WHAT IS TEXTUALISM?

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OVER the past two decades, eminent scholars and judges have devoted renewed attention to both the goals and the methods of statutory interpretation. In the academy, indeed, "theories of statutory interpretation have blossomed like dandelions in spring."[1] The range of theories is not quite so broad in actual American courtrooms, but judges too are of different minds about how to approach statutes.

One of the leading approaches, championed by Justices Scalia and Thomas on the Supreme Court and by Judge Easterbrook on the Seventh Circuit, goes by the name of "textualism." Although its advocates accept that label,[2] they did not choose it; the approach was named more by critics than by adherents.[3] Perhaps not surpris-

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[1] William N. Eskridge, Jr., Dynamic Statutory Interpretation 1 (1994).

[2] See, e.g., 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: Federal Courts and the Law 3, 23 (Amy Gutmann ed., 1997); Herrmann v. Cencom Cable Assocs., 978 F.2d 978, 982–83 (7th Cir. 1992) (Easterbrook, J.).

[3] The earliest usage of "textualism" reported by the *Oxford English Dictionary* comes from 1863, when an author used the term to criticize Puritan theology. See Mark Pattison, Learning in the Church of England, *in* 2 Essays by the Late Mark Pattison 263, 286 (Henry Nettleship ed., Oxford, Clarendon Press 1889) (referring to the "arbitrary textualism of the Puritan divines"), *quoted in* 17 Oxford English Dictionary 854 (2d ed. 1989). The term retained its dismissive overtones when Justice Robert Jackson introduced it to the *United States Reports* a century later. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (asserting that the enumerated powers should have "the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism"). Although later references to "textualism" became less dismissive, the legal academics who helped to spread the label are not generally associated with the approach. See, e.g., Kenneth S. Abraham, Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair, 32 Rutgers L. Rev. 676, 683 (1979) (adopting the term "textualist" to describe critics of the interpretive style exemplified by *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 205–17 (1980) (using the labels "textualism" and "intentionalism" to describe different strains of "originalism" in constitutional interpretation); Richard A. Posner, Legal Formalism,

ingly, then, the label tends toward caricature.[4] It also risks exaggerating what is genuinely at stake in contemporary debates about statutory interpretation: no "textualist" favors isolating statutory language from its surrounding context,[5] and no critic of textualism believes that statutory text is unimportant.[6]

Much of the rhetoric used to define textualism is similarly unhelpful. The most common way of distinguishing textualism from its principal judicial rival, "intentionalism," purports to identify a basic disagreement about the proper goal of statutory interpretation: intentionalists try to identify and enforce the "subjective" intent of the enacting legislature, while textualists care only about the "objective" meaning of the statutory text. For reasons that Part I of this Article will try to explain, however, this distinction is far less helpful than the rhetoric on both sides suggests. To begin with, the distinction itself is exaggerated; judges 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. Many textualists do impose more restrictions than the typical intentionalist on the evidence of intent that they are willing to consider, but those restrictions need not reflect any fundamental disagreement about the goals of interpretation. In any event, whatever disagreements may exist on this score do not account for the most significant differences between textualism and intentionalism. Thus, even when

Legal Realism, and the Interpretation of Statutes and the Constitution, 37 Case W. Res. L. Rev. 179, 198 (1986) (calling Judge Easterbrook's approach to statutes "textualist rather than intentionalist"); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 415–24 (1989) (discussing the rise of "textualism" in statutory interpretation); see also William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990) (definitively popularizing the term).

[4] See, e.g., Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 Cardozo L. Rev. 1597, 1615 (1991) ("[I]nsofar as the label suggests a simple and literal meaning of the statutory text at issue, it betrays the sophistication and complexity of Justice Scalia's approach.").

[5] See, e.g., In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) (indicating that statutory texts must be understood in light of "their contexts—linguistic, structural, functional, social, historical"); Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 536 (1983) (agreeing with Wittgenstein that "sets of words do not possess intrinsic meanings and cannot be given them").

[6] See, e.g., Kent Greenawalt, Statutory Interpretation: 20 Questions 35 (1999) ("No one seriously doubts that interpretation of statutes turns largely on textual meaning.").

there is no useful legislative history on some question of interpretation (and hence no intrinsic reason for the "objective" meaning sought by textualists to diverge from the "subjective" intent sought by intentionalists), one can still expect to observe systematic differences between the results reached by textualists and the results reached by intentionalists.

Those differences are less categorical than either textualists or their critics generally acknowledge, and they are correspondingly harder to describe. Part II, however, will try to provide a positive account of what distinguishes textualism from intentionalism. My central argument is that even if all judges accepted the basic goals of intentionalism (as, in fact, I believe that many judges whom we think of as textualists really do), different attitudes toward what academics call "rules" and "standards" could still generate the very same divide that we currently observe.[7]

Section II.A will consider various methodological differences between textualism and intentionalism, including not only the debate over legislative history but also disputes about the level of certainty necessary to diagnose "drafting errors" and the relative importance of regularized canons of construction. As we shall see, the textualist position on these matters need not reflect any disdain for the "intentionalist" goal of minimizing disparities between the legal directives that interpreters take statutes to establish and the legal directives that members of the enacting Congress understood themselves to be establishing. Someone who fully accepted that goal could still be a textualist on the ground that judges are likely to make more accurate assessments of legislative intent if they use a relatively rule-like approach (of the sort associated with textualism) than if they conduct a more open-ended inquiry (of the sort associated with intentionalism). Thus, much of what separates textualism from intentionalism may be less about the *desirability* of the search for legislative intent than about the *mechanics* of that search and about whether a relatively rule-like approach will advance or hinder it.

[7] Cf. Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22 (1992) (attributing differences in how individual Justices decide constitutional cases to their differing tastes for rules and standards). For a thumbnail sketch of how academics use the terms "rules" and "standards," see infra notes 81–84 and accompanying text.

Section II.B will turn from questions of methodology to questions of substance. Here, judges whom we think of as textualists have explicitly noted their relative affinity for rules. When a statutory directive seems rule-like on its face, the typical textualist is less inclined than the typical intentionalist to apply background principles of interpretation that effectively push in the direction of standards. Likewise, when interpreting statutory language that is concededly ambiguous and that could be read to draw more or less formal categories, textualists tend to be quicker than intentionalists to settle upon the more rule-like meaning.[8]

There is, of course, no necessary connection between these tendencies and the textualists' apparent affinity for rule-like methods of interpretation; it is theoretically possible to favor a very rule-like methodology that resolves all doubts in favor of reading statutes to establish standards. As a practical matter, however, it is no surprise that the same people who are receptive to rules in other contexts also favor a relatively rule-like approach to interpretation. Thus, Section II.B's conclusions about matters of substance reinforce Section II.A's hypothesis about methodology.

Part III will trace the same ideas in the debate over "imaginative reconstruction," an approach that encourages judges to resolve interpretive questions by putting themselves in the shoes of the enacting legislature.[9] Contrary to the widespread perception that textualists repudiate this technique, judges whom we think of as textualists regularly engage in it. Again, however, their use of imaginative reconstruction looks different from that of intentionalists, in a way that reflects their relative receptivity toward rules.

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[8] See, e.g., Adams v. Plaza Fin. Co., 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) (arguing for a more "rule-based" interpretation than Chief Judge Posner's majority opinion); Thomas W. Merrill, The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807, 807 (2002) (noting "Justice Scalia's . . . attachment to rules and dislike of standards"); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1187 (1989) (suggesting that when an ambiguous provision lends itself to a range of equally plausible interpretations, the Supreme Court should extend "the law of *rules* . . . as far as the nature of the question allows").

[9] See, e.g., Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817 (1983).

Although I consider myself a textualist, my account will not necessarily match the self-perception of other textualists.[10] My central point, then, is best understood as descriptive rather than explanatory: Whatever the root causes of the differences between textualist and intentionalist interpretation, someone seeking to predict how textualist judges will diverge from intentionalist judges is well-advised to start with the distinction between rules and standards. As we shall see, that distinction is a surer guide to the systematic differences between textualism and intentionalism than more high-falutin talk about the fundamental goals of interpretation or the distinction between "objective" meaning and "subjective" intent.

I. DO TEXTUALISTS AND INTENTIONALISTS HAVE DIFFERENT GOALS?

Broadly speaking, the possible goals of statutory interpretation can be divided into three main categories: (1) goals connected with enforcing the "speaker's intent"; (2) goals connected with enforcing the "reader's understanding"; and (3) goals external to the communication between speaker and reader, such as promoting sound policy, making our legal system as coherent as possible, or keeping the costs of the interpretive process within manageable bounds. "Intentionalists" commonly associate themselves with the first set of goals; emphasizing that statutes are mechanisms to convey the policy decisions of the people whom we have elected to legislate for us, intentionalists call upon courts to try to enforce the

[10] My account does, however, have considerable affinity with arguments advanced by Professor Adrian Vermeule. See Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74 (2000). Professor Vermeule, a textualist, does not agree that textualists and intentionalists have the same basic goals. See id. at 82–83 (defining textualism and intentionalism in terms of a fundamental disagreement about the aims of interpretation). But he emphasizes that even if one embraces the intentionalists' goals, one cannot be sure how best to advance those goals; the selection of an appropriate methodology to capture legislative intent will depend on a variety of assumptions that do not lend themselves to proof. See id. at 83–84, 100–13. In the face of this "empirical uncertainty," id. at 113, Vermeule argues that even intentionalists could (and in his view should) embrace the relatively formalist techniques that he associates with textualism. See id. at 128–49. Because even intentionalists could adopt a rule-bound approach to interpretation, Vermeule asserts that "the real fight in interpretation is about means, not ends." Id. at 148; see also id. at 89 (discussing the prospect of an "overlapping consensus" among interpreters who agree upon methodological questions notwithstanding continuing disagreements about the goals of interpretation).

directives that members of the enacting legislature understood themselves to be adopting.[11] "Textualists," by contrast, commonly associate themselves with the second set of goals; emphasizing that statutes have serious consequences for people outside of the legislature[12] and that people should not be held to legal requirements of which they lacked fair notice, textualists suggest that interpretation should focus "upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean."[13]

Standard formulations of the distinction between "textualism" and "intentionalism" center on this alleged difference in goals.[14] But scholars who have closely examined the Supreme Court's recent output have noticed that prevalent styles of judging do not really track these categories.[15] It does not follow that there are no

[11] See, e.g., Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court, 39 Am. U. L. Rev. 277, 301 (1990) ("Congress makes the laws, I try to enforce them as Congress meant them to be enforced."); see also Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226, 232 (1988) ("[A] statutory obligation does not emanate from the mere words of the provision but from the *act of legislation* . . . . Legal obligations arise because we recognize law-making authority vested in certain human beings. It is to that exercise of human will in making the relevant law that we refer in statutory construction." (footnotes omitted)).

[12] See, e.g., Frank H. Easterbrook, Abstraction and Authority, 59 U. Chi. L. Rev. 349, 362–63 (1992) (criticizing "the proposition that legal and literary interpretation should use the same methods" and explaining that "[j]udges . . . use texts to impose obligations—to order persons to do things, pay money, go to jail").

[13] Antonin Scalia, Response, *in* A Matter of Interpretation: Federal Courts and the Law, supra note 2, at 129, 144; see also Scalia, supra note 2, at 17 ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than 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.").

[14] See, e.g., Morell E. Mullins, Sr., Tools, Not Rules: The Heuristic Nature of Statutory Interpretation, 30 J. Legis. 1, 20 (2004) (noting that "[i]ntentionalism . . . employs a writer-centered strategy for attributing meaning to statutory text," while "textualism . . . employs a reader-centered strategy"); Jonathan R. Siegel, Textualism and Contextualism in Administrative Law, 78 B.U. L. Rev. 1023, 1025 (1998) (defining "intentionalists" as "those who believe that the function of a court in matters of statutory interpretation is to discern what the legislature intended and to implement that intent," and contrasting them with "textualists" who "assert that discovery of legislative intent is not the goal of statutory interpretation").

[15] See Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History De-

differences between the judges whom we think of as textualists and those whom we think of as intentionalists. The most important differences, however, are not really captured by the standard ways we talk about them. 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. Indeed, it is not even clear that textualists and intentionalists disagree about the proper mix of these different kinds of goals; other differences in outlook could readily account for the battle lines that we currently observe. In this sense, debates about the fundamental goals of statutory interpretation are superfluous to the divide between judges whom we consider textualists and judges whom we consider intentionalists.

A. The Concept of "Objectified" Intent

Professor William Eskridge and his coauthors suggest that when one is trying to understand a theory of statutory interpretation, one should "distinguish between the overall *goal* of interpretation prescribed by [the theory] and the admissible *sources* the interpreter may consider in attempting to achieve that goal."[16] Textualists and intentionalists have a well-known disagreement about the proper use of internal legislative history, and one might naturally think that this disagreement about sources itself reflects a fundamental disagreement about goals. But we will defer discussion of that point until Section I.B. For now, let us bracket the debate about sources by stipulating that we have an "appropriately informed" interpreter—someone who knows what interpreters are permitted to know and who will use that information for the purposes that interpreters are permitted to use it. The thesis of this Section is that both textualists and intentionalists would give this interpreter the same basic marching orders. In particular, textualist as well as intentionalist judges routinely seek to identify and enforce the legal

bate and Beyond, 51 Stan. L. Rev. 1, 5 (1998) (concluding that the standard distinction between "textualism" and "intentionalism" is "far too stylized to capture the Court's interpretive practices which, in fact, cut across these familiar categories").

[16] William N. Eskridge, Jr., et al., Legislation and Statutory Interpretation 211 (2000).

directives that an appropriately informed interpreter would conclude the enacting legislature had meant to establish.

To be sure, textualist rhetoric does not emphasize this point. Judge Easterbrook attacks the very idea that a multi-member legislature can have a collective "intent"[17] and emphasizes that "[t]he meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person."[18] Justice Scalia likewise distinguishes between "subjective legislative intent" (which he would disregard even if the concept were coherent) and what he calls "a sort of 'objectified' intent" (toward which he is more favorable).[19] As we shall see, however, both the "objectified" intent sought by Justice Scalia and the "reasonable import of the language" sought by Judge Easterbrook[20] do reflect some sort of inquiry into the meaning intended by members of the enacting legislature. Indeed, once one gets past disputes about which sources of information can be used for which purposes, the reasonable reader imagined by Justice Scalia and Judge Easterbrook has the same basic mission as the typical intentionalist: he is trying to figure out "what Congress meant by what it said."[21]

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[17] See, e.g., Easterbrook, supra note 5, at 547; Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body."); cf. infra Section I.C (discussing the textualist attack on collective intent).

[18] Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 65 (1988).

[19] Scalia, supra note 2, at 17; see also id. at 29 (referring to his view that "the objective indication of the words, rather than the intent of the legislature, is what constitutes the law"). See generally Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 89 (1991) ("Scalia [and] Easterbrook . . . have argued that the whole idea of legislative intent should be scrapped."); Jane S. Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 Yale L.J. 107, 118 (1995) ("Textualists view legislative intent as irrelevant . . . ."); Jonathan R. Siegel, What Statutory Drafting Errors Teach Us About Statutory Interpretation, 69 Geo. Wash. L. Rev. 309, 319 (2001) ("The textualist is not interested in legislative intent and questions whether such intent can even be said to exist.").

[20] Easterbrook, supra note 18, at 62.

[21] In re Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) (quoting Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, *in* Benchmarks 196, 218–19 (1967)); see also Scalia, supra note 13, at 144 (conceding that "what the text would reasonably be understood to mean" and "what it was intended to mean" are concepts that "chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and

For a straightforward illustration of this point, consider why textualists (like all other interpreters) embrace the presumption against surplusage. According to that canon, if a statutory provision lends itself to two possible interpretations, and if one of those interpretations would make another provision in the statute superfluous, then interpreters ordinarily should prefer the other interpretation. The reason for this presumption is simple: the fact that members of the enacting legislature bothered to include the second provision sheds light on what they probably intended the first provision to mean.[22] Textualists have no difficulty accepting this logic.

By the same token, textualists freely admit that statutory provisions should be interpreted in light of their apparent purposes, as long as those purposes can be gleaned from evidence of the sort that textualists permit interpreters to consider.[23] Textualists acknowledge that the same statutory language might be understood differently if adopted in a context that suggests one purpose than if adopted in a context that suggests another.[24] As Professors Larry Alexander and Saikrishna Prakash recently have noted, however, purpose is relevant because it sheds light on what the interpreter believes the enacting legislature meant (or, if you prefer, what the interpreter believes an appropriately informed reader would believe the enacting legislature meant).[25]

hence the evident purpose of, its utterance"); Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?": Why Intention Free Interpretation is an Impossibility, 41 San Diego L. Rev. 967, 968–69, 974 (2004) (observing that "intention free textualism" is "a conceptual impossibility" because "[o]ne cannot attribute meaning to marks on a page . . . without reference to an author, actual or idealized, who is intending to communicate a meaning through the marks"); Kent Greenawalt, Are Mental States Relevant for Statutory and Constitutional Interpretation?, 85 Cornell L. Rev. 1609, 1619 (2000) ("[L]isteners attribute meaning according to their sense of the speaker's aims.").

[22] See, e.g., TRW, Inc. v. Andrews, 534 U.S. 19, 33 (2001) ("We doubt that Congress, when it inserted a carefully worded exception to the main rule, intended simultaneously to create a . . . rule that would render that exception superfluous.").

[23] See, e.g., John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2408 (2003) ("Textualism does not purport to exclude all consideration of purpose or policy from statutory interpretation.").

[24] See, e.g., *Sinclair*, 870 F.2d at 1342. For a simple example, see Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 283–84 (2000).

[25] Alexander & Prakash, supra note 21, at 979 ("[T]he commonplace truth that all understandings of texts are contextual just demonstrates that all texts *qua* texts acquire their meaning from the presumed intentions of their authors.").

