://perma.cc/AA5Z-YMD2>.

bank commercials.<sup>5</sup> But, whether deliberate or not, most restaurants leave even careful readers at the mercy of their own special culinary ambiguity. Having spent a career navigating statutory challenges, I offer the casual diner a set of interpretive tools.

## I. STATUTORY AND CULINARY BASICS: PLAIN MEANING

As with statutes, the first stop on our tour of culinary tools is plain meaning: when language is plain and unambiguous, it must be given effect.<sup>6</sup>

Pizza restaurants present classic examples of clear-cut menus. It does not take a rocket scientist—or a Supreme Court Justice—to interpret the classic pizza menu by picking ingredients from the various rows and columns. There is, however, “no errorless test for identifying or recognizing ‘plain’ or ‘unambiguous’ language.”<sup>7</sup> As Justice Breyer observed, “[l]egislation inevitably contains ambiguities and gaps.”<sup>8</sup> Even pizza restaurants can confuse the uninitiated diner by serving concoctions such as “The Magical Mystery Tour,” “Kosmic Karma,” and “Red Skin Potato Pie” (not to be confused with sweet potato pie).<sup>9</sup> Pizza restaurants also present the classic question: is that tomato sauce made of a vegetable or a fruit? The Supreme Court settled this significant pizza-related debate as early as 1893, when it decided that although “[b]otanically speaking, tomatoes are the fruit of a vine, . . . in the common language of the people,” tomatoes were vegetables, not fruits.<sup>10</sup>

In menus, as in the law, slavish adherence to plain meaning can lead one astray. Just as shoestring fries have nothing to do with ragged footwear and salmonberries do not taste like fish, Jerusalem artichokes are neither from Jerusalem (they are native to North America) nor artichokes (they are perennial tubers). Who knew, for example, that the “eel” dish served at the restaurant attached to the Jade Buddha Temple in Shanghai is actually hearty mushroom prepared in the same style as fried eel slices? Even seemingly straightforward items like “sweetbreads” spell trouble for the plain-reading vegetarian.<sup>11</sup> Likewise, “Bar-B-Q Meat Fried Rice,” may be an unpleasant

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<sup>5</sup> The current online version of the menu does not contain the misspelling. See *Ed Debevic’s Menu*, FEATUREDFOODS.COM, [http://featuredfoods.com/a-store/eds\\_p3a.pdf](http://featuredfoods.com/a-store/eds_p3a.pdf) (last visited Feb. 23, 2014), archived at <http://perma.cc/M2CV-ATCQ>.

<sup>6</sup> See, e.g., *Newhall v. Sanger*, 92 U.S. 761 (1875).

<sup>7</sup> *United States v. Turkette*, 452 U.S. 576, 580 (1981).

<sup>8</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 105 (2005).

<sup>9</sup> *Mellow Menu*, MELLOW MUSHROOM, <http://mellowmushroom.com/corpmenu> (last visited Mar. 1, 2014), archived at <http://perma.cc/Y66Z-VNYT>.

<sup>10</sup> *Nix v. Hedden*, 149 U.S. 304, 307 (1893).

<sup>11</sup> The sweetbread dilemma is captured quite perfectly by the poet Ogden Nash, who wrote:

That sweetbread gazing up at me  
Is not what it purports to be.  
Says Webster in one paragraph,

surprise for the carnivore dining at the kosher, vegan Buddha Bodai in New York City.<sup>12</sup> In an extreme case, blind adherence to plain meaning may even be dangerous. Mugaritz, a three-Michelin star restaurant located just outside of San Sebastian, Spain, serves diners a “stone” without explanation.<sup>13</sup> These potatoes coated in clay are presented alongside actual river stones; a potentially risky plating choice. The potatoes, in fact, are coated with edible clay made of improbable ingredients: kaolin (a white powder clay), lactose, black vegetable dye, salt, and water.<sup>14</sup> At Pomegranate, a Russian-Georgian restaurant in San Diego, diners enjoying the *chakhokhbili*<sup>15</sup> are exhorted: “Try a glass of young red wine with it and you’ll fly like an eagle.”<sup>16</sup> Pomegranate is, fortunately, located on the ground floor.

