ABSURD RESULTS, SCRIVENER'S ERRORS, AND STATUTORY INTERPRETATION

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INTRODUCTION

When a sheriff arrests a postal employee for murder, does the arrest violate a law against obstructing the passage of the mail?[1] Or, suppose that a statute makes it illegal to "draw blood" in the streets. Do its terms apply to a doctor who performs emergency surgery in the street?[2] What of a prisoner who breaks out of prison because the building is on fire? Does his flight violate a law against prison escapes?[3] Many would say that these laws should not be taken literally.

In order to avoid odd results, however, courts sometimes have to rewrite a statute's words. For example, the Ninth Circuit recently concluded, while interpreting the Class Action Fairness Act of 2005, that the word "less" actually means "more."[4] Other courts have found that the word "of" means "or,"[5] and the word "unlawful" means "lawful."[6] Should judges ever have the power to revise unambiguous statutes? Textualists generally say no to this question, and yet they recognize

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1. *Cf.* United States v. Kirby, 74 U.S. 482 (1868) (concluding that the law does not apply to such facts).

2. *Cf.* WILLIAM BLACKSTONE, 1 COMMENTARIES *60 ("[T]he Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon, who opened the vein of a person who fell down in the street with a fit.").

3. *Cf. Kirby*, 74 U.S. at 487 ("The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'").

4. *See*, *e.g.*, Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1146 (9th Cir. 2006). The Ninth Circuit is not alone in this view. *See* Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1093 n.2 (10th Cir. 2005) (concluding that "less" should be read to say "more."). For a critique of the Ninth Circuit's decision, see *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.,* 448 F.3d 1092, 1099 (9th Cir. 2006) (Bybee, J., dissenting from denial of rehearing en banc) (suggesting that the court had "ignored the deference we must give to the supremacy of the legislature").

5. *See*, *e.g.*, Stanton v. Frankel Bros. Realty Co., 158 N.E. 868, 870 (Ohio 1927).

6. *See*, *e.g.*, Scurto v. Le Blanc, 184 So. 567, 574 (La. 1938)

exceptions. These exceptions, and their reconciliation with textualism, are the topic of this article.

Oliver Wendell Holmes, Jr. famously said that, "[w]e do not inquire what the legislature meant; we ask only what the statute means."[7] This is an apt summary for textualist statutory interpretation.[8] In essence, textualist courts look for the meaning of a statutory text, read in context, as it would be interpreted by a competent user of the language.[9] If the statute is unambiguous, searching behind the statutory language for the actual intentions of legislators is unnecessary.[10] The court's determination of the objective meaning of the statute ends the inquiry.

Despite textualist claims that legislative intent is not relevant, this interpretive approach seems to have limits.[11] When the literal meaning of a statute would be absurd, courts will seek an alternative reading of the statutory text.[12] This avoidance of absurd results is known as the

7. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

8. *Cf*. Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 16 (Amy Gutmann ed., 1997) (questioning the view that "the judge's objective in interpreting a statute is to give effect to 'the intent of the legislature.'"); *id*. at 17 ("It is the *law* that governs, not the intent of the lawgiver."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("The words of the statute, and not the intent of the drafters, are the 'law.'").

9. *See*, *e.g*., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 ("[T]extualism does not admit of a simple definition, but in practice is associated with the basic proposition that judges must seek and abide by the public meaning of the exacted text, understood in context (as all texts must be)."); Easterbrook, *supra* note 8, at 65 ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."). *See also* Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined.") (citation omitted).

10. *See*, *e.g*., Scalia, *supra* note 8, at 16 (endorsing the rule that "when the text of a statute is clear, that is the end of the matter."). *See also* Nat'l Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) ("Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity. Subject to the standard proviso about absurd results, when the statute itself resolves the problem at hand, that is an end to matters.") (citations omitted).

11. To some commentators, these exceptions indicate that textualism is concerned with subjective intent. *See*, *e.g*., Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is An Impossibility*, 41 SAN DIEGO L. REV. 967 (2004) (alleging exceptions to textualist premises, and concluding "these exceptions all point in one direction—toward a healthy (but underappreciated) concern for authorial intent."). *Cf*. Caleb Nelson, *What Is Textualism*, 91 VA. L. REV. 347, 348 (2005) ("[J]udges whom we think of as textualists construct their sense of objective meaning from what the evidence that they are willing to consider tells them about the subjective intent of the enacting legislature.").

12. For a thorough analysis of this doctrine, see generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). *See also* Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69

absurdity doctrine. Similarly, when a statute obviously suffers from a drafting error, courts will correct the statute to comport with the text Congress presumably intended to write.[13] This exception is the scrivener's error doctrine.

Avowed textualists willingly apply these exceptions when interpreting statutes.[14] Yet both of these doctrines are troubling for a textualist theory of statutory interpretation. In each instance, courts are given leeway to depart from the literal meaning of the text, based on what the legislature presumably intended (or would have intended, had they thought of the specific problem at issue). These judicially created exceptions appear to create a contradiction between textualist theory and practice.[15]

Furthermore, the absurdity and scrivener's error doctrines raise difficult line drawing questions. If the absurdity doctrine is grounded in policy, why should courts limit themselves solely to absurdities, without addressing the policy concerns that arise in less egregious situations?[16] If the scrivener's error doctrine is grounded in the pursuit of legislative intent, why not depart from clear statutory language in other cases where legislative goals and the actual text diverge?[17] A dividing line between cases where policy or intent should matter, and cases where a clear text should prevail, is less than obvious.

Critics argue that the absurdity and scrivener's error doctrines are fatal to a textualist theory of statutory interpretation.[18] As one

GEO. WASH. L. REV. 309 (2001); John Copeland Nagle, *Textualism's Exceptions*, *in* ISSUES IN LEGAL SCHOLARSHIP (2002), *available at* http://www. Bepress.com/ils/iss3/art15.

13. *See generally* Michael S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV. 589 (2000) (describing application of the scrivener's error doctrine). *See also* Siegel, *supra* note 12; Nagle, *supra* note 12.

14. *See*, *e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring) (interpreting Rule 609(a) of the Federal Rules of Evidence to avoid an "absurd, and perhaps unconstitutional, result"). *See also* Manning, *supra* note 12, at 2420 n.123 (listing opinions by Justice Scalia and Judge Easterbrook that recognize the absurdity doctrine).

15. *See*, *e.g.*, Nagle, *supra* note 12, at 3 (contending that the absurdity and scrivener's error doctrines conflict with textualist principles).

16. *Cf.* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 45 (1994) (suggesting, based on textualist acceptance of the absurdity doctrine, a concession that "following statutory text is not all that is going on in statutory interpretation, and that current interpretive values also have a role to play.").

17. *Cf.* Siegel, *supra* note 12, at 333 ("[I]f the statutory text *is* the law, why is it sometimes not the law? Why does it cease to be the law when it is absurd, or obviously mistaken?").

18. *See id*. ("The more important problem is that acknowledgement of the absurd results or 'scrivener's error' exception undermines the very foundations of textualism."). *See also* Recent Case, *Statutory Construction—Drafting Errors—D.C. Circuit Declares Section 92 of the National Bank Act Invalid*—Independent Ins. Agents v. Clarke, 955 F.2d 731 (D.C. Cir. 1992), 105 HARV. L. REV. 2116, 2121 (1992) ("Rigidly textualist judges . . . cannot correct drafting errors without undermining their own interpretive methodology."). *See also* Gene Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1065

commentator recently suggested:

> Once it is admitted that statutory text does not always, by virtue of its creation through constitutional processes, have an unshakable claim to enforcement, and once it is confirmed that the judiciary may, without improperly invading the legislative power, depart in some cases from statutory text, the thing becomes a matter of degree.[19]

Defenders of textualism have also expressed doubts that this kind of exception is consistent with textualist principles.[20] John Manning, for example, has recently suggested that courts should reject the absurdity doctrine because it permits courts to displace the outcomes of the legislative process.[21]

In contrast, this article will contend that the absurdity and scrivener's error doctrines are consistent with textualist principles, at least in cases of gross absurdities, or obvious drafting errors. In such cases, a literalist statutory interpretation may be incompatible with the understanding of a competent user of the language. Competent readers do consider the apparent intent of an author when they read a document. Because some interpretations of a statute *could not* have been intended by the statute's authors, they are not plausibly consistent with the statute's objective meaning.

The key to making sense of the alleged exceptions to textualism is to clarify the role of intent for textualist thought. Statutes are unlike casual conversations, in which the speaker's subjective intent is paramount to

(2006) (suggesting that John Manning "essentially incorporates both the theory and practice of the absurdity doctrine into his own version of contextual textualism," and that this approach "casts further doubt on the theoretical foundations of the new textualism").

19. *See* Siegel, *supra* note 12, at 326. For similar arguments, *see* ESKRIDGE, *supra* note 16, at 45–46 ("[T]here is no logical reason not to sacrifice plain meaning when it directs an 'unreasonable' result that was probably unintended by Congress."); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 986 (1995) (suggesting, with respect to an absurdity exception to rules: "once it is decided that a single exception will be allowed, it is always open, in principle, to decide that another exception should be made too. The refusal to make a further exception is based on a form of casuistry, finding the proposed further exception to be distinguishable from the previous case in which an exception has been made. Hence the line between case-by-case judgments and rule-following becomes thin in principle."). *Cf.* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) ("In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product.").

20. *See*, *e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 115 (2001) (suggesting textualists' adherence to absurdity doctrine "subjects [them] to the charge that there is no principled difference between their (narrow) absurdity doctrine and more robust forms of strong purposivism or equitable interpretation."); Nagle, *supra* note 12, at 2 ("[W]hy have an exception in the first place? If statutory text is paramount, then why should the results matter?").

21. *See* Manning, *supra* note 12, at 2486.

interpreting the meaning of an utterance.[22] The nature of the legislative process raises serious doubts about the verifiability, and even existence, of a subjective legislative intent raise serious doubts. But even if no true intent exists, statutes can still appear to be the product of an authorial intent.

This presumed, "objectified" intent is a standard feature of textualist doctrine.[23] Textualists regularly rely on such presumptions—Congress's presumed intent enables courts to adopt colloquial word meanings in place of dictionary definitions, for example.[24] Courts also assume that established terms of art are intended to have their acquired meaning.[25] Linguistic conventions permit judges to conclude that an intended meaning exists without knowing what was actually intended.

Although the situations are unusual, both the absurdity and scrivener's error doctrines fit within this broad concept of an "objectified" intent. They address an outcome which is so unthinkable, or a word choice which is so clearly mistaken, that a literal interpretation of the statute's words would deviate from the conventional understanding of the statutory language. It is not plausible to presume Congress desires that its words be read to the letter under these circumstances. To the extent objective meaning is a guide, even a court that is skeptical that legislative intent exists can rule out certain statutory interpretations.

Recognizing why textualism permits the absurdity and scrivener's error doctrines does more than provide coherence, however. A textualist justification for these doctrines also places limits on their scope.[26] Only extreme cases—cases of obviousness—would justify reliance on an

22. *Id.* at 2462 n.274 (drawing this distinction).

23. *See*, *e.g.*, Scalia, *supra* note 8, at 17 ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."). *See also* Manning, *supra* note 9, at 426 n.23 ("[T]extualists believe that objective intent derives from the way a person conversant with applicable social and linguistic conventions would read the words in context.").

24. *See* Manning, *supra* note 20, at 109 ("Like any reasonable language user, textualists pay attention to the glosses often put on language (even in ordinary usage), the specialized connotations of established terms of art, and the background conventions that sometimes tell readers how to fill in the gaps inevitably left in statutory directions.").

25. *See* Morisette v. United States, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

26. *Cf.* Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring) (suggesting that the absurdity doctrine is only a legitimate tool "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.") (citation omitted).

"objectified" intent that conflicts with an otherwise clear statute. Less severe departures from anticipated uses of language may reflect the compromises inherent in the legislative process.[27] This line between obvious and debatable cases is not bright, but it is necessary if courts are to concern themselves solely with what a statute objectively means.

Part I of this article will describe the basic premises of textualist thought. Part II will outline the primary arguments offered in support of the textualist approach. One of the principal justifications is a skepticism regarding the verifiability, and in some cases the possibility, of legislative intent. Other concerns include the formal nature of legislation, and the constitutional separation of powers. These concerns provide a backdrop for the discussion which follows.

Part III will set forth the two significant "exceptions" to textualism, the absurdity doctrine and the scrivener's error doctrine. Although some dispute exists as to the proper scope of these doctrines, this discussion will provide an analysis of each as applied by courts. This Section will also discuss the textualist challenges raised by both doctrines.

Parts IV and V will demonstrate that the scrivener's error and absurdity doctrines can be squared with textualist thinking, given a context-based analysis of legislative language. A reasonable reader of statutory language takes into account the apparent intent of an author as evidenced by the text. These Sections of the article will suggest that, when a drafting error is obvious enough, or an application of statutory language sufficiently absurd, a reasonable reader would understand the meaning of a statute to exclude the "literal" meaning. As a result, the objective meaning of a statute is distinct from its literalist interpretation.

Finally, Part VI will address the line drawing difficulties posed by a test for absurdities and scrivener's errors that covers only the most egregious cases. Courts may misapply either doctrine, and in some cases will have incentives to do so. A requirement that all readers would agree Congress could not have intended the statute to apply to the matter in dispute, or that the statutory language could not have been intended as written, should limit the potential for misuse.

I. TEXTUALISM DEFINED

Broadly defined, textualism is a theory of statutory interpretation that calls for judges to enforce the objective meaning of statutory language.[28]

27. *Cf.* Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 461 (2002) ("Dissatisfied with the text of the statute, the Commissioner attempts to search for and apply an overarching legislative purpose to each section of the statute. Dissatisfaction, however, is often the cost of legislative compromise.").

28. *But cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct.. 2611, 2628 (2005) (Stevens,

Assuming that a statute's meaning is unambiguous, courts must faithfully apply the text as written.[29] This objective meaning is located in the reader's understanding of the text. In this formulation, the statute's meaning can be found in "the understanding of the objectively reasonable person."[30] Courts should hear the words of a statute as a "skilled, objectively reasonable user of words" would hear them.[31]

Textualists also recognize that the meaning of words is context-dependent.[32] In contrast with early plain-meaning theories, modern proponents reject a context-free understanding of language, whereby

J., dissenting) ("Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted."). It is beyond the scope of this article to assess the possibility of an objective meaning. On the question of whether an objective meaning exists, see Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 85 (concluding that many legal questions have determinate answers "in the sense of answers (1) that virtually all lawyers would reach upon understanding the legal questions and (2) that are unopposed by any powerful contrary arguments consonant with the 'ground rules' of the legal enterprise."); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 203, 222 (Andrei Marmor ed., 1995) ("Meaning is not radically indeterminate; instead, meaning is public—fixed by public behaviour, beliefs, and understandings. There is no reason to assume that such conventions cannot fix the meaning of terms determinately."). *See also* Manning, *supra* note 12, at 2397 n.30 (citing literature on this question).

29. *See* Scalia, *supra* note 8, at 16 ("when the text of a statute is clear, that is the end of the matter."). *See also* Manning, *supra* note 9, at 420 ("[T]extualism does not admit of a simple definition, but in practice is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context (as all texts must be).").

30. Easterbrook, *supra* note 8, at 65. *See also id*. at 61 ("Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem."). This is not to say that all judges will agree on the perspective of an objectively reasonable person. *Cf.* Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1658 (2000) ("Mental state perplexities may intrude when typical readers, or a reasonable reader, determine legislative purpose and when the judge decides how to construct the reader.").

31. Easterbrook, *supra* note 8, at 65. *See also* Scalia, *supra* note 8, at 17 (suggesting judges look for "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.").

32. *See*, *e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994) ("Words take their meaning from contexts, of which there are many—other words, social and linguistic conventions, the problems the authors were addressing."). *See also* Manning, *supra* note 12, at 2457 ("[T]extualists do believe that statutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts."). For dramatic examples of the effect which context may have on word meaning, see Gerald Graff, *'Keep off the Grass,' 'Drop Dead,' and Other Indeterminacies: A Response to* Sanford Levinson, 60 TEX. L. REV. 405, 407–08 (1982). In addition to the statutory setting, textualists recognize the significance of choosing the relevant linguistic community when interpreting a document. *See*, *e.g.*, Cont'l Can Co. v. Chi. Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities."). *See also* Manning, *supra* note 12, at 2396 ("[C]ontemporary theories of textual interpretation . . . build on Wittgenstein's premise that language is intelligible by virtue of a community's shared conventions for understanding words in context.").

courts look solely to the four corners of a document for its meaning.[33] Nor are dictionary definitions always decisive when determining the meanings of words, although they provide relevant evidence of that meaning.[34] Words may have established definitions in colloquial usage that differ from their dictionary definitions.[35]

Modern textualists contend that statutory language must be read in light of the reasonable understanding of the relevant linguistic community, given the circumstances in which the language was uttered.[36] The setting matters. Thus, a technical term may be understood in light of the definition used by experts in the field, or a legal term of art may be read with respect to its common law meaning. Ambiguities are often resolved by the common understanding of a word in a particular context.

This philosophy is frequently contrasted with an interpretive stance known as intentionalism. Intentionalists are concerned with the subjective intent of the legislature in enacting a statute, and this is where they locate statutory meaning.[37] To be sure, the border between textualism and intentionalism is not always obvious.[38] By and large,

33. This is a point which John Manning has emphasized. *See* Manning, *supra* note 12, at 2456 (explaining that this plain-meaning school has been rejected by modern textualists). Leading textualists are quite clear that they do not consider themselves to be literalists. *See*, *e.g.*, Manning, *supra* note 9, at 434 (noting that textualists are not literalists); Manning, *supra* note 20, at 108 (same); Scalia, *supra* note 8, at 24 ("The good textualist is not a literalist . . . ."); Easterbrook, *supra* note 32, at 67 ("I want to reemphasize what should be obvious. 'Plain meaning' as a way to understand language is silly.").