The fact that textualists recognize the concept of "scrivener's errors"—typos, erroneous cross-references, and similar drafting mistakes—reinforces this point.[26] When the evidence that they are willing to consult persuades them that a statute contains such an error, textualist judges are perfectly willing to read the statute as saying what members of the enacting legislature apparently intended it to say.[27] Textualists can certainly square this approach with their emphasis on "objective" meaning; when 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. This response, however, concedes that the textualist determines "objective" meaning by asking what an appropriately informed reader would think that the members of the enacting legislature had (subjectively) intended.[28]

When pushed to acknowledge the importance of legislative intent, textualists sometimes fall back on another distinction: the intent that matters, they say, concerns the rule that legislators meant to adopt rather than the real-world consequences that legislators expected the rule to have.[29] To borrow an example from Judge Easterbrook, suppose that Congress enacts a statute reducing the tax rate on capital gains, and suppose we know (from permissible sources) that all members of Congress voted for this statute in the hope that it would stimulate the economy and thereby increase tax revenues. Even if tax revenues actually plunge after the rate reduction, textualist judges will not feel free to adjust the statutory rate in order to boost revenues; they will continue to enforce the rule

[26] See id. at 980 (arguing that even to recognize the category of "scrivener's errors" is "to have a baseline of legislative intent, for it is only against that baseline that it is possible to speak of legislative misspeaking").

[27] See, e.g., Scalia, supra note 2, at 20–21; cf. Manning, supra note 23, at 2459 n.265 (criticizing attempts to identify scrivener's errors by assessing the policy decisions that the statutory text appears to reflect, but acknowledging the possibility of "a narrower scrivener's error doctrine that seeks only to identify obvious clerical or typographical errors").

[28] See Cass R. Sunstein, Justice Scalia's Democratic Formalism, 107 Yale L.J. 529, 546–47 (1997) (book review) ("[T]he movement from 'intentions' to 'meaning,' while entirely sensible, is not a movement from something (entirely) subjective to something (entirely) objective.").

[29] See Scalia, supra note 13, at 144 (accepting Ronald Dworkin's emphasis on this point).

that Congress adopted even if it fails to produce the effects that Congress hoped to achieve.[30]

Again, though, this fact does not really serve to distinguish textualists from other interpreters. In Easterbrook's example, *no* judge would enforce the consequences that Congress meant to achieve rather than the rule that Congress meant to adopt.[31]

Of course, the meaning of a rule and the consequences that members of Congress hoped to achieve cannot always be separated as crisply as in this example; judges of all stripes often use the consequences that Congress hoped to achieve to draw inferences about the rule that Congress meant to adopt. On occasion, indeed, the hoped-for consequences will lead judges to infer exceptions or embellishments to the rule that a statute's bare text seems to state. As Part II discusses, textualists probably are less willing than other judges to second-guess the text for this reason. But this difference between textualists and other interpreters is less about the importance of the rules that Congress intended to adopt than about how best to determine the content of those rules. Here too, then, philosophical discussions about the kind of "intent" that matters do little to capture what really separates textualists from intentionalists.

B. The Debate Over Sources

So far, I have told only half the story. I have said that when interpreting a statute, textualists and intentionalists both try to ascertain and enforce the rule that an appropriately informed reader would believe members of the enacting Congress intended to adopt. But I have not yet discussed the differences in what these two camps mean by an "appropriately informed" reader.

[30] See In re Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.).

[31] See, e.g., Siegel, supra note 14, at 1055; see also Ronald Dworkin, Comment, *in* A Matter of Interpretation: Federal Courts and the Law, supra note 2, at 115, 116–18 (agreeing that interpreters should focus on what Professor Dworkin calls the "semantic intention" behind Congress's laws, as opposed to "what the various legislators as individuals expected or hoped the consequences of those laws would be"); cf. Paul F. Campos, The Chaotic Pseudotext, 94 Mich. L. Rev. 2178, 2206–08 (1996) (criticizing Easterbrook's larger point, but appearing to agree about what judges would do in Easterbrook's specific example).

When one takes those differences into account, it may be true that textualists seek a somewhat more "objective" form of intent than intentionalists—one that depends less on "the mental states of any particular legislators."[32] Textualists are more apt than intentionalists to treat the legislative process as a black box that spits out the laws to be interpreted but whose internal workings in any particular case are not part of the context that should be ascribed to an "appropriately informed" reader. To a large extent, textualists will read the laws enacted by a particular Congress at a particular time to have the same meaning regardless of who was chairing the key committees, or what sponsors and witnesses said about the bill, or whether the enacting Congress was in the hands of Democrats or Republicans.

Still, it is easy to exaggerate the divide between textualism and intentionalism on this score. Even intentionalists do not seek a purely subjective form of intent; inspired by concerns about notice and the desire to hold down the costs of legal interpretation, they too restrict what an "appropriately informed" reader is permitted to know about the actual intentions of members of the enacting Congress. Conversely, the "intent" sought by textualists is not purely objective; as we shall see in Section I.B.1, textualists are willing to take account of certain kinds of information about the actual purposes and understandings of the specific legislators who comprised the enacting Congress. Indeed, the principal way in which the information base used by textualists differs from the information base used by intentionalists is simply that textualists tend to exclude or de-emphasize internal legislative history, and Section I.B.2 notes that this difference need not reflect any disagreement about the goals of statutory interpretation or the kind of "intent" that matters. In any event, Section I.B.3 observes that any such disagreement is far from the most important way in which textualism differs from intentionalism.

[32] See Greenawalt, supra note 6, at 92 ("We may speak of a fully objective legislative intent as one that does not depend on the mental states of any particular legislators. It may be assessed mainly in terms of how a reasonable reader would understand the language the legislature has used.").

1. Intentionalism Is Not Purely "Subjective" and Textualism Is Not Purely "Objective"

Influenced both by formal rules of evidence and by common understandings about the proper sources of statutory meaning, all approaches to statutory interpretation impose some restrictions on the information that interpreters can use to glean the intended meaning of a statute. Intentionalism is no exception. Although intentionalists are happy to treat committee reports and other publicly available materials as part of the context known to an "appropriately informed" reader, they reject other information that is probative of lawmakers' actual intentions but not spread out on the public record.

With near unanimity, for instance, courts interpreting federal statutes refuse to consider affidavits or live testimony from members of the enacting Congress about what they or their colleagues understood themselves to be adopting.[33] Of course, interpreters would approach this sort of evidence with caution even if their sole goal was to identify and enforce the meaning actually intended by the enacting legislature; after-the-fact testimony by legislators or former legislators trying to help a particular litigant in a current dispute might not really reflect the understandings that prevailed in Congress at the time of enactment. But intentionalists exclude more such testimony than concerns about accuracy alone would lead them to keep out.[34] To explain why intentionalists support the near-total ban on testimony about legislators' private understandings, one must take account of additional concerns, such as the need for citizens and their lawyers to have fair notice of the law's requirements and for voters to be able to understand what their elected representatives are up to.[35]

[33] See, e.g., Covalt v. Carey Can., Inc., 860 F.2d 1434, 1438–39 (7th Cir. 1988) (emphasizing the universality of this principle in federal court, though noting that California state courts have sometimes allowed state legislators to testify about the legislature's general understanding of a bill).

[34] See, e.g., Greenawalt, supra note 6, at 167–68 (suggesting that concerns about reliability do not fully justify our "virtually absolute preclusion" of legislators' testimony about what they intended).

[35] See id. at 168.

Examples of this sort could be multiplied,[36] but the basic point is clear: the form of intent that matters to intentionalists is not purely "subjective." Rather than single-mindedly seeking the enacting legislature's *actual* intent, intentionalists seek only what someone who was drawing upon an artificially restricted information base—from which information has been excluded for reasons other than unreliability—would *believe* to be the legislature's actual intent.

Conversely, textualists do not seek a purely "objective" form of intent that reflects no particularized information at all about the mental states of members of the enacting legislature. Even Justice Scalia's interpretation of a statute will sometimes depend on what committee reports and floor statements reveal about the actual intent of members of Congress,[37] and Judge Easterbrook seems willing to take account of legislative history more frequently.[38] In other ways too, textualists as well as intentionalists make use of publicly

[36] For a simple if fantastical illustration, suppose 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 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. Cf. Greenawalt, supra note 21, at 1620 ("[N]o viable approach to legal meaning can wholly exclude reader understanding approaches.").

[37] See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (indicating that when courts would otherwise construe a statute so as to avoid a result that seems "unthinkable," statements in the legislative history showing that members of Congress did in fact contemplate that result can affect what the courts should do).

[38] See Bd. of Trade v. SEC, 187 F.3d 713, 720 (7th Cir. 1999) (Easterbrook, J.) (noting that even the most reliable legislative history "has limited utility," but leaving room for its use "when there is a genuine ambiguity in the statute"); Scattered Corp. v. Chi. Stock Exch., 98 F.3d 1004, 1006 (7th Cir. 1996) (Easterbrook, J.) (providing examples of acceptable uses of legislative history, such as to show "that an ambiguous clause in the statute is designed to ordain private suits"); Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1158 (7th Cir. 1990) (Easterbrook, J.) (treating legislative history as relevant to the proper interpretation of the phrase "substantially all" in a federal statute); see also Frank H. Easterbrook, What Does Legislative History Tell Us?, 66 Chi.-Kent L. Rev. 441, 442, 448 (1990) (asserting that the apparent difference between Judge Easterbrook and Professor Eskridge about the appropriate uses of legislative history "is not nearly so great as it seems," and agreeing that "[i]ntelligent, modest use" of legislative history "can do much to bring the execution [of a statute] into line with the plan").

available information about the linguistic habits and policy preferences of the particular group of legislators who comprised the enacting Congress. For instance, many textualists use records of a bill's drafting history (such as amendments made during the legislative process) to shed light on how members of the enacting legislature understood the resulting statute, and they let that information control their own interpretations of the statutory language.[39] Similarly, textualists attach importance to the word choices made by the same legislators in other statutes.[40] No real-life textualist judge actually treats members of the enacting legislature entirely like cogs hidden inside a black box.

2. The Relevance of the Legislative-History Debate

Although the intent sought by intentionalists is not purely "subjective" and the intent sought by textualists is not purely "objective," it is certainly true that the hypothetical reader envisioned by the typical intentionalist will frequently have access to more information about actual legislative intent than the hypothetical reader envisioned by the typical textualist. After all, textualist judges are famous for ignoring or deemphasizing legislative history under circumstances in which other interpreters would invoke it. Without completely excluding legislative history from the context on which an "appropriately informed" reader would draw,[41] the typical tex-

[39] See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 737 n.272 (1997) ("[T]extualist judges . . . do not categorically exclude a statute's drafting evolution from their consideration of statutory context."); see also EEOC v. Waffle House, 534 U.S. 279, 302–03 (2002) (Thomas, J., joined by Scalia, J., dissenting) (discussing the evolution of the bill that became the Equal Employment Opportunity Act of 1972 and invoking amendments to that bill to shed light on the powers that the statute as enacted gives the EEOC); S. Austin Coalition Cmty. Council v. SBC Communications, 274 F.3d 1168, 1172 (7th Cir. 2001) (Easterbrook, J.) ("[T]he legislative history—the *enactment* history, not the fog of words generated by legislators—shows that 'common carrier' [in § 7 of the Clayton Act of 1914] means *all* common carriers. The version of § 7 that was passed by the House used the word 'railroad'; the Senate amended this to 'common carrier,' a broader designation; the House acceded to the Senate's amendment."). But see Bank One Chi. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the majority for invoking the drafting history of a statute).

[40] See, e.g., Stewart Org. v. Ricoh Corp., 487 U.S. 22, 36 (1988) (Scalia, J., dissenting) (calling it "particularly instructive" to compare the statute in question with "another provision, enacted by the same Congress a year earlier").

[41] See supra notes 37–38 and accompanying text.

tualist views publicly available legislative history as a far less important source of information than the typical intentionalist.

It is not clear, however, that this stance reflects any disagreement about the goals of statutory interpretation or the kind of "intent" that matters. When attacking the use of legislative history, textualists have tended to take the "kitchen sink" approach; they have advanced many different arguments, some of which seem sounder than others. But one of the major prongs of their attack—and the one that rings truest at least to me—is that people outside of the legislature are not sufficiently sophisticated consumers of legislative history for its use to advance the search for actual legislative intent.

To be sure, Congress is a collective entity, and so the concept of legislative "intent" is obviously something of a construct for textualists and intentionalists alike. But the fact that collective intent is a construct does not mean that it has no relationship to anyone's actual intent, or that the interpretive tools used to generate it cannot be judged in terms of that relationship.[42] When one is assessing a proposed interpretive tool, it is perfectly sensible to ask whether use of the tool will tend to minimize or to widen the aggregate gap between what individual members of the enacting legislature understood themselves to be adopting and what interpreters take the statute to mean.

For a host of different reasons, textualists have suggested that inviting courts to make widespread use of legislative history will widen that gap. Justice Scalia worries that "clues provided by the legislative history are bound to be false" with respect to many issues; the fact that one legislator or committee of legislators purported to read a particular provision in a particular way will not readily come to the attention of others, but judges will overvalue that isolated fact and will understand the legislative history to reflect an authoritative aggregation of the whole body's intent.[43] Once courts start down this path, moreover, legislative history might become even "less worthy of reliance," because canny legislators or staffers will have an incentive to salt the *Congressional Record* with misleading statements that further their own special

[42] For further discussion of the collective intent of legislatures, see infra Section I.C.
[43] See Scalia, supra note 2, at 32.

agendas.[44] According to Justice Scalia, the ability to invoke legislative history also makes it easier for willful judges to enforce their own policy preferences rather than whatever Congress has authoritatively decided.[45] With all of these arguments, Justice Scalia suggests not that the legislature's actual collective intent is always nonexistent or irrelevant, but rather that judicial decisions will better approximate that intent if courts generally disregard legislative history than if they take it into account.

One can certainly imagine individual cases in which judges who consult the available legislative history will better capture a statute's intended meaning than judges who disregard it. But one can also imagine cases in which the opposite will be true—in which the available legislative history is misleading, but its unreliability will not be apparent to the judges who use it. People who want judges to enforce the intended meaning of statutes (to the extent it can be gleaned from publicly available materials) 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?

As Professor Adrian Vermeule has argued, the latter position is entirely possible.[46] Judges operate at some remove from the legislative process, and so they are likely to be pretty bad at distinguishing reliable legislative history from unreliable legislative history. At the same time, members of Congress are likely to be pretty good at using statutory language in a conventional way (especially if they

[44] Id. at 34; see also, e.g., Adrian Vermeule, The Cycles of Statutory Interpretation, 68 U. Chi. L. Rev. 149, 162–71 (2001) (hypothesizing that the legislative history produced during periods when courts consult legislative history might be less reliable than the legislative history produced during periods when courts do not consult legislative history).

[45] See Scalia, supra note 2, at 36 (suggesting that because legislative history is so "manipulab[le]," its use permits judges to mask their willful behavior more effectively).

[46] See 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) (spelling out this sort of argument and concluding that "the interaction between distinctive features of legislative history and structural constraints of the adjudicative process may indeed cause legislative history to reduce rather than increase judicial accuracy"); cf. infra text accompanying notes 105–106 (discussing Frederick Schauer's defense of *United States v. Locke*, 471 U.S. 84 (1985)).

know that many judges are reluctant to consult legislative history for signs of idiosyncratic usage). The fact that textualists generally downplay legislative history therefore does not prove that textualists are less interested than other interpreters in enforcing the intended meaning of statutes. Textualists might simply believe that in the aggregate, judicial efforts to identify a statute's intended meaning will be no less accurate (and considerably more efficient[47]) if judges routinely presume that members of Congress were using words in their conventional sense than if judges are always combing the legislative history for signs that members of Congress agreed upon some other meaning.

Admittedly, textualists also raise other objections to the use of legislative history. Textualists sometimes assert, for instance, that giving weight to internal legislative history allows members of Congress to circumvent the constitutional requirements for exercising the legislative power, under which legislative proposals must be reduced to texts that are voted upon by both houses of Congress and presented to the President.[48] In the past, this argument may indeed have reflected underlying disagreements about the proper goals of statutory interpretation; nontextualist judges sometimes seemed willing to enforce statements in committee reports without regard to whether they bore on the intended meaning of anything in the actual statutory text.[49] Nowadays, though, it is hard to find anyone who advocates such untethered use of legislative history.[50]

[47] See Scalia, supra note 2, at 36–37.

[48] See, e.g., Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."); Easterbrook, supra note 17, at 68–69 ("No matter how well we can know the wishes and desires of legislat*ors*, the only way the legislat*ure* issues binding commands is to embed them in a law."); see also Manning, supra note 39, at 695 ("[T]extualists argue that crediting *unenacted* expressions of legislative intent contravenes the constitutional requirement of bicameralism and presentment.").

[49] See Bradford C. Mank, Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies, 86 Ky. L.J. 527, 539 (1998) ("To some extent, the revival of textualism during the 1980s was a healthy reaction to the misuse by many judges of legislative history.").

[50] See, e.g., Eskridge et al., supra note 16, at 230 (observing that even Justice Scalia's critics agree that legislative history "is, at best, evidence of what the law means" and that "neither citizens nor judges should consider legislative history to be *authoritative*

To the extent that the textualists' constitutional arguments get at any points that remain genuinely in dispute, these arguments may simply be a different way of packaging the textualists' claim that legislative history will mislead courts about the intended meaning of statutes. Textualists certainly do not believe that the Constitution prohibits using external sources to shed light on statutory meaning;[51] to the contrary, they concede that if Congress so decrees, it can validly require courts to interpret statutes in light of preexisting committee reports and floor statements.[52] The gist of the textualists' position is simply that Congress generally has *not* so decreed and that giving weight to legislative history causes courts to enforce something other than what both houses of Congress approved and presented to the President. At least some versions of this argument reduce to concerns about the reliability of legislative history.[53]

in the same way that statutory text is authoritative"); Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 863 (1992) ("No one claims that legislative history is a statute, or even that, in any strong sense, it is 'law.' Rather, legislative history is helpful in trying to understand the meaning of the words that do make up the statute or the 'law.'").