In the case of molecular gastronomy, which takes pride in thwarting expectations, plain meaning might be a last, rather than first, resort for the culinary adventurer.<sup>17</sup> At New York’s WD-50, for example, a “fried egg” is served for dessert. The quotes are essential, and a tip to expect the unexpected. What comes to your table looks like a perfectly cooked and seasoned sunny-side-up egg—so far, it matches the menu. But take a bite and you’ll find that it was properly listed as a dessert after all: it is “false fried egg of coconut cream with a carrot juice yolk.”<sup>18</sup>

## II. A CANONICAL MENU

Where the plain meaning of a menu’s language leaves us bereft of guidance, or even misguided, the canons of culinary interpretation offer a convenient reference point in reading the tea leaves of contemporary menus. Of course, the traditional canons of constitutional, statutory and contractual in-

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It is the pancreas of a calf.  
 Since it is neither sweet nor bread,  
 I think I’ll take a bun instead.

Ogden Nash, *The Sweetbread*, FOOD 30, 30 (1989).

<sup>12</sup> *Noodles, Fried Rice & Congees*, BUDDHA BODAI, <http://www.chinatownvegetarian.com/Noodles.htm> (last visited Mar. 1, 2014), *archived at* <http://perma.cc/J9QZ-XA3M>.

<sup>13</sup> See ADONI LUIS ARDIZ, MUGARITZ: A NATURAL SCIENCE OF COOKING 94 (2012).

<sup>14</sup> Epicurious, an online recipe site, offers the recipe complete with a recommendation to heat a few polished river stones and coat them with the clay mixture. *Edible Stones*, EPICURI-  
 OUS, <http://www.epicurious.com/recipes/food/views/Edible-Stones-51102800> (last visited Mar. 1, 2014), *archived at* <http://perma.cc/4H4P-3HQX>.

<sup>15</sup> The menu defines it as “Georgian Eagle,” and explains, “[t]his aromatic casserole will make your mouth water. Large pieces of chicken simmered with onions, tomatoes, basil—plus, of course, the chef’s secret spices.” *Pomegranate Russian-Georgian Restaurant*, POME-  
 GRANATE RESTAURANT, <http://www.pomegranatesd.com/menu.pdf> (last visited Mar. 1, 2014), *archived at* <http://perma.cc/8VVT-9R8M>.

<sup>16</sup> *Id.*

<sup>17</sup> See generally NATHAN MYHRVOLD, CHRIS YOUNG & MAXIME BILET, *MODERNIST CUI-  
 SINE: THE ART AND SCIENCE OF COOKING* (2011), a 50-pound, six-volume treatise based on  
 science inspired technique.

<sup>18</sup> *WD-50*, COUNTRYEPICURE (Dec. 11, 2006), <http://countryepicure.wordpress.com/2006/12/11/wd-50/>, *archived at* <http://perma.cc/YF2K-DQG9>.

terpretation are not without their harsh critics.<sup>19</sup> With a nod to Sir Isaac Newton, Judge Richard Posner has noted that “for every canon . . . there is an equal and opposite canon.”<sup>20</sup> And while the Supreme Court has admonished that the canons are not mandatory rules, but rather guides that “need not be conclusive,”<sup>21</sup> others have questioned even this bland proposition.<sup>22</sup> In their recent book, Justice Scalia and Bryan Garner endorse a “fair reading method,” although they offer extensive comments on a number of other interpretive canons.<sup>23</sup>

Statutory interpretation is not the only area of law with parallels to menus. The term “menu” has also been used in the field of contract law. As Professor Ian Ayres explained:

A menu is a contractual offer that empowers the offeree to accept more than one type of contract. When an offer is not a menu, the offeree has only an all-or-nothing power of acceptance. A menu, in contrast, is a nexus of at least two simultaneous offers. This simple definition comports with common restaurant usage. You can order bacon or ham or nothing at all.<sup>24</sup>

Indeed, a menu is akin to a contract offering, which generally includes the subject of the contract, quantity, and price. On menus, quantity often poses an issue because it is an unstated term, except of course in the case of the gargantuan steak, like the 48-ounce Porterhouse steak offered at Shula’s Steak House.<sup>25</sup> More recently, menus have begun to offer the “small/large”

<sup>19</sup> See, e.g., Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 211–12 (1967) (predicting that the canon of constitutional avoidance, “whether it be denominated one of statutory interpretation or, more accurately, of constitutional adjudication—still more accurately, of constitutional nonadjudication—is likely to become one of evisceration and tergiversation.”).

<sup>20</sup> See Richard A. Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (citing KARL LLEWELLYN, *THE COMMON LAW TRADITION* 521–35 (1960)).