34. *See* Easterbrook, *supra* note 32, at 67 (noting that "the choice among meanings must have a footing more solid [than] a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures."); Manning, *supra* note 12, at 2458–59 ("[B]ecause dictionaries have a limited capacity to record the nuances of usage, widely shared contextual understandings may identify colloquial refinements of even the most locally applicable dictionary definitions.").

35. *See* Manning, *supra* note 12, at 2459. (providing as an example the manner in which the term "motor vehicle" has come to mean "cars, trucks, and perhaps motorcycles.").

36. *See id.* at 2458 ("Modern textualists start from the premises that 'a large number of contextual understandings will be assumed by all speakers of a language,' and that many such understandings will be 'largely invariant across English speakers at a given time.'") (quoting FREDERICK F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 57 & n.6 (1991)). *See also* Easterbrook, *supra* note 32, at 61. For examples of judicial expressions of this point, see Manning, *supra* note 20, at 11 n.433.

37. As William Eskridge defines the traditional intentionalist approach, "the Court views its role as implementing the original intent or purpose of the enacting Congress." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990). From the intentionalist perspective, "almost anything that casts light upon what Congress attempted to do when it enacted a statute is potentially relevant." *Id.* Textualists, in contrast, are far less willing to consider evidence of legislative intent.

38. *See* Nelson, *supra* note 11, at 353–54 (noting that "textualist as well as intentionalist judges routinely seek to identify and enforce the legal directives that an appropriately informed interpreter would conclude the enacting legislature had meant to establish."). *See also id*. at 359–60 (providing examples). *See also* Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 464 (2005) [hereinafter Nelson, *A Response*] (arguing that distinctions between intentionalists and textualists are not

however, intentionalists are interested in the meaning a statute actually had to its authors, while textualists are interested in the meaning it would have to a competent reader.[39]

Efforts to discern what a reasonable reader would understand a text to mean often take into account the apparent intent of the text's author.[40] A reasonable reader understands language in light of how authors under the circumstances usually intend their words.[41] Thus, textualist courts look for an "objectified intent."[42] Should an author's actual intent diverge from the apparent intent indicated by the text, the textualist will conclude that the apparent intent prevails.[43]

Intent may play a different role where ambiguities arise. Ambiguous statutes have more than one plausible meaning, and they require more from a court than a mere application of a statute's objective meaning.[44] Some textualist judges are willing to consider legislative history where a statutory text is ambiguous.[45] Whether this choice to review legislative history concedes an interest in subjective legislative intent is a separate question.[46] For that matter, whether a statute is ambiguous in the first

clear cut).

39. *See* Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 20 (2003) (suggesting "textualism . . . employs a reader-centered strategy" and "[i]ntentionalism . . . employs a writer-centered strategy for attributing meaning to statutory text."). The two conceptions can be collapsed to some extent. *Cf.* Greenawalt, *supra* note 30, at 1672 (concluding that "[r]eaders of statutes end up making judgments about the aims of legislators.").

40. *See*, *e.g.*, Scalia, *supra* note 8, at 17 ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris."). *See also id*. ("As Bishop's old treatise nicely put it . . . '[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended.'") (emphasis omitted) (citing JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 57–58 (1882)).

41. *See*, *e.g.*, Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined.") (citation omitted). Note that this reference to how an ordinary Member of Congress would read words is not a reference to how that individual *did* read the words.

42. *See* Scalia, *supra* note 8, at 17.

43. As Jonathan Siegel notes, there is some uncertainty whether the Supreme Court considers this a question of the clarity of Congress's intent, or the clarity of the text itself. *See* Siegel, *supra* note 12, at 325 n.74 (discussing cases which use either formulation).

44. *Cf.* Alexander & Prakash, *supra* note 11, at 988 (suggesting that, without reference to evidence of actual authorial intent, a text may have multiple objective meanings).

45. *See*, *e.g.*, Bd. of Trade v. SEC, 187 F.3d 713, 720 (7th Cir. 1999) (Easterbrook, J.) ("Legislative history is problematic under the best circumstances, and even so reliable a source as the Conference Committee Report may be used only when there is a genuine ambiguity in the statute."). *See also* Nelson, *supra* note 11, at 360 n.38 (citing statements by Judge Easterbrook which recognize the potential usefulness of legislative history in interpreting ambiguous statutes); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 737 n.272 (1997) (providing examples of cases in which textualist judges consider a statute's drafting evolution as part of statutory context).

46. *Cf.* Nelson, *supra* note 11, at 360–61 ("[T]extualists as well as intentionalists make use of

place can be difficult to resolve.[47]

For purposes of this article, however, the problems of ambiguity are not at issue. When statutes are unambiguous, courts are faced with a different concern. Under the traditional understanding of textualism, an unambiguous statute is decisive, and Congress's subjective legislative intent is unavailable as a source of statutory meaning.[48] It is in this context that the absurdity and scrivener's error doctrines become significant.

II. THE CONCEPTUAL AND POLICY FOUNDATIONS OF TEXTUALISM

As later Sections of this Article will develop, textualism is inconsistent with some incarnations of the absurdity and scrivener's error doctrines. It is (or can be) compatible with a narrow reading of these doctrines, but the ability to reconcile textualism and its "exceptions" depends on the premises of textualist thinking. Common justifications for textualism, along with their implications, are set forth in the discussion below.

A. Intent Skepticism

Textualists are deeply skeptical that courts can accurately verify legislative purposes beyond what is indicated by express statutory language. Two of the leading judicial proponents of textualism, Justice Scalia and Judge Easterbrook, both emphasize this concern. Insights from public choice theory play a prominent role in this skepticism. Proponents raise doubts about the existence of intent as applied to groups. In addition, some question the judicial capacity to reconstruct legislative intent after the fact, even assuming that a group intent exists.

Public choice theory suggests that legislation is often the product of interest groups' competing for legislative outcomes.[49] Statutory

publicly available information about the linguistic habits and policy preferences of the particular group of legislators who comprised the enacting Congress."), with Manning, *supra* note 9, at 439 n.65 ("[T]extualists may rely on apparent overall purpose not as a way of identifying subjective legislative intent, but rather as a theory of appropriate judicial behavior in cases of indeterminacy."). *See also* Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990) ("Because laws themselves do not have purposes or spirits—only the authors are sentient—it may be essential to mine the context of the utterance out of the debates, just as we learn the limits of a holding from reading the entire opinion.").

47. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct.. 2611, 2628 (Stevens, J., dissenting) (suggesting that ambiguity is "in the eye of the beholder").

48. *See supra* note 10.

49. *See* Easterbrook, *supra* note 8, at 63 ("[T]he original intent approach to legislation ignores the fact that laws are born of compromise. Different designs pull in different directions. To use an

language is frequently drafted through a complex bargaining process, which can result in legislative compromises that do not reflect shared policy goals.[50] Theorists such as Kenneth Arrow have demonstrated that legislation may reflect multiple preferences, with the order in which votes are taken altering the substantive outcome of the bargaining process.[51]

Assuming a shared policy goal, the legislature may have chosen an incremental means to achieve it.[52] Purpose-based interpretation raises the concern that a deviation from the letter of the law will conflict with the chosen means, effectively disregarding legislators' actual intentions.[53] In light of the potential for legislative compromise, judges are not well situated to determine how legislators intended to resolve particular problems other than by compliance with a clear statutory

algebraic metaphor, law is like a vector. It has length as well as direction."). *See also* Manning, *supra* note 20, at 18 ("Because statutory details may reflect only what competing groups could agree upon, legislation cannot be expected to pursue its purposes to their logical ends; accordingly, departing from a precise statutory text may do no more than disturb a carefully wrought legislative compromise.").

50. In Judge Easterbrook's words:

> If legislation grows out of compromises among special interests, however, a court cannot add enforcement to get more of what Congress wanted. What Congress wanted was the compromise, not the objectives of the contending interests. The statute has no purpose. It is designed to do what it does in fact. The stopping points are as important as the other provisions.

Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 46 (1984):

51. *See* Kenneth Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–44 (1992) (explaining how, under Arrow's Theorem, "it is not possible to guarantee that a majority rule process will yield coherent choices"). *See also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) ("It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support. The existence of agenda control makes 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.") (citation omitted). In addition, "[a] successful logrolling process yields unanimity on every recorded vote and indeterminacy on all issues for which there is no recorded vote." *See id*. at 548 (citation omitted). For additional commentary, see Manning, *supra* note 20, at 19 n.76 (gathering sources).

52. *Cf*. Small v. United States, 544 U.S. 385, 404 (2005) (Thomas, J., dissenting) ("[I]t is not senseless to bar a Canadian antitrust offender from possessing a gun in this country, while exempting a domestic antitrust offender from the ban. Congress might have decided to proceed incrementally and exempt only antitrust offenses with which it was familiar, namely, domestic ones.").

53. *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 n.4 (1994) (Scalia, J.) (noting that the Court is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."). *See also* Manning, *supra* note 20, at 19 ("[T]extualists contend that enforcing the purpose, rather than the letter, of the law may defeat the legislature's basic decision to use rules rather than standards to articulate its objectives."); Easterbrook, *supra* note 32, at 68 ("Sometimes Congress specifies values or ends, things for the executive and judicial branches to achieve, but often it specifies means, creating loopholes but greater certainty. Using legislative history and an imputed 'spirit' to convert one approach into another dishonors the legislative choice as effectively as expressly refusing to follow the law.").

text.[54]

In many cases, no legislative intent exists with respect to specific statutory clauses. A bill may not be fully read in all its particulars by each legislator.[55] And a group cannot possess intentions in the same manner as an individual speaker.[56] Groups do not have minds. Even if one posits that legislatures can possess a majoritarian "group intent" by amalgamating the intent of individual legislators, the legislative majority is often comprised of individuals with multiple, divergent intentions.[57]

54. As Manning explains:

> The question is not about legislative or societal preferences in the abstract. Rather, the relevant question is whether the legislature—constrained by the legislative process—would have been able to agree on wording that would include or exclude the troubling application or omission. Modern textualists contend that the latter question is simply unanswerable after the fact. The legislative process, they argue, is too complex, too path-dependent, and too opaque to allow judges to reconstruct whether Congress would have resolved any particular question differently from the way the clear statutory text resolves the question.

Manning, *supra* note 12, at 2409–10.

55. This point applies *a fortiori* to legislative history. *Cf.* Bank One Chi. N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (suggesting that "it is a fiction of Jack-and-the-Beanstalk proportions to assume that more than a handful of those Senators and Members of the House who voted for the final version of the Expedited Funds Availability Act, and the President who signed it, were, when they took those actions, aware of the drafting evolution that the Court describes.").

56. *See* Heidi M. Hurd, *Sovereignty In Silence*, 99 YALE L.J. 945, 969 (1990) (describing the implausibility of the position that "legislatures experience sensations, moods, and emotions, as well as intentions."). *See also* Easterbrook, *supra* note 32, at 68 ("Intent is elusive for a natural person, fictive for a collective body."); Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1389 (2000) ("[L]egislatures, courts, agencies, and other legal institutions do not possess mental states, independent of the mental states of the persons that make up these institutions."). *But see* Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 437–444 (2005) (suggesting that a group can be seen as possessing a single intent even if its constituent individuals do not share the same reasons for their intent). Although Solan accurately describes how we sometimes think of groups in intentional terms, it does not follow that our perception of a group's joint intent actually reflects an intention in a literal sense. As Hurd notes, "individuals within a group would have to function with each other in a manner analogous to the way in which neurons function together in a brain before such a group could literally be thought to possess a mental state like an intention." Hurd, *supra* at 970.

57. *See* Hurd, *supra* note 56, at 973 ("Just because each member of a group intends to communicate something does not mean that the group intends to communicate some one thing."). This point was forcefully made by Max Radin, in *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred [legislators] each will have exactly the same determinate situations in mind . . . are infinitesimally small."). *See also* Easterbrook, *supra* note 51, at 547 (suggesting legislatures do not have intents, only "outcomes"). *Cf.* Greenawalt, *supra* note 30, at 1627 ("One can undoubtedly speak of group intentions when all, or virtually all, members of the group have the same specific intention, the intention is relevant to their participation together, and the members know that the intention is shared. Whether one should speak of the intentions of a group in other circumstances is more doubtful."). For an interesting analysis of cases in which there is no majority preference within a group, see Einer Elhauge, *Preference Eliciting Default Rules*, 102 COLUM. L. REV. 2027, 2076–78 (2002).

If courts were able to accurately verify the intention of each individual comprising a legislative majority, there still might be no group intent for the interpreter to verify.

It is also debatable whether one can accurately verify legislative intent after the fact. As time passes, the reconstruction of intent grows increasingly difficult, if not impossible.[58] The historicist concern is that the court's interpretation "will inevitably be influenced by current context, including the interpreter's own views and predispositions."[59] Especially in cases of older statutes, the challenges can be insurmountable.[60]

In response to the problem of unknowable (or unverifiable) intentions, the textualist therefore looks to the legislators' intent to enact the statutory text itself.[61] Joseph Raz notes that the intention required to legislate is "the intention to say what one would be normally understood as saying, given the circumstances in which one said it."[62] This abstract intention is sufficient to justify following an enacted law as written, even in cases where individual legislators lack an understanding of the content of the legislation.[63]

The intent that a given text become law is an intention which courts can presume each legislator in the majority shares.[64] For textualists, this is enough. As Manning explains the textualist insight: "If one cannot accurately ascertain what the body as a whole would have done with matters unspecified or even misspecified by the text, then perhaps the best one can do is to approximate the way a reasonable person in the

58. *See* Easterbrook, *supra* note 51, at 550 ("It is all very well to say that a judge able to understand the temper of 1871 (and 1921), and able to learn the extent of a compromise in 1936, may do well when construing statutes. How many judges meet this description?").

59. Eskridge, *supra* note 37, at 644.

60. *Cf. id*. at 646 ("The current judicial interpreter cannot ignore important legal developments after 1866 (such as the adoption of the fourteenth amendment in 1868 and the enactment of the 1871 Act) and, more subtly, cannot expunge personal feelings about the variety of remedies that should be available to enforce our nation's civil rights laws today.").

61. Manning, *supra* note 9, at 433. *See also* Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 355 (Andrei Marmor ed., 1995) ("[I]t strikes me that in a multi-cultural society, legislators are entitled to insist on the authoritativeness of the text and nothing but the text, as the only thing that one can be sure has been at the forefront of each member's legislative endeavors.").

62. Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 268 (Robert P. George ed., 1996).

63. *See id*. at 267 (describing the minimal required intent for an act to qualify as legislative, and noting that "[o]n this understanding the required intention is very minimal, and does not include any understanding of the content of the legislation.").

64. *Cf*. Manning, *supra* note 9, at 433 ("Ascribing . . . objectified intent to legislators offers an intelligible way for textualists to hold them accountable for whatever law they have passed, whether or not they have any actual intent, singly or collectively, respecting its details.").

legislator's position would have read the words actually adopted."[65]

B. Constitutional Structure

In addition to disputing the existence and verifiability of legislative intent, textualists also raise formal concerns. Notably, they contend that intentionalism is inconsistent with the judicial role in a system of separated powers. The intent of individual legislators, or even the legislature as a whole, is not the same thing as the statute itself.[66]

In one formulation, the concern with intentionalism is that the legislature would be encroaching on the judicial branch. From this perspective, "[i]ntended meaning is a form of extra-statutory legislative interpretation of a statute, and judicial reliance upon it allows the legislature to exercise essentially judicial power."[67] Courts are seen as abdicating their responsibility to interpret the text if they defer to the manner in which individual legislators interpret it.

Another perspective considers the Constitution's requirements under the Presentment Clause.[68] Arguably, allowing legislators' subjective intentions to count as law permits members of the legislative branch (or their staffs) to produce laws that are not voted on by each chamber and signed by the President.[69] Manning has presented a variation on these arguments, suggesting that reliance on legislative history as authority allows for a congressional self-delegation.[70] In effect, agents of Congress, through the legislative history, are permitted to legislate by

65. *Id.* *Cf.* Greenawalt, *supra* note 30, at 1634 ("The justification for deciding that the crucial mental state of legislators is having statutes interpreted according to conventional techniques cannot be simply that this is a straightforward application to law of what is generally true for personal communications. The reasons for choosing this mental state must rest on special features of the law.").

66. *See*, *e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."). *See also id.* ("The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*.") (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845)).

67. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 34 (1989).

68. U.S. CONST. art. I, § 7.

69. *See* Wallace v. Christensen, 802 F.2d 1539, 1560 (9th Cir. 1986) (Kozinski, J., concurring) ("Committee reports that contradict statutory language or purport to explicate the meaning or applicability of particular statutory provisions can short-circuit the legislative process, leading to results never approved by Congress or the President."). Another issue relates to the potential that the President in signing a bill into law will not have considered the legislative history. *See* Eskridge, *supra* note 37, at 650 (describing this theory). *See also* Kenneth Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376 (1987).

70. *See* Manning, *supra* note 45, at 710–25.

this means.[71]

Not all uses of legislative history are problematic.[72] However, to the extent that legislative history serves as an authoritative source of statutory meaning, it can raise separation of powers concerns. The import of a clear statutory text is that it is, in the view of textualist courts, the exclusive source of a law's command.

C. Instrumental Effects of Textualism

Also, textualists consider the potential consequences of their interpretive approach *vis a vis* intentionalism. Some look to the incentives that strict interpretation of statutory texts may provide for Congress in future cases. If courts are unwilling to modify statutes that are inconsistent with legislative history or broad policy goals, this may encourage greater clarity in legislative drafting.[73] Interest groups may be motivated to reveal their preferences more openly.[74]

Another argument suggests that judges do a better job of approximating legislative intent when they try to determine the meanings of statutes without reference to legislative history.[75] Caleb Nelson has recently suggested that textualism may be the approach best-suited to approximating subjective legislative intent. Rather than an end

71. *See id*. at 698. *See also* Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) ("Thus, if legislation consists of forming an 'intent' rather than adopting a text (a proposition with which I do not agree), Congress cannot leave the formation of that intent to a small band of its number, but must, as the Constitution says, form an intent of the Congress.") The problem can also be stated in terms of encroachment on the judicial power. *See* Manning, *supra* note 45, at 706 ("This practice effectively assigns legislative agents the law elaboration function—the power 'to say what the law is.'").