[51] See Manning, supra note 39, at 702 (noting that "textualist judges routinely draw interpretive insights from sources outside the statutory text").

[52] See John F. Manning, Putting Legislative History to a Vote: A Response to Professor Siegel, 53 Vand. L. Rev. 1529, 1534 (2000).

[53] The same goes for Professor Manning's argument that when courts use committee reports to flesh out the meaning of statutes, they are effectively permitting sub-units of Congress to legislate on behalf of the whole body, in violation of the structural principle that only Congress as a whole can exercise the legislative power. See Manning, supra note 39, at 706–31. As Professor Siegel has pointed out, the constitutional principle that Congress cannot delegate legislative power does not prevent Congress from passing statutes that incorporate decisions made by committees (or other entities). See Jonathan R. Siegel, The Use of Legislative History in a System of Separated Powers, 53 Vand. L. Rev. 1457, 1480–89 (2000). Thus, the mere fact that committee reports are not prepared by the full Congress does not automatically make it wrong for courts to consult them for guidance about the intended meaning of statutory language. One can make Professor Manning's argument against the use of committee reports only if one draws a distinction between the meaning that committee reports suggest and the meaning intended by Congress as a whole. That distinction, in turn, derives from concerns about the reliability of legislative history. See United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 221 (2001) (Scalia, J., concurring in the judgment) (criticizing the majority for invoking "statements in testimony and Committee Reports that I have no reason to believe Congress was aware of"); Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 375 (asserting that committee reports "at best can shed light only on the 'intent' of that small portion of Congress in which such records originate").

Of course, if the Constitution or some other governing principle required courts to take a fully objective view of legislative intent that reflects no information at all about the enacting legislature's internal processes, then legislative history would be irrelevant even if it were completely reliable. But it is hard to read the Constitution in this way,[54] and textualist judges do not do so. Even Justice Scalia does not assert that the subjective understandings reflected in floor statements and committee reports can *never* affect a court's interpretation of a statute,[55] and many textualists are willing to consider aspects of legislative history that they deem less prone to manipulation than committee reports.[56] These nuances in the textualists' position cannot possibly be attributed to the Constitution, but they are entirely consistent with concerns about reliability.[57]

One final argument against the use of legislative history does stand separate and apart from those concerns, but it can no longer do much work. As late as the 1950s, Justice Jackson could plausibly assert that statements made on the floor of Congress were not readily accessible to the citizenry and that letting such statements shape a court's understanding of a statute therefore risked holding people to legal requirements of which they lacked fair notice.[58] One

[54] See Vermeule, supra note 10, at 98 ("[T]he Constitution cannot plausibly be read to say a great deal about statutory interpretation . . . .").

[55] See supra note 37 and accompanying text.

[56] See supra note 39 (discussing textualist reliance on drafting history).

[57] Cf. Eskridge et al., supra note 16, at 231–32, 235–36 (noting that "[f]ew have found much force in Justice Scalia's Article I, Section 7 argument" and suggesting that the debate should instead boil down to "pragmatic concern[s] about the costs and benefits of the use of legislative history in the interpretive calculus").

[58] See, e.g., Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396–97 (1951) (Jackson, J., concurring) ("Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. . . . Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country."). But see Henry M. Hart, Jr., & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1250–51 (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994) (tent. ed. 1958) (attempting to refute Justice Jackson's claim by noting that as of 1956, "there are now at least three depository libraries for [United States government] documents in each state of the union, and many more in most," though conceding that most of these libraries chose not to receive all of the categories of government documents that were authorized for distribution).

occasionally hears echoes of this argument in the modern debate.[59] But it 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.[60]

To be sure, culling legislative history for clues about the intended meaning of statutes can still be expensive and time-consuming.[61] But textualists are perfectly willing to let the legal system impose some such costs on the citizenry when they believe that doing so will actually promote the search for what the enacting Congress meant. We have already seen that many textualists will consult committee reports for some purposes and that they are also willing to investigate questions of drafting history. By the same token, textualists frequently understand statutes to include technical terms of art, which laymen and lawyers alike can grasp only after doing considerable research.[62] When interpreting old statutes, moreover, the typical textualist judge seeks to unearth the statutes' *original* meanings rather than enforcing whatever modern readers

[59] See, e.g., 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 52 (1989) ("If the average citizen is presumed to be aware of the legislative history as well as the statute, are we then enforcing not simply unknown but almost unknowable laws?").

[60] See Richard A. Danner, Justice Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History, Duke J. Comp. & Int'l L., Summer 2003, at 151, 191 ("Today, an actual small town lawyer in Greenville, North Carolina still might not have access to a collection of legislative history documents in her office or in the Greenville public library, but she can obtain and examine most of them fairly easily at a local university library documents department, through the services of one of the law school libraries in the state, or electronically."); see also id. at 168, 170 (noting that for bills considered since 1995, both committee reports and the daily edition of the *Congressional Record* have been available on the Internet through the Government Printing Office's website).

[61] See id. at 192–93.

[62] See, e.g., Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 615–16 (2001) (Scalia, J., concurring); Babbitt v. Sweet Home Chapter of Cmties. for a Great Ore., 515 U.S. 687, 717–18 (1995) (Scalia, J., dissenting); Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126–27 (1995) (Scalia, J.); Argentina v. Weltover, Inc., 504 U.S. 607, 612–13 (1992) (Scalia, J.); Moskal v. United States, 498 U.S. 103, 121–26 (1990) (Scalia, J., dissenting).

might take the statutes' language to mean.[63] This position makes perfect sense if textualists care about the enacting legislature's intent, but not if they are more interested in avoiding research costs and implementing the reading that the people subject to the legislation would most readily adopt.[64]

In sum, even though textualists are reluctant to consult legislative history, one cannot conclude that they have no interest in the intended meaning of statutes, or that they have unusual views about the kind of "intent" that matters. Their stance on legislative history might simply reflect their intuitions about which publicly available materials reliably help judges identify the sort of intent that both textualists and intentionalists seek.

3. The (In)significance of this Debate

In any event, even if textualists and intentionalists really do have some disagreements about the goals of interpretation and the kind of "intent" that matters, the most important differences between textualism and intentionalism lie elsewhere. Any difference between the two camps' vision of "intent" would chiefly affect the information base upon which interpreters draw; the practical implication of the contrast would simply be that intentionalists consider internal legislative history more than textualists do. But one of Justice Scalia's major arguments against the use of legislative history is that it is not worth the bother; "legislative history is ordinarily so inconclusive" that refusing to consider it would save time and expense without significantly affecting case outcomes.[65] If the chief practical difference between textualists and intentionalists were

[63] Cf. T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 49, 60 (1988) (suggesting that interpreters should use modern-day interpretive conventions to decode old statutes as well as new ones, but acknowledging that this proposal flies in the face of conventional versions of textualism).

[64] Compare id. at 58 (noting that "lay persons consulting the statute may be more likely to read it in light of current understandings," and hence that "present-minded[]" interpretation promotes notice of the law's requirements better than a focus on original meaning), with Steven D. Smith, Law Without Mind, 88 Mich. L. Rev. 104, 115 (1989) (objecting that by letting the meaning of existing statutes fluctuate according to fortuitous changes in linguistic conventions, Professor Aleinikoff's proposal would cause the legal directives enforced in court to become the product of "accident" rather than reflecting policies that someone, somewhere, had considered to be good ideas).

[65] Scalia, supra note 2, at 36.

simply their respective stances toward legislative history, and if Justice Scalia is correct that courts usually would interpret statutes the same way no matter which stance they took, then whether judges are textualists or intentionalists would rarely affect how they understand statutes.

Textualists themselves surely reject that conclusion, or they would not devote so much energy to the textualist cause. What is more, they are right to do so. As Parts II and III will suggest, the attitudes of textualists and intentionalists diverge in important ways that go beyond any disagreements about the proper goals of interpretation.

C. The Point of the Textualist Attack on Collective Intent

Before we continue, however, I should confront one obvious objection to what I have already said. I have suggested that the typical textualist may well be no less interested than the typical intentionalist in identifying and enforcing the intended meaning of statutory language. But textualist rhetoric often attacks the very concept of collective intent. Judge Easterbrook, for instance, writes that "[b]ecause legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable"; while intentions can exist at the level of individual legislators, "[t]he body as a whole . . . has only outcomes."[66] Aren't statements of this sort flatly incompatible with any concern for what "the legislature" intended statutory language to mean?

The answer is "not necessarily," because the textualists' arguments about collective intent are more qualified than they seem. When phrased carefully, they focus primarily on matters that the statutory language does not seem to address—matters as to which (according to the textualists) the enacting legislature has given no authoritative direction.[67] The textualists' basic point is not that lan-

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[66] Easterbrook, supra note 5, at 547.

[67] See, e.g., id. at 548 ("[J]udicial predictions of how the legislature would have decided *issues it did not in fact decide* are bound to be little more than wild guesses, and thus to lack the legitimacy that might be accorded to astute guesses." (emphasis added)); Manning, supra note 39, at 675 ("[T]extualist judges argue that a 535-member legislature has no 'genuine' collective intent *with respect to matters left ambiguous by the statute itself*." (emphasis added)). Thus, the phrase "hidden yet discov-

guage adopted by a collective body *cannot* authoritatively reflect any collective intent about anything, but rather that the typical statute enacted by Congress *does not* authoritatively reflect any collective intent on policy goals that transcend its own terms.

Textualists emphasize that the legislative process is set up to achieve agreement on words, not motives or purposes.[68] To be sure, some people might expect legislators to deliberate with each other until they reach a consensus about the direction that public policy should take, and then to implement that consensus through legislation designed to carry out the agreed-upon goals. If one has this vision of the legislative process, one might understand the resulting statutes to reflect collective intentions that go well beyond the statutes' specific provisions.[69] But most textualists (and indeed most modern scholars of legislation) take a different view of the legislative process. Influenced by public choice theory,[70] they speak of contests between rival interest groups whose advocates struggle to hammer out compromises on statutory language even while agreeing to disagree about broader policy goals.[71] To the extent that statutes are compromises of this sort, courts trying to enforce their intended meaning should not lightly extrapolate from their "spirit" to answer questions that the statutes do not seem to address.[72] Indeed, textualists object that such extrapolation "is a sure way of de-

erable" is a key qualifying phrase in the passage quoted in the text accompanying note 66.

[68] See, e.g., Easterbrook, supra note 17, at 68 (sketching out the highly varied motives that might lead particular legislators to coalesce around the same bill).

[69] See, e.g., William N. Eskridge, Jr., & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. Pitt. L. Rev. 691, 694–701 (1987) (discussing the premises of the Legal Process school that dominated the 1950s).

[70] See, e.g., William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 276–77 (1988) (noting that Judge Easterbrook's theory of statutory interpretation is "tied at least in part to the insights of public choice theory").

[71] See Easterbrook, supra note 5, at 540–41 (emphasizing that "[a]lmost all statutes are compromises" and applying this statement to "public interest" statutes as well as to "interest group" statutes); see also Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039, 1083 (1997) (observing that "the Powell-Scalia arguments [against reading implied causes of action into federal statutes] presuppose that the legislative process is based on compromises between contending interest groups").

[72] See, e.g., Easterbrook, supra note 17, at 68 ("Compromises have no spirit; they just are.").

feating the original legislative plan";[73] the point of most statutes is to effectuate a compromise between competing goals, and courts that extend one or another of those goals to some new area risk "upsetting the balance of the package" that the enacting legislature approved.[74]

To the extent that textualists are especially committed to this view of the legislative process, they may be especially cautious about reading statutes to reflect an underlying consensus on policy goals that extend beyond the statutes' terms.[75] Thus, textualists may well understand the intended meaning of the typical statute to have a narrower scope than some other interpreters would give it. But textualists certainly do not reject the very concept of "intended meaning." To the contrary, their arguments about "upsetting the balance of the package" and "defeating the original legislative plan" are *premised* on the idea that legislators typically have some collective understanding of the meaning of the terms that they are adopting.

This is not to say, of course, that every member of the enacting legislature will have exactly the same understanding of every nuance and implication of those terms. Although disagreements about the meaning of statutory language might be less pronounced than disagreements about the underlying policy goals that the legislature should be trying to serve, some diversity of interpretation within the enacting legislature is inevitable. But the fact that the notion of "intended meaning" requires some aggregation of competing views does not mean that it is entirely incoherent, or that every possible method of aggregation is just as sensible as every other possible method of aggregation. Far from making any such claim, textualists regularly advertise their approach as the best way for courts to identify the compromises that members of the enacting legislature collectively intended to strike.

This point helps us make sense of other aspects of textualist rhetoric too. It is quite common, for instance, for textualists to por-

[73] Easterbrook, supra note 5, at 546.

[74] Id. at 540 (adding that "the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved").

[75] I owe this point to a conversation with Tom Merrill.

tray themselves as "faithful agents" of the enacting legislature.[76] 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? But if textualists are as interested as intentionalists in enforcing the intended meaning of statutory language, and simply believe that the textualist approach will better capture the type of intent that both camps seek, then the textualists' self-conception is far more understandable. In sum, even the rhetoric of textualism does not prove that textualists and intentionalists have fundamentally different goals.

II. TEXTUALISM AND THE ADVANTAGES OF "RULENESS"

At least for the sake of argument, then, let us suppose that judges generally agree with each other about the basic goals of statutory interpretation. In recognition of the need for the targets of legislation to have fair notice of the requirements to which they are subject, judges will not seek to enforce purely private understandings held by members of the enacting legislature; the information that judges draw upon in determining statutory meaning must have been available to the public.[77] Subject to that constraint, however, judges care about enforcing the intended meaning of statutes. Thus, judges strive to identify and enforce the legal directives that an "appropriately informed" reader would think members of the enacting Congress had understood themselves to be establishing.

The hypothesis of this Part is that even if all judges approached statutes this way, the current divide between "textualists" and "intentionalists" would remain. With respect to questions of methodology, some judges would expect a relatively rule-based approach to bring judges closest to the intended meaning of statutory language, while others would have more faith in judges' capacity to determine intended meaning through case-by-case evaluations conducted outside the strictures of rules. Section II.A argues that

[76] See, e.g., Easterbrook, supra note 17, at 63 ("[Judges] are supposed to be faithful agents, not independent principals."); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 18 (2001) ("The root of the textualist position is . . . in straightforward faithful agent theory.").

[77] See Eskridge et al., supra note 16, at 296–97 (suggesting that it is "rare" for federal courts to deviate from this "accessibility rule").

this contrast is capable of generating most of the methodological debates that we currently observe between textualists (who incline toward the rule-based approach) and intentionalists (who favor the more holistic approach). Thus, the methodological differences between judges whom we think of as textualists and judges whom we think of as intentionalists might relate less to the basic goals of interpretation than to the assumptions and attitudes that interpreters bring to their common task.

Section II.B considers differences between textualists and intentionalists that are substantive rather than methodological. Sometimes the tools that judges use to determine a statute's intended meaning will produce a single determinate answer, leaving no room for judges to pursue any other goals. But to the extent that judges are uncertain which interpretive tools to use, or to the extent that the interpretive tools they select identify only a range of possible interpretations, judges will use additional criteria—including, perhaps, their own sense of sound policy—to pick from the array of permissible options. As we shall see, judges whom we think of as textualists use somewhat different criteria for this purpose than judges whom we think of as intentionalists. Some of the differences may simply boil down to politics; today's textualists tend to be politically conservative,[78] and the complex of attitudes that they draw upon in resolving close cases may well color what we think of as "textualism." Apart from the pull of politics, though, the substantive differences between textualists and intentionalists again reflect different attitudes toward rule-based decisionmaking. In the face of uncertainty about Congress's intended meaning, textualists are generally quicker than other judges to read statutes as giving courts relatively rule-like directives to apply.

The fact that different judges have different attitudes toward "ruleness" has already been widely noted, both in the context of

[78] This correlation has not always held true. Thurgood Marshall, for instance, certainly was not the most conservative member of the Burger Court, but his approach to many statutes resembled that of today's textualists. See Steven B. Price, Comment, FIRREA's Statute on the Standard of Liability for Bank Directors and Officers: Through the Looking Glass of New Textualism, 30 Idaho L. Rev. 219, 254 & n.197 (1993) (associating Justice Marshall with textualism and illustrating the point by citing his dissent in *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986), and his majority opinion in *United States v. Locke*, 471 U.S. 84 (1985)); see also, e.g., Williams v. United States, 458 U.S. 279, 301–02 (1982) (Marshall, J., dissenting).

constitutional law[79] and in the context of statutory interpretation.[80] Indeed, textualists themselves have acknowledged that the contrast between rules and more flexible "standards" is important to their approach.[81] But while it is common knowledge that textualism is a more rule-based approach than intentionalism, it is not so widely recognized that textualism may be a more rule-based approach *to achieving the very same goals as intentionalism*. The thesis of this Part is that the contrast between rule-based and standard-based decisionmaking can, by itself, capture most of what distinguishes textualists from intentionalists.

A. Textualists' Receptivity Toward Rule-Like Means of Discerning Intent

Formal definitions of "ruleness" vary.[82] The basic idea, though, relates to the character of the judgments that implementing officials must make in order to apply a legal principle or directive to particular cases. All legal principles or directives seek to advance certain goals, but they can do so in different ways. A "standard" might simply state those goals and leave implementing officials in

[79] See Sullivan, supra note 7, at 69–95.