<sup>21</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001).

<sup>22</sup> See Posner, *supra* note 20, at 806.

<sup>23</sup> Scalia and Garner explained their “fair reading” method as follows:

[The fair reading method] determin[es] the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued . . . [which] requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and with older texts, historical linguistic research. It also requires an ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context. This critical word *context* embraces not just textual purpose but also (1) a word’s historical associations acquired from recurrent patterns of past usage, and (2) a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance.

ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012).

<sup>24</sup> Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 3 (2006).

<sup>25</sup> *Restaurant Menu*, SHULA’S, <http://www.donshula.com/shulas-steak-house> (last visited Mar. 12, 2014), archived at <http://perma.cc/M6U7-SEKQ>. To date, approximately 39,300 peo-

plate option. Alinea in Chicago has gone one step farther by representing quantity via various-sized circles.<sup>26</sup> Price should be straightforward, and menus without prices definitely confound diners.<sup>27</sup>

So, whether you view the menu as a statute or as a contract, when faced with any decision more complex than “red or white,” or “sausage or pepperoni,” the canons of construction can help to tease out meaning from a garbled menu. Here is my own menu, offering a sampling of the many canons of construction.

### A. *Aperitif: Words of Art*

In a statute, words are to be taken in their ordinary meaning unless they are technical terms or words of art. As explained by the Supreme Court, “the canon that ‘we construe a statutory term in accordance with its ordinary or natural meaning’ applies only ‘in the absence of [a statutory] definition.’”<sup>28</sup>

The culinary world is rife with terms of art. Indeed, restaurateurs at times seem to have agreed to a full-out assault on the concept of plain language; menus with ingredients such as ginger ale granite, geoduck clam, glogg, endiga, gobo root, pea soil, and similarly inscrutable terms leave diners scratching their heads.

Fortunately, some sympathetic restaurants provide a “statutory” definition. Wild Ginger in Seattle assists diners by defining “satay” as “an Indonesian word meaning skewered and grilled.”<sup>29</sup> Similarly, a San Diego

ple have been inducted into the Shula’s Steak House 48 oz. Club, which “honor[s] the true beef lovers of America.” *48oz. Club*, SHULA’S, <http://www.donshula.com/shulas-clubs/48-oz-club> (last visited Mar. 1, 2014), archived at <http://perma.cc/BTV4-FBJQ>.

<sup>26</sup> *What is the menu like at Alinea?*, FORBES TRAVEL GUIDE, <http://www.forbestravelguide.com/chicago-illinois/restaurants/alinea/what-is-the-menu-like-at-alinea> (last visited Mar. 1, 2014), archived at <http://perma.cc/SV58-MNEU?type=text>.

<sup>27</sup> Certain fine dining restaurants once offered a “lady’s menu,” which did not contain prices “because, of course, the gentleman was paying.” Phil Vettel, *Ladies First? Not Always*, CHI. TRIB. (Nov. 13, 2008), [http://articles.chicagotribune.com/2008-11-13/entertainment/0811110152\\_1\\_wine-service-women-first-ladies](http://articles.chicagotribune.com/2008-11-13/entertainment/0811110152_1_wine-service-women-first-ladies), archived at <http://perma.cc/G5V4-WERK> (p. 1), and <http://perma.cc/4VED-45VM> (p. 2). Such menus are now mostly a sexist anachronism. *Id.* However, the four-star restaurant, Carlos’s in Chicago, sometimes gets a request for the “lady’s menu.” *Id.* The proprietor, Carlos Nieto explained that this occurs, for example, when “[s]omeone’s taking their in-laws to dinner, and doesn’t want them to see the prices [or] the host of a private party might not want his guests to see the prices.” *Id.* Mr. Nieto recognized that “these days, ladies would be upset if they got a menu with no prices.” *Id.*

<sup>28</sup> *Gustafson v. Alloyd Co.*, 513 U.S. 561, 585 (1995) (Thomas, J., dissenting) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)).