72. On appropriate uses of legislative history, compare Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000), with John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000).

73. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 103 (2000) ("A central argument for textualism is that it has a democracy-forcing effect: Judicial refusal to remake enacted text forces Congress to legislate more responsibly *ex ante*."). As Vermeule indicates, this argument raises empirical questions.

74. *See id*. at 103–04 ("The argument can also be put in the language of information-eliciting default rules: Adherence to text will prod legislative coalitions into revealing their preferences explicitly.").

75. *Cf*. Nelson, *supra* note 11, at 363 ("People who want judges to enforce the intended meaning of statutes . . . must try to decide which sort of case is more common: in the aggregate, will judges reach more accurate assessments of intended meaning if they try to gauge the reliability of legislative history on a case-by-case basis or if they apply a more categorical presumption against its usefulness?"). *See also* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1863–77 (1998) (discussing how distinctive features of legislative history may interact with judicial constraints "in ways that produce distinctively severe risks of judicial error in the determination of legislative intent.")

in itself, some textualists may see their interpretive method "as the best means of generating matches between the legal directives that courts enforce and Congress's actual collective understandings of the statutes it enacts."[76]

Finally, a prominent strand of textualism considers the potential for judicial bias. Legislative history often contains remarks supporting both sides of an issue. Judge Leventhal famously said that reviewing legislative history is like "looking over a crowd and picking out your friends."[77] In theory, textualist interpretation would constrain the ability of judges to advance their personal policy preferences through a selective use of legislative history.

Whether or not these instrumental arguments for textualism are empirically supported is unclear. Congress, for example, may inevitably draft vague or ambiguous legislation due to the impossibility of predicting all statutory applications, and the practical realities of legislative compromise.[78] Whatever the merits of these claims may be, instrumental arguments do appear to influence judicial opinions.[79]

76. Nelson, *A Response*, *supra* note 38, at 461.

77. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct.. 2611, 2626 (2005) (quoting Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)). Judge Wald's article recounts a conversation with Judge Leventhal in which this comment was made.

78. *Cf.* Eskridge, *supra* note 37, at 677 ("The vast majority of the Court's difficult statutory interpretation cases involve statutes whose ambiguity is either the result of deliberate legislative choice to leave conflictual decisions to agencies or the courts, or the result of social or legal developments the most clairvoyant legislators could not have foreseen."). Eskridge concludes that, "[e]ven if Congress drafted statutes with a sophisticated appreciation of the Court's ground rules, it is doubtful whether clearer rules would improve the drafting process." *Id*. *See also* Siegel, *supra* note 12, at 342–43 ("[I]t is unrealistic to imagine that the hundreds or even thousands of people involved in a statute's passage could, if only given the right incentives, anticipate everything that will happen once the statute is actually governing the hundreds of millions of people that make up the country."). For an example of intentional statutory vagueness, see Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. TECH. L. REV. 381, 434 (2005) (suggesting that Congress opted for a vague fair use doctrine in order to delegate difficult policy decisions to the courts).

79. For example, Justice Scalia has argued as follows:

> It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes law, the people must obey. I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.

United States v. Taylor, 487 U.S. 326, 345–46 (1988) (Scalia, J., concurring).

D. Distinctions Between Textualism and Intentionalism

Several commentators have recently suggested that textualists are simply a different type of intentionalist.[80] Some suggest that, when textualists look for an objectified intent, they are making an intentionalist inquiry.[81] Often, this conclusion is supported with the claim that interpretation *requires* an inquiry into intent.[82] Perhaps textualists only differ from intentionalists regarding the best methodology for determining intent.[83]

Taking textualist judges at their word, these suggestions are incorrect. Some ostensibly textualist courts may be concerned with the legislature's actual intent. But leading proponents have expressly rejected the intentionalist view. It is this intention-free theory of textualism—the view which rejects actual intent as a source of meaning—to which this article will refer in the discussion which

80. *See*, *e.g*., Alexander & Prakash, *supra* note 11, at 982 ("[W]e believe that many textualists, despite their protestations to the contrary, are ultimately interested in the intentions of actual authors."); Nelson, *supra* note 11, at 353 (2005) ("Textualists and intentionalists alike give every indication of caring both about the meaning intended by the enacting legislature and about the need for readers to have fair notice of that meaning, as well as about some additional policy-oriented goals."). *Cf*. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) ("Given that nonadherents and adherents of textualism alike place great weight on statutory text and look beyond text to context, it is hard to tell what remains of the textualism-purposivism debate.").

81. *See* Alexander & Prakash, *supra* note 11, at 978–82 (describing alleged textualist exceptions to an intention-free method of statutory interpretation). *See also id*. at 975 n.23 ("As we explain later, we believe that invocations of context amount to unacknowledged invocations of authorial intent.").

82. *See id*. at 972 ("We shall argue that such [intention free] textualism is a conceptual impossibility—that authorial intentions constitute the meanings of texts."); Larry Alexander, *All or Nothing at All?*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 361 (Andrei Marmor ed., 1995) ("If texts are attempts by their authors to communicate, then texts mean what their authors intend them to mean."); David Sosa, *The Unintentional Fallacy*, 86 CAL. L. REV. 919, 927 (1998) ("[T]he rule of law is emphatically not about form. It is 'about' meaning. And meaning cannot ultimately be independent of intention."). *Cf*. Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 471 (2005) ("I don't believe that any judge or commentator can consistently maintain that courts should dispense altogether with discussion of legislative intent. The concept is just too deeply embedded in the way we see the world.").

83. *See* Nelson, *supra* note 11, at 376–77 ("As compared to intentionalism . . . textualism can be seen as a more rule-based method of ascertaining what the enacting legislature probably meant."). *Cf*. Alexander & Prakash, *supra* note 11, at 983 (proposing a possible form of textualism where "the interpreter should seek out authorial intent, but in doing so should refuse to consider certain kinds of evidence thereof, even if reliable."). Among other things, the absurdity and scrivener's error doctrines are urged as support for the view that textualists do care about legislative intent. *See id*. at 979 ("Those who seemingly advance an [intention free] textualism use these doctrines to avoid the odd readings that application of such a textualism would yield. In so doing, these scholars once again back away from their strong textualism by bringing in authorial intentions through the backdoor."). *See also* Nelson, *supra* note 11, at 356 (suggesting that, even if these doctrines are grounded in an "objective meaning", the textualist determines that objective meaning "by asking what an appropriately informed reader would think that the members of the enacting legislature had (subjectively) intended.").

follows.[84]

Textualism so conceived is conceptually different from intentionalism when defining statutory meaning. The objectified intent recognizable from a text, taken in context, is not the same as the actual subjective intent of its authors.[85] A legislature's actual intent may or may not track the apparent intent implied by legislative language, assuming that an actual intent exists.[86] In the case of a clear statute, the textualist is not interested in the legislature's actual intent.

As noted above, some reference to an author's apparent intent is a requirement for interpreting a text in the manner of a reasonable, competent reader.[87] Users of language—including the competent reader of a statute—will naturally understand the meaning of an author's words in light of the author's presumed understanding.[88] If readers regularly divorced the meaning of an utterance from this presumed understanding, communication is difficult to imagine.

Context-based interpretation of an otherwise ambiguous text is a case in point. Where multiple meanings of a phrase are available, the conventional meaning may be clear based on what is usually intended in that context.[89] Context also sometimes indicates a meaning of a word that differs from its common meaning, to the extent the unusual usage fits the circumstances.[90] The *appearance* of intent, based on convention, is relevant for textualist interpretation.[91]

To avoid the pitfalls of literalism, and perhaps even to make sense of a statute, textualists necessarily consider how language is conventionally

84. I owe the coinage of "intention free textualism" to Alexander & Prakash, *supra* note 11, at 968 ("The defining feature of this form of textualism is the insistence that intentions play no role in the production of meaning, and so we call this view 'intention free textualism,' or 'IF textualism.'").

85. *See* Manning, *supra* note 9, at 434–438 (discussing the distinction between the two types of intent).

86. The potential for divergence is evident in cases where a clear statute's semantic meaning is in tension with statements contained in the legislative history.

87. *See supra* notes 40–42.

88. *See supra* note 40. *Cf.* Greenawalt, *supra* note 30, at 1658 ("Proponents of a reader understanding approach assume that the reader has some idea of the broad objectives lying behind legislation.").

89. Scalia, *supra* note 8, at 17 (describing the textualist search for "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."). John Manning has recently suggested that where a statute is ambiguous, textualists also look for an objective statutory purpose. *See* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 85 (2006) (describing a textualist belief that "interpreters can (at least sometimes) draw a suitably objective inference of purpose—presumably one that a 'reasonable user of words' would arrive at after reading the entire text in context.").

90. *See* Manning, *supra* note 20, at 110 ("If the meaning of words is a function of the way speakers use them in context, it follows that the identical words may have different meanings when used in different contexts.").

91. *See supra* notes 40–42.

used.[92] An important consequence of this approach is that an assumed intent plays a role in textualists' thinking. In Justice Scalia's words, when comparing what a text is reasonably understood to mean and what it is intended to mean, these concepts "chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance."[93]

Absent consideration of an author's apparent intent, courts could be ignoring the objective meaning of the statute. In *Smith v. United States*, for example, the Supreme Court confronted a statute which enhanced a criminal sentence when a person "'during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.'"[94] The Court majority determined that an individual who traded his gun for drugs had "used" a firearm for these purposes.[95]

Justice Scalia concluded otherwise.[96] Dissenting, he argued as follows:

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, i.e., as a weapon.[97]

This rationale reflects a concern with what a speaker would conventionally intend when referring to "use" in the context of a firearm.

As these disputes indicate, people recognize different senses of "meaning." For this reason, philosophers of language sometimes divide the meaning of an utterance into its "sentence meaning" and "speaker's meaning."[98] The sentence meaning is the semantic meaning of a text,

92. *See* Manning, *supra* note 20, at 110–11. For that matter, if they want to engage in interpretation that resembles normal usage of language, they must look to intent.

93. Antonin Scalia, *Response, in* A MATTER OF INTERPRETATION 129, 144 (Amy Gutmann ed., 1997). *See also* Nelson, *supra* note 11, at 354 n.21 (citing support for view that textualists are ultimately interested in what Congress intended).

94. 508 U.S. 223, 227 (1993) (citing 18 U.S.C. § 924 (c)(1)).

95. *Id*. at 237.

96. *Id*. at 241 (Scalia, J., dissenting).

97. *Id*. at 242.

98. Adler, *supra* note 56, at 1384–96 (describing the two concepts); Hurd, *supra* note 56, at 962–68 (same). It is possible to divide the forms of meaning further. *See*, *e.g.*, Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 247–48 (1981) (describing sentence meaning, utterance meaning, and speaker's meaning—utterance meaning would cover the meaning of a statement in a particular case of its use). For purposes of this article, the above phrasing will be used, but it should be noted that there is variation of terminology in this context.

and it is understood in terms of conventions shared by the relevant linguistic community.[99] The speaker's meaning is the subjective intent of the text's author—what the author meant her words to say.[100] These concepts are useful for discussing the textualist approach, which can be unnecessarily tangled in different understandings of "meaning."

In order to communicate successfully, there must be an understanding of sentence meaning that operates independently of speaker's meaning.[101] A conventional, non-subjective meaning of a phrase is required; otherwise there would often be no way to determine what a speaker's true meaning might be. To take an oft-used example, suppose a madman shouts "Gleeg! Gleeg! Gleeg!," in an effort to indicate that it is snowing in Tibet.[102] Since no sentence meaning exists in this case, knowing the speaker's meaning on the basis of the language used would be impossible.[103]

Conversely, it is not necessary to know the speaker's meaning when interpreting a text in order to make sense of it in conventional terms. Suppose you walk up to a stranger and ask what time it is. If he says,

99. *See* Adler, *supra* note 56, at 1393 ("Roughly, sentence meaning is the kind of linguistic meaning attached to a well-formed sentence, independent of the communicative intentions (or other mental states) that happen to be held by those who utter the sentence."); *id*. at 1394 ("More crisply, the sentence meaning of a linguistic utterance is what the utterance conventionally communicates.").

100. *See id*. at 1387 ("Very roughly, the speaker's meaning of a linguistic utterance is what the speaker intends by that utterance.").

101. *See*, *e.g*., Hurd, *supra* note 56, at 966–67 ("It is precisely because Grice failed to reduce sentence meaning to speaker's intentions that those who wish to appeal to drafters' intent when interpreting statutes may use speakers' intentions to clarify and elucidate sentence meaning. In other words, it is because sentence meaning is not the same as speaker's intentions that the latter can supplement the former in legal interpretation."). *See also id*. at 965 n.52 ("To suggest that meaning should be fixed by the intentions with which sentences are uttered would be to suggest that sentences have, by themselves, no meaning independent of those intentions. Were this the case, no one could express intentions."). *Cf*. Moore, *supra* note 98, at 248 ("A speaker cannot literally arrogate to himself Humpty Dumpty's power to 'make words mean what he pleases' (although he can mean what he pleases by them).").

102. *See*, *e.g*., Hurd, *supra* note 56, at 962 (citing Paul Ziff, *On H.P. Grice's Account of Meaning*, *in* READINGS IN THE PHILOSOPHY OF LANGUAGE 444, 447–48 (J. Rosenberg & C. Travis eds., 1971)).

103. *See id*. at 963 ("It cannot be said in such a case that the speaker's [meaning] tells us anything about the sentence's meaning."). *See also* Moore, *supra* note 98, at 252 (using a variation of this example with reference to a statute); Manning, *supra* note 12, at 2457 n.257 (citing this example in support of the idea that there are "general understandings of language"). Alexander & Prakash respond to this argument by noting that apparent nonsense can be meaningful:

> "Gleeg, gleeg, gleeg" is the attempt at a reductio that textualists throw up at intentionalists. The problem is that it is not reductio. "Gleeg, gleeg, gleeg" can be as meaningful as the third base coach's pulling on his ear with the successful intent to convey the idea "Bunt!"

Alexander & Prakash, *supra* note 11, at 978 n.27. However, this example presumes conventions that render would-be nonsense meaningful. The textualist point is that the conventional meaning is a thing separate and apart from the speaker's meaning.

"It's three o'clock," the sentence meaning of that phrase is quite clear given the context. The speaker, for some private reason, may have intended his response to mean that the sky is falling. Yet it doesn't matter what the speaker actually intended for purposes of understanding the conventional import of his remarks.

Textualist courts do not look for a speaker's meaning separate from what is conveyed by an unambiguous text, read in context. Even though the court may presume a speaker's meaning for purposes of interpreting a statute, the court does not seek the speaker's meaning as such. Whether or not a legislative speaker's meaning can exist—many textualists claim that it cannot—textualist courts look elsewhere in the case of an unambiguous statute. Nothing in the nature of language use requires that they do otherwise.

Admittedly, textualists sometimes suggest that a speaker's meaning is relevant to their analysis.[104] For example, in *Connecticut National Bank v. Germain*, the Court concluded it "must presume that [the] legislature says in a statute what it means and means in a statute what it says there."[105] This presumption could imply an ultimate interest in speaker's meaning. Some may see the express text as the best way of attaining that meaning.[106]

Textualists have also been known to interpret a statute in terms of legislative "intent."[107] Yet the occasional rhetorical nod to intent is not an intrinsic part of textualist interpretive methodology. Statements that refer to legislative intent, or the purpose of a statute, show the trappings of intentionalist thinking. They are nevertheless also consistent with the view that texts are understandable in light of an "objectified" intent. Reference to "intent" does not mean the interpreter is interested in whether a speaker's meaning truly exists, or in what that speaker's meaning might be.

Despite haphazard reference to a statutory text's meaning in terms of legislative intent, the goal for the textualist court is not literally to descry a legislative intent. In Judge Easterbrook's words: "Statutes are law, not evidence of law."[108] Taken at face value, this claim is not a mere

104. For a list of examples, see Solan, *supra* note 56, at 455–57.

105. 503 U.S. 249, 253–54 (1992).

106. *Cf.* Nelson, *supra* note 11, at 417 ("Within certain constraints, all mainstream interpreters seek the meaning intended by the enacting legislature.").

107. *See*, *e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (Scalia, J.) ("The question, at bottom, is one of statutory intent, and we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'") (quoting FMC Corp. v. Holliday, 498 U.S. 52, 56 (1990) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).

108. *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

reformulation of intentionalism.

E. The Formal Importance of Objectified Intent

Even if one can build a wall between sentence meaning and speaker's meaning, it does not follow that one should. There is something unusual about interpreting texts in this way—this is not how people engage in conversation. We normally think of the speaker's meaning when we try to interpret what someone says to us.[109] When a listener is unsure what a speaker means, she may ask for clarification. It is arguable that, even if legislative intent is hard to determine, one should at least try to find it, and consider as much evidence as possible when doing so.[110]

Yet the line between apparent and actual intent is not artificial, and reflects an insight about the nature of legislative acts. Legislation exists in its final, written form, and only this finalized version binds the public. Inquiries into the subjective intent behind a statute place a substantial burden on individuals who must follow the law.[111] And, although legislative history is now easier to obtain than it once was, law still differs from conversational language.[112] Law has an existence for the public detached from its authors' intentions.

Consider the following example, provided by Caleb Nelson:

> [S]uppose that on the same day that Congress enacts a statute regulating the fees of "lawyers," members of Congress and the President prepare secret statements explaining that they were using the word "lawyers" to

109. Lawrence Solan suggests that there is little choice in thinking in terms of a speaker's intent. *See* Solan, *supra* note 56, at 429 ("[E]ven when there is no dispute about meaning, intent lurks in the background as a crucial element of our understanding."). *See also* Alexander & Prakash, *supra* note 11, at 979 ("We believe that context is universally regarded as relevant only because it is evidence of authorial intent.").