[80] See, e.g., Michael C. Dorf, The Supreme Court, 1997 Term— Foreword: The Limits of Socratic Deliberation, 112 Harv. L. Rev. 4, 20 n.74 (1998) ("Other things being equal, proponents of textualism tend to favor rules over standards, while proponents of purposivism tend to prefer standards over rules."); Cass R. Sunstein, Must Formalism Be Defended Empirically?, 66 U. Chi. L. Rev. 636, 639 (1999) (linking the debate over "formalism" more generally to "the debate over rules and standards"); Vermeule, supra note 10, at 77 (noting that "many debates over interpretation are debates over rules and standards").

[81] See, e.g., Easterbrook, supra note 17, at 68 (listing the fact that "[r]ules differ from standards" as one of eight propositions that help define Judge Easterbrook's approach).

[82] See, e.g., Hart & Sacks, supra note 58, at 139–40 (defining a "rule" as a directive "which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events" and a "standard" as one "which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience"); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 560 (1992) (defining rules and standards entirely in terms of "the extent to which efforts to give content to the law are undertaken before or after individuals act" (emphasis omitted)); see also Sullivan, supra note 7, at 58 n.231 (observing that while the terminology of "rules" and "standards" suggests a crisp dichotomy, "[i]n fact, there is only a continuum of greater or lesser 'ruleness'").

charge of deciding how best to promote them under each individual set of facts that might arise. A more "rule-like" principle or directive will itself incorporate some advance judgments on that score—generalizations that the implementing officials might think unfounded in a particular case, but that they are nonetheless supposed to accept.[83] Thus, a rule might tell implementing officials to ignore some factors that they otherwise would have thought relevant to the goal behind the rule and to focus exclusively on a narrower set of issues identified by the rule.[84] Or it might permit implementing officials to consider all the circumstances they like, but still make some binding generalizations about how those circumstances usually play out or about the proper weight of various factors. As Professor Frederick Schauer explains, a legal principle or directive is "rule-like" to the extent that it "entrenches" those sorts of generalizations, so that implementing officials follow them even when some other course might seem more likely to promote the rule's underlying justifications in the case at hand.[85]

The concept of "ruleness" can be applied both to statutory directives (adopted by Congress) and to the interpretive principles that courts use to understand those directives (generally articulated by the courts themselves). Textualists have discussed the concept mostly in the former context; as they acknowledge, statutory directives tend to be more rule-like in their hands than in the hands of intentionalists. But we will defer discussion of that point until Sec-

[83] See Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 51–52 (1991).

[84] See id. at 53 (noting that rule-like directives tend to "narrow[] the array of facts" that officials trying to promote the rule's underlying justification might otherwise consider (emphasis omitted)); id. at 78 (describing decisionmaking as "rule-based" to the extent that it "exclud[es] from consideration some properties of the particular event that a particularistic decision procedure would recognize"). But see id. at 155 (noting that this feature of rules, though common, is not inevitable, and that some rules have "factual predicates so narrow and so precise that all or almost all relevant variation is permissibly taken into account").

[85] Id. at 51 (noting that a rule-like directive "prescrib[es] (although not necessarily conclusively) the decision to be made even in cases in which the resultant decision is not one that would have been reached by direct application of the rule's justification"); id. at 100 (observing that a rule-like directive "at least partially . . . impede[s] recourse to the justifications behind the rule"); cf. Sullivan, supra note 7, at 58 ("A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background . . . policy to a fact situation.").

tion II.B. For now, we will focus instead on questions of methodology.

When confronting a statute, all mainstream interpreters start with the linguistic conventions (as to syntax, vocabulary, and other aspects of usage) that were prevalent at the time of enactment. Those conventions help determine the "ring" that the statutory language would have had to "a skilled user of words . . . thinking about the . . . problem [that the legislature was addressing]."[86] This conventional meaning (or range of meanings) is not the end of the story for either textualists or intentionalists; no mainstream judge is interested solely in the literal definitions of a statute's words,[87] and textualists are willing to deviate in certain ways from the baseline that conventional meaning provides. Still, textualists prefer such deviations to be guided by relatively rule-like principles. While textualists are willing to invoke some regularized canons that bear on the intended meaning of statutory language even though they are not part of normal communication, textualists are more reluctant than other interpreters to make ad hoc judgments that the enacting legislature must have intended something other than what conventional understandings of its words would suggest.[88]

Contrary to widespread perceptions, however, this reluctance need not stem from distinctive views about the relevance of intended meaning. Without departing from our hypothetical consensus about the kind of "intent" that matters, someone who accepts certain premises about the institutional capabilities of courts might simply believe that judges will reach more accurate assessments of that intent if they accept the discipline of rules. As compared to intentionalism, then, textualism can be seen as a more rule-based

[86] Easterbrook, supra note 18, at 61.

[87] See, e.g., Manning, supra note 76, at 108 ("Modern textualists . . . are not literalists."); Scalia, supra note 2, at 24 ("[T]he good textualist is not a literalist . . . .").

[88] See, e.g., Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (arguing that in general, only "established canons of construction" will justify deviating from "the ordinary meaning of the [statutory] language in its textual context"); see also Brogan v. United States, 522 U.S. 398, 406 (1998) (Scalia, J.) ("It is one thing to acknowledge and accept . . . well defined (or even newly enunciated), generally applicable, background principles of assumed legislative intent. It is quite another to espouse the broad proposition that criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions.").

method of ascertaining what the enacting legislature probably meant.

1. The Rule-Like Nature of Textualists' Stance on Legislative History

We have already seen one aspect of this distinction between textualism and intentionalism. When intentionalists argue that internal legislative history helps judges ascertain the intended meaning of statutes, they express faith in judges' abilities to make case-by-case evaluations about the likely accuracy and representativeness of passages from floor statements and committee reports. Textualists, on the other hand, are more skeptical of judges' abilities to decide which passages are misleading and which deserve credence; one of their primary arguments against widespread use of legislative history is that judges are not well positioned to separate the wheat from the chaff in this way and that a more categorical exclusion of legislative history may actually yield more accurate determinations of the intended meaning of statutory language.[89] In this respect, at least, textualists suggest that the basic goal of all mainstream interpreters can better be achieved by a somewhat more rule-like approach than intentionalists favor.

2. Textualists' Cautious Approach to "Drafting Errors"

The much-discussed case of *United States v. Locke*[90] illustrates another way in which textualists take a more rule-based approach to interpretation than intentionalists.[91] By statute, people seeking to preserve certain rights to extract minerals from federal lands must file papers with the Bureau of Land Management (BLM) "prior to December 31" of each year.[92] In *Locke*, the Supreme Court had to decide whether filings made *on* December 31 were timely. Consistent with a BLM regulation requiring the filings to be made "on or before December 30 of each calendar year," the

[89] See supra notes 43–46 and accompanying text.
[90] 471 U.S. 84 (1985).
[91] See Frederick Schauer, The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw, 45 Vand. L. Rev. 715, 729–32 (1992) (using *Locke* to illustrate the difference between an interpretive approach that emphasizes "plain meaning" and other interpretive approaches).
[92] 43 U.S.C. § 1744(a) (2000).

Court answered this question in the negative.[93] Justice Stevens dissented, concluding that Congress had made a "scrivener's error" and that the key statutory phrase was best understood to mean "prior to the end of the calendar year" or "prior to the close of business on December 31st."[94] At least in the absence of further information about the statute,[95] textualists tend to favor the BLM's interpretation, while nontextualists tend to favor Justice Stevens's view.[96]

This fact might seem to undercut my claim that textualists care about enforcing the directives that members of the enacting Congress intended to establish. Although it is *possible* that a significant group within Congress really wanted filings to be made on or before December 30 rather than on or before December 31,[97] does it not seem more likely that most members of Congress understood the filing deadline to coincide with the end of the year?[98] Admittedly, the phrase "prior to" is conventionally understood to mean *before*. But if it seems likely that most members of Congress really

[93] *Locke*, 471 U.S. at 90 (quoting 43 C.F.R. § 3833.2-1(a) (1980)).

[94] Id. at 119, 123 (Stevens, J., dissenting).

[95] Judge Posner has called attention to a separate feature of the statute that could have led even textualists to question the BLM's interpretation. The relevant section provided one set of rules for mining claims located "prior to October 21, 1976," and another set of rules for mining claims located "after October 21, 1976." Unless one is willing to say that Congress provided no rules at all for claims located *on* October 21, 1976, one must conclude that this part of the statute was using either "prior to" or "after" idiosyncratically. The provision requiring filings to be made "prior to December 31" might reinforce this conclusion, leading interpreters to understand the phrase "prior to" as meaning "no later than" throughout the section. Richard A. Posner, The Problems of Jurisprudence 267–68 (1990). Of course, to the extent that BLM regulations had authoritatively interpreted the phrase "prior to December 31" as meaning "on or before December 30," *Chevron* deference might still have required courts to accept the BLM's interpretation even if they themselves would have preferred Justice Stevens's view.

[96] Compare Easterbrook, supra note 18, at 61–62 (sounding sympathetic to the BLM's interpretation), with Posner, supra note 95, at 267–69 (siding with Justice Stevens and criticizing the contrary view as "a wooden, unimaginative response to the legislative command").

[97] Perhaps, for instance, members of Congress did not want a flood of paper to come into regional BLM offices on New Year's Eve, a day that many BLM employees might ask to take off.

[98] See *Locke*, 471 U.S. at 119 (Stevens, J., dissenting) (doubting that members of Congress really meant "that the applicable deadline for a calendar year should end *one day before* the end of the calendar year that has been recognized since the amendment of the Julian Calendar in 8 B.C.").

meant *on or before*, why would textualists resist Justice Stevens's diagnosis of a drafting error?

The answer is not that textualists care nothing for "subjective" intent and scoff at the very concept of "drafting error." That concept does have some hidden complications with which all interpreters must wrestle.[99] At least in broad outline, however, the concept of "drafting error" recognized by textualist judges is similar to that recognized by other judges. Everyone agrees that the wording of a statute can qualify as a "drafting error" only if (1) at least some members of Congress were misinformed about the conventional meaning of the statute's words[100] and (2) the statute probably would have been enacted in a different form had those members

[99] In order to define the concept of "drafting error," one must think carefully about the circumstances in which mistakes by individual members of Congress amount to a mistake by Congress as a whole. In the prototypical case of scrivener's error, *no* member of Congress actually intended to enact the rule that would result from taking the statutory language at face value, and so we have no difficulty saying that Congress as an institution made a mistake. But unanimous errors of this sort lie at one end of a spectrum. Were we omniscient about the mental states of individual members of the enacting Congress, we surely would identify many cases in which some members understood the statutory language to mean what it would conventionally be understood to say, other members acted under the misimpression that it actually meant or said something else, and still other members acted without focusing on the relevant issue at all. The mere fact that many members of Congress fall into the second group does not automatically mean that Congress as an institution has made a "drafting error." Depending on the power of each group's members (which in turn depends on the procedural rules validly used by each house of Congress), it is certainly possible that the same bill would have passed in the same form even if everyone had enjoyed perfect information. And even if we knew that the misimpressions held by people in the second group were crucial to the bill's passage, we could not automatically conclude that Congress as an institution preferred the second group's view over the first group's view. After all, the impressions held by people in the first group may also have been crucial to the bill's passage.

[100] In theory, one might be able to extend the doctrine of "drafting error" to cover mistakes by the President: if the President had understood the conventional meaning of a bill's words, perhaps he would have threatened to veto the bill, and perhaps members of Congress would have reacted by rewording the bill before enacting it. Indeed, the doctrine might even be extended to cover mistakes by lobbyists, constituents, and other people who have no formal role in the legislative process but who nonetheless can influence the wording of bills. Whether for theoretical or practical reasons, however, textualist and nontextualist judges alike resist arguments of this sort. In the judicial mind, the concept of "drafting error" refers to mistakes by members of Congress or their staffs.

understood the conventional meaning of its text.[101] Everyone also agrees that when these conditions are satisfied, mistakes by individual members of Congress can sometimes add up to mistakes by the institution as a whole.[102] No less than intentionalists, then, textualist judges acknowledge a concept of "drafting error" that refers to the actual intent of individual legislators.[103]

It is in the practical application of this concept that textualists and intentionalists really part company. Before they will reinterpret a statutory text on the ground that it reflects a drafting error, textualist judges insist on a very high degree of certainty that Congress as an institution did indeed make a mistake. Justice Scalia, for instance, restricts the doctrine of "scrivener's error" to cases in which the legislature "obviously" misspoke,[104] and the leading academic proponent of textualism likewise suggests that the mere "possibility" that members of Congress really meant what the statute seems to say should be enough to defeat claims of drafting error.[105] When judges simply think it *more likely than not* that mem-

[101] Claims of "drafting error" generally assert that a majority coalition sufficient to enact a statute did exist, but that the bill that was enacted would have been drafted differently (or would have been successfully amended during the legislative process) if members of the coalition had correctly understood the conventional meaning of the words that they were using. This feature of the concept of "drafting error" is not inevitable. One can certainly imagine arguments that a particular statute should be interpreted to have no effect—to mean nothing at all—on the ground that no statute would have passed if members of Congress had correctly understood the conventional meaning of the words that they were considering. In practice, however, the concept of "drafting error" is not put to this use; as a doctrine of statutory interpretation, it presupposes a statute to interpret.

[102] See supra note 27.

[103] To make this point crystal clear, both Justice Scalia and Judge Easterbrook would let judges consult internal legislative history before determining that Congress made a mistake. See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (indicating that if courts suspect that a statute reflects a drafting error, it is "entirely appropriate" for them to consult committee reports and floor statements to determine whether members of Congress really meant what they said); Scattered Corp. v. Chi. Stock Exch., 98 F.3d 1004, 1006 (7th Cir. 1996) (Easterbrook, J.) (suggesting that courts can properly consult legislative history, including floor statements, in order to decide whether "through some technical error cross-references . . . were garbled" in a statute).

[104] Scalia, supra note 2, at 20–21; see also United States v. X-Citement Video, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("[T]he *sine qua non* of any 'scrivener's error' doctrine, it seems to me, is that the meaning genuinely intended but inadequately expressed must be absolutely clear . . . .").

[105] Manning, supra note 23, at 2424–29.

bers of Congress misunderstood the statutory language and that the statute would have been enacted in a different form but for this misunderstanding, the typical textualist will resist the diagnosis of "drafting error."

Professor Schauer has already discussed the logic that might produce such a strong presumption against second-guessing what statutory texts seem to say. As he emphasizes, any test for drafting errors risks mistakes of two different sorts—"false positives" (in which the test is triggered even though an omniscient observer would say that the relevant statute does not satisfy our definition of "drafting error") and "false negatives" (in which the test is *not* triggered even though an omniscient observer would know that the statute *does* meet our definition of "drafting error"). A relatively conservative test—for instance, one triggered only when courts believe that no member of Congress could possibly have intended to enact the directive that conventional understandings of the statutory language would produce—risks generating many false negatives. But a test that is easier to satisfy will reduce false negatives only at the cost of increasing false positives.[106]

Even if one is trying to give effect to the actual intent of the enacting Congress (subject to the constraints discussed above), there will come a point at which this tradeoff is not worth making: further liberalization of the test for drafting errors will produce more than one false positive for each false negative that it eliminates. The more one distrusts the ad hoc judgments that tests for drafting errors necessitate, the sooner one will expect that point to be reached, and the more conservative one's favored test will be. In particular, one might adopt the position advocated by modern textualists: judges should have leeway to identify and correct "drafting errors" only in what they consider to be very clear cases.[107]

Expectations about how members of Congress will react to such a test might fortify this conclusion. Although Congress is not per-

[106] See Schauer, supra note 91, at 730; see also Schauer, supra note 83, at 135–65 (elaborating upon this sort of argument).

[107] See supra notes 104–105; cf. Schauer, supra note 91, at 730 ("[T]he result in *Locke* is premised on the controversial but not implausible supposition that interpreters empowered to set aside plain language in the service of intent-negating absurdity would be so over-inclined to place cases in this category as to outweigh in expected harm the harm that would come from prohibiting them from placing *any* cases in this category.").

fectly responsive to doctrines of statutory interpretation, the courts' reluctance to identify and correct "drafting errors" may encourage members of Congress or their staffs to spend more time proofreading and poring over each individual bill. For the bills that get passed, the ultimate result of a conservative test that encourages Congress to be careful might be a significant reduction in false positives without much increase in false negatives.[108]

Both of these arguments for a conservative approach to "drafting error" obviously rely on highly contestable assumptions. But while neither argument is plainly correct, the important point is that both arguments will appeal most to people who are relatively sympathetic to rules. After all, such people are more likely than other interpreters to worry about errors in the application of tests that require case-by-case exercises of judgment, and to expect the advance notice associated with more rule-like approaches to promote successful communication between Congress and the courts.

The textualists' cautious approach to "drafting errors" obviously is not the purest possible sort of rule; rather than categorically excluding any arguments about such errors, textualist judges do ac-

[108] A numerical example helps illustrate what the textualists may have in mind. Suppose that for every hundred statutes now enacted by Congress, an omniscient observer would identify three that meet our definition of "drafting error." A "liberal" test for identifying those errors might catch two of the three (producing only one false negative), but might mistakenly diagnose three other supposed errors too (producing three false positives). The "conservative" test, by contrast, might diagnose no errors of any sort, producing three false negatives but no false positives. Even without any feedback effects, the conservative test has generated fewer total errors (false negatives plus false positives). What is more, if the fact that some prominent judges embrace the conservative test encourages Congress to be more careful, then the next hundred statutes might contain only two genuine drafting errors; even if the conservative test again misses both, it will produce only two false negatives.