<sup>29</sup> *Seattle Lunch Menu*, WILD GINGER, <http://www.wildginger.net/WildGinger/files/28/281c6086-d218-4a38-bbe5-9008007c11f9.pdf> (last visited Mar. 1, 2014), archived at <http://perma.cc/QC99-U3R4>. Other restaurants leave it to the diner to decipher terms like “tatsoi,” “guanciale,” “agrodolce,” and “plugra butter.” A quick reference to Google reveals that these items are an Asian dark-green vegetable, dry-cured and seasoned pork jowl, an Italian sweet and sour sauce, and a special extra-fatty type of butter. Of course, until fairly recently, Google generally was not available at the dinner table—and perhaps should not be—but the rise of smart phones and tablets and their ilk undoubtedly avail the diner of new, efficient avenues to resolve culinary ambiguities.

restaurant provides an explanation of its “Surfing Goat Ping Pong Cheese,” which is listed under the “Bruschetta” category.<sup>30</sup> To dispel any confusion over goats in Hawaiian-print shorts wielding ping pong paddles, page five of the menu explains under the heading “Cheese” that “Surfing Goat Ping Pong” is cheese from a dairy in Maui, Hawaii.<sup>31</sup> Nonetheless, it takes a visit to the dairy’s website to discover that “ping pong cheese” is goat cheese (chèvre) balls in olive oil.<sup>32</sup>

The increasingly common practice of advertising ingredients’ origins often breeds confusion, particularly when a proper noun is slipped in without capitalization. The dinner menu for Pazzo Ristorante in Portland, Oregon, once included “Bistecca Magra,” which was described as “grilled painted hills skirt steak, spinach paprika and red peppers.”<sup>33</sup> It turns out that “Painted Hills” is a producer of naturally raised beef,<sup>34</sup> and that the hills are painted only, not grilled and painted. (Whether “spinach paprika” is a single spinach-infused spice or two separate ingredients is left for the reader to ponder.)

### B. Appetizer: Reading the Statute as a Whole

The diner faced with an indecipherable menu will often find guidance by looking to context; often, the meaning of a single dish cannot be easily divined without reading the menu as a whole.<sup>35</sup>

For example, while “milk and orange juice—\$1.50” conjures up a truly foul beverage served only at the Honey Bee Deli in San Diego, reference to menu’s section heading (“Drinks”) and other items in the section (“soda and water—\$1.00”) suggest that the phrase merely refers to two beverages with the same price. Likewise, Caffè Italia’s offering of “The strawberry with fresh whipped cream” for \$6.50 might strike a diner as an outrageously expensive piece of fruit if the diner ignored the overall heading, “Belgian Waf-

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<sup>30</sup> *Menu*, EXTRAORDINARY DESSERTS, <http://s499369706.onlinehome.us/food-drinks/> (last visited Apr. 7, 2014), archived at <http://perma.cc/8RCY-VQH2>.

<sup>31</sup> *Id.*

<sup>32</sup> *More About Cheeses*, SURFING GOAT DAIRY, <http://www.surfinggoatdairy.com/images/pdf/moreaboutcheeses.pdf> (last visited Mar. 1, 2014), archived at <http://perma.cc/R4QS-EE6C>.

<sup>33</sup> *See Dinner Menu*, PAZZO RISTORANTE, <http://www.pazzo.com/portland-dining.php> (last visited Mar. 1, 2014), archived at <http://perma.cc/SVA9-3B7J>. The dish in question is not currently featured on Pazzo Ristorante’s menus.

<sup>34</sup> PAINTED HILLS NATURAL BEEF, <http://www.paintedhillsnaturalbeef.com> (last visited Mar. 1, 2014), archived at <http://perma.cc/5UNF-BXKP>.

<sup>35</sup> *See, e.g., Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (stating that it is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”) (internal quotation marks omitted). *See also J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 146 (2001) (Scalia, J., concurring) (noting that the canon “that statutes must be construed in their entirety, so that the meaning of one provision sheds light upon the meaning of another” is a “perfectly valid canon[ ] of interpretation”).

fles.” Although we are cautioned against using legislative headings to limit the plain meaning of the text,<sup>36</sup> in the menu world, headings are invaluable.

A related counterexample shows that these rules are difficult to deploy in practice. Zuni Café in San Francisco has served an alluring dessert: the “Blossom Bluff peach.” The price—supposedly \$8—indicates that something special is in store.<sup>37</sup> But unlike Caffè Italia, where the fruit comes with waffles and whipped cream, the only accoutrements at Zuni Café are a plate and a steak knife. This makes sense at Zuni, a purveyor of farm-fresh California cuisine whose menus change daily and are “inspired by seasonal organic ingredients.”<sup>38</sup> The description of a dish must be read in context not only with the entire menu, but the restaurant itself.