110. *Cf.* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) ("In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product.") For support, Justice Stevens cites *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.").

111. *Cf.* Scalia, *supra* note 8, at 17 (comparing judicial application of what the lawgiver meant instead of what was promulgated to "the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read.").

112. *Cf.* Nelson, *supra* note 11, at 367 ("[I]t is hard to believe that the textualists' position on legislative history really reflects special sensitivity to the goal of fair notice, because the most widely used kinds of legislative history are now no less available to the citizenry than the statutory texts they purport to explain."). *But cf.* OFFICE OF LEGAL POLICY, *supra* note 67, at 52 ("If the average citizen is presumed to be aware of the legislative history as well as the statute, are we then enforcing not simply an unknown but almost unknowable laws?").

> mean "doctors" throughout the statute. These statements are sealed in envelopes, to be opened only in the event of litigation about the statute's meaning. Even if there is no reason to doubt their accuracy, and even if members of the enacting Congress genuinely expected courts to give the statutory language the private meaning that the statements illuminate, I am unaware of any judges who would actually do so.[113]

This scenario is unlikely to transpire, but it illustrates the normative significance of the divide between sentence meaning and speaker's meaning. A search for the legislature's apparent intent—as evidenced by a contextual reading of the statutory language—serves a different, sometimes conflicting purpose from a search for the subjective intentions of actual legislators.

Statutes in themselves offer little for a reader to consult beyond the text.[114] Assumptions about the author, the language, and the setting of the language's use, are necessary in order to intelligently read a text.[115] And indeed, textualists make a number of assumptions of this type. A basic example is the assumption by United States courts that statutes are written in English.[116] Nevertheless, most of the usual conversational cues that provide context for spoken language are absent from a statute.

In this manner the primary source of a legislative document's objective meaning is its text.[117] The absence of conversational cues arises not merely because statutes are law. Statutes are enacted through a process that eliminates many of the signals that accompany a spoken utterance, and they qualify as statutes only in their final version. One has but to imagine a statute enacted sarcastically, with hyperbole, or in an ironic tone, to see the difficulty that laws pose for conversational norms of understanding.[118]

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113. Nelson, *supra* note 11, at 360 n.36. *See also* Greenawalt, *supra* note 30, at 1620 ("For many technical statutes, the relevant readers may be trained lawyers or experts in the field, but the meaning that statutory words convey to the readers that count bears on how judges should interpret those words.").

114. *Cf.* Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431, 445 (2001) ("Written texts typically differ from spoken language in that they tend to be much more autonomous. With an autonomous document, you strive to include in the text itself everything that the reader needs to understand it. You do this because you may be separated from the reader in time or space, and often in both.").

115. Without making such assumptions, the text would be incomprehensible, at least as a text. *Cf.* Alexander & Prakash, *supra* note 11, at 977 (suggesting that if one does not recognize an author, a text has no meaning).

116. *Cf. id.* at 974–75 (describing potential difficulties if one does not identify the language of a text).

117. A text's context also plays a role in interpreting a statute, especially in cases of ambiguous texts. Contextual clues are nevertheless limited for purposes of understanding laws in ways that do not apply to spoken words.

118. Jonathan Siegel makes this point:

Peter Tiersma has aptly compared a statute to a message in a bottle, set adrift on the ocean.[119] In Tiersma's terms, such messages are "autonomous."[120] A potential rescuer who reads the message can only consult the message's words, with little context. As Tiersma notes:

> Virtually nothing is communicated by nonlinguistic channels, which means that the entire message must be expressed in words. The text may not be read until months or years after it is created. And the reader will have little or no opportunity to ask questions or request clarification. Thus, all communicative intentions must be in the text itself.[121]

Tiersma is not an orthodox textualist, but the concept of autonomous documents provides an explanation for why textualists rely exclusively on objectified intent.[122] If a statute is seen as an autonomous document, a search for actual legislative intent is questionable, even if this intent could be reliably ascertained. In this respect at least, a law is like a poem, where the authorial intent does not provide the textual meaning.[123] To interpret the text in light of actual legislative intent is

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> The techniques of understanding natural language in ordinary conversation cannot all be uncritically imported into the task of statutory interpretation. . . . Professor Sinclair, for example, observes that legislative speech is one-sided, rather than a conversation between two interlocutors; that legislative utterances are not "true" or "false" the way a statement made in ordinary conversation might be; and that legislatures do not use sarcasm, irony, or metaphor as an ordinary speaker might.

Siegel, *supra* note 12, at 347 (citing M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 385–90 (1985)). *Cf.* Moore, *supra* note 98, at 188–92 (describing difficulties in interpreting metaphors in legislation). Unsurprisingly, figures of speech are uncommon in statutes. *Cf.* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 366-67 (2005) ("Humor is not a quality one typically associates with statutes, so it seems appropriate to assume, as a general matter, that a legislature has not created a statutory syllepsis.").

119. *See* Tiersma, *supra* note 114, at 433.

120. *Id*.

121. *Id*. This analogy explains one of the attractions of textualism. *See id*. at 434 ("Consequently, despite claims of its detractors, the plain meaning rule and textualism are not as naïve as one might think. There is, in fact, a natural tendency to interpret statutes as autonomous written texts.").

122. Tiersma would adopt textualism when interpreting penal statutes, but is skeptical in other contexts. *See id*. at 434–35. He concludes: "Everyone should be a textualist sometimes. But no one should always be one." *Id*. at 482.

123. *See* HANS-GEORG GADAMER, *On the contribution of poetry to the search for truth*, *in* THE RELEVANCE OF THE BEAUTIFUL AND OTHER ESSAYS 105, 107 (Nicholas Walker, trans., Robert Bernasconi ed., 1998) ("We have not even begun to approach the poem if we try to go beyond it by asking about the author and what he intends by it."). This point is not intended as an endorsement of methods used to interpret poems in general. *Cf.* Greenawalt, *supra* note 30, at 1618 (noting that it is often suggested "whatever a poem means to a reader is its meaning for that individual."). As Greenawalt notes, "[f]or statutory and constitutional provisions, such individualist approaches cannot afford an appropriate interpretive standard." *Id*. *See also* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 362 (1992) (critiquing the application of literary interpretation to legal texts).

potentially to revise the text.

For textualists, evidence of legislative intent assumes a different role than it might otherwise have. Legislative history does not possess the same author as the final legislative draft—and legislative history is generally not communicated *with* the statutory text.[124] A statute's drafting history can, perhaps, elucidate what some authors intended at a moment in time, but it is not relevant for a reader of the statute *qua* statute.[125] Pre-enactment evidence of intent is not generally part of the legislative utterance.[126]

F. The Issue of Faithful Agency

Objectified intent and actual intent are different in their interpretive significance. The textualist's "objectified intent" prevails over actual intent because it fills in the meaning of the law. Yet this raises questions about the function of courts. Discarding a known legislative intent is potentially problematic if one's goal is to enforce statutes the way Congress desired.[127]

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124. Manning makes a similar point from a structural perspective:

> [E]ven if the elaborations of meaning found in the legislative history potentially reflected some broader understanding, one might nonetheless wish to insist upon its expression in a format—the statutory text—that is subject to the full constitutional process of bicameralism and presentment. Only in that way would one have assurance that the norms expressed in a committee report or sponsor's statement reflected not merely the views of a hypothetical legislative majority, but also a position capable of surviving the cumbersome and elaborate process of enactment.

Manning, *supra* note 9, at 426 n.23.

125. Jeremy Waldron has eloquently expressed this point:

> For if a judge appeals beyond a statute to the intentions of particular legislators, he will be appealing to things said or done during the course of the bill's passage. At that stage the decisive synthesis may not have emerged or crystallized in individual minds, and we may be dealing with what can only be described pro tem as 'the reconciling of opposites . . . by the rough process of a struggle between combatants fighting under hostile banners.'

Waldron, *supra* note 61, at 352 (citing J.S. MILL, ON LIBERTY 58 (1955)).

126. A notable exception could exist in cases where the legislation cross references legislative history. *Cf.* Siegel, *supra* note 72.

127. Alexander and Prakash suggest it is paradoxical to assume that legislators would want their subjective intentions to be irrelevant in interpreting the statutes they enact. *See* Alexander & Prakash, *supra* note 11, at 974 n.21. This is not inherently so. In some cases an author may prefer textualism as a means of limiting the risk of judicial error. *Cf.* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003) (describing how commercial contracting parties may prefer a textualist interpretation of their agreements). A legislator may have a preference that a court apply a textualist interpretive methodology, even if there is a risk that sometimes the court will find a semantic meaning inconsistent with his subjective belief. Assuming the legislator believes courts are more error prone when they use an intentionalist approach, such a preference can be rational. *Cf.*

A view of courts as faithful agents of Congress is longstanding and seems to require enforcement of actual legislative intent.[128] Moreover, textualists themselves have described the courts' role as that of a faithful agent.[129] By interpreting statutes in accord with the conventional meaning of the language used, textualists contend courts are being faithful to the legislature's command.[130] Consequently, an unwillingness to interpret statutes in light of an actual legislative intent—assuming there is a reliable means to determine this intent—appears to conflict with a fundamental premise of textualist thought.[131]

Critics are right to challenge the textualist claim of faithful agency. Whatever one's view of textualism generally, faithful agency is a misnomer in this context. Under black-letter agency law, an agent must act loyally on behalf of a principal,[132] and technical readings of a

Nelson, *A Response*, *supra* note 38, at 462 (suggesting that "people with certain intuitions may well surmise that in the aggregate, courts will better reflect the meaning intended by contracting parties if they conclusively presume . . . that the parties were using 'majority talk'" and noting that this same view could apply when interpreting statutes).

128. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature."). On the relation of this theory to legislative intent, see Nelson, *supra* note 11, at 371–72 ("It is quite common . . . for textualists to portray themselves as 'faithful agents' of the enacting legislature. If textualists entirely rejected the notion of collective intent, then this self-conception would be mystifying: what does it mean to be 'faithful' to a principal that is not sentient and that lacks any coherent understanding of its own commands?"). It should be noted that not everyone accepts faithful agency as the correct conception of the judicial role. For example, William Eskridge has suggested that partnership concepts should also be considered. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 (2001) ("In my view, Article III judges interpreting statutes are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of 'We the People.'").

129. *See*, *e.g.*, Manning, *supra* note 20, at 7 ("[T]extualism also starts from the faithful agent premise—that a federal court is responsible for accurately deciphering and implementing the legislature's commands."). *See also* Manning, *supra* note 9, at 423 ("In any system predicated on legislative supremacy, a faithful agent will of course seek the legislature's intended meaning in some sense, and modern textualists do situate themselves in that tradition."). *Cf.* Easterbrook, *supra* note 32, at 63 (describing political society's view that "[w]e are supposed to be faithful agents, not independent principals.").

130. *See*, *e.g.*, Manning, *supra* note 20, at 7.

131. As Alexander & Prakash note:

> Textualists acknowledge that Congress has the right to place a set of marks on a page. But they forbid Congress from selecting the meaning of those marks. Instead, the meanings of those marks are supposed to be fixed according to a set of rules that are (relatively) independent of Congress. . . . Whatever the merits of textualism, it does not strike us as a theory where the interpreter acts as a faithful agent of Congress.

Alexander & Prakash, *supra* note 11, at 993. *See also id*. at 970.

132. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

principal's requests may conflict with this goal.[133] Principal-agent relationships do not accurately reflect the judicial role as applied by textualist courts.

In light of this doctrinal inconsistency, it is more accurate to see the faithful-agent concept as a metaphor. A court is a "faithful agent" for textualist purposes insofar as a court follows the law's command, not the legislature's command—courts are not literally agents of Congress.[134] Textualists sometimes endorse the faithful agent concept, but they generally do so in terms of fealty to the *text* Congress adopted.[135] For example, Manning has argued that courts must be faithful agents of Congress, while adding, in the same paragraph, that textualists "deny that a legislature has any shared intention that lies behind but differs from the reasonable import of the words adopted."[136]

The judiciary has no duty of loyalty to Congress as an entity, nor should it under a system of separated powers.[137] Judicial independence is a fundamental feature of the judicial role, which by its nature requires decisions that will contravene legislative preferences. In addition, the Presentment Clause limits the faithful agent concept—aside from appropriately enacted statutes, signed by the president or passed with a veto-proof majority, legislative intentions are not part of the law. [138]

Thus, the court does not seek to determine what Congress wanted it to do—it is concerned only with what a piece of properly enacted legislation objectively means.[139] This perspective emphasizes the idea

133. *Cf.* Greenawalt, *supra* note 30, at 1625 (concluding that, "for many informal instructions, a recipient should pay attention to the giver's intent and interpret the instructions accordingly, even if she would reach a different conclusion based on the instructions alone."). *See also* Lon L. Fuller, *The Case of the Speluncean Explorers*, 112 HARV. L. REV. 1851, 1858–59 (1999) ("No superior wants a servant who lacks the capacity to read between the lines.").

134. *Cf.* Easterbrook, *supra* note 32, at 68 ("No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law.").

135. For example, in an article which describes the policy that judges should be faithful agents, Judge Easterbrook also concludes that "statutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for meaning." Easterbrook, *supra* note 32, at 67. *See also* Easterbrook, *supra* note 46, at 446–47 (noting distinctions between the legislature-judge relationship and the standard principal-agent relationship).

136. Manning, *supra* note 9, at 430.

137. Were courts truly agents of Congress, the legislature would presumably be able to correct what it considered incorrect decisions of the courts. *But cf.* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222 (1994) (discussing the Framers' rejection of that idea). In addition, retroactive legislative history could be useful in interpreting statutes, since it would represent Congress's present preferences. *But cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct.. 2611, 2627 (2005) (refusing to recognize amendment to a statute through *post hoc* legislative history).

138. *See supra* text accompanying notes 68–69 . *See also* Easterbrook, *supra* note 46, at 447 (discussing the "many rules that tie the hands" of a legislative "principal").

139. *Cf.* Joseph Raz, *Interpretation Without Retrieval*, *in* LAW AND INTERPRETATION: ESSAYS IN

of a rule of laws, rather than a rule of legislators.[140] Generally applicable laws, prospective in nature, are considered separate from both the will of legislators[141] and the will of judges.[142]

As Jeremy Waldron has noted, "it is an important part of our normative concept of legal authority that legislators themselves should be bound by the laws they enact."[143] The thought that legislators are bound by what they choose to enact modifies the concept of a faithful agent; so understood, the command of legislation exists independently of its authors.

III. ABSURD RESULTS AND SCRIVENER'S ERRORS

The analysis above explains how textualists may interpret statutes without reference to subjective legislative intent. The outcome of a strict reading of statutory language can be jarring, nonetheless. A safety valve for such situations is to look to the absurdity and scrivener's error doctrines.[144] Both doctrines appear to justify deviations from a clear

LEGAL PHILOSOPHY 155, 161 (Andrei Marmor ed., 1995) ("Artists, like legislators know (when they do) that the meaning of their work is that which can be gauged without regard to the private context, and therefore they will create works which have the meaning they intend when so understood.").

140. For example, consider the following argument from Justice Scalia:

> Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

Scalia, *supra* note 8, at 17.

141. *See*, *e.g.*, LON FULLER, THE MORALITY OF LAW 217 (rev. ed., 1969) ("The publication of rules plainly carries with it the 'social meaning' that the rulemaker will himself abide by his own rules."); *id*. at 218 ("Lilburne demands to know 'whether ever the Commonwealth, when they chose the Parliament, gave them a lawless and unlimited power, and at their pleasure to walk contrary to their own laws and ordinances before they have repealed them?'") (citing JOHN LILBURNE, ENGLAND'S BIRTH-RIGHT JUSTIFIED (1645)). *See also* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 153 (1960) ("It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.")

142. *See*, *e.g.*, Osborn v. Bank of United States, 22 U.S. (9 Wheaton) 738, 866 (1824) (Marshall, C.J.) ("Judicial power, as contradistinguished from the power of laws, has no existence. Courts are the mere instruments of the law, and can will nothing."). *See also* MONTESQUIEU, SPIRIT OF THE LAWS, XI, 6 ("[T]he national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor.").

143. Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 349 (Andrei Marmor ed., 1995). *See also* HAYEK, *supra* note 141, at 155 ("The chief safeguard is that the rules must apply to those who lay them down and those who apply them—that is, to the government as well as the governed—and that nobody has the power to grant exceptions."); Easterbrook, *supra* note 46, at 447 ("With legislation, the 'principal' is not the sitting Congress but the enacting one (or perhaps the polity as a whole).").

144. *See* Manning, *supra* note 20, at 118 (suggesting that the absurdity doctrine provides an

statutory text, and courts describe their application in these terms.[145] The following Sections outline each doctrine.

A. The Absurdity Doctrine

As noted, the absurdity doctrine permits courts to avoid an absurd application of an otherwise clear statute. Within this doctrine, judicial theories proceed along a continuum. Some cases involve applications of laws which produce "odd results," or appear strongly inconsistent with legislative policy. Other cases involve extreme departures from societal norms. Precedent varies as to how absurd a statutory application must be to trigger the absurdity doctrine.

One of the most famous absurdity cases is *Holy Trinity Church v. United States*.[146] In that case, the Supreme Court interpreted the Alien Contract Labor Act, which made it unlawful for any person, company, partnership, or corporation to "in any way assist or encourage the importation or migration, of any alien or aliens" into the United States.[147] The Holy Trinity Church had contracted with a Reverend Warren to immigrate to the United States as a pastor for the church.[148]

The church's contract fell within the letter of the statute. However, the Supreme Court concluded that the statute did not apply in this context, despite the statutory text. As the Court explained its reasoning:

> This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.[149]

The Court reasoned that the application at issue could not be within the statute, given the Christian history of America: "the general language

important, albeit limited, safety valve.) *But cf*. Nagle, *supra* note 12, at 3 (asking the question, "[w]hy does textualism need a safety valve?").