This extra reduction in errors admittedly comes at the cost of making the legislative process more time-consuming for each statute, which may reduce the quantity of legislation that Congress enacts. See Farber & Frickey, supra note 19, at 92–93. But people with libertarian leanings may not be particularly troubled by that result. Indeed, Judge Easterbrook has suggested that transaction costs in the legislative process are affirmatively desirable; the cumbersome nature of that process is one of the checks on Congress's power, and it forces members of Congress to set priorities rather than legislating to their hearts' content on every subject that they might want to address. See Easterbrook, supra note 5, at 548–49. Although Judge Easterbrook's argument obviously does not help us identify the optimal level of transaction costs in the legislative process, it does caution against the uncritical assumption that transaction costs are automatically bad.

knowledge the possibility that an evaluation of all the permissible evidence will persuade them that Congress really did make a mistake of the sort that they should correct. But because a very high burden of persuasion must be met before that evaluation matters, their approach is *more* rule-like than the looser approach favored by intentionalists.[109] Thus, the textualists' reluctance to diagnose "drafting errors" is another manifestation of their relative affinity for rule-like principles of interpretation.

3. Textualists' Use of Canons Reflecting Likely Intent

The same can be said of textualists' willingness to use formal canons of construction.[110] Subject to a few qualifications discussed below, textualists use those canons to get at much the same thing that intentionalists seek: both camps are trying to ascertain what the enacting legislature probably meant by its words. Again, though, textualists take a more rule-based approach to that task than intentionalists.

The canons that textualists emphasize fall into two basic categories. Some canons simply reflect broader conventions of language use, common in society at large at the time the statute was enacted. As Justice Scalia puts it, canons like *noscitur a sociis* (telling interpreters to understand particular terms in light of the words that accompany them in the statute) and *expressio unius est exclusio alterius* (telling interpreters to be alert to the possibility of negative implications) are "commonsensical"; they reflect ordinary principles that laymen as well as lawyers use to interpret communications.[111]

It requires little argument to link canons of this sort to the likely intent of the enacting legislature. Their usefulness in identifying authors' intent is precisely why the principles underlying these

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[109] Cf. Schauer, supra note 83, at 109 (discussing the rule-like nature of "rules of thumb," which "elevat[e] the level of confidence necessary for taking action inconsistent with them," and hence serve to entrench the generalizations that they reflect "even when there is reason to believe, short of the elevated level of confidence, that the generalization is inapplicable on this occasion").

[110] Cf. Eskridge, supra note 3, at 663 (noting that although "the canons have been derided by scholars as arbitrary guides to statutory interpretation," Justice Scalia and other "new textualists" have led "a revival of canons that rest upon precepts of grammar and logic, proceduralism, and federalism").

[111] See Scalia, supra note 2, at 25–26.

canons are widely used in society at large. In ordinary communication, after all, success is measured by whether the people to whom a statement is addressed understand the statement to mean what the declarant intended to convey.[112] Rules of thumb like *noscitur a sociis* help that happen. An example offered by Justice Scalia—"If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else"[113]—captures this point well. The obvious reason why the surrounding context sheds light on the meaning of "bay" is that it sheds light on the *intended* meaning of "bay"—on whether the declarant was using the word to refer to a body of water or a horse.[114]

The second category of canons favored by textualists is both more specialized and more interesting. Instead of reflecting linguistic conventions used in society at large, the principles in this second category are used primarily by lawyers; they relate specifically to the interpretation of statutes. What is more, they can lead interpreters to deviate from the conventional meaning that a layman would take the words of a statute to convey. The well-established presumption against reading a statute to operate "retroactively," for instance, often causes courts to infer exceptions to statutory provisions whose words, on their face, appear to cover all pending cases; unless the enacting Congress clearly manifested a contrary intent, laws burdening private rights will be understood to cover only post-enactment conduct.[115]

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[112] See, e.g., Greenawalt, supra note 6, at 95.

[113] Scalia, supra note 2, at 26.

[114] See Dworkin, supra note 31, at 117; see also Alexander & Prakash, supra note 21, at 979 (arguing that "context is universally regarded as relevant [to statutory interpretation] only because it is evidence of authorial intent").

[115] See, e.g., Landgraf v. USI Film Prods., 511 U.S. 244 (1994). *Landgraf* concerned § 102 of the Civil Rights Act of 1991, which specified that "[i]n an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act . . . , the complaining party may recover compensatory and punitive damages" in addition to the remedies that had previously been available (such as back pay). Pub. L. No. 102–166, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a (2000)). Notwithstanding the seemingly broad language of this provision, the Court held that compensatory damages were not available in all actions that were pending when the statute was enacted, or even in all actions that were brought after the statute was enacted, but only in actions about conduct that occurred after that date. The Court's two textualists, though disagreeing with certain aspects of the

Textualists regularly apply background principles of this sort to qualify or supplement the meaning that statutory language might suggest to an ordinary reader.[116] The important question is *why* tex-

Court's analysis, reached the same bottom line. See *Landgraf*, 511 U.S. at 286 (Scalia, J., concurring in the judgment).

[116] See, e.g., Young v. United States, 535 U.S. 43, 49–50 (2002) (Scalia, J.) (taking "hornbook law" to establish that statutes of limitations are normally subject to "equitable tolling," and concluding that "Congress must be presumed to draft limitations periods in light of this background principle"); United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) (arguing that after *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the presumption that Congress intends to give administrative agencies authority to resolve ambiguities in the statutes they administer "operates as a background rule of law against which Congress legislates," so that statutes otherwise silent on this point should be understood as implicitly delegating interpretive authority to the administrative agency); Bennett v. Spear, 520 U.S. 154, 163 (1997) (Scalia, J.) ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."); Stewart Org. v. Ricoh Corp., 487 U.S. 22, 36–37 (1988) (Scalia, J., dissenting) (arguing that 28 U.S.C. § 1404(a) "was enacted against the background that issues of contract, including a contract's validity, are nearly always governed by state law," and urging the majority to take account of that background principle when determining the statute's meaning); see also Manning, supra note 23, at 2393 (acknowledging that "the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language" and observing that modern textualists incorporate those "background conventions" into their approach).

Judge Easterbrook's opinion on the Case of the Speluncean Explorers is to the same effect. In a classic essay from 1949, Professor Lon Fuller considered how judges might apply a seemingly clear statute—"Whoever shall willfully take the life of another shall be punished by death"—to the facts of a hypothetical case in which four explorers killed and ate one of their colleagues in order to survive after a landslide trapped them in a cave. Lon L. Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949). For the fiftieth anniversary of Fuller's essay, Judge Alex Kozinski penned an opinion upholding the defendants' convictions on the ground that "a conscientious judge has no choice but to apply the law as the legislature wrote it." The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium, 112 Harv. L. Rev. 1834, 1876 (1999) (Kozinski, J.). Judge Easterbrook, however, argued that the language of the statute had to be understood in light of its "historical and governmental contexts" and that those contexts supplied a relevant background principle: courts seeking to apply criminal statutes of this sort (which do not set forth any "closed list of defenses") are free to consider claims that the defendants' acts were justified for reasons not spelled out in the statute. Id. at 1913–14 (Easterbrook, J.). According to Judge Easterbrook, the principle that courts could entertain such defenses had long been part of "the normal operation of the legal system," and it formed the backdrop against which the legislature wrote new statutes. Indeed, the legislature could write such a simple murder statute (listing no defenses at all) "precisely because it knew that courts entertain claims of justification." Id. at 1914. Applying this background principle, Judge Easterbrook concluded that the language of the murder statute

tualists accept this sort of deviation from conventional meaning. In what follows, I acknowledge that many textualists themselves seem uncertain of the answer, but I suggest that they instinctively evaluate most canons with reference to the likely intent of the enacting legislature.

a. What Makes Canons Canonical?

Textualists sometimes seem agnostic about the goals behind the canons that they use. Eager to distinguish their approach from "intentionalism," they hesitate to argue that the best test of a canon is whether its use will minimize the gap between what interpreters understand statutes to mean and what members of the enacting legislature intended them to mean. Indeed, some textualists seem attracted to the idea that a canon can form part of the backdrop for legislation even if there is little reason to think that members of the enacting Congress acted in accordance with it.[117] On that view, if courts and other interpreters were in the habit of using the canon at the time a statute was enacted, then the canon controls the meaning of the words that Congress enacted regardless of the goals that the canon serves and whether or not the canon is a plausible tool for discerning how members of Congress themselves understood the statute.[118]

meant something less absolute than a reader unfamiliar with the background principle might assume.

[117] See, e.g., John Copeland Nagle, Severability, 72 N.C. L. Rev. 203, 256–58 (1987) (appearing to assume that a statute establishing a pro-severability canon would automatically control the meaning of all future statutes that did not explicitly opt out of it); Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2118 (2002) (suggesting that if Congress enacts a statute providing that "laws of the United States, including this one, may be repealed only by the words 'Mother, may I?,'" statutes passed by subsequent Congresses should not be recognized as repeals unless they use this form of words). But see Larry Alexander & Saikrishna Prakash, Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation, 20 Const. Comment. 97, 98–100 (2003) (criticizing the use of "[a]rtificial rules of interpretation laid down in advance that do not reflect subsequent usages or intentions," and suggesting that the "Mother, may I" canon articulated by one Congress should affect interpretation of statutes passed by a later Congress only if it is reasonable to surmise that members of the later Congress knew about the canon and would have used the "Mother, may I" formulation if they had intended to repeal anything).

[118] Cf. Manning, supra note 76, at 16 n.65 (asserting that "[textualists'] assumptions about *objectified* legislative 'intent' correspond significantly to those of modern posi-

In keeping with this view, Justice Scalia has occasionally suggested that some canons should be used by present-day interpreters simply because they have been used by interpreters in the past, without regard to whether their use will help interpreters glean what members of Congress probably intended statutory language to mean. There are at least two major canons that many textualists appear to embrace on this ground. One is the rule of lenity; even though it has no obvious connection to legislative intent,[119] Justice Scalia has said that it "is validated by sheer antiquity."[120] The other is the "canon of avoidance"—the principle that federal statutes should be read to avoid raising constitutional questions, even when those questions might be resolved in favor of the statutes' constitutionality. Unlike the canon telling interpreters to prefer readings that avoid known constitutional defects, the canon telling interpreters to avoid even constitutional *questions* is hard to defend in terms of the enacting legislature's likely intent; at least in modern times, there is no particular reason to presume that members of Congress systematically try to avoid gray areas and to refrain from pushing their power to its limits.[121] Nonetheless, Justice Scalia has

tivism"); Manning, supra note 39, at 676 (considering, though rejecting on other grounds, "the positivist claim that . . . legislative history has, by interpretive convention, become part of the background against which Congress enacts legislation, and thus an appropriate set of materials to impute to Congress, regardless of its 'genuine' legislative intent").

[119] See William N. Eskridge, Jr., Norms, Empiricism, and Canons in Statutory Interpretation, 66 U. Chi. L. Rev. 671, 678 (1999) (observing that the rule of lenity probably is a "loose canon"—one not designed to "reflect[] legislative preferences"); see also Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 Colum. L. Rev. 2162, 2193 (2002) ("Even if legislatures were not prone to lean against criminal defendants, a canon that always chose the narrow end of the range of possible meanings would systematically thwart legislative preferences compared to a canon that chose a moderate interpretation or whichever interpretation most likely reflects legislative preferences for that particular statute.").

[120] Scalia, supra note 2, at 29.

[121] See, e.g., Frederick Schauer, *Ashwander* Revisited, 1995 Sup. Ct. Rev. 71, 92–93 (persuasively debunking "the assumption that members of Congress desire to have the courts resolve doubts in favor of eliminating potential constitutional problems"); see also Einer Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, 2054 (2002) (supporting Professor Schauer's view with evidence from state codes of statutory interpretation, and noting that although every state legislature to have addressed the topic "has directed courts to construe statutes to avoid constitutional invalidity," no state legislature has told courts "to avoid constitutional doubts that do not result in actual invalidity").

embraced the canon,[122] essentially because it *is* a canon: the Court has applied it "'for so long . . . that it is beyond debate.'"[123]

Justice Scalia, however, does not speak for all textualists on this point,[124] and even he probably does not really believe that established canons should apply without regard to their likely accuracy. Consider, for instance, his various statements about the extent to which the Supreme Court's adoption of a dubious canon ought to affect the Court's understanding of subsequently enacted legislation. Suppose that at Time 1 the Court identifies a new background principle of interpretation. Suppose that contrary to the Court's claims at Time 1, this principle does not really shed light on the intended meaning of statutes enacted before then. At Time 2, however, Congress enacts a new statute. Should textualist judges conclude that Congress enacted this statute against the backdrop of the principle that the Court announced at Time 1?

Justice Scalia sometimes answers "no"[125] and sometimes answers "yes."[126] If statutes mean whatever the Court's established canons say they mean, these divergent answers would be hard to explain. But if one instead thinks of canons as tools designed to get at Congress's likely intent, then the divergence is much easier to rationalize. Even after being announced by the Court, some canons might be relatively poor guides to the likely intent of subsequent Congresses. For instance, a canon that runs counter to ordinary understandings of language, and that does not help members of Congress express technical ideas for which they would otherwise lack a ready vocabulary, might impede rather than assist the transmission of intended meaning; courts might well find it hard to tell whether

[122] See Manning, supra note 76, at 121 & n.482 (citing cases).

[123] Almendarez-Torres v. United States, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). But see Clark v. Martinez, 125 S. Ct. 716, 724–25 (2005) (Scalia, J.) (calling the canon of avoidance "a means of giving effect to congressional intent" and "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

[124] See, e.g., Frank H. Easterbrook, Do Liberals and Conservatives Differ in Judicial Activism?, 73 U. Colo. L. Rev. 1401, 1405–06, 1409 (2002) (attacking the canon of avoidance as "noxious," "wholly illegitimate," and "a misuse of judicial power").

[125] See, e.g., Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001).

[126] See, e.g., United States v. Mead Corp., 533 U.S. 218, 256–57 (2001) (Scalia, J., dissenting).

members of Congress were legislating in light of the canon or in light of ordinary usage. Canons that are designed to reflect Congress's established practices, but that get those practices wrong, might have much the same effect. Even canons that get Congress's established practices right might lose their validity as times change and members of Congress develop different habits. If one assesses canons by their utility in discerning the likely intent of members of the enacting legislature, then one can easily understand why textualists do not automatically accept whatever canons the Supreme Court has articulated in the past.[127]

b. The Link Between Specialized Canons and Likely Intent

This criterion for assessing canons fits naturally with most of the specialized canons that textualists use. To a large extent, those canons can be seen as entrenched generalizations about the likely intent of the enacting legislature.

[127] In view of their affinity for rules, of course, some textualists might doubt the ability of judges to distinguish accurately between established canons that remain useful in the search for legislative intent and those that do not. Rather than requiring interpreters to draw this distinction, textualists could take an even more rule-like approach to the use of canons: they could assert that interpreters *should* automatically accept whatever canons the Supreme Court has articulated in the past, on the theory that interpreters will do more harm than good if they try to distinguish between the established canons that are valid and those that are not.

To the extent that textualists care about the original meaning of a statute, though, some distinction among canons seems inevitable. The Court cannot sensibly have a single set of canons that it applies to all statutes; interpretive conventions change over time, and canons that reflect the linguistic practices or policy preferences of modern Congresses may not be appropriate tools for decoding older statutes enacted when linguistic practices or patterns of thought were different. Cf. Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519 (2003) (discussing this issue in the context of constitutional interpretation). Because the cases that reach the Supreme Court in any given Term can implicate statutes of different vintages, moreover, the same Court may well invoke one set of canons to interpret the Judiciary Act of 1789, a somewhat different set of canons to interpret the Sherman Act of 1890, and a third set of canons to interpret the Civil Rights Act of 1964. A wholly self-referential approach, telling future Courts to decode statutes by applying whatever canons the Court was in the habit of using at the time the statutes were enacted, is therefore impossible. To decide which canons govern the interpretation of a particular statute inevitably requires a more fine-grained inquiry, and it seems quite natural for that inquiry to entail at least some consideration of the patterns of speech and legislative behavior that actually prevailed during the era in which Congress enacted the statute.

Many of the canons used by textualists reflect observations about Congress's own habits. The link between these canons and the intended meaning of statutory language is obvious; unless there is some substantial reason to believe that members of Congress meant to depart from their usual patterns of behavior, interpreters interested in Congress's likely intent would naturally seek guidance from those patterns. This idea helps account for a host of specialized canons, such as the presumption against retroactivity (which arguably rests on the premise that members of Congress rarely mean to establish new substantive rules for past conduct), the presumption against extraterritoriality (which arguably rests on the premise that members of Congress typically intend to regulate only domestic conduct), and the principle that federal statutes should not lightly be read to invade areas that traditionally have been regulated exclusively by the states (which again uses Congress's established patterns to illuminate what might otherwise be ambiguities in federal statutes).[128]

Of course, generalizations of this sort are not universally seen as the best tools for determining what particular statutes were intended to mean. Judges who like standard-based interpretation often criticize textualists for emphasizing canons at the expense of a more holistic approach to identifying the enacting legislature's likely intent.[129] These critics are absolutely correct that reducing Congress's established patterns of behavior to pithy canons is bound to lose some nuances: courts sometimes will apply the presumption against retroactivity even under circumstances in which Congress has not traditionally shied away from retroactive effects

[128] Cf. Elhauge, supra note 121, at 2051–56 (discussing how courts might derive canons of this sort).