### C. *Soup: Reading the Statute in Its Contemporary Context*

Courts also consider congressional actions in light of the contemporary legal context.<sup>39</sup> The Ninth Circuit has observed that, in construing a statute, “[i]t is the duty of a court . . . to consider [the] time and circumstances surrounding the enactment as well as the object to be accomplished by it.”<sup>40</sup> For example, in *Callejas v. McMahon*, the court viewed an amendment to a particular law as attempting to illuminate, rather than change, the statute because prior cases had interpreted the earlier version of the act in divergent ways.<sup>41</sup> The context of the dispute or ambiguity was important to the conclusion that “the amendment is properly viewed as a legislative interpretation or clarification of the original act.”<sup>42</sup>

The observation in *Callejas* applies with equal force to the culinary arena—a reader should presume that the chef took stock of the surrounding culinary world when writing the menu. For example, the menu for Aquavit in New York<sup>43</sup> once offered such whimsical dishes as scallops “with sturgeon caviar, lily bulb salad, celery-yuzu juice & mango mustard sorbet.”

<sup>36</sup> See Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47, 203 (2008); Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 212 (1998).

<sup>37</sup> See Paolo, *Zuni’s Nectarine Desert Leaves Something to be Desired*, SF EATER (Aug. 18, 2008), [http://sf.eater.com/archives/2008/08/18/zunis\\_nectarine\\_dessert\\_leaves\\_something\\_to\\_be\\_desired.php](http://sf.eater.com/archives/2008/08/18/zunis_nectarine_dessert_leaves_something_to_be_desired.php), archived at <http://perma.cc/JW7T-XEQA>. In response to public discussion of the dish, Zuni clarified that it did intend to serve an unadorned peach for dessert. It did, however, apologize to the diner for the price; the peach should have been \$4.50, not \$8. *Id.*

<sup>38</sup> See *Menus*, ZUNI CAFÉ, <http://www.zunicafe.com/menus.html>, archived at <http://perma.cc/4MH-FTPX>. Of course, the terms “organic” or “natural” are in the eyes of beholder. See Liz Alderman, *In France, a Battle to Keep Menus Fresh*, N.Y. TIMES (Jan. 28, 2014), [http://www.nytimes.com/2014/01/29/business/international/in-france-a-battle-to-keep-menus-fresh.html?\\_r=0](http://www.nytimes.com/2014/01/29/business/international/in-france-a-battle-to-keep-menus-fresh.html?_r=0), archived at <http://perma.cc/P957-SYS6>.

<sup>39</sup> See, e.g., Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) (“It is always appropriate to assume that our elected representatives, like other citizens, know the law . . .”).

<sup>40</sup> *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *Dinner*, AQUAVIT, <http://www.aquavit.org/restaurant/pdfs/Aquavit%20New%20York%20Dinner.pdf> (last visited Feb. 23, 2014), archived at <http://perma.cc/83RK-79R6>.



The salmon plate's pairing of "espresso mustard sauce & goat cheese ice cream" similarly demolishes conventional culinary boundaries. Such combinations, if considered in a vacuum (or perhaps in your neighborhood burger joint), appear nonsensical and, to some, a bit pretentious. However, they make perfect sense in the context of contemporary fusion cuisine in New York City—some chefs really do make ice cream out of goat cheese.<sup>44</sup> One wonders, though, whether the world is really ready for another restaurant's offering of "crab and apple cannoli." Is this culinary creativity or an oxymoronic abomination?<sup>45</sup> In the restaurant world, menus survive the canon against absurdities that rejects unintelligible or irreconcilable language.<sup>46</sup>

#### D. *Salad: Punctuation Can Be Inferred*

The eminent grammarian who noted that punctuation is "a courtesy designed to help readers to understand a story without stumbling"<sup>47</sup> must never have read a statute . . . or a menu. In law, "[t]he importance of statutory language depends not on its punctuation, but on its meaning."<sup>48</sup> By some lights, "lawyers eschew the comma as far as possible, regarding it as a troublemaker."<sup>49</sup>

Restaurateurs seem to have enthusiastically embraced this absence of punctuation; while punctuation has been limited in its role in statutory inter-

<sup>44</sup> In the case of Aquavit, it helps to understand the chef's philosophy. The website once explained that the chef was "born in Ethiopia, raised in Sweden, and schooled in culinary institutes aboard cruise ships." See *Aquavit Restaurant New York | The History of Restaurant Aquavit*, AQUAVIT, <http://www.aquavit.org/restaurant/default/history.asp> (last visited Mar. 12, 2014), archived at <http://perma.cc/VWJ8-KU2S> (current version). The site further explained that the menu "showcases modern Scandinavian cuisine by combining age-old culinary traditions of Sweden with the ambitious creations of our chefs." Suddenly, dishes like "vodka lime herring" are not so surprising.