145. *See* Dodd v. United States, 125 S. Ct.. 2478, 2483 (2005) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (quotation marks omitted). *Cf.* Siegel, *supra* note 12, at 334 ("The meaning of a statute, assuming it to be clear, does not change because it is absurd.").

146. 143 U.S. 457 (1892). For recent analyses of this case, see Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, And History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000).

147. *Holy Trinity*, 143 U.S. at 458.

148. *See id*. at 457–58.

149. *Id*. at 459.

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."[150]

A more recent decision along these lines is *Public Citizen v. United States Department of Justice*.[151] In *Public Citizen*, the Court addressed the Federal Advisory Committee Act (FACA), which regulates "federal advisory committees."[152] These committees are defined as a group "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government."[153] At issue in this case was the applicability of these regulations to the American Bar Association's Standing Committee on the Federal Judiciary.

The *Public Citizen* Court determined that the statute did not cover the ABA Standing Committee, despite the Department of Justice's use of that committee to evaluate prospective judicial nominees.[154] The key to the opinion was the meaning of the verb "utilize."[155] The Court determined that if Congress intended a "straightforward reading" of the word "utilize," it would force the President to meet all of FACA's restrictions, even for consulting with his political party when selecting his cabinet.[156] The Court concluded it was appropriate to look past a literal reading of a statutory term when it would "compel an odd result."[157] In light of this reading, the *Public Citizen* majority turned to legislative history and the constitutional avoidance doctrine, and concluded that the ABA Standing Committee was not covered by the Act.[158]

Cases like *Holy Trinity Church* and *Public Citizen* permit judges to avoid literal readings when they believe that specific applications of a statute are inconsistent with what Congress intended. Indeed, the *Public Citizen* Court suggested that something less than absurdity was sufficient to justify departure from the letter of a statute, in light of legislative history.[159]

150. *Id*. at 472.

151. 491 U.S. 440 (1989).

152. *Id*. at 445–47 (describing the statute and its application).

153. *Id*. at 451 (quoting 5 U.S.C. app. §3(2)).

154. *Id*. at 467.

155. *Id.* at 453.

156. *Id*. ("Nor can Congress have meant—as a straightforward reading of 'utilize' would appear to require—that all of FACA's restrictions apply if a President consults with his own political party before picking his Cabinet.").

157. *Id*. at 454.

158. *Id*. at 455–67.

159. *See id*. at 453 n.9 (suggesting that it is appropriate to use "all available materials in

Other decisions impose a higher hurdle for deviations from literal text. Chief Justice Marshall, for example, argued that it is appropriate to avoid applying a provision when "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[160] This level of absurdity is of a different type from the foregoing cases: it calls for courts to reject readings of a statute that are unthinkable.[161]

Several of the classic absurdity cases meet this standard. For example, in *United States v. Kirby*, a sheriff executed an arrest warrant against a mail carrier for murder.[162] A prosecutor then filed charges against the sheriff under a federal statute that made it a crime to willfully interfere with the delivery of the mail.[163] The Supreme Court concluded that the law did not apply in these circumstances, in light of "common sense."[164]

The *Kirby* Court cited two examples for support, both of which are frequently offered as examples of true absurdities:

> The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'[165]

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ascertaining the intent of our elected representatives, rather than read their enactments as requiring what may seem a disturbingly unlikely result, provided only that the result is not 'absurd.'").

160. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203 (1819). *Cf.* Crooks v. Harrelson, 282 U.S. 55, 60 (1930) ("[T]he principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. . . . [T]o justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense.").

161. *Cf.* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (suggesting it is appropriate to consult legislative history "to verify that what seems to us an unthinkable disposition . . . was indeed unthought of . . . .").

162. 74 U.S. (7 Wall.) 482, 484 (1868).

163. *Id.* at 483–85.

164. *Id.* at 487 ("And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."). For a discussion of the background of this case, see David Achtenberg, *With Malice Toward Some:* United States v. Kirby*, Malicious Prosecution, and The Fourteenth Amendment*, 26 RUTGERS L.J. 273 (1995) (describing how the case was the product of Union and Confederate disputes). *See also* Nagle, *supra* note 12, at 11 (discussing Achtenberg's article as evidence that the application of the absurd results rule may have worked an injustice).

165. *Kirby*, 74 U.S. at 487.

In each of these latter instances, there is something not only absurd, but monstrous, in applying the statutory language to the particular case. While these cases could meet Chief Justice Marshall's test for an application of the law which all would unite in rejecting, it is debatable whether cases like *Public Citizen* do. This Article suggests that only the most extreme instances of absurdity support a textualist use of the absurdity doctrine.

B. The Scrivener's Error Doctrine

The scrivener's error doctrine permits courts to amend a statutory text where it clearly results from a drafting error. Scrivener's errors may resemble statutory absurdities, since an obvious error frequently produces an absurd text.[166] In this regard, the scrivener's error doctrine overlaps with the absurdity doctrine. The two doctrines are distinguishable, however, on the theory that the scrivener's error doctrine addresses an "error of expression," while the absurdity doctrine addresses unforeseen, egregious applications of statutory language.[167]

A good example of a scrivener's error case is *Scurto v. Le Blanc*.[168] There, the Louisiana Supreme Court addressed a statute that permitted litigants to impeach witness testimony "in any unlawful way."[169] Should one take this statute literally, all manner of illegal methods could be used to demonstrate that a witness is lying.[170] Instead, the Court made a straightforward determination that "this substitution of the word 'unlawful' for the word 'lawful' was an accident," and interpreted the

166. *Cf.* Manning, *supra* note 12, at 2459 n.265 ("As presently conceived by some members of the Court (including Justice Scalia), the scrivener's error doctrine is apparently a form of the absurdity doctrine; it identifies scrivener's errors by asking whether Congress could have intended to adopt the policy that the text clearly suggests.").

167. *See* Fried, *supra* note 13, at 595 (describing scrivener's error doctrine in terms of an "error of expression"); Scalia, *supra* note 8, at 20 (suggesting the doctrine applies where "on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made"). *See also* Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION 115, 116 (Amy Gutmann ed., 1997) (noting the "crucial distinction between what some officials intended to *say* in enacting the language they used, and they intended—or expected or hoped—would be the *consequence* of their saying it.").

168. 184 So. 567 (La. 1938). For further discussion of this case, see Fried, *supra* note 13, at 590.

169. *Scurto*, 184 So. at 574 (describing an "inadvertent" legislative substitution of the word "unlawful" for "lawful").

170. As Michael Fried suggests, "[i]f a party sought to test the credibility of an opponent by submerging the opponent under water to see whether the opponent floated, then—such conduct clearly being an unlawful means of impeachment—the party could not be estopped under the rule." *See* Fried, *supra* note 13, at 589–90.

statute as if it had said "lawful."[171]

Other cases involve obvious punctuation errors, or cross-references to clearly wrong sections of a statute.[172] In some of these situations, the scrivener's error doctrine is necessary to avoid nonsense—without revision, the statutory language would be gibberish.[173] More controversial decisions involve plausible statutory results that nonetheless look like the product of a typographical error.

For example, in *United States v. Locke*, the Federal Land Policy Management Act provided that mining claim filings must be made "prior to December 31 of each year."[174] The appellees had filed their claim on December 31, and argued that the statute should be construed to require a filing "on or before" December 31.[175] The Supreme Court concluded that the text should be read as written.[176] December 31 was clearly not "prior to" December 31, and that clarity resolved the issue.[177]

In dissent, Justice Stevens argued for the scrivener's error doctrine.[178] In his view, the Court's application of the statute was contrary to the intent of Congress.[179] In addition, the statutory wording resulted from an error. According to Stevens:

> As the facts of this case demonstrate, the scrivener's error is one that can be made in good faith. . . . That it was in fact an error seems rather clear to me because no one has suggested any rational basis for omitting just one day from the period in which an annual filing may be made, and I would not presume that Congress deliberately created a trap for the unwary by such an omission.[180]

This proposed application of the use of the scrivener's error doctrine thus appears to address word choices which produce results contrary to legislative policy goals, where no rational basis would explain the word choice at issue.

Justice Stevens has elaborated on this doctrine in recent cases. In

171. *Scurto*, 184 So. at 574.

172. *See* Manning, *supra* note 12, at 2459 n. 265 (discussing cases).

173. For example, where the literal meaning of a statute calls for a certificate to be furnished "upon request of the . . . request" instead of "upon *receipt* of the . . . request," the statute is incoherent. *See* United States v. Scheer, 729 F.2d 164, 169 (2d Cir. 1984). The Court's application of the scrivener's error doctrine avoids nonsense in such cases.

174. 471 U.S. 84, 93 (1985).

175. *Id*.

176. *Id.* at 96.

177. *Id*. ("The phrase 'prior to' may be clumsy, but its meaning is clear."). According to the court, "with respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words." *Id*. at 93.

178. *Id.* at 123 (Stevens, J., dissenting).

179. *Id*. at 120–23.

180. *Id*. at 123.

Koons Buick Pontiac GMC, Inc. v. Nigh, Stevens concurred to address the application of the scrivener's error doctrine to a clause of the Truth in Lending Act.[181] The resolution of the case turned on the meaning of the phrase: "under this subparagraph."[182] Depending upon how these words were interpreted, statutory damages would be capped at $1000 (as they had been prior to a statutory amendment), or else the cap would no longer exist.[183] The Court majority determined that the provision at issue was unclear, but that in light of legislative history, the $1000 damages cap still applied.[184]

Stevens concluded the statutory text at issue was unambiguous,[185] and also that the statutory scheme was not "implausible."[186] He felt the Court could not "escape this unambiguous statutory command" because of an absurd result.[187] However, Stevens determined that this statutory command could be avoided because the Court was able to use "common sense."[188] The legislative history indicated that Congress intended a different result from the wording of the final text.[189] In his view, this "demonstrated that a busy Congress is fully capable of enacting a scrivener's error into law."[190]

Textualist judges have defined the doctrine differently. In *Green v. Bock Laundry Mach. Co.*, the Supreme Court addressed Rule 609(a) of the Federal Rules of Evidence.[191] The Rule permitted impeachment of witnesses based upon evidence of criminal convictions but only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[192] Presumably, this language was aimed at prejudice to criminal defendants, not civil defendants.[193]

Read literally, the text at issue in *Bock Laundry* seemed to require the odd result that civil defendants receive an evidentiary benefit not offered

181. 543 U.S. 50, 65 (2004) (Stevens, J., concurring).

182. *Id.* at 55.

183. *Id*. at 53 (comparing the Fourth Circuit's reading with the Supreme Court majority's reading).

184. *Id*.

185. *Id*. at 65 (Stevens, J., concurring).

186. *Id*. ("There is nothing implausible about a scheme that uses a formula to measure the maximum recovery under (i) without designating a ceiling or floor.").

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*.

191. 490 U.S. 504 (1989).

192. *Id*. at 509 (quoting FED. R. EVID. 609(a)).

193. *Cf. id*. at 510 (describing constitutional distinctions between rights of criminal defendants and civil litigants).

to civil plaintiffs. Rather than countenance this result, the Court concluded that the Rule permits impeachment of a civil witness with evidence of prior convictions regardless of prejudice to the witness or party offering the testimony.[194] The majority considered the apparent absurd results, and the legislative history, as support for its holding.[195]

Justice Scalia concurred, evincing a rare acceptance that a statute should not be applied as literally written. In this instance, he noted, a literal interpretation would produce "an absurd, and perhaps unconstitutional, result."[196] On this basis, it was "appropriate to consult all public materials . . . to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of . . . ."[197] In addition, the case raised the specter of a scrivener's error. Scalia contended that the word "criminal" in front of the word "defendant" was a qualification "that could understandably have been omitted by inadvertence—and sometimes is omitted in normal conversation . . . ."[198]

Scalia has since described his *Bock Laundry* concurrence in terms of the scrivener's error doctrine.[199] Dissenting in *United States v. X-citement Video*, he explained that the scrivener's error doctrine "permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result."[200] This definition would apparently limit the doctrine to cases where the text can bear the unusual meaning. In addition:

> [T]he sine qua non of any 'scrivener's error' doctrine . . . is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the statute rather than correcting a technical mistake.[201]

194. *Id*. at 527.

195. *Id*. at 511 (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987) (agreeing with the Seventh Circuit that the Rule "can't mean what it says"); *id.* at 511–24 (describing history of Rule 609(a) and Rule 403).

196. *Id*. at 527 (Scalia, J., concurring).

197. *Id*.

198. *Id*. at 529.

199. United States v. X-Citement Video, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting).

200. *Id*. *See also* Union Bank v. Wolas, 502 U.S. 151, 163 (1991) (Scalia, J., concurring) ("Since there was here no contention of a 'scrivener's error' producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable.").

201. *X-Citement Video*, 513 U.S. at 82. *See also* United States v. Granderson, 511 U.S. 39, 59 (1994) (Scalia, J., concurring) ("I can neither pronounce the results reached by a straightforward reading of the statute utterly absurd nor discern any other self-evident disposition for which they are an obviously mistaken replacement."). The *Granderson* formulation may allow for a scrivener's error doctrine that applies in cases not involving absurd results.

Like the absurdity doctrine, the scrivener's error doctrine exists along a continuum. As endorsed by Justice Stevens, the scrivener's error doctrine permits courts to avoid a strict application of statutory text when the court determines there was an error based on a countervailing legislative purpose. Under this view, considerations of policy and legislative goals are very much a part of the scrivener's error doctrine's application.[202] Justice Scalia's approach requires the legislative intent to be absolutely clear, and conceivably requires absurd results, in order to trigger the doctrine.[203]

As with the absurdity doctrine, the legitimacy of this doctrine for a textualist method of interpretation depends upon the form the scrivener's error doctrine takes.

C. Textualist Critiques and Proposed Solutions

Textualist judges strongly express the view that the absurdity and scrivener's error doctrines should be read narrowly. These limits mitigate the concern that textualism suffers from doctrinal inconsistency—but they do not necessarily solve the problem. Even narrow versions of these doctrines undercut textualist principles to the extent courts are permitted to consider policy or legislative intent that runs contrary to unambiguous statutory language.

The absurdity doctrine is not a typical interpretive canon within the legal subcommunity. It is true that courts regularly presume legislators draft statutes with the knowledge of established judicial conventions.[204]

202. Recent decisions suggest that the current Supreme Court does not endorse Justice Stevens' conception of the scrivener's error doctrine. *See*, *e.g*., Lamie v. United States Tr., 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.") (quoting United States v. Granderson, 511 U.S. 39, 68 (1994) (Scalia, J., concurring)). Indeed, the Court has recently applied a difficult to meet standard for the absurdity doctrine. *See*, *e.g*., Dodd v. United States, 125 S. Ct.. 2478 (2005) (interpreting a statute of limitations for collateral attacks on criminal convictions such that it could run before the cause of action accrued). *Cf. id*. at 2488 (Stevens, J., dissenting) (contending that this statutory consequence is an absurd result).

203. Jonathan Siegel provides a useful discussion of cases indicating Justice Scalia's views on the importance of absurdity to the scrivener's error doctrine. *See* Siegel, *supra* note 12, at 330–32. As Siegel notes, not all of Scalia's statements support an absurdity requirement as part of the scrivener's error doctrine. Instead, the obviousness of the error and of the statute's intended meaning appear to justify the exception as he would apply it. *Id*. at 332.

204. *See* Manning, *supra* note 12, at 2467 ("These background conventions, if sufficiently firmly established, may be considered part of the interpretive environment in which Congress acts."). *See also* Nelson, *supra* note 11, at 391 ("[S]ome specialized canons help courts discern Congress's likely intent not because they reflect careful study of what Congress does on its own, but simply because members of Congress know that the courts use them."). *Cf*. Easterbrook, *supra* note 51, at 540 ("Rules are desirable not because legislators in fact know or use them in passing laws but because rules serve as off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and

In theory, a reasonable member of Congress would read these conventions into a statutory text, and legislative bargains would reflect this interpretive setting.[205] The difficulty is that the absurdity doctrine is potentially very broad, and unpredictable in application.

As Manning suggests, treating the absurdity doctrine as just another interpretive convention would dramatically affect the judicial role:

> If the Court applied a background convention providing that "judges shall apply the social meaning of a statute unless they can think of a better way of doing the same thing," that convention would in some sense be the basis of every legislative bargain. But more accurately understood, it would license the courts to disregard the specific bargains struck through the legislative process and to strike new balances outside the confines of bicameralism and presentment. Although somewhat less sweeping, the absurdity doctrine has an analogous effect.[206]

Thus, the absurdity doctrine seems to conflict with textualist thought. A broad-based scrivener's error doctrine would have a similar impact.

The most basic answer from the textualist perspective is to simply do away with the absurdity and scrivener's error doctrines. Potentially, the benefits from having these doctrines as an option do not counterbalance the effects of courts and litigators that read them broadly. British judges, at times, have supported this view.[207]

The difficulty with eliminating either doctrine is the possibility that an extreme case will arise under an otherwise unambiguous text. Such cases may be rare, but that does not render their outcomes acceptable, especially in instances of gross injustice. Jury nullification, pardons, or prosecutorial discretion offer no guarantee against the emergence of the

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legislating solutions for them.").

205. *Cf.* Manning, *supra* note 12, at 2472 ("One might argue, of course, that the absurdity doctrine's potential application is part of the bargain itself. But given the doctrine's open-ended and ad hoc nature, it is difficult to sustain that position.").

206. *Id*.

207. *Cf.* Siegel, *supra* note 12, at 325 n.73 (citing examples of British judicial statements against the absurdity doctrine, described in HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1112 (Eskridge & Frickey eds., 1994)); Fried, *supra* note 13, at 596 (citing British cases rejecting the scrivener's error doctrine). Although he does not propose that courts abolish either doctrine, John Nagle has critiqued the willingness of textualist judges to accept the absurdity and scrivener's error doctrines. *See generally* Nagle, *supra* note 12. Recently, Adrian Vermeule has also called the absurdity doctrine into question on institutional grounds. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 58 (2006) ("[T]he crucial questions about absurdity are institutional. First, will judges avoid more absurdity than they create, or vice versa? Second, is judicial power to correct absurdity beneficial in net effect, given that some fraction (perhaps a very high fraction) of genuine absurdities will be weeded out by other institutions in the legal system?"). The concerns Vermeule raises, however, are distinct from the question whether the absurdity doctrine can be squared with textualist tenets.

truly absurd result.[208] A textualism that lacked this safety valve is unpalatable when courts are confronted with cases of true absurdity.