[129] See, e.g., Koons Buick Pontiac GMC v. Nigh, 125 S. Ct. 460, 470 (2004) (Stevens, J., concurring) (lamenting "rote repetition of canons of statutory construction" and asserting that "it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product"); J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l, 534 U.S. 124, 156 (2001) (Breyer, J., dissenting) (criticizing Justice Thomas's majority opinion and Justice Scalia's concurrence for relying too heavily on the presumption against implied repeals, and urging the Court to approach statutory interpretation "not as if it were a purely logical game, like a Rubik's Cube, but as an effort to divine the human intent that underlies the statute"); Posner, supra note 9, at 805–17 (attacking the canons for being too "mechanical" and for resting on "unrealistic assumptions," and encouraging courts to make case-by-case decisions rather than applying "algorithm[s]").

or in which the particular Congress that enacted a statute was willing to accept those effects. But the more benefits one sees in having rules, the more one might think this cost worth absorbing. The alternatives—giving less weight to Congress's usual patterns of behavior or encouraging courts to take account of those patterns without articulating specific canons designed to capture what they are—would surely produce errors of their own. The errors caused by refusing the guidance of specific canons might well outnumber the errors generated by the oversimplifications that such canons inevitably make.[130]

At least according to textualists, canons and presumptions can also take advantage of another benefit of "ruleness"—relative predictability. Indeed, some 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. That knowledge, in turn, enables members of Congress to convey their intended meaning in a way that the courts will understand.[131]

Justice Scalia has suggested precisely this defense of his proposed rule that courts should not read federal statutes to establish private causes of action by implication. To be sure, he also defends that approach as a fairly accurate generalization about Congress's established practices; in his view, members of Congress almost always make express provisions for private causes of action that they want to create.[132] In keeping with his predilection for rules, more-

[130] Cf. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516–17 (conceding that the canon reflected in *Chevron* deference—an "across-the-board presumption" that when a statute administered by a federal agency contains an ambiguity, the enacting Congress meant to give the agency authority to settle upon one of the permissible interpretations in a way that binds courts—may not be "a 100% accurate estimation of . . . congressional intent," but suggesting doubt that courts would reach more accurate results if they proceeded "on a statute-by-statute basis" without any guiding presumption).

[131] Cf. Elhauge, supra note 121, at 2173–76 (noting that by establishing "default rules" for responding to ambiguities, courts can sometimes change how bills are drafted, resulting in wording that clarifies what would otherwise have been an ambiguity).

[132] See Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment) (deeming it "implausibl[e]" that Congress would rely upon mere implication for "[a] legislative act so significant, and so separable from the remainder of the statute, as the creation of a private right of action").

over, he suggests that courts are more likely to reflect congressional intent on this point if they *never* infer causes of action than if they try to identify, on a case-by-case basis, the exceptional occasions on which members of Congress really did intend to establish private causes of action by implication.[133] But Justice Scalia adds that if the courts were to embrace his proposed rule against inferring private causes of action, the risk of frustrating "genuine legislative intent" by applying that rule to subsequently enacted statutes "would decrease from its current level of minimal to virtually zero"; the very existence of the rule would lead Congress to provide expressly for private rights of action whenever its members wanted to create such rights.[134] In this as in other areas, Justice Scalia suggests that having clear canons of statutory interpretation—even if they initially seem too unrefined to match actual congressional intent—will ultimately help minimize the gap between the courts' interpretations of statutes and the meanings intended by members of Congress.[135]

Justice Scalia goes on to suggest that this argument gives canons that favor rules an edge over canons that favor standards.[136] For reasons described in the margin, this extension of the argument is probably wrong; it is far from obvious that background principles of the sort that Justice Scalia prefers really do help Congress communicate its decisions more effectively than background principles

[133] See id. at 191 (Scalia, J., concurring in the judgment) ("It is . . . not beyond imagination that in a particular case Congress may intend to create a private right of action, but chooses to do so by implication. One must wonder, however, whether the good produced by a judicial rule that accommodates this remote possibility is outweighed by its adverse effects.").

[134] Id. at 192 (Scalia, J., concurring in the judgment).

[135] See, e.g., Finley v. United States, 490 U.S. 545, 556 (1989) (Scalia, J.) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."); see also Greenawalt, supra note 6, at 209 (sketching out a similar defense of the presumption against extraterritoriality).

[136] See *Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment) (asserting that "Congress would welcome the certainty" produced by Scalia's proposed approach to implied causes of action and that "conscientious legislators cannot relish the current situation, in which the existence or nonexistence of a private right of action depends upon which of the opposing legislative forces may have guessed right as to the implications the statute will be found to contain").

of the sort that he criticizes.[137] But even though the possibility of feedback effects probably does not do much independent work in helping textualists identify the kinds of canons they should support, it does help textualists defend the retention of background rules that might otherwise seem too blunt to reflect accurate estimations of congressional intent.

c. The Room for Normative Canons in an Intent-Based Approach

Some scholars who are neither textualists nor intentionalists, and who do not want the interpretation of statutes forever tied to the meaning intended by the enacting legislature, assert that many of the canons currently used by the Supreme Court "are hard if not impossible to defend" in these terms;[138] instead of being connected to the search for legislative intent, some common canons simply

[137] Compare two possible background principles that courts could use in determining whether to recognize private causes of action. On Justice Scalia's preferred approach, if a federal regulatory statute fails to specify whether private individuals can bring suit to enforce the duties that it creates, then the statute will be understood *not* to create a private cause of action. On the alternative approach that Justice Scalia criticizes, the same statute would instead be understood as delegating authority to judges to decide whether such a cause of action would serve the statute's underlying purposes. Justice Scalia is absolutely correct that use of this alternative canon would produce less predictable results than use of the canon that Justice Scalia favors. But if members of Congress are concerned about this fact and do not want to delegate the cause-of-action decision to the courts, they need only enact a provision expressly declaring that the statute does (or does not) create a private cause of action. Thus, Congress can opt out of the approach that Justice Scalia criticizes just as readily as it can opt out of the approach that Justice Scalia favors. Indeed, the opt-out mechanism is the same for both approaches. It is not self-evident that either approach will do a better job than the other at promoting effective communication between Congress and the courts.

This is not to say that interpreters have no basis at all for choosing one approach over the other. Just as normative judgments often influence how interpreters proceed when the intended meaning of a statute is unclear, so too normative judgments can influence the judiciary's choices about whether to establish one background principle or another under circumstances in which neither possibility is more likely than the other to bring judicial decisions into line with congressional intent. Thus, if we believed that Congress should not be encouraged to delegate broad policymaking authority to the courts, we might well favor Justice Scalia's proposed approach to implied causes of action over the alternative described above. Cf. Sunstein, supra note 3, at 470 n.237 (suggesting support for a presumption that "important decisions are to be made by accountable actors").

[138] Eskridge, supra note 119, at 682.

"represent value choices by the Court."[139] To the extent that textualists do indeed embrace canons that are "normative" rather than "descriptive"—canons that are designed to favor certain substantive policies more than to help interpreters discern the enacting legislature's likely intent[140]—my description of textualism as a rule-based approach to determining intended meaning is incomplete.

Still, the fact that "normative" canons do play a role in textualism does not defeat my description. Interpretive tools designed to capture what the enacting legislature probably meant are not magic bullets; although they will provide definitive answers to some questions, they will identify only a range of possible answers to others. Unless interpreters are willing to hold the latter statutes void for vagueness, they need some way to finish the job and to pick from among the possible meanings that their primary interpretive tools have identified. In cases of first impression, one could imagine each individual federal judge making these selections on the basis of personal normative judgments. But supporters of rule-based decisionmaking might prefer the Supreme Court to identify rules designed to exert some systematic influence over those decisions—rules that might be informed by the Justices' own normative judgments, by the likely judgments of some other set of decisionmak-

[139] William N. Eskridge, Jr., & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 596 (1992). But see David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. Rev. 921, 960 (1992) (suggesting that the most significant canons used by the Supreme Court reflect a preference for continuity that "is in fact a useful guideline in discerning legislative purpose").

[140] For the distinction between "descriptive canons," which provide guidance about "what the legislature . . . probably meant," and "normative canons," which "direct courts to construe any ambiguity in a particular way in order to further some policy objective," 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). I prefer Professor Ross's formulation to the more standard dichotomy between "textual" canons (which reflect "general notions of English composition or syntax") and "substantive" canons (which reflect "substantive principles or policies drawn from the common law, other statutes, or the Constitution"). See William N. Eskridge, Jr., et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 818–19 (3d ed. 2001). These dichotomies are not the same: many "substantive" canons (such as those that reflect Congress's established patterns of behavior) help interpreters discern likely legislative intent, and hence can be seen as "descriptive" rather than "normative."

ers,[141] or by the judgments reflected in the Constitution or in other aspects of our legal traditions.[142] In cases of genuine ambiguity (that is, cases in which our primary interpretive tools have simply identified a range of possible meanings, none of which is significantly more likely than the others to reflect the enacting legislature's intent), the textualists' general view of legislative supremacy does not rule out reliance upon normative canons of this sort.[143]

Tellingly, the rule of lenity and the canon of avoidance—the two major canons that we had difficulty explaining on intent-based grounds above—both seem confined to this secondary role; they kick in only after the Court's primary interpretive tools (including all applicable "descriptive" canons) have failed to identify a single best answer. The Court itself says that "[t]he rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'"[144] Likewise, Justice Scalia has indicated that the canon of

[141] See, e.g., Elhauge, supra note 121, at 2081–2112 (arguing that when interpreters find a statute unclear on some point, they should seek to resolve the ambiguity in line with the "enactable preferences" of the current legislature).

[142] See Eskridge & Frickey, supra note 139, at 598–629 (discussing the Supreme Court's use of substantive canons that reflect "constitutional values"); see also Cipollone v. Liggett Group, 505 U.S. 504, 546 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[O]ur jurisprudence abounds with rules of 'plain statement,' 'clear statement,' and 'narrow construction' designed . . . to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied.").

[143] Of course, statutory interpretation is not a crisp two-stage process, in which interpreters first determine the range of meanings that Congress could be thought to have intended and then use a different set of tools to select a single interpretation from within that range. Many well-established canons used by textualists are best viewed as hybrids that serve both functions simultaneously; they derive some of their force from accurately describing Congress's established habits, but they get added weight because of the normative aspirations that they reflect. The presumption against retroactivity, for instance, is partly descriptive, but normative judgments about the unfairness of retroactive legislation probably give it some extra force. Still, as long as those normative judgments do not get so much weight as to trump the canons' descriptive aspirations, the fact that textualists use such canons is entirely consistent with the proposition that textualists care about enforcing the intended meaning of statutes.

[144] Reno v. Koray, 515 U.S. 50, 65 (1995) (quoting Smith v. United States, 508 U.S. 223, 239 (1993), and Ladner v. United States, 358 U.S. 169, 178 (1958)); see also Muscarello v. United States, 524 U.S. 125, 138–39 (1998) ("The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [the rule of lenity],

avoidance enters the picture only after the Court has used its normal tools of statutory interpretation and has concluded that the statute "is susceptible of two constructions."[145]

This formulation admittedly conceals some difficult questions. A statute plainly "is susceptible of two constructions" when interpreters are in equipoise between the two leading possibilities. But what if one of the possible constructions seems somewhat better than the other? How big a gap must exist between the leading interpretation and the next most likely alternative for the Court to say that the statute permits only one construction?

Questions of this sort call to mind the criterion for *Chevron* deference: when is one construction of a statute so superior to the alternatives that the administering agency has no option but to use it, and how close must the alternatives get in order to become "permissible"? In that context, Justice Scalia has suggested that textualists will tend to confine *Chevron* deference to relatively close cases.[146] This stance does not automatically imply an answer to the questions flagged above; the trigger for normative canons need not be the same as the trigger for *Chevron* deference (and indeed may vary from canon to canon). Still, many textualists instinctively shy away from giving substantial weight to normative canons, lest they systematically drive statutory interpretation away from the enact-

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for most statutes are ambiguous to some degree. . . . To invoke the rule, we must conclude that there is a 'grievous ambiguity or uncertainty in the statute.'" (some internal quotation marks omitted)); United States v. R.L.C., 503 U.S. 291, 311 (1992) (Thomas, J., concurring in part and concurring in the judgment) (noting that "the rule [of lenity] operates only 'at the end of the process' of construction, if ambiguity remains 'even after a court has seize[d] every thing from which aid can be derived'" (citations and some internal quotation marks omitted)).

[145] Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (quoting United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)); see also Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 471 (2001) (Scalia, J.) ("No matter how severe the constitutional doubt, courts may choose only between reasonably available interpretations of a text."). But cf. Feltner v. Columbia Pictures Television, 523 U.S. 340, 358–59 (1998) (Scalia, J., dissenting) (suggesting that courts should not interpret a federal statute in such a way as to present a constitutional question if an alternative construction is "fairly possible," even if the interpretation that raises the constitutional question would otherwise be best).

[146] Scalia, supra note 130, at 521 (suggesting that textualists are less likely than other interpreters to find "the triggering requirement for *Chevron* deference"). See generally Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351 (1994) (discussing possible reasons for this phenomenon).

ing legislature's likely intent.[147] Justice Scalia himself explicitly wonders "where the courts get the authority" to disfavor policies that Congress has the power to adopt, and to "interpret the laws that Congress passes to mean less or more than what they fairly say."[148]

As scholars have noted, there are a few areas in which Justice Scalia may stray from this line.[149] Yet even if textualist judges do

[147] See, e.g., John F. Manning, Legal Realism and the Canons' Revival, 5 Green Bag 2d 283, 291–92, 294 (2002) (noting that "at least in theory," textualist judges are more receptive to "the traditional linguistic and syntactic canons" than to "canons that openly serve policy rather than communicative objectives").

[148] Scalia, supra note 2, at 28–29.

[149] Most prominently, Justice Scalia will not read federal statutes to abrogate state sovereign immunity unless they do so "with unmistakable clarity." Blatchford v. Native Village of Noatak, 501 U.S. 775, 785 (1991); see also Manning, supra note 147, at 292 n.42 (citing this presumption as a counterexample to Justice Scalia's professed distaste for substantive canons). At times, Justice Scalia has defended the presumption against abrogation of state sovereign immunity as an accurate generalization about congressional intent. See Scalia, supra note 2, at 29 ("[S]ince congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation."). But he has also portrayed it as a way of protecting constitutional federalism—a way "'[t]o temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure.'" *Blatchford*, 501 U.S. at 786 (quoting Dellmuth v. Muth, 491 U.S. 223, 227–28 (1989)). Given the strength of the presumption, Professors Eskridge and Frickey plausibly suggest that the Court's normative commitment to federalism has sometimes caused it to diverge from the intended meaning of statutes in this area. See Eskridge & Frickey, supra note 139, at 621–23.

Someone seeking to defend this result might say that judges are responsible for interpreting the Constitution as well as federal statutes and that it is perfectly appropriate for their principles of statutory interpretation to reflect values derived from the Constitution. But insofar as interpreters are putting those values in opposition to the intended meaning of statutes, this response sits uneasily with textualist theory. If § 5 of the Fourteenth Amendment does indeed give Congress some power to abrogate the states' immunity from private suits, why should Congress have to clear more hurdles to use that power than to regulate interstate commerce or to pass any other statutes that the Constitution authorizes? The fact that the Constitution protects federalism in other ways is no answer; especially for textualists, the *limits* on those protections (including the fact that the Constitution by hypothesis does let Congress expose the states to certain kinds of suits) are no less noteworthy than the protections themselves. Why should the policy behind the Constitution's specific protections of federalism spill over to justify special rules of statutory construction that are nowhere intimated in the Constitution itself? And why should state sovereignty, but not other constitutional values, receive this special protection? See id. at 596–98 (noting the ideological dimensions of the use of substantive canons and observing that "the cur-

sometimes give a few normative canons too much weight, rigorously principled decisionmaking may be too much to expect from any judges. Indeed, part of what drives textualists toward rules in the first place is their skepticism about judges' abilities to apply an underlying justification consistently from case to case. The generalized view of textualism as a rule-based approach to ascertaining the intended meaning of statutes may be subject to some counterexamples, or there may be some situations in which judges whom we think of as textualists deviate from what this generalized view would lead one to predict. As with other generalizations, though, the existence of a few counterexamples should not prompt wholesale repudiation of the generalization itself. To a very large extent, textualism can indeed be understood as a rule-based approach to determining intended meaning.

B. Textualists' Receptivity to Rule-Like Directives from Congress

The typical textualist's affinity for rule-based decisionmaking shows up not only in matters of methodology, but also in substantive results. When it is unclear how rule-like Congress meant a statutory directive to be, intentionalists are more likely than textualists to resolve doubts in favor of standards.

Every time members of Congress and their staffs draft a statute, they must consider not only the mix of objectives that they are trying to achieve, but also whether those objectives will be best accomplished by directives that are more or less rule-like. Thanks to the work of diverse scholars, the principal costs and benefits of formulating legal directives as rules are now familiar.[150] On the "cost" side of the ledger, rules inevitably draw arbitrary lines; they can magnify small differences and overlook big ones. Almost all

rent Court emphasizes a different array of clear statement rules than did the Court in the 1970s"); Mank, supra note 49, at 608 (complaining that "[t]extualist judges have too freely invoked clear-statement rules to protect federalist concerns and have not applied the canons vigorously enough to protect civil liberties").