<sup>45</sup> Though culinary ambiguity can be a byproduct of sloppy wording, it often serves a purpose. See generally Emmanuelle Fauchart & Eric Von Hippel, *Norms Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008) (explaining that culinary ambiguity can serve to protect intellectual property in recipes). The same can be true in statutory construction. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 373 (1978) (explaining that purposeful ambiguity may permit social norms to inform interpretation).

<sup>46</sup> The canon against absurdities applies "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring); see also *Small v. United States*, 544 U.S. 385, 404 (2005) (Thomas, J., dissenting). As Roscoe Pound noted, "[t]here are sometimes statutes which no rule or canon of interpretation can make effective or applicable to the situations of fact which they purport to govern." 3 ROSCOE POUND, JURISPRUDENCE 493 (1959).

<sup>47</sup> LYNNE TRUSS, EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION 7 (2003).

<sup>48</sup> *Chickasaw Nation v. United States*, 534 U.S. 84, 98 (2001) (O'Connor, J., dissenting) (citing *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) ("[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning.")).

<sup>49</sup> TRUSS, *supra* note 47, at 81.

pretation, in the world of contemporary dining it is in full retreat. The comma, while much maligned, might assist the reader in determining what, exactly, will turn up if one orders “fresh fruit platter with cottage cheese or lowfat yogurt and banana nut muffin” or the true nature of the accompaniment to a Caribbean chicken salad on a bed of “cucumbers, fresh orange supreme, pineapple, lime and plantain chips.”<sup>50</sup>

Punctuation is not only regularly omitted, but also increasingly used as visual ornamentation with no regard to its meaning. Rice, an earlier incarnation of the restaurant at the W Hotel in San Diego, sprinkled periods throughout its menu, seemingly at random. While one might comprehend “angel hair pasta . garlic . tomatoes . basil . buffalo mozzarella” with relative ease, “st. agur . szechuan pepper chicken salad” and “free range chicken breast stuffed . chorizo . queso fresco” prove more difficult to decipher. What is “st. agur” (a French blue cheese from the village of Monts du Velay) and why is it listed first and, albeit a proper noun, so casually inserted in ee cummings script? Perhaps it is served as a small portion alongside the salad, rather than incorporated within? The treacherous period inserted after “chicken breast stuffed” derails the unsuspecting diner who is left to wonder “stuffed with what?” Chorizo? Queso Fresco? Both? Neither?<sup>51</sup>

### E. *Entree: Specific over General*

As a judge, I follow the Supreme Court’s admonition to avoid applying a general provision when doing so would undermine principles created by a more specific provision.<sup>52</sup> The Supreme Court put the proposition as follows:

[A] later statute, general in its terms and nor expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly

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<sup>50</sup> On the other hand, a comma may also serve to augment rather than alleviate ambiguity, as is the case with an offering of “warm chocolate, caramel soufflé with crème fraîche.”

<sup>51</sup> Poultry is apparently a particularly difficult topic for menu authors to relate. Wild Ginger in Seattle offers “a velveted free range chicken breast.” *Wild Ginger*, OPENMENU, <http://openmenu.com/restaurant/20ee8aa4-15bb-11e0-b40e-0018512e6b26> (last visited Feb. 22, 2014), archived at <http://perma.cc/53B-4W73>. The chicken is not “velveted free,” i.e., sans a fuzzy cloth covering. Rather, “velveted” is a method of marinating and precooking meat to make it tender. The dish is thus better understood as “a velveted, free-range chicken breast.”

<sup>52</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992); see also *United States v. Estate of Romani*, 523 U.S. 517, 530–33 (1998) (holding that a later, specific statute trumps an earlier, more general statute).

named, or unless the provisions of the general are manifestly inconsistent with those of the special.<sup>53</sup>

As a diner, I often find myself wishing that chefs were similarly restrained.