Furthermore, that either doctrine will fall out of favor is highly unlikely.[209] Both doctrines are acceptable in some form to the staunchest judicial defenders of textualist interpretation. If application of these doctrines is inevitable, far better from the textualist perspective if there is a means to explain them.

Another answer to textualism's exceptions is to apply other, less controversial doctrines in their stead. In many cases, the use of the absurdity doctrine is unnecessary to resolve a case, because contextual interpretation, based upon established social usages, will preclude the troubling application of statutory language.[210] In addition, certain established interpretive canons—*e.g.*, the doctrine of necessity, or the doctrine *de minimis non curat lex*—offer narrower alternatives to the absurdity doctrine.[211] These canons are comparatively predictable from the legislative viewpoint, and give courts less opportunity to rewrite statutes on policy grounds.[212]

Unfortunately, an established social usage may not be forthcoming, and the relevant canons may be inapplicable. The benefit of these alternative canons is also their weakness. The restricted scope of narrower established canons means that some egregious cases will evade

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208. John Nagle suggests that such outcomes are unlikely, however:

> Of course a surgeon operating on a critically injured patient and a prisoner fleeing for his life should not be subjected to severe criminal sanctions. It is difficult to imagine, though, how that would actually happen. A federal grand jury or an elected local prosecutor would have to agree to indict such sympathetic defendants, then a jury would have to agree to convict them.

Nagle, *supra* note 12, at 10.

209. In fact, the absurdity doctrine has been a consistent interpretive feature over the years. *See* Manning, *supra* note 12, at 2389 (noting that "the absurdity doctrine has been one of the few fixed points in the Court's frequently shifting interpretive regimes.").

210. *See id*. at 2461 (contending, based on the manner in which people choose words to effect desired ends, interpretation that accounts for contextual social usage "should eliminate the most egregious cases of absurdity.").

211. *Cf.* Alex Kozinski, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1913 (1999) (applying doctrine of necessity to avoid a literalist interpretation of a statute in a hypothetical murder case). *See also* Manning, *supra* note 12, at 2467 (suggesting that such background legal conventions "will often enable judges to sidestep putative absurdities without resorting to the ad hoc strong intentionalism that defines the absurdity doctrine."). Note, however, that not all courts are solicitous of *de minimis* arguments. *See*, *e.g.*, Pub. Citizen v. Young, 831 F.2d 1108, 1118–22 (D.C. Cir. 1987) (rejecting a *de minimis* argument in the context of the Delaney Clause, which addressed the regulation of food additives).

212. *See* Manning, *supra* note 12, at 2473 ("To the extent that established conventions such as the defense of necessity or equitable tolling have developed content through common law reasoning, they offer at least an intelligible basis for legislators and the public to identify and evaluate the legislative bargains struck.").

their grasp. A statute may contain an obvious drafting error, evidenced in the legislative history, yet still be unambiguous when read literally. The *Scurto* case with its allowance for "unlawful" impeachment is a good example. A clearly drafted law might also create unanticipated results—which all humanity would unite against—yet not fall within an established canon.[213]

A third possibility, proposed by Manning, would substitute the constitutional avoidance canon for the absurdity doctrine.[214] Under this canon, courts avoid interpretations of a statute which raise serious constitutional questions.[215] For example, readings of a statute which raise doubts under the rational basis test could implicate the avoidance canon. Truly absurd statutory applications may fit into this category. In addition, the avoidance canon applies only in cases where the statutory language is ambiguous, thus removing the concern that courts are ignoring a clear statutory text.[216]

For these reasons, the avoidance canon is arguably less pernicious from the textualist point of view than the absurdity doctrine.[217] As Nagle has pointed out, though, the avoidance canon is itself subject to challenge.[218] Unlike a restricted reading of the absurdity doctrine, the avoidance canon does not necessarily have a link to probable legislative intentions. It is a judicial policy judgment that statutes should be interpreted to avoid constitutional questions, and this judgment raises serious separation of powers concerns.[219] And, much like a broad absurdity doctrine, the application of the avoidance canon is hard for

213. *Cf. id*. at 2474–76 (suggesting that this risk is justified in light of constitutional structure).

214. *See* Manning, *supra* note 12, at 2476–85 (suggesting replacement of the absurdity doctrine with an approach that seeks to avoid serious constitutional questions under the rational basis test). *Cf*. Manning, *supra* note 20, at 118–19 (noting that the absurdity doctrine can be viewed as an application of the practice requiring the Court "to construe statutes, where possible, to avoid substantial constitutional questions.").

215. For an in-depth discussion of this canon and its implications, *see* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001). *See also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

216. *See* Manning, *supra* note 12, at 2481–82 (noting that the avoidance canon allows courts to avoid constitutional questions "only when there is a plausible textual interpretation that would avoid such questions."). *But cf*. Kelley, *supra* note 215, at 855 ("[T]he fact that there might be numerous 'fair' constructions of a statute does not mean that there is not one that is best.").

217. In addition, depending upon its application, a link to rationality review may apply to only a limited number of cases. *See* Manning, *supra* note 12, at 2482–83.

218. Nagle, *supra* note 12, at 3 (noting that the avoidance canon may itself be misconceived). *See also* Kelley, *supra* note 215 (critiquing the avoidance canon); John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495 (1997) (same); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71 (same).

219. *See* Kelley, *supra* note 215, at 843 (describing concerns related to legislative supremacy, as well as Article II values).

Congress to anticipate beforehand.[220]

Judge Posner notes the broad impact which the canon may have:

> Congress's practical ability to overrule a judicial decision misconstruing one of its statutes . . . is less today than ever before, and probably was never very great. The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution. . . .[221]

Whether courts should replace the absurdity doctrine with the avoidance canon is far from clear. An alternative to the absurdity doctrine that still conflicts with textualist principles, however, does not remove the challenge to textualism.

Ultimately, the potential alternatives to the absurdity and scrivener's error doctrines are appealing, but inadequate. Statutes will inevitably continue to force courts to recognize a drafting error, or to avoid an unthinkable outcome. Both doctrines are well-established, and to the extent the occasional extreme fact pattern arises, both will still be found necessary. Accordingly, there is a need for a theory of these two doctrines that is still consistent with textualism. The following Sections offer such a theory.

IV. A TEXTUALIST THEORY FOR ABSURDITIES

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

Outcomes that everyone would consider monstrous do exist, and this informs a reader as to an author's presumed intent. Note that Chief Justice Marshall's test for absurdity looks for results that are sufficiently monstrous that *all*, without hesitation, would unite in rejecting them. Although one should take great care in ascribing policy views to

220. *Cf.* Kelley, *supra* note 215, at 866 ("[T]he avoidance canon's insistence that Congress clearly demonstrate its desire to force a constitutional decision places the onus on Congress to foresee the nature of the interpretive problems that will arise under a particular statute; it is clear, however, that the legislative process cannot adequately anticipate every potential issue (constitutional or otherwise) that might arise.").

221. Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

legislators, certain outcomes may be so far beyond the pale that a competent reader would assume they are not intended. Thus, to the extent objectified intent is relevant, the door is open to judicial recognition of absurdity as an indicator of meaning.

Reasoning along these lines is common for informal conversations, and some intentionalist theories of statutory interpretation attempt to transplant conversational norms into the interpretive process.[222] Drawing on precepts developed by Paul Grice, this perspective looks to how language is used, and the assumptions that a listener makes about a speaker's meaning.[223] In conversation, listeners attempt to intuit what a speaker actually means, and the process is a cooperative endeavor. Inasmuch as textualism is concerned with the competent reader's perspective, these norms of interpretation are potentially relevant, albeit constrained.

Textualists recognize the import of ordinary language use when interpreting statutes. For example, in *Johnson v. United States*, Justice Scalia suggested "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny."[224] Readers naturally assume certain intentions in certain contexts, and the cocktail party test is a helpful reminder of this fact. Ignoring these aspects of meaning is to ignore the way in which we use language.

The problem for textualists is that statutory text may not be rational, and may even serve contradictory purposes, yet still reflect the legislative bargain struck during the drafting process. In this respect, the expectations appropriate to statutory language are unlike those for conversational language.[225] Many of the purposive assumptions that are quite normal when interpreting spoken language are out of place when interpreting a statute enacted by two chambers of Congress and signed by the President.

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222. *See*, *e.g.*, Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179; M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985). *See also* Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 253; Solan, *supra* note 56.

223. *Cf.* PAUL GRICE, STUDIES IN THE WAY OF WORDS 26 (1989) (describing the cooperative principle of conversation). Grice's philosophy of language is grounded in the importance of speaker's meaning.

224. Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

225. *See* Hurd, *supra* note 56, at 990 ("[L]egislation does not appear to be best explained as communication because the legislature lacks the intentions required of a speaker and because citizens and officials lack the beliefs required of an audience (at least concerning the conduct rules traditionally construed as paradigmatic commands)."). *See also* Manning, *supra* note 12, at 2462 n.274 (Conversational maxims "[do] not readily translate from the conversational setting to the complex, multilateral bargaining process of framing a statute.").

The Supreme Court has implicitly recognized this concern in its application of the absurdity doctrine. In *Barnhart v. Sigmon Coal Co., Inc.*, the Court interpreted the Coal Industry Retiree Health Benefit Act of 1992, a statute which imposed obligations on "signatory coal operators" and "related persons" to address benefit plans in the coal mining industry.[226] Signatory coal operators had signed agreements requiring contributions to benefit plans under collective bargaining agreements.[227] "Related persons" were entities with certain business affiliations to a signatory coal operator.[228] The issue was whether the Commissioner of Social Security could "assign retired miners to the successors in interest of out-of-business signatory operators," for purposes of paying their benefit plans.[229]

Although the statute expressly provided for successor liability with respect to related persons, it contained no text imposing liability on a signatory coal operator's successor in interest.[230] Strictly construed, this meant that successors to signatory coal operators that had signed onto the benefit plans would not be liable, but successors to related persons would be.[231]

The Commissioner of Social Security argued for the extension of liability to the successors of signatory coal operators, and suggested that the Court should interpret the statute this way to avoid counter-intuitive results.[232] The Court refused to do so.[233] Despite the apparent illogic of the statute, the Court applied the text as written.[234]

As explained by the *Barnhart* Court:

> [N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. . . . [A] change in any individual provision could have unraveled the whole. It is quite possible that a bill that assigned liability to successors of signatory operators would not have survived the legislative process. The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second

226. 534 U.S. 438 (2002).

227. *Id*. at 447.

228. *Id*. at 451–52.

229. *Id*. at 442.

230. *Id*. at 453–54.

231. *Id*. at 459.

232. *Id*.

233. *Id.* at 461–62.

234. *Id*. (concluding that "[t]his statute does not contain conflicting provisions or ambiguous language" and refusing to "alter the text" of the statute).

guess.[235]

Thus, mere oddity of design is not enough. But in the more egregious absurdity case, a reader can confidently determine that a particular application falls outside the ambit of the text. This determination is not simply an issue of imposing the reader's policy preferences: it is a determination which follows from the conventional understanding of the context, in light of the unthinkable consequences of the alternative. In other words, absurdity cases are cases of obviousness.

Textualists are right to exclude many of the implied meanings and purposes that characterize language used in conversational settings. The pre-enactment bargaining process and complexities of legislation make it nearly impossible to accurately assess such implicit intentions. It does not follow that textualists must exclude *every* instance of implied meaning. Even a reader who holds a deep skepticism regarding the existence of legislative intent may recognize that certain applications of statutory language could not have been intended by an author given the language used.[236]

The language philosopher John Searle provides a useful illustration of how extreme applications may fall outside of a statement's sentence meaning. In an essay on literal meaning, he has argued that the truth conditions of a sentence vary based upon background assumptions that "have nothing to do with indexicality, change of meaning, ambiguity, conversational implication, vagueness, or presupposition as these notions are standardly discussed . . . ."[237] Background assumptions can determine a sentence's applicability.

Searle considers the following request at a restaurant—"Give me a hamburger, medium rare, with ketchup and mustard, but easy on the relish."[238] He then suggests unusual readings of this request:

> Suppose for example that the hamburger is brought to me encased in a cubic yard of solid Lucite plastic so rigid that it takes a jack hammer to bust it open, or suppose the hamburger is a mile wide and is "delivered" to me by smashing down the wall of the restaurant and sliding the edge of

235. *Id*. at 461.

236. This perspective is similar in some respects to the textualist understanding of the implied covenant of good faith in contract law. *Cf*. Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990) (Easterbrook, J.) ("'Good faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties."). Judges who are generally reluctant to look past the explicit terms of an agreement still recognize an exception to address results which simply could not have been intended.

237. JOHN R. SEARLE, *Literal Meaning*, *in* EXPRESSION AND MEANING 117, 125 (1979).

238. *Id*. at 127.

it in. Has my order . . . been fulfilled or obeyed in these cases?[239]

Searle concludes that the order for a hamburger has not been obeyed in these cases.[240] More to the point, the fact that his order has not been obeyed does not show he "failed to say exactly and literally" what he meant.[241] According to Searle, he should not have said "Give me a hamburger" and added, "don't encase it in plastic and no mile wide hamburgers, please."[242] The initial request was properly stated.

It is significant that nothing more needed to be said to state the order properly. If qualifiers respecting egregious hamburgers were required in order to express the hamburger order, it would be impossible to adequately say what we mean. Searle notes that there are always additional ways in which the background assumptions of our speech might fail to apply to the circumstances:

> First, [the background assumptions] are not fixed and definite in number and content; we would never know when to stop in our specifications. And second, each specification of an assumption tends to bring in other assumptions, those that determine the applicability of the literal meaning of the sentence used in the specification.[243]

He concludes that objective meaning necessarily exists relative to background assumptions.[244]

To read a text in light of the innumerable, unstated background assumptions which are a part of a sentence's meaning is not to improperly deviate from the literal meaning of the words, nor to abolish the idea of objectivity.[245] There is still an objective meaning—given certain inevitably unstated background assumptions. The significance is

239. *Id*. *Cf*. JOHN R. SEARLE, THE REDISCOVERY OF THE MIND 179 (1992) [hereinafter SEARLE, REDISCOVERY] ("If I say 'Cut the grass,' and you rush out and stab it with a knife, or I say 'Cut the cake,' and you run over it with a lawn mower, there is a perfectly ordinary sense in which you did not do exactly what I asked you to do.").

240. SEARLE, *supra* note 237, at 127.

241. *Id*. at 128.

242. *Id*. As Searle adds, "If we say that, then it will become impossible ever to say what we mean because there will always be further possible breakdowns in our background assumptions which would lead us to say that the obedience conditions of the sentence were not satisfied in a given context." *Id*.

243. *Id*. at 126. *See also id*. at 128, 131 (concluding that background assumptions cannot be completely represented). *See also* SEARLE, REDISCOVERY, *supra* note 239, at 180.

244. SEARLE, *supra* note 237, at 132–33. *See also* SEARLE, REDISCOVERY, *supra* note 239, at 181 ("The suggestion, surely correct, is that sentence meaning, to at least some extent, underdetermines what the speaker says when he utters the sentence. Now, the claim I am making is: Sentence meaning *radically* underdetermines the content of what is said.").

245. Searle emphasizes that his theory is not destructive of literal meaning. SEARLE, *supra* note 237, at 132 ("Motion, though relative, is still motion. Similarly, when I say that the literal meaning of a sentence only has application relative to the coordinate system of our background assumptions, I am not denying that sentences have literal meanings. Literal meaning, though relative, is still literal meaning.").

that some applications of language, though acceptable when consulting a dictionary definition, fall outside of a text's meaning because they conflict with our background assumptions.

Recognizing these assumptions is hardly antithetical to textualist analysis—the concern is how extensively to apply this insight.[246] Manning, for example, has recognized the potential of contextual analysis as a substitute for the absurdity doctrine in some cases.[247] Yet he places a substantial limit on this possibility: "[f]or 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."[248] The usage at issue must be pre-existing, and settled.[249]

For an illustration of how established uses of language could permit courts to avoid results without using the absurdity doctrine, recall Pufendorf's discussion of a statute that creates criminal liability for those who draw blood in the public square. As the phrase "drew blood" has developed a settled social connotation, Manning suggests this could permit a court to avoid the application of the law to a doctor.[250] People regularly speak of drawing blood when they go to the doctor, and the concept involves a different meaning from drawing blood at a fight.[251] This established social use would arguably indicate an ambiguity between a violent act and a medical procedure.

As noted above, contextual analysis of this sort is only a partial solution to absurdity doctrine concerns. Established usages do not remedy some of the worst absurdities, such as punishing the escapee from a prison who does not wish to be burned to death. There is no

246. David Sosa has suggested that this theory may pose problems for textualists in cases of indeterminacy, however. Sosa, *supra* note 82, at 931–32 (contending that the search for objective meaning cannot resolve problems of indeterminacy, but that an inquiry into intent may do so).

247. Manning, *supra* note 12, at 2461 ("[B]ecause people typically try to choose words to effect their desired ends, textual interpretation that accounts for contextual social usage, including colloquial usage, should eliminate the most egregious cases of absurdity."). *But cf.* Solan, *supra* note 56, at 460 ("Manning is surely correct that a more nuanced, context-sensitive understanding of language can reduce resort to extratextual material. . . . The only problem with this analysis is its denial that intent underlies it.").