[150] For a small sampling of the rich literature on this topic, see, e.g., Schauer, supra note 83; Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257 (1974); Kaplow, supra note 82; Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1985); Cass R. Sunstein, Problems with Rules, 83 Cal. L. Rev. 953 (1995).

rules, moreover, are simultaneously over- and under-inclusive: they apply in some situations not warranted by their underlying purposes, and they fail to reach other situations that those purposes would seem to cover.[151] The fact that the drafters of a rule cannot foresee everything that may happen in the future exacerbates this drawback; rules that may be justified now run the risk of being too inflexible later.[152]

But formulating directives in relatively rule-like terms has familiar benefits too. When legislators suspect that their outlook on the world differs from that of the officials who will implement the directive, they may want to leave fewer contestable decisions up to the implementing officials. The results that the directive produces might come closer to the legislators' preferences if the legislators formulate the directive as a rule (incorporating the generalizations that they themselves think appropriate) than if they formulate it as a standard (leaving more room for whatever generalizations the implementing officials would draw on their own).[153] Even if legislators do not fear that implementing officials will *systematically* promote an agenda that the current legislature opposes, legislators might simply fear that different implementing officials will have divergent outlooks and that the development of a standard through case-by-case adjudication will therefore yield unduly varied results.[154] In some situations, moreover, relatively rule-like directives might do a better job of giving citizens advance notice of the legal requirements to which they will be held, and legislators might value the advance notice provided by rules more than they value the promise of retrospective reasonableness held out by standards.[155]

This quick summary of the costs and benefits of rules is hardly exhaustive. But the basic point is simple: the ideal degree of rule-

[151] See, e.g., Schauer, supra note 83, at 135; see also Easterbrook, supra note 18, at 65 ("Rules overshoot or undershoot.").

[152] See Schauer, supra note 83, at 135 (noting that rules "doom the decision-making of today to the categories of yesterday").

[153] See id. at 159 (noting that rules are "devices for determining who should be considering what" and "operate as tools for the *allocation of power*").

[154] Cf. Scalia, supra note 8, at 1178–79 (suggesting that the Supreme Court can better control the lower federal courts and promote uniformity of decision by eschewing "totality of the circumstances" tests in favor of more rule-like formulations of the governing legal principles).

[155] See Schauer, supra note 83, at 137–45 (discussing the conditions under which this argument applies).

ness that a legislature should choose in a particular policy area is itself a difficult policy question that rarely has a canonical answer. Most of the time, some considerations will cut in favor of rules and others will cut against them.

In the first instance, the choice between rules and standards is obviously up to Congress. But the background principles that courts use to interpret Congress's words help determine how rule-like statutory directives are in practice. Litigants often ask interpreters to infer exceptions to a statutory provision when, in the interpreters' judgment, application of the provision would not serve the enacting legislature's apparent goals. Conversely, litigants sometimes ask interpreters to pay attention to the provision (as a matter of either statutory interpretation or "federal common law") in situations that are not covered by its explicit terms but that, in their judgment, implicate the policy behind it. As Judge Easterbrook has explained, interpreters who accede to such requests are understanding the provision to be less "rule-like" than it seems at first glance; rather than staying entirely within the categories identified on the face of the statute, the interpreters are asserting authority to make their own determinations about how Congress's underlying purposes play out in the case at hand.[156] Textualists tend to be slower than other interpreters to assert this authority.[157]

Textualists often portray their stance on this issue as being dictated by the legislature's own decisions. If one assumes that Congress generally means its statutory directives to be just as rule-like as they seem on the surface, then judges who regularly infer exceptions or embellishments in the service of the directives' underlying purposes are "dishonor[ing] the legislative choice" to bind implementing officials to a rule.[158] But everyone agrees that interpreters

[156] See Easterbrook, supra note 17, at 68.

[157] Compare, e.g., Manning, supra note 76 (reflecting the textualist's relative hostility toward this style of interpretation), with William N. Eskridge, Jr., All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806, 101 Colum. L. Rev. 990 (2001) (reflecting the nontextualist's relative receptivity toward it).

[158] Easterbrook, supra note 17, at 68; see also, e.g., Adams v. Plaza Fin. Co., 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) (emphasizing that when Congress has deliberately adopted a rule, courts "disserve that legislative choice by deciding that standards really are the way to go"); Easterbrook, supra note 18, at 65 ("It is always possible to turn a rule into a vague standard by looking at intent."); Manning,

should appreciate the significance of the choice between rules and standards and should respect the legislature's ability to enact rules even when judges think standards more appropriate. When it is clear that the enacting legislature really meant its directives to be just as rule-like as they seem, intentionalists too would bow to the legislature's decision. Conversely, even textualists sometimes read legal directives as being less rule-like than they seem on their face.[159]

The real difference between textualism and intentionalism on this point boils down to the relative ease with which interpreters embrace such readings. Imagine that Congress has formulated a directive in seemingly rule-like terms, but there are no other indications that members of Congress meant to preclude judicial recognition of exceptions or embellishments in the service of the directive's underlying purposes; the area addressed by the directive does not cry out for rules, Congress has not had any consistent history of deliberately choosing rules in this area, and there are no signs (other than the bare words of the provision) that Congress intended the language of the directive to exclude the possibility of any implied exceptions or embellishments. Under these circumstances, intentionalists are less likely than textualists to conclude that Congress meant the directive to be as rule-like as it seems and to give judges no license to infer reasonable qualifications on the basis of experience.

In advancing their respective positions on this issue, textualists and their critics each accuse the other side of infidelity to Congress: textualists complain that intentionalists make statutory directives more standard-like than the enacting legislature intended,[160] while critics of textualism return the favor by suggesting that textualists push statutes farther in the direction of rules than Congress really

supra note 76, at 7 ("[E]nforcing the background purpose . . . of a precise text may . . . defeat Congress's evident choice to legislate by rule rather than by standard.").

[159] Judge Easterbrook's opinion in the Case of the Speluncean Explorers is an obvious example. The background principle that he applied there resulted in a much more standard-like directive than the bare words of the statute suggested. See supra note 116.

[160] See supra note 158 and accompanying text; see also Manning, supra note 76, at 20 ("[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 . . . .").

meant.[161] As these warring accusations indicate, textualists and intentionalists both purport to honor the enacting legislature's choice between rules and standards, but they use somewhat different background principles to identify what that choice is.

Depending on one's premises about the general tendencies of Congress and the courts, one can certainly argue that the textualists have it right. If one assumes that Congress starts from a baseline of agnosticism about the merits of rules and standards in various contexts, one might see no reason for courts to apply a thumb on the scale in favor of standards; textualists can plausibly argue that when Congress has chosen to formulate a directive in relatively rule-like terms, courts should not systematically assume that Congress nonetheless wants to leave room for courts to make the sorts of decisions that standards require.[162] Textualists can also argue that judges are likely to err on the side of reading statutes to give the judiciary more discretionary power than Congress intended, and that the courts' background principles of interpretation should be set in such a way as to offset this expected bias. But the textualists' relative receptivity toward rules surely has some normative overtones too; it reflects *both* a desire to honor the enacting legislature's choice between rules and standards *and* a tendency to resolve doubts on that score in favor of rules. Perhaps textualists worry more than other interpreters about the delegation of policymaking authority from Congress to the judiciary; faced with uncertainty about how rule-like Congress meant a particular directive to be, textualists may tend to resolve their doubts in a way that shifts fewer important decisions from politically accountable mem-

[161] See, e.g., MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 244 n.7 (1994) (Stevens, J., dissenting) (criticizing Justice Scalia's "rigid reading" of a statutory provision as "out of step with our prior recognition that the 1934 Act was meant to be a 'supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy'" (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940))); Marozsan v. United States, 852 F.2d 1469, 1482 (7th Cir. 1988) (Posner, J., concurring) (arguing that "Congress almost certainly did not intend" the consequences that would flow from the rule-like statutory interpretation advocated by Judge Easterbrook in dissent); see also Daniel J. Meltzer, The Supreme Court's Judicial Passivity, 2002 Sup. Ct. Rev. 343, 389 ("Congress has not legislated on the assumption that courts would be powerless to flesh out statutory enactments.").

[162] See Easterbrook, supra note 17, at 63 (acknowledging that "[n]o one could say that rules are always preferable to standards, or the reverse," but criticizing a style of interpretation that always resolves "tough cases" in favor of having standards).

bers of Congress to politically insulated courts. Or perhaps interpreters of all stripes simply tend to assume that Congress shares their own views of rule-based decisionmaking. In a variety of contexts, judges whom we think of as textualists have less faith than other interpreters in the likelihood that multiple decisionmakers will reach predictable and accurate judgments through the case-by-case application of relatively standard-like directives.[163]

Whatever the root causes of this difference between textualists and intentionalists, two things seem clear. First, the background principles of interpretation used by judges whom we think of as textualists are more likely to produce rule-like laws than the background principles of interpretation used by other interpreters. Second, this disagreement has nothing to do with the difference between "subjective" and "objective" forms of intent. The background principles that intentionalists favor on this point need not entail any extra inquiry into the particular mindset of the enacting legislators; in the absence of any other information about Congress's likely intent, the judges whom we think of as intentionalists are simply more receptive to a background presumption of judicial discretion than the judges whom we think of as textualists.

III. TEXTUALISM AND "IMAGINATIVE RECONSTRUCTION"

If we take the difference between rules and standards as the starting point for distinctions between textualism and intentionalism, we can also shed light on the relationship between textualism and the intentionalist technique of "imaginative reconstruction," whereby interpreters try to "imagine how [the enacting legislators] would have wanted the statute applied to the case at bar."[164] People often cast textualism in stark contrast to this technique, and textualist judges themselves have contributed to the impression that

[163] See, e.g., Scalia, supra note 8, at 1176–79 (suggesting that when a statutory provision implicitly or explicitly delegates some lawmaking authority to judges, the federal Supreme Court should tend to prefer rules over standards in exercising this authority); see also supra Section II.A; cf. Sunstein, supra note 80, at 650 (associating Justice Scalia with formalism and observing that "a central formalist goal is to reduce the burdens of on-the-spot decisions, above all by eliminating the need for the exercise of discretion in particular cases, and by making sure that law is as rule-like as possible, in a way that promotes predictability for parties and lawmakers alike").

[164] Posner, supra note 9, at 817.

they entirely repudiate it.[165] Again, however, the facts are less stark. As we shall see, the difference between rules and standards lets us offer a more satisfying account of the extent to which textualists engage in imaginative reconstruction.

A. Textualist Use of Imaginative Reconstruction

1. Reconstructive Approaches to Severability and the Like

In several areas of statutory interpretation, textualist judges seem perfectly happy to embrace imaginative reconstruction. Questions of severability provide a clear example. Suppose that Congress enacts a statute with two provisions, and a court concludes that one of them is unconstitutional. Should the court treat the whole statute as a nullity, or should it recognize the valid provision as law? Standard doctrine, which judges of all different stripes accept, maintains that this question is one of statutory interpretation and that courts should use a species of imaginative reconstruction to answer it: judges are to ask whether the enacting legislature would rather have enacted no statute at all than a statute without the provision that the court has held invalid.[166]

This way of framing the question does put some constraints on the courts' imagination. Had the enacting Congress known that courts would refuse to enforce part of its statute, it might have taken a totally different approach to the problem that it was trying

[165] See, e.g., Morse v. Republican Party of Va., 517 U.S. 186, 276 n.18 (1996) (Thomas, J., dissenting) ("We are not free to construe statutes by wondering about what Congress 'would have wanted to enact.'"); Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992) (Scalia, J.) ("The question . . . is not what Congress 'would have wanted' but what Congress enacted . . . ."); Easterbrook, supra note 5, at 548 (asserting that because of logrolling and the ability of individual members of Congress to control the order in which their committees or chambers consider different proposals, "judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses").

[166] See, e.g., Miller v. Albright, 523 U.S. 420, 457 (1998) (Scalia, J., concurring in the judgment) (agreeing that in most situations, the Court assesses the severability of an unconstitutional provision in a federal statute by asking "whether Congress would have enacted the remainder of the law without the invalidated provision"); Alaska Airlines v. Brock, 480 U.S. 678, 684–85 (1987). But cf. Nagle, supra note 117, at 206 (complaining that "*Alaska Airlines* employs a decidedly non-textualist approach to deciding severability" and urging Congress to enact a general statute providing the interpretive direction "that all [federal] statutes shall be construed as severable absent a specific nonseverability clause").

to solve, and it might therefore have redrafted the entire statute. Severability doctrine does not tell courts to canvass the whole range of possibilities to which the enacting Congress could have resorted; instead, courts simply imagine an up-or-down vote on the existing statute minus the unconstitutional provision.[167] Still, the fact remains that courts conducting severability analysis routinely have to speculate about how the enacting Congress would have answered a question that it did not actually face. Textualist judges regularly join opinions taking this approach, and they have voiced no fundamental objection to it.[168]

The Supreme Court's textualists have also embraced imaginative reconstruction when deciding how to conform statutes to dubious precedents that the Court is not prepared to overrule. Once upon a time, for instance, the Court was relatively quick to read federal regulatory statutes as implicitly creating private causes of action. During the heyday of this approach, courts read private causes of action into various provisions of federal securities law;[169] even after the heyday, the Burger Court read a private cause of action into Title IX of the Education Amendments of 1972.[170] Although members of the current Court may well believe that these decisions mis-

[167] See, e.g., Gulf Oil Corp. v. Dyke, 734 F.2d 797, 804 (Temp. Emer. Ct. App. 1984).

[168] Justice Scalia has suggested that in conducting the imaginative reconstruction required by severability analysis, he might emphasize different sorts of evidence than some other judges. In particular, rather than stressing internal legislative history, Justice Scalia believes that the structure of the overall statute provides "the best evidence" of whether Congress would have enacted the statute minus the provision that the Court has invalidated. See Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 560–61 (2001) (Scalia, J., dissenting). This issue, however, simply reflects the legislative-history debate discussed in Section I.B. The question that Justice Scalia is trying to answer remains one of imaginative reconstruction.

Justice Thomas, on the other hand, has recently indicated some discomfort with standard severability analysis, though he has not suggested an alternative. See United States v. Booker, 125 S. Ct. 738, 799 n.7 (2005) (Thomas, J., dissenting in part) ("I assume, without deciding, that our severability precedents—which require a nebulous inquiry into hypothetical congressional intent—are valid, a point the parties do not contest.").

[169] See, e.g., Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under § 10(b) [of the Securities Exchange Act of 1934]."); J.I. Case Co. v. Borak, 377 U.S. 426, 431–35 (1964) (recognizing a private cause of action to enforce § 14(a) of the 1934 Act).

[170] See Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

interpreted the statutes that they addressed,[171] the Court has shown no inclination to overrule them. Once one recognizes a private cause of action, however, one inevitably confronts a whole host of questions about its details. In suits brought under the private cause of action that earlier courts read into § 10(b) of the Securities Exchange Act, can defendants seek contribution from other wrongdoers?[172] Under what circumstances should school districts be liable for damages under the private cause of action that the Burger Court read into Title IX?[173] To answer such questions, the Court regularly uses imaginative reconstruction: the Court tries to determine "how the [enacting] Congress would have addressed the issue" if its members had taken for granted that they were creating a private cause of action.[174] Far from protesting, both of the Court's textualist members accept this description of the Court's task.[175]

More generally, even when textualists criticize the use of imaginative reconstruction in particular cases, they use imaginative reconstruction to do so. In his most famous article about statutory interpretation, Judge Easterbrook argued that when a statute appears to be silent on some issue, courts and scholars are too quick to ask how the issue would have been resolved if the enacting Congress had squarely confronted it. Judge Easterbrook tenta-

[171] See, e.g., Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (asserting that the Court has "abandoned" the approach to private causes of action reflected in *Borak*); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 77–78 (1992) (Scalia, J., concurring in the judgment) (indicating that *Cannon* was wrong as an original matter, but adhering to it because subsequently enacted legislation builds on the private cause of action that it recognized); see also supra notes 132–135 and accompanying text.

[172] See Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286 (1993).

[173] See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

[174] *Musick, Peeler & Garrett*, 508 U.S. at 294 ("Our task is not to assess the relative merits of the competing rules, but rather to attempt to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act."); see also *Gebser*, 524 U.S. at 285 ("Because Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on Congress' intent with respect to the scope of available remedies. . . . Instead, 'we attempt to infer how the [1972] Congress would have addressed the issue had the . . . action been included as an express provision in the' statute." (quoting Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 178 (1994))).

[175] In *Gebser*, Justices Scalia and Thomas both joined the majority opinion in full. Justice Scalia did the same in *Musick, Peeler & Garrett*; Justice Thomas dissented, but went out of his way to endorse the use of imaginative reconstruction. See *Musick, Peeler & Garrett*, 508 U.S. at 299 (Thomas, J., dissenting) (disagreeing only with "the Court's chosen method for pursuing this difficult quest").

tively suggested that instead of simply assuming the authority to engage in this reconstructive project, courts should find the statute inapplicable unless it "plainly hands [them] the power to create and revise a form of common law" with respect to the issue.[176] This proposed rule admittedly would curtail courts' use of imaginative reconstruction in particular cases. To defend this curtailment at the retail level, however, Judge Easterbrook explicitly engaged in imaginative reconstruction at the wholesale level; he tried to imagine what legislatures would say on the question of when courts should use imaginative reconstruction.[177] This form of argument does not reveal a philosophical objection to imaginative reconstruction, but simply a willingness to employ it at a high level of abstraction before using it more generally.

2. Reconstructive Approaches to Ordinary Ambiguities

Someone who persists in trying to cast textualism in opposition to imaginative reconstruction might argue that judges have no real alternative to imaginative reconstruction when they are trying to answer questions of severability or to decide how to develop dubious precedents. In these special areas, after all, judges must reach decisions even though they have no relevant text to consult; whether or not a statute explicitly addresses the severability of its own provisions, courts cannot find the statute inapplicable to that issue. But textualists do not restrict their use of imaginative reconstruction to a few special areas. When confronting possible ambiguities in a statutory provision, it is absolutely routine for textualists to put themselves in the shoes of the enacting Congress and to try to identify the interpretation that its members either (1) probably had in mind or (2) would have preferred if they had considered the question.

Consider, for instance, how textualists might analyze Learned Hand's opinion in *Fishgold v. Sullivan Drydock & Repair Corpora-*

[176] Easterbrook, supra note 5, at 544. When a statute does delegate this power to courts, moreover, Easterbrook encouraged them to exercise it "using today's wisdom" rather than trying to "conjur[e] up the solutions" that the legislature would have devised at the time of enactment. Id. at 545.