This issue is aptly illustrated by a family brunch outing. One morning at The Broken Spur Café on Casper Mountain in Wyoming, my family was besieged by confusion over what meal we were eating. The menu included a breakfast menu—with no specific times of service—and a lunch menu that was available from 11:00 until 4:00 daily. The final page of the menu, however, included a “Sunday Breakfast” menu, served on Sundays from 8.00–1.00. Unaware of the schedule, we arrived on a Sunday at 11.30, hungry for the Broken Spur’s famous special pancakes. Looking at the first two pages of the menu, my brother asked the question that made our hearts skip a beat—“can we still get breakfast, or are we stuck with the lunch menu?”

Major consequences rode upon the fine hourly distinctions—such Casper classics as Grandma’s Original “Pumpkin Spice Stallion,” Grandpa’s Favorite “Banana Mountain Man,” and my favorite, the Peanut Butter “Lawman,” are offered during Sunday breakfast only. “Relax,” I told my family members. “The specific must prevail over the general, so the general times for breakfast and lunch must yield to the Sunday-specific schedule.” Alas, that canon may hold in the law, but not so atop Casper Mountain, where we were left eating an early lunch.

#### F. *Dessert: Relying on Common Sense*

As Justice Oliver Wendell Holmes observed more than eighty years ago, “there is no canon against using common sense in construing laws [or menus!] as saying what they obviously mean.”<sup>54</sup> In a more recent case, the Supreme Court held that the Indian Gaming Regulatory Act’s reference to another chapter of the United States Code was simply an error, reasoning that “in context, common sense suggests that the cross-reference is simply a drafting mistake, a failure to delete an inappropriate cross-reference in the bill that Congress later enacted into law.”<sup>55</sup> The Court observed, “in ordinary life, we would understand an analogous instruction—say, ‘Test drive some cars, including Plymouth, Nissan, Chevrolet, Ford, and Kitchen Aid’—not as creating ambiguity, but as reflecting a mistake.”<sup>56</sup> In the law, in car-buying, and in dining, common sense is an essential ingredient.

By way of example, Le Pain Quotidien’s one-time proclamation that “All our Breads are made with Organic Flour, Seeds, Nuts, Grains & Raisins” presumably meant that if a bread contains such items, they will be organic, not that one should expect every loaf or croissant to come studded

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<sup>53</sup> *Rogers v. United States*, 185 U.S. 83, 87–88 (1902).

<sup>54</sup> *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

<sup>55</sup> *Chickasaw Nation v. United States*, 534 U.S. 84, 91 (2001).

<sup>56</sup> *Id.* at 90–91.

with nuts and raisins. Perhaps an astute manager recognized this problematic language. The menu now touts that the “rustic breads all begin with organic, stone-ground wheat, water and salt” and then “add grains and seeds or supplement with carefully milled flours.”<sup>57</sup>

Haphazard translations of foreign menus add a whole new layer to this analysis. A menu in France included a dessert of “sprinkle of coconut on iced passionfruit gaspacho”—common sense compels me to conclude that the gaspacho dominates the dish rather than the coconut, despite the ordering of the items in the description. Common sense also tells me that Momofuku Milk Bar’s famous compost cookie is not made of table scraps.<sup>58</sup>

### G. *Digestif: Legislative History*<sup>59</sup>

As a last resort, when hopelessly astray in a wilderness of fishberries, painted meat, and geoduck clam (which needs no artistic license to highlight its nonsense), the diner may turn to a sort of “menu history,” not unlike the Congressional reports cited in judges’ opinions.<sup>60</sup> When a diner simply cannot decipher a dish from the menu itself, there is recourse to outside sources: waiters, chefs, and various culinary Bibles, such as *The Oxford Companion to Food*<sup>61</sup> or *Larousse Gastronomique*.<sup>62</sup>

The first step is to consult the waiter, although the response to such a query may reflect imperfectly the drafter’s intent.<sup>63</sup> The pitfalls of entrusting a waiter with the more delicate questions of menu interpretation are familiar to anyone who has actually tried it—confidence often outstrips knowledge,

<sup>57</sup> *Our Bread*, LE PAIN QUOTIDIEN, <http://www.lepainquotidien.com/our-bread/> (last visited Feb. 23, 2014), archived at <http://perma.cc/UEK5-4HXM>.

<sup>58</sup> *See Recipes and How To’s*, MILK BAR, <http://milkbarstore.com/main/press/recipes-and-how-tos/#compost> (last visited Feb. 23, 2014), archived at <http://perma.cc/8D9X-VBCH>.