248. Manning, *supra* note 12, at 2462–63.

249. *Id.* at 2463 (noting importance of a "settled connotation" to contextual analysis). This is not an application that addresses unambiguous statutes. *Cf.* Siegel, *supra* note 12, at 334 ("It is one thing to say that, by virtue of long usage, particular words or phrases may take on specialized meanings that are surprising to a casual reader. . . . The breaking point is surely passed, however, by the suggestion that statutory text does not mean what it means whenever what it means is absurd.").

250. Manning, *supra* note 12, at 2461–63 (discussing application of contextual analysis to Pufendorf's absurdity example involving surgery in the streets).

251. *Id.* at 2461 ("A modern textualist, however, would place different glosses on the phrase 'drew blood' in different contexts.").

established social nuance to the word "escape" which applies to breaking out from prison but not where death is at issue. Notwithstanding the gross injustice in punishing this act, the prisoner has still escaped.

For Manning, mature legal systems address this gap.[252] Over time, interpretive doctrines arise to address situations which would otherwise involve absurdities. Thus, an established judicial doctrine—the doctrine of necessity—now exists to deal with scenarios like the prison escape in case of fire.[253] The difficulty with this proposal is that it does not address the problem of absurdities in the first instance, and the textualist cannot add new doctrines each time a new absurdity arises. It is hard to see how reliance solely on established social usages or pre-existing canons will provide comfort in future, unanticipated cases.[254]

Instead, a competent reader should consider social conventions that are more abstract, as evidenced by Searle's hamburger example. Textualist judges are concerned with how a reader would understand statutory language in context, and competent readers do take into account obvious authorial intentions that are evident from that language. Legislative enactment does not strip away established colloquial meanings. It also need not strip away the most basic reader understandings about the authors of statutes.

The competent reader familiar with the legislative process cannot presume that a statute will be coherent from a policy perspective. The legislative process produces statutes which do not reflect one shared legislative policy, given the inevitable legislative compromises. A reader *can* presume law does not reflect a compromise whereby sheriffs are punished for arresting criminals within their jurisdiction, doctors jailed for saving lives in the streets, or prisoners punished for escaping from certain death. Presumptions about the use of language can include

252. *Id*. at 2468 ("Because of the abundance of such conventions in a legal system as old as ours, textualists have at their disposal a collection of well-settled background norms for addressing many (though certainly not all) of the problems that were once handled by the absurdity doctrine out of necessity.").

253. *Id*. at 2469 ("A modern court . . . might analyze the same problem in terms of the background common law defense of necessity, against which the legislature presumably enacted the criminal statute against escape."). *See supra* text accompanying note 211.

254. Jonathan Siegel notes the draw of the absurdity doctrine for textualists:

> The textualists are . . . between a rock and a hard place. On the one hand, they need the absurd results exception, because perverse cases prevent them from maintaining, with perfect purity, the position that clear statutory text must always be followed. On the other hand, by acknowledging the absurd results exception, they expose the error of the view that the Constitution compels their theory of statutory interpretation.

Siegel, *supra* note 12, at 335.

questions of gross injustice, at least at the margins.

This is not to say that such presumptions are always accurate. Given the risk that even a seemingly monstrous result is the product of a legislative compromise, or that judges will tend to be overexpansive in using the absurdity doctrine, considering legislative history in such cases is a matter of prudence.[255] And Congress may always indicate with precision that an apparently absurd result is indeed the intended one.[256] In this sense, the absurdity doctrine is an interpretive default, rather than a mandate.

Moreover, this theory requires courts to distinguish undesirable, even highly undesirable, consequences of applying a statute, from consequences that are unthinkable. There is nothing unthinkable in finding that the government "utilized" the ABA in the *Public Citizen* case, even if the policy result is felt to be highly undesirable. Nor is the outcome of strict construction unthinkable in the *Church of the Holy Trinity* case.[257] As surprising as a strict application of the statute might be from the perspective of the late nineteenth century, the case does not implicate a truly absurd or monstrous result.

One of the classic absurdity cases, *Riggs v. Palmer*, provides an example of the distinction.[258] *Riggs* involved an heir who laid claim to the estate of his grandfather, whom he had murdered.[259] The Court

255. *Cf.* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (suggesting it is appropriate to consult legislative history "to verify that what seems to us an unthinkable disposition . . . was indeed unthought of . . . ."). One might also suggest that the absurdity itself renders an otherwise clear statute ambiguous. *Cf.* AM Int'l, Inc. v. Graphic Mgmt. Assocs.,Inc., 44 F.3d 572, 577 (7th Cir. 1995) (Posner, C.J.) ("An absurdity in the application of the plain-meaning rule usually results from a comparison of the apparently plain meaning to the real-world setting in which the contract or statute is to be applied. It is the same point that a clear document can be rendered unclear—even have its apparent meaning reversed—by the way in which it connects, or fails to connect, with the activities that it regulates."). If adopted, this theory could also support a resort to legislative history.

256. This view was expressed by William Blackstone:

> [I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power . . . to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it.

WILLIAM BLACKSTONE, 1 COMMENTARIES *60. *Cf.* Rhode Island Charities Trust v. Engelhard Corp., 267 F.3d 3, 7 (1st Cir. 2001) ("True, parties can contract for preposterous terms. If contract language is crystal clear or there is independent extrinsic evidence that something silly was actually intended, a party may be held to its bargain, absent some specialized defense."). Conceivably such instances would raise rationality review concerns in some cases. *Cf.* Manning, *supra* note 12, at 2479–82 (describing rationality review issues raised by some absurdities).

257. Granted, societal views about what is unthinkable may shift over time and differ among judges. This concern about line drawing is addressed *infra* in Part VI of this article.

258. 22 N.E. 188 (NY 1889). For an interesting discussion of the reasoning in this case, see RONALD DWORKIN, LAW'S EMPIRE 15–20 (1986).

259. *Riggs*, 22 N.E. at 188–89.

applied the absurdity doctrine to avoid giving this individual his inheritance.[260] *Riggs* does not involve an unthinkable application of the text: the murderer seeking to benefit from the statute is monstrous, but the statute's workings as such are not.[261] As John Nagle has noted, parents might still wish their children to receive an inheritance in this case.[262]

Chief Justice Marshall's formulation is thus quite restrictive. A meaning which, without hesitation, "all would unite in rejecting," is one which reflects background assumptions for effectively all users of the language. The obvious absurdity and injustice of applying the statute in such a case indicate that the law's terms do not cover the facts at issue. Thus, it is not necessary to view the problem of absurdities in terms of a judicial imposition of policy. Instead, this is an intent-based approach, from an objective perspective. The interpreter may safely conclude that if anyone, without hesitation, would reject the grossly absurd meaning of the law—it could not have been intended.

Consequently, established examples of the application of language at issue are not forthcoming because they would not have occurred to anyone. Rather than look to whether a particular colloquial meaning is commonly used, one looks to whether a particular meaning would *ever* be used. For this reason, the absence of a relevant established social nuance is unsurprising. For the same reason, legislators should not be expected to evade absurdities during the drafting process.

To return to Searle's hypothetical, the mile wide hamburger is still a hamburger. A restaurant that provides this mega-burger is nevertheless not in compliance with the request for a hamburger, because it is unthinkable that the person making the request had this gigantic object in mind. Likewise, the prison escapee has escaped, but the competent reader can determine that the law does not apply to these facts. It is unthinkable that a legislator could have had the escapee's case in mind.

As Searle has suggested, sentence meaning must be understood in relation to an indefinite number of background assumptions.[263]

260. *Id.* at 189.

261. *Id*. at 192 (Gray, J., dissenting) (contending that policy does not demand the court avoid the succession to the grandson, "for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime.").

262. Nagle, *supra* note 12, at 10 ("The very people whom I expect to inherit from me . . . are the very people whom I would want to forgive and let them have my stuff in the hopefully remote possibility that they were to murder me."). *See also Riggs*, 22 N.E. at 192 (Gray, J., dissenting) ("To allow their argument to prevail would involve the diversion by the court of the testator's estate into the hands of persons, whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients.").

263. *See* SEARLE, *supra* note 237, at 128 ("And there are . . . two reasons why these extra assumptions could not all be realized in the semantic structure of the sentence, first they are indefinite in

Legislators are simply not able to resolve the absurdity problem *ex ante*. It is impossible to anticipate ahead of time all of the assumptions which might matter when a statute is applied, although they are easy enough to discern after the fact. Given the lack of clairvoyance of human actors, there is no way to avoid all possibility of absurd applications, no matter how carefully a statute is drafted.[264]

Objectified intent is the appropriate lens here. Concurring in *Public Citizen v. United States Department of Justice*,[265] Justice Kennedy offered the following commentary on the absurdity doctrine:

> This exception remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations 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.[266]

This formulation can be squared with textualist principles, not as a judicial effort to follow the subjective intent that lies behind a statutory text, but as an instance where the presumed intent is so clear that it would influence any competent reader's understanding of what the text means.

Legislation does not closely resemble conversation between individual human beings—many clues as to intent are stripped away. Accordingly, inferences that listeners make in conversation are not readily available.[267] Irrational statutory texts can also be expected given the legislative process and the unknowable compromises which lead to an enacted bill.[268] Nevertheless, skepticism of intentionalist inquiries should not obscure the existence of an obvious authorial meaning. The objective meaning of a sentence can be clear based upon the likelihood

number, and second, whenever one is given a literal statement of these assumptions, the statement relies on other assumptions for its intelligibility.").

264. Even were the application at issue an anticipated one, it is far from clear that this renders an absurdity concern less salient. The very absurdity of a particular fact pattern may cause a reasonable legislator to believe the statute would not cover the application before the court, and accordingly leave the absurd scenario unaddressed.

265. 491 U.S. 440 (1989).

266. *Id.* at 470–71 (Kennedy, J., concurring) (citation omitted).

267. *See supra* text accompanying notes 222–225. *See also* Manning, *supra* note 12, at 2462 n.274 ("In contrast with the typical conversational setting, the initial step of identifying a background purpose at odds with a statutory text may be unintelligible or may slight the legislative process that produced the final text."); Siegel, *supra* note 12, at 348 ("These differences do not prove that it is wrong to attempt to use Grice's theories in understanding statutes, but they do defeat the argument that textualism is a faulty method simply because it differs from the usual methods by which people understand each other's ordinary remarks.").

268. *Cf.* Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002).

that almost all users of the words in this context would intend one thing and not another.

Established social nuances are one way of locating the significance of a text. Non-established uses can also implicate obvious meanings. For example, a successful metaphor will involve a novel linkage between two things. In interpreting a metaphor, the reader will recognize that the literal meaning of the metaphor is nonsensical, or at least that it does not seem to fit the context. In Searle's terms, the literal meaning is "defective."[269] If the literal meaning of a sentence is sufficiently defective, the reader will be able to recognize it as a metaphor, and interpret the sentence figuratively.

Legislators, for obvious reasons, make little use of metaphors in the legislation they enact. It would also be unusual to see judges locating metaphors in a regulatory statute. To the extent a statute contained a well-crafted metaphor, however, a competent, reasonable user of the language would plausibly be able to recognize it without relying on conversational cues.[270]

Similarly, an absurdity causes a competent user of the language to interpret language in a way that avoids an unthinkable result. This analysis does not entail a policy determination in the sense that the reader's policy preferences are altering the outcome. Rather, it is a determination that the objective meaning is different from what it would otherwise be when the words are read literally. Indeed, the presumed intent may be so obvious that interpretation to avoid absurdities is not even conscious. Viewed in these terms, the absurdity doctrine is an application of the concept of "objectified intent," and nothing more.

V. A TEXTUALIST THEORY FOR SCRIVENER'S ERRORS

In light of the above discussion, the proper treatment of scrivener's errors should be apparent. Although scrivener's errors need not be manifestly absurd, their existence may be equally clear from reading the statutory text. Following the concept of objectified intent, when a

269. JOHN R. SEARLE, *Metaphor*, *in* EXPRESSION AND MEANING 76, 105 (1979) (suggesting that a listener can tell that an utterance probably has a metaphorical meaning by adopting the strategy that "[w]here the utterance is defective if taken literally, look for an utterance meaning that differs from sentence meaning."). Note that, without reference to drafting history or other evidence of intent, it can be quite easy to recognize metaphors when reading a text.

270. Justice Scalia, for example, views the references to speech and press in the First Amendment as a synecdoche for communication more broadly. *See* Scalia, *supra* note 8, at 38 ("In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole."). Although this is a case of constitutional interpretation rather than statutory interpretation, a similar principle is at work.

drafting error is sufficiently obvious from a reasonable reading of a statute that it could not represent what Congress intended to write, the court should read the statute as if the error had been corrected.

Indeed, the risk of overturning a legislative bargain can be minimal. As Manning has noted:

> [O]ne could describe a narrower scrivener's error doctrine that seeks only to identify obvious clerical or typographical errors. These errors would be apparent from the relationship of a particular word or phrase to its surrounding text. For example, Congress might use a cross-reference that, in context, could refer only to a nearby section other than the one actually named.[271]

In these cases, "when an internal textual inconsistency or an obvious error of grammar, punctuation, or English usage is apparent from reading a word or phrase in the context of the text as a whole, there is only the remotest possibility that any such clerical mistake reflected a deliberate legislative compromise."[272]

At times, a drafting error is so utterly obvious to any reader that the meaning of the text would have to incorporate a revision to reflect the author's apparent intent. One does not have to adopt a speaker's meaning view of statutory content to conclude that a reader would take into account the apparent intent when an error is sufficiently obvious.

Intentionalists occasionally point to a classic Far Side cartoon to demonstrate perceived flaws in textualism.[273] A plane is flying over a desert island, and the copilot notices a marooned man who has drawn a large sign in the sand of the beach. Unfortunately, the man never completed his sign, which says in large letters, "Helf". Instead of rescuing the man, the copilot states: "Wait! Wait! . . . Cancel that, I guess it says 'helf.'"[274]

In cases like this one, the typographical error is blatant. The humor in Gary Larson's cartoon stems from the fact that no actual plane would ever turn away because the message said "Helf." Anyone in the plane would read the sign to say "Help." Its drafting history would be an

271. Manning, *supra* note 12, at 2459 n.265.

272. *Id*. It should be noted that Manning does not endorse broader versions of the scrivener's error doctrine. *See id.* (noting that versions of the scrivener's error doctrine that consider whether Congress could have intended to adopt the policy the text clearly suggests raise the same concerns as the absurdity doctrine).

273. *See*, *e.g*., Alexander & Prakash, *supra* note 11, at 980 n.38 (citing this cartoon as a *reductio* of intention-free textualism); Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 366 (Andrei Marmor ed., 1995) (using this cartoon as support for intentionalism). *Cf*. Tiersma, *supra* note 114, at 432 (discussing a variation on the Far Side cartoon).

274. This cartoon is reprinted, and discussed, in Alexander, *supra* note 273, at 366.

afterthought. Similarly, courts should recognize that a reasonable, competent reader will adjust the meaning of a text where the correct expression is obvious on the face of the document.[275]

VI. LINE DRAWING PROBLEMS

What then, of interpretations that avoid "odd" results, short of absurdity? Arguably, a reader could look at these applications of statutory language and conclude, based upon a theory of "objectified intent," that the language does not extend to this less-than-absurd application. In consequence, legislative bargains would be subject to judicial rewrite whenever a court could discern a conflict between a text and the perceived legislative purpose of a statute. The risk that courts will too easily find anomalous results is plausible.

As an example of the practical danger that "exceptions" pose for textualist doctrine, consider the Supreme Court's recent decision in *Small v. United States*.[276] In *Small*, the applicable statute made possession of a firearm unlawful for any person who had been "convicted in any court" of a crime punishable by imprisonment for more than one year.[277] The petitioner, Mr. Small, was convicted under the statute for possession of a firearm, and had previously been convicted for attempted smuggling of firearms into Japan.[278] At issue was whether Small's prior conviction in a Japanese court counted as being "convicted in any court."[279]

Justice Breyer, writing for the majority, concluded that "any court" did not include foreign courts.[280] The *Small* Court concluded that, "even though the word 'any' demands a broad interpretation, we must look beyond the word itself."[281] This reasoning was based on the significance of context to word meaning, with the Court noting that "any" signifies different things in different situations.[282] In determining the scope of "any" in this setting, the Court emphasized the "commonsense notion

275. *Cf*. Nelson, *supra* note 11, at 356 ("[W]hen an appropriately informed reader would conclude that the statutory text contains a scrivener's error, textualists can assert that someone seeking the 'objective' meaning of the text would naturally correct the error.").

276. 544 U.S. 385 (2005).

277. *Id*. at 387 (quoting 18 U.S.C. § 922(g)(1) (2006)).

278. *Id*.

279. *Id*. ("Does this phrase apply only to convictions entered in any *domestic* court or to *foreign* convictions as well?").

280. *Id*.

281. *Id*. at 388 (citation omitted).

282. *Id*. (noting that "[i]n ordinary life, a speaker who says, 'I'll see any film,' may or may not mean to include films shown in another city.").

that Congress generally legislates with domestic concerns in mind."[283]

At the same time, Breyer rejected the idea that the Court was applying a clear statement rule, and explained that the presumption against extraterritorial application of a statute did not apply.[284] To the contrary, the statutory application was domestic. Instead, the Court's assumption that Congress focuses on domestic concerns helped the Court "determine Congress' intent where Congress likely did not consider the matter and where other indicia of intent are in approximate balance."[285]

Justice Breyer noted that some countries' criminal laws would historically include crimes such as "Private Entrepreneurial Activity," conduct encouraged in the United States.[286] These are hardly dangerous activities. Additional support came from the Court's conclusion that if the statute were read to include foreign convictions, the statute's language "creates anomalies."[287] For example, the statute contained an exception for "federal or state" antitrust or regulatory offenses—this language meant the exception would not apply to cases where foreign convictions were at issue.[288]

Yet "any" is a broad term that usually means "one or some indiscriminately of whatever kind."[289] The *Small* case presented no established social nuance, such that "any" would have a different meaning from its usual connotation.[290] There was also no applicable interpretive canon, such as the presumption against extraterritorial applications.[291]

In dissent, Justice Thomas contended that, under the majority's reasoning, "'any' means not what it says, but rather 'a subset of any,'" thus distorting the plain meaning of the statute.[292] In response to the Court's suggestion that foreign convictions "somewhat less reliably

283. *Id*. (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

284. *Id*. at 389 ("[A]lthough the presumption against extraterritorial application does not apply directly to this case, we believe a similar assumption is appropriate when we consider the scope of the phrase 'convicted in any court' here."); *id*. at 390 ("These considerations, suggesting significant differences between foreign and domestic convictions, do not dictate our ultimate conclusion. Nor do they create a 'clear statement' rule, imposing upon Congress a special burden of specificity.").