<sup>59</sup> With apologies to Justice Scalia, for whom a dose of legislative history is presumably more likely to unsettle than calm the stomach. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 390 (2000) (Scalia, J., concurring) (“Of course even if all of the Court’s invocations of legislative history were not utterly irrelevant, I would still object to them.”).

<sup>60</sup> *See BedRoc Ltd. v. United States*, 541 U.S. 176, 187 n.8 (2004) (noting “longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text.”); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005) (affirming that “[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country” and using legislative history to determine government purpose in the Establishment Clause context).

<sup>61</sup> ALAN DAVIDSON ET AL., *THE OXFORD COMPANION TO FOOD* (2d ed. 2006).

<sup>62</sup> LAROUSSE GASTRONOMIQUE (Prosper Montagne ed., Octopus Publ’g 2001) (1938).

<sup>63</sup> As the Supreme Court observed in *Exxon Mobil Corp. v. Allapattah Servs.*:

[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

545 U.S. 546, 568 (2005).

and waiters, like congressional staffers, may carry institutional incentives that diverge from the authoritative speaker.<sup>64</sup>

When in doubt, the best move is to go directly to the source—the chef. Unlike the problems created by long-lived statutes and short-lived Congressional careers, the typical diner can be confident that the author of the menu likely will also be the person in the kitchen with the biggest white hat.<sup>65</sup> That person will often have thought long and hard about the word choices on the menu.<sup>66</sup> Indeed, university researchers are now exploring the psychology of menus, documenting “the effect the name of a dish has on diners.”<sup>67</sup> Like modern litigation, menu deconstruction may soon require a bevy of experts. As one restaurateur put it, “[t]he chefs write the music and the menu becomes the lyrics, and sometimes the music is gorgeous and it’s got the wrong lyrics and the lyrics can torpedo the music.”<sup>68</sup>

### III. CONCLUSION

One could attempt to avoid ambiguous menus all together by opting for a cafeteria style approach to dining, in which case you actually see the merchandise. Then again, not all is apparent to the naked eye, as anyone who has eaten at a classic dim sum restaurant will attest. A whole array of fillings can be hiding in a seemingly simple, fluffy, white steamed bun.

But perusing creative menus is all part of the fun—whether the creative flair is intentional or unintentional. Culinary ambiguity can lead to culinary adventures. A little surprise to the taste buds every now and then is far preferable to keeping to the safe world of PB&Js or other straightforward dishes. Then again, even classic peanut butter and jelly has gotten a glamorous make-over: Peanut Butter & Co. in New York City offers such exotic twists on the American classic as “White Chocolate Wonderful”—peanut butter

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<sup>64</sup> Justice Scalia cautioned:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself. I decline to participate in this process.

Blancard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring).

<sup>65</sup> Although, in this day of corporate restaurateering, the menu author could be a menu engineer or restaurant consultant. Amy Fleming, *Restaurant Menu Psychology: Tricks to Make us Order More*, THE GUARDIAN WORD OF MOUTH BLOG (May 8, 2013, 8:13 PM) <http://www.theguardian.com/lifeandstyle/wordofmouth/2013/may/08/restaurant-menu-psychology-tricks-order-more>, archived at <http://perma.cc/X6V2-FMDV>.

<sup>66</sup> See Sarah Kershaw, *Restaurants Use Menu Psychology to Entice Diners*, N.Y. TIMES, Dec. 22, 2009, at D1.

<sup>67</sup> Fleming, *supra* note 65.

<sup>68</sup> Kershaw, *supra* note 66.

blended with sweet white chocolate, and spicy peanut butter called “The Heat Is On.”<sup>69</sup> And, believe it or not, they offer a Peanut Butter BLT. And yes, the plain meaning rule applies: The sandwich combines peanut butter and bacon.<sup>70</sup> I think I’ll stick to the classic variety.

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<sup>69</sup> *Peanut Butter Jars*, PEANUT BUTTER & Co., <http://ilovepeanutbutter.com/peanut-butter-1.html> (last visited Feb. 23, 2014), *archived at* <http://perma.cc/YWG8-5N82>.

<sup>70</sup> *Sandwich Shop Menu*, PEANUT BUTTER & Co., [http://ilovepeanutbutter.com/media/pdf/shop\\_menu.pdf](http://ilovepeanutbutter.com/media/pdf/shop_menu.pdf) (last visited Feb. 23, 2014), *archived at* <http://perma.cc/KL45-M29Q>.