285. *Id*. at 390.

286. *Id*. at 389.

287. *Id*. at 391.

288. *Id*.

289. *Id*. at 396 (Thomas, J., dissenting) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976))).

290. *Cf*. Manning, *supra* note 12, at 2458–59 (describing how established social nuances might allow a court to ignore a dictionary definition in favor of colloquial understandings of a word).

291. *Cf. id*. at 2465–67 (describing how pre-existing canons of interpretation may become a part of the legislative bargain).

292. *Small*, 544 U.S. at 395 (Thomas, J., dissenting).

identif[y] dangerous individuals," Thomas suggested that a reasonable legislator would have considered how accurate, on average, foreign courts are at determining dangerousness and culpability.[293] In addition, even if the statutory anomalies cited by the majority were odd, he noted that they were not absurd.[294]

Notwithstanding these concerns, however, the *Small* majority did not rely on the absurdity doctrine. The Court merely applied an "assumption" about legislative intent. Cases like *Small* do indicate that present day courts are willing to interpret an apparently unambiguous statute to avoid an odd result. The risk that courts will depart from clear texts based upon doubtful applications of the law is therefore real. But it is far from clear that getting rid of the absurdity doctrine would restrict judicial opinions of this type.

Arguably, the absurdity doctrine encourages courts to revise clear statutory texts, since sufficiently anomalous results are at least sometimes a relevant consideration in cases of unambiguous statutes.[295] On the other hand, if the absurdity doctrine were more consistently limited to cases of monstrous or unthinkable results, this restraint might push future courts away from an "odd results" analysis in intermediate cases. It is uncertain whether the mere existence of the absurdity doctrine encourages deviations from unambiguous statutory language.

A more direct challenge to textualist theory contends that no principled distinction separates grossly absurd applications from merely odd results.[296] From this perspective, the fact that courts sometimes take absurdity into account—regardless of how absurd the application is—undercuts the argument against nontextual considerations when interpreting clear statutes. This claim overstates the conceptual problem for textualists. Some differences in kind depend upon differences in degree, and absurdity is one of them.

The contention that the textualist "exceptions" are just a matter of degree—thereby destroying the consistency of textualist doctrine—is reminiscent of a puzzle known as the "Sorites Paradox."[297] The ancient Greeks pondered the following logical problem. If you take a heap of

293. *Id*. at 402 (suggesting that Congress might proceed incrementally such that the majority's examples of anomalies would be rational). Thomas also suggested that the majority's interpretation would itself produce anomalies. *Id*. at 404–05.

294. *Id*. at 404 (discussing the significance of a lack of absurdity).

295. *Cf*. Nagle, *supra* note 12, at 4 ("If judges are encouraged to apply the absurd results rule and the scrivener's error rule, then we should not be surprised to see that judges want to depart from the plain statutory language to honor other indications of the legislature's intent, too.").

296. *See*, *e.g*., Siegel, *supra* note 12, at 335.

297. *See* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 517 (1994) (describing the Sorites Paradox). "Sorites" is derived from Greek for "heap".

sand, and then remove one grain, you still have a heap. If you remove another grain, the remainder will still constitute a heap. Grain by grain, there is no particular grain which causes the leftover sand to cease being a heap.[298] The apparently logical conclusion is that each successive quantity of grains is therefore a heap. Yet, when there is one grain left, this final grain of sand is clearly not a heap of sand, suggesting that something is wrong with the prior reasoning.[299]

A similar vagueness problem exists with absurdities. There is no clear line which distinguishes the routine application of a statute from the absurd. For that matter, there is no clear line which distinguishes that which is merely absurd, from the absurd and monstrous. A very absurd statutory result can seem awfully similar to a result that is just a notch or two less egregious. Yet the concept of a gross absurdity is accessible, despite the blurry edges.

Chief Justice Marshall's view of absurdity is stated in terms of a viewpoint in which all would unite. That is a comprehensible test. An inability to clearly draw the line between cases like *Barnhart* and cases like *Kirby* is a function of vagueness, but this vagueness does not render the concept of absurdity useless to the courts. Nor, for that matter, should it invite courts to apply a broad-based "odd results" analysis in cases that are not quite at the egregious level.

The distinction between extreme absurdities and mundane anomalies is grounded in more than prudence, or the shock value of an absurdity. It is a reflection of the textualist concern with objective meaning. As one moves along the continuum of statutory applications, from unlikely, to odd, to unthinkable, a point is reached where any competent user of the language will say that the language does not apply to these facts. However characterized, it is this point which justifies an absurdity exception.

Michael Moore suggests that consideration of egregiousness as one's standard poses a problem for formalist courts because the inquiry calls for courts to consider normative questions in deciding whether to take absurdity into account. In his view:

> The *degree* of absurdity, injustice, or unfairness cannot serve as some kind of "triggering mechanism" for asking the safety valve question, for it suggests the following possibility: a case where clear language leads to a result sufficiently absurd that, if the court considered it, would suffice to construe the language differently. But the court does not ask the safety

298. *See id*.

299. Although the paradox may not seem complex, Waldron notes that this is not an easy problem to solve as a question of logic: "among philosophers there is no widely accepted resolution to the Sorites Paradox." *Id*.

> valve question because it is not *so* absurd as to be "shocking." If anything would be absurd, this would be. It would be as if a court, before it could inquire into a party's negligence, had to *find him grossly negligent*.[300]

Moore's analysis is persuasive in terms of a court that finds it formally wrong to consider anything short of egregious absurdities—but his argument need not undermine the textualist recognition of the absurdity doctrine.[301]

Textualist courts reject the relevance, and perhaps existence, of a legislative intent distinct from the objective statutory meaning. This rejection does not mean that these courts cannot observe statutory anomalies or odd results when reading statutes. It merely means that anomalies and odd results are not of interest in themselves. A textualist court does have to look at these aspects of the statute in order to find a gross absurdity, unthinkable to all. The focus is not on the importance of avoiding odd results (of whatever degree), but on the importance of such results as indicators of an objective statutory meaning.[302]

Intent skepticism justifies enforcement of clear statutory text, even where the text's effects seem illogical. Statutory language that serves conflicting ends may simply reflect the legislative bargaining process. Yet, granting the insights of public choice theory, it is hard to see how some applications of law could be intended by any legislator. A myriad of unstated background assumptions, as discussed above, qualify literal meaning. In cases that fall sufficiently beyond the pale, those background assumptions delimit the objective content of a text.

As with absurdities, the scrivener's error doctrine exists along a continuum of cases that concludes with obvious typographical errors. At some point, an error in expression is so completely obvious that all readers can recognize the error. In cases of sufficient obviousness, the

300. Moore, *supra* note 98, at 280 n.281.

301. This is so, unless one adopted a version of textualism that attempts to read texts without taking into account objective indicators of intent. To the extent that modern textualism is comfortable with determining objective intent based upon context, the consideration of absurdity is not inherently barred. Another way of putting this is that it is acceptable to consider absurdity as evidence of an objective meaning, even though it is not acceptable to consider absurdity as a substantive limit on available meanings.

302. A loose analogy can be made to the business judgment rule. Courts applying this doctrine are not to second guess a board's substantive judgments. Even terribly bad business judgments will not support liability. However, a business decision for which no rational justification can be provided may fall outside the business judgment rule. In such cases, it is not the substance of the business decision, but the objective evidence of a state of mind, which is at issue. *Cf.* Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) (noting in the business judgment rule context that irrationality "may tend to show that the decision is not made in good faith . . . ."). With the absurdity doctrine, the absurdity is important not as a substantive flaw in the statute but because it indicates that the statutory meaning is different from what the words would otherwise literally say.

correct statutory content may also be clear. Thus, an individual marooned on an island, writing "Helf" in the sand, has been unambiguous in his textual meaning.

Prudence should nevertheless play a part in resolving these interpretive questions. Textualists in particular are nervous about rewriting what appears to be an unambiguous statutory text. Even if the concept of an unthinkable absurdity or an obvious drafting error is coherent, that does not make the vagueness concern irrelevant to interpretation. Inevitably, judges will disagree as to how unthinkable a particular statutory application is, or how blatant a scrivener's error. What if judges disagree as to whether a particular case is egregious enough?

Here, the problem of statutory indeterminacy offers a helpful analogy. Lawrence Solan has written about the difficulties posed by what he calls "pernicious ambiguities"—indeterminacies in language (whether vagueness or ambiguity) where the actors involved in a dispute "all believe a text to be clear, but assign different meanings to it."[303] In some cases, not only participants, but judges will also assign different meanings to what they consider a clear statute. In Solan's view, these disputes represent a communicative breakdown.[304]

Courts disagree about the significance of pernicious ambiguities. One view is that, where different parties take opposing views on the clear meaning of a statute, it indicates that at least one party is incorrect in their interpretation.[305] Another view suggests, where there are reasonable contrary positions among the parties, there must be an ambiguity.[306] Likewise, some judges think it irrelevant whether courts have differed in their interpretations; other judges conclude that a judicial split is evidence that the statutory meaning is unclear.[307]

As Solan notes, courts are right to be cautious about finding uncertainty merely based on a dispute regarding the meaning of a

303. Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 859 (2004). As Solan notes, ambiguity and vagueness are distinguishable, but for purposes of discussion he treats both as a form of ambiguity. *Id*. at 860.

304. *Id*. at 859 ("The competing interpretations reflect a complete communicative breakdown. If language worked so poorly in general, then it would not be possible to have a language-driven rule of law at all.").

305. *Id*. at 867 (citing as an example Justice Thomas's concurrence in *Bank of America National Trust and Savings Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.").

306. *See* Solan, *supra* note 303, at 867 ("Other courts come to the opposite conclusion, finding ambiguity because of the parties' disagreement, provided that they each adopt plausible positions.").

307. *See id*. at 871–76.

statute.[308] This caution is especially appropriate in cases where the disputants are the litigants themselves. He suggests these disputes should be relevant when neutral parties—such as judges—are in disagreement.[309] Disagreement may not be *per se* evidence of ambiguity,[310] but, he concludes, courts should reject the idea "that language upon whose meaning there is total disagreement is clear language."[311]

Assessing the merits of this argument as applied to statutory indeterminacies is beyond the scope of this Article.[312] Yet Solan's argument can be extended to the problem of absurdities and scrivener's errors. The concept of a gross absurdity, which all would unite in rejecting, is a vague one. What seems absurd to one person will seem plausible to another. Likewise, the existence of a truly obvious scrivener's error is, in some cases, a matter for debate. Passage of time from the enactment of a statute adds to the probability of judicial error.

Because the test proposed in this article is keyed to absurdities or errors that are so clear that they could not have been intended, a dispute among the courts (or judges on a panel) is significant. The mere fact of a dissenting opinion, or a circuit split, is not dispositive in assessing statutory meaning. Nevertheless, a court that is concerned with the acceptability of the absurdity or scrivener's error doctrines should take into account judicial disagreement. As a matter of prudence, judicial disagreement indicates that anomalous results are not grossly absurd, nor the product of obvious drafting errors.

Courts may draw the line poorly in some cases. Merely anomalous results will be called gross absurdities, and awkward statutory phrasing will sometimes be amended as if it were a drafting error. Courts can be expected to occasionally misperceive a legislative bargain as if it were a mistake. A careful application of textualism's "exceptions" will hopefully limit that risk.

308. *Id*. at 887 ("Courts are rightly cautious about drawing sweeping conclusions about uncertainty merely from the fact that there is a dispute over the applicability of language in a contract or a statute."). In Solan's view, they are nonetheless too cautious. *Id*.

309. *Id*. at 888 ("When it appears that different people—especially randomly selected judges with less of an agenda than litigation parties—are not in accord about the interpretation of statutory or contractual language, it should raise a red flag that there may be a failure to communicate.").

310. *Id*. ("Courts may be right in refusing to use these disagreements as per se evidence of ambiguity.").

311. *Id*.

312. The two contexts are somewhat different. Allowing a dispute over textual meaning to assist in finding an ambiguity may permit courts too easily to deviate from a clear text. In contrast, applying Solan's argument to the vagueness of our conceptions of absurdity or scrivener's errors arguably makes it less likely that a court will deviate from a clear text.

CONCLUSION

Canons of interpretation are divisible into two basic categories: normative canons, and descriptive canons.[313] A normative canon permits courts to interpret ambiguous statutory language in light of policy preferences, which may or may not reflect legislative intent.[314] Such canons are controversial, though not uncommon.[315] A descriptive canon is arguably less intrusive on legislative prerogatives. Descriptive canons are presumptions which courts apply based upon their perceived correlation to legislative intent.[316]

Absent a compelling link to the apparent intent of the legislature—as evidenced by a contextual reading of the statutory language—the absurdity doctrine is an invitation for judicial revision of legislative bargains. Accordingly, the absurdity doctrine should not be understood in normative terms.[317] Courts lack the authority to rewrite unambiguous statutes to meet their policy preferences, or the legislature's apparent policy preferences, no matter how desirable or enlightened the policy

313. *See* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 VAND. L. REV. 561, 563 (1992) (observing these two functions for canons of interpretation). Other divisions have been suggested. *See*, *e.g.*, Vermeule, *supra* note 73, at 85 ("The canons come in two broad groups: the so-called 'textual' or 'linguistic' canons, which are default rules that govern questions of grammar and syntax, and the 'substantive' canons, which are default rules that implement substantive interpretive, institutional, and distributive policies."). Ross's dichotomy may be more useful in this context. *See* Nelson, *supra* note 11, at 394 n.140 (noting that "many 'substantive' canons . . . help interpreters discern likely legislative intent, and hence can be seen as 'descriptive' rather than 'normative.'").

314. *See* Ross, *supra* note 313, at 563 ("[N]ormative canons are principles, created in the federal system exclusively by judges, that do not purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective.").

315. A good example of a normative canon, discussed *supra* notes 215–220, is the canon of constitutional avoidance. This canon stems as much from judicial policy as from any insights it might give into legislative intent.

316. *See* Ross, *supra* note 313, at 563 ("Descriptive canons are principles that involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language.").

317. Judge Easterbrook has recently critiqued a substantive understanding of the absurdity doctrine:

> Today the anti-absurdity canon is linguistic rather than substantive. It deals with texts that don't scan as written and thus need repair work, rather than statutes that seem poor fits for the task at hand. In other words, the modern decisions draw a line between poor exposition and benighted substantive choice; the latter is left alone, because what judges deem a "correction" or "fix" is from another perspective a deliberate interference with the legislative power to choose what makes for a good rule.

Jaskolski v. Daniels, 427 F.3d 456, 462 (7th Cir. 2005). *See also* United States v. Logan, 453 F.3d 804, 806 (7th Cir. 2006) ("The statute is not absurd as written. Its text parses; there is no linguistic garble."). This article does propose that substance matters, but only in those cases where the substantive absurdity is so great that it has import for an objective meaning.

may be.

Instead, in egregious cases, the absurdity doctrine should function like a descriptive canon. Sufficiently monstrous results—results which all would unite in rejecting—are not compatible with the presumed intent of the legislature. Even for textualists, an author's presumed intent is part of our understanding of a statute. The objective meaning understood by a competent user of the language can exclude a sufficiently outrageous application of the law.

This means that a judicial interpretation which relies on the absurdity doctrine may still be faithful to the law's command. It is an outlying instance of the contextual interpretation of language. Due to the vicissitudes of legislative bargaining, courts cannot safely qualify clear statutory language to take into account contrary or limiting legislative purposes. Legislative intent, assuming it exists, is often unverifiable by courts. Courts can, however, note instances where an application of the law is so far beyond the pale that it could not, under any scenario, be the product of a legislative compromise.

The scrivener's error doctrine can be formulated in similar terms. Clerical errors, misspellings, cross-references to the wrong section of a statute, can be so obvious that no competent reader would take them at face value. They do not pass the interpretive laugh test. Avoidance of gibberish, and in some cases bizarre outcomes, permits a court to fix a clear mistake of expression.

Should the absurdity doctrine, or the scrivener's error doctrine, be applied in less than obvious circumstances, their textualist justification falls away. It is the certainty of an unintended result which colors the objective meaning of a statute. For purposes of a coherent textualist philosophy, the only acceptable cases are at the true extremes, where it is impossible the text was intended to mean what it otherwise appears to say.[318]

So understood, neither the absurdity doctrine nor the scrivener's error doctrine is an exception to textualism. They simply provide additional

318 It may be argued that I am proposing a form of purposivism, where the meaning of a statute is found in the perceived purpose of a hypothetical legislator. Perhaps this is accurate, but only to the extent that the apparent purpose of a statute can, in some cases, lead competent readers to conclude that the objective meaning of statutory language excludes a particular application as a matter of context. Insofar as an objectified "purpose" can affect the ordinary understanding of language, then such elements should be incorporated into textualism. *Cf.* Manning, *supra* note 89, at 78 ("[B]ecause textualists understand that speakers use language purposively, they recognize that evidence of purpose (if derived from sources other than legislative history) may also form an appropriate ingredient of the context used to define the text."). On the other hand, a mere conflict between apparent statutory purposes and sentence meaning is not sufficient to justify rewriting statutory content to make it more coherent. For recent perspectives on the role of statutory purposes in textualist thought, compare *id*., with Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913 (2006).

evidence that textualism diverges from literalism. Textualism's purported exceptions fit nicely with the idea that courts "do not inquire what the legislature meant," but "ask only what the statute means."