[177] See, e.g., id. at 540–43 (arguing that "a legislature able to specify a rule at no cost would not select universal construction").

tion,[178] often hailed as a paradigmatic example of imaginative reconstruction.[179] A federal statute enacted in 1940 protected the jobs of people who left private-sector employment to serve in the United States military: if they received an honorable discharge from the military and were still qualified to perform their old duties, and if their former employer's circumstances had not changed radically in the meantime, then the employer had to restore them "without loss of seniority" to their old position or another "of like seniority, status, and pay."[180] For one year after this restoration, moreover, the statute protected them against being "discharged from such position without cause."[181] In keeping with these provisions, Abraham Fishgold—who had been inducted into the army during World War II—was restored to his private-sector job as a welder in 1944. On several occasions over the next year, however, his employer refused to give him work because there was not enough to go around; the company's agreement with its union called for work to be allocated on the basis of seniority, and some nonveterans were more senior than he. Fishgold argued that the company's refusal to give him work on these occasions amounted to "discharge[] . . . without cause" in violation of the statute, but Judge Hand disagreed, in part because he thought it "extremely improbable" that the enacting Congress had meant to give veterans a privilege as broad as the one that Fishgold claimed.[182] At the time the statute was adopted, after all, the United States was not at war and Congress did not know the sacrifices that servicemen would soon be making. Hand emphasized that the court's task was "not to decide what is now proper" in light of the events that had unfolded after 1940, but simply "to reconstruct, as best we may, what was the purpose of Congress when it used the words in which [the relevant provisions] were cast."[183]

Although modern textualists probably would speak in terms of "meaning" rather than "purpose," no textualist would object to

[178] 154 F.2d 785 (2d Cir.), aff'd, 328 U.S. 275 (1946).
[179] See, e.g., Eskridge et al., supra note 140, at 685; Carlos E. González, Reinterpreting Statutory Interpretation, 74 N.C. L. Rev. 585, 607 & n.85 (1996).
[180] Selective Training and Service Act of 1940, § 8, 54 Stat. 885, 890 (expired 1947).
[181] Id.
[182] *Fishgold*, 154 F.2d at 788–89.
[183] Id. at 789.

Hand's basic approach. Textualists are happy to use the public context in which Congress acted as a guide to the meaning of the statutory language.[184] When a statutory provision seems on the surface to permit a range of possible interpretations, moreover, textualists regularly use clues derived either from the statute itself or from other permissible sources (such as Congress's established practices or common features of our legal system that members of Congress are presumed to respect) to try to deduce what the enacting legislature meant.[185] In this way, textualists regularly use a species of "imaginative reconstruction" to clarify what would otherwise be ambiguities in statutory language.

People seeking to draw a categorical distinction between textualism and imaginative reconstruction might respond that textualists use this technique only for certain purposes; textualists use imaginative reconstruction to identify what members of the enacting Congress actually decided, but not to speculate about what members of the enacting Congress would have decided if they had confronted some question that never occurred to them. But this proposed distinction does not really work, at least in any stark form.

For one thing, the distinction itself is fuzzy, because what we take the enacting legislature to have "decided" is something of a legal construct. When assessing the wording of a bill, legislators

[184] See, e.g., Scalia, supra note 2, at 30 (indicating that interpreters can and should consider "the public history of the times in which [a statute] was passed" (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845))).

[185] See, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Scalia, J.) ("[W]e find it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards."); Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000) (Scalia, J.) (relying upon "[s]everal contextual features" to conclude that "exclusivity is intended" in 11 U.S.C. § 506(c)); Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding, 514 U.S. 122, 129 (1995) (Scalia, J.) (relying on patterns used by Congress in drafting other statutes to conclude that "when an agency in its governmental capacity *is* meant to have standing [to seek judicial review of administrative rulings], Congress says so"); MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1994) (Scalia, J.) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion . . . ."); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 672 (1990) (Scalia, J.) ("It seems most implausible to us that Congress, being demonstrably aware of the *dual* distorting effects of regulatory approval requirements in this entire area . . . [,] should choose to address both those distortions only for drug products . . . .").

and their staffs think about how the bill would handle various concrete cases that come to their minds, but they cannot possibly anticipate and specifically consider every conceivable application of the legal rules that the bill states. Applications not specifically contemplated at the time of enactment are nonetheless part of the enacting legislature's "decision," because one of the things that the enacting legislature decides is the level of generality at which to word the statute; the general rules set forth in the statute connect the dots between the paradigm cases that individual legislators have in mind. For this reason, the enacting legislature can be said to have "decided" how to handle even cases that no legislator could possibly have imagined at the time of enactment.[186] Sometimes, however, cases that the enacting legislature could not possibly have contemplated will differ in such material ways from those within the legislature's ken that even textualists will resist reading the statute to cover them.[187] At least sometimes, then, determining whether the enacting legislature has "decided" a question can shade into determining whether members of the enacting legislature would have seen any reason to distinguish a case that they did not actually consider from the cases that they did contemplate.

This phenomenon is easiest to spot when a statute uses "open-textured" terms—terms with latent indeterminacies that become apparent only with the passage of time.[188] To borrow an example from Justice Brennan, suppose that a statute enacted in 1850 required government officials to "inspect all ovens installed in a home for propensity to spew flames,"[189] and suppose that modern interpreters must decide whether the statute covers electric ovens.

[186] See, e.g., K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 323 (1988) (Scalia, J., concurring in part and dissenting in part) ("A 19th-century statute criminalizing the theft of goods is not ambiguous in its application to the theft of microwave ovens . . . ."); Smith v. Chi. Sch. Reform Bd. of Trs., 165 F.3d 1142, 1150 (7th Cir. 1999) (Easterbrook, J.) (observing that "statutory words often have effects in addition to those contemplated by their authors").

[187] See, e.g., Easterbrook, supra note 12, at 361 (observing that "texts do not settle disputes their authors and their contemporary readers could not imagine" and that "[a] problem neither appreciated nor discussed is not resolved").

[188] For the philosophical concept of "open texture," see Friedrich Waismann, Verifiability, Supp. 19 Proc. Aristotelian Soc'y 119 (1945). For discussion of this concept in the context of legal interpretation, see Michael S. Moore, The Semantics of Judging, 54 S. Cal. L. Rev. 151, 200–02 (1981).

[189] *K Mart*, 486 U.S. at 316 (Brennan, J., concurring in part and dissenting in part).

To answer that question, textualist judges would start by investigating the conventional meaning of the word "ovens" in 1850. Depending on what they found, their inquiry might conceivably stop there: perhaps the word was conventionally understood to cover "heated enclosures of any sort, no matter what the source of heat" (in which case the language chosen by the enacting legislature might unambiguously reach electric ovens),[190] or perhaps it was conventionally understood to be limited to "enclosures in which heat is generated by the nearby combustion of some fuel" (in which case the language chosen by the enacting legislature might unambiguously exclude electric ovens). More likely, however, conventional understandings of the word "ovens" in 1850 did not incorporate either of these closure rules; people using the word in 1850 did not have to choose between these alternatives, and so the invention of electric ovens exposed a latent indeterminacy in their vocabulary. To resolve this indeterminacy, modern-day textualists might find themselves thinking about the purposes that the enacting legislature was trying to serve; if electrically heated enclosures are just as likely to spew flames as wood- or coal-burning ovens, a textualist might well conclude that the statute is best understood to cover them.[191] But this interpretation of the statute reflects the judge's assessment of whether the difference between electric ovens and traditional ovens would have mattered to the enacting legislature, given its demonstrated interest in reducing the incidence of oven fires. To the extent that textualists use this sort of imaginative reconstruction to determine what a statute means, it is hard to draw a sharp line between what the enacting legislature authoritatively "decided" and what its members probably would have decided if they had thought about some question that did not occur to them.

When textualists engage in this sort of project, they do tend to avoid the *rhetoric* of imaginative reconstruction; rather than speculating about what the enacting legislature "would have" decided, they say that they are addressing the implications of what the enacting legislature actually did decide. But this formulation may

[190] See id. at 324 n.2 (Scalia, J., concurring in part and dissenting in part).

[191] See, e.g., In re Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.) (using this sort of analysis to decide whether the generic term "mower" in a 1935 statute covers a haybine, a piece of farm equipment that did not exist in 1935).

simply be a more accurate description of what advocates of imaginative reconstruction see themselves as doing. Advocates of imaginative reconstruction do not think of themselves as inventing a new statute. No less than other interpreters, they are trying to understand what the enacting legislature "decided"—what meaning to ascribe to the words that the legislature really did enact. To do so, they consider the decisions that the enacting legislature unquestionably did make (and recorded in authoritative statutory language), and they ask what those decisions imply for other issues that the enacting legislature did not specifically consider but that the statute might be understood to address.[192] To the extent that the statute's possible treatment of those other issues is ambiguous, interpreters face a choice among different interpretations. Still, the decisions that are clearly reflected in the statute provide principles that guide this exercise of discretion.[193] At the extreme, those decisions may eliminate the ambiguity entirely; interpreters may conclude that in light of the decisions that the enacting legislature unquestionably did make, one resolution of the ambiguity is manifestly preferable to all the other possibilities. Although interpreters might express this conclusion by talking about what the enacting legislature *would have* decided *if* it had considered the issue, they could just as readily speak in terms of the implications of the decisions authoritatively reflected in the statute. Whichever formulation interpreters use, they are trying to figure out what the decisions reflected in the statute mean for issues that the enacting legislature did not specifically contemplate. Neither textualism nor any

[192] Because advocates of imaginative reconstruction confine their reconstructions to issues that (in their view) the statute might be understood to address, they do not reject Judge Easterbrook's point that statutes have limited "domains" and that courts should not seek to reconstruct how the enacting legislature would have wanted to handle issues outside of those domains. See Easterbrook, supra note 5, at 533–34. Being less interested in the confining effects of rules, however, they may read the typical statute to have a somewhat broader domain than a textualist would. Cf. supra text accompanying notes 68–75 (suggesting another possible explanation for the same phenomenon).

[193] Cf. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (indicating that statutes empowering executive agencies to act according to their best judgment, but providing "intelligible principle[s]" to guide the exercise of that authority, do not constitute forbidden delegations of legislative power); Touby v. United States, 500 U.S. 160, 165 (1991) (indicating that the same idea applies when Congress legislates in ways that leave "a certain degree of discretion to . . . judicial actors").

other plausible approach to statutory interpretation categorically refuses to conduct this sort of inquiry.

B. Imaginative Reconstruction and Rules

This is not to say that textualists use imaginative reconstruction in the same way that intentionalists use imaginative reconstruction. Textualists try to keep their attempts at imaginative reconstruction within the rule-based framework that they understand the enacting legislature to have chosen, and they are more likely than intentionalists to presume that this framework applies notwithstanding changed circumstances.

Return to the example of the old statute requiring inspection of "ovens." To decide how this law applies to newfangled appliances, textualists will not ask, on a case-by-case basis, whether the enacting legislature would have wanted to cover those appliances if it had known about them. Instead, textualists will emphasize the need to identify an appropriate verbal formula to determine the coverage of the word "ovens," and they will take the statute to cover a particular appliance only if the appliance fits within that formula. Reconstruction does enter this project: in choosing from the array of formulas that the open-textured nature of the word makes possible, textualist judges may well put themselves in the shoes of the enacting legislature and try to decide, in light of its apparent purposes, which one it would have preferred. But textualists will not take the fact that the legislature did not envision this particular problem as a license to leave its formulation of the relevant rule behind and to inquire solely into the purposes that it was trying to serve.

One consequence of this approach is that, as applied to modern technology, the rule stated by the statute is likely to be even more over- or under-inclusive than rules often are, because the enacting legislature had no opportunity to tailor its rule with modern technology in mind. If one understands the statutory term "ovens" to cover all heated enclosures, then not only electric ovens but also solar ovens and ovens powered by cold fusion will be included; if one instead understands the term to cover only enclosures heated by the nearby combustion of some fuel, then all these modern devices will be excluded. This is so even if the enacting legislature's underlying purposes would support some distinctions among these

modern appliances—as if electric ovens are fire hazards but the new cold-fusion ovens are not.

To be sure, the enacting legislature knew nothing about any of these modern devices, and so its chosen formulation could not possibly have reflected a deliberate decision to lump them together. Still, the enacting legislature could certainly have contemplated the general possibility that technology would continue to develop and that unforeseen circumstances would arise in the future. According to textualists, indeed, that possibility is one of the things that legislatures typically take into account when they make their initial choice between rules and standards.[194] One of the drawbacks of rule-like directives is that the categories they use will become outmoded over time,[195] but the desire to constrain future as well as present implementing officials will sometimes lead legislators to favor rule-like formulations notwithstanding this cost. At least in the absence of substantial evidence that the enacting legislature did *not* make this calculation, textualists tend to believe that courts are more likely to capture the enacting legislature's intent by sticking to the formulation it chose than by engaging in a more freewheeling type of imaginative reconstruction.[196]

Other interpreters, by contrast, are less likely to handle cases about unforeseen circumstances entirely within the confines of the verbal formulation that the enacting legislature happened to use. While trying to honor the enacting legislature's choice between rules and standards in the situation that it confronted, nontextualists often understand that choice to have less force for issues that the enacting legislature could not possibly have envisioned. In our example, for instance, rather than simply using imaginative recon-

[194] See, e.g., Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 283–84 (7th Cir. 1990) (Easterbrook, J., dissenting).

[195] See supra note 152 and accompanying text.

[196] Cf. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324–25 (1988) (Scalia, J., concurring in part and dissenting in part) ("Justice Brennan is asserting that we have the power—indeed, the obligation . . . —to decline to apply a statute to a situation that its language concededly covers, not on the ground that the enacting Congress actually intended but failed to express such an exception, nor even on the ground that failure to infer such an exception produces an absurd result, but on the ground that, *if* the enacting Congress had foreseen modern circumstances, it *would* have adopted such an exception, since otherwise the effect of the law would extend beyond its originally contemplated purpose. I confess never to have heard of such a theory of statutory construction.").

struction to select from among the possible meanings of the term "ovens," intentionalists might be somewhat more apt to ask how the enacting legislature would have varied the statutory language if it had known about the new technology.[197] This inquiry, which inevitably entails some direct application of the statute's underlying purposes, makes the statute less rule-like than it seems on its face.

The difference between textualists and intentionalists on this score reduces to the background presumptions that interpreters use to understand the original statutory language. At least in the absence of other clues, textualists tend to presume that when the enacting legislature formulates a directive in relatively rule-like terms, it means that formulation to carry forward despite the possibility of unforeseen circumstances. Intentionalists are quicker to presume that the legislature meant its chosen formulation to matter most for the situations that were within its ken at the time of enactment. Over time, then, the sort of imaginative reconstruction associated with intentionalists effectively makes statutes more standard-like than the sort of imaginative reconstruction associated with textualists.[198]

[197] Cf. Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, 886 F.2d 871, 903 (7th Cir. 1989) (Posner, J., dissenting) ("I am not myself deeply shocked that courts sometimes rewrite statutes to address problems that the legislators did not foresee . . . ."), rev'd, 499 U.S. 187 (1991). Of course, even intentionalists often decline to engage in this sort of project. See, e.g., United States v. Lorenzetti, 467 U.S. 167, 179 (1984) ("[T]he fact that changing state tort laws may have led to unforeseen consequences does not mean that the federal statutory scheme may be judicially expanded to take those changes into account. . . . It is for Congress, not the courts, to revise longstanding legislation in order to accommodate the effects of changing social conditions.").

[198] Although this Article focuses on the difference between textualism and intentionalism, it is worth noting that many of the substantive disagreements between textualists and academic advocates of "dynamic" interpretation can be cast in similar terms. Those disagreements often are described as being about whether the meaning of statutes can evolve over time. Some versions of dynamic interpretation, however, can be reduced to the more traditional question of how readily the original statutory language should be read to contain a time-released delegation of authority to the courts. In effect, the enacting Congress could be understood to be telling interpreters: "Here is a verbal formula that we expect you to follow fairly closely now. But if and when the assumptions underlying this formula become discredited, you have authority to update the formula appropriately; likewise, if relevant circumstances change in ways that we have not foreseen, you have authority to vary the formula as you think best to continue serving the public purposes that we are trying to advance." See, e.g., Eskridge, supra note 1, at 52–53. To the extent that interpreters read this implicit qualification into statutory language, they understand seemingly rule-like provisions

Importantly, though, the background presumption favored by intentionalists reflects no more information about the actual mental states of members of the enacting legislature than the background presumption favored by textualists. Again, then, the distinction between "subjective" and "objective" forms of intent does not capture what is really going on. Here as elsewhere, the contrast between textualists and intentionalists is better understood in terms of their divergent attitudes toward rule-based decisionmaking.

CONCLUSION

Perhaps because textualists are drawn to bright-line distinctions, they have tended to describe their rejection of intentionalism in fundamental terms, as relating to the very purposes of statutory interpretation. But this claim is under-theorized and over-rhetoricked. It is far from clear that textualists care less than intentionalists about giving effect to the intended meaning of statutes, or that intentionalists care less than textualists about ensuring fair notice of the law's requirements to people outside the enacting legislature.

What *is* clear is that judges whom we think of as textualists have a greater affinity for "rules" than judges whom we think of as intentionalists. Even if textualists and intentionalists have exactly the same goals, this fact could account for most of the distinctive features of textualism, including not only the textualists' stance on legislative history, but also their reluctance to diagnose "drafting errors," their relative receptivity toward formal canons of construction, and their caution about inferring exceptions or embellishments to statutory language in the service of the legislature's underlying aims. Even the textualists' tendency to read statutes as having somewhat smaller "domains" than intentionalists[199] can be thought of in these terms; the more a statute's domain exceeds its

to become increasingly standard-like over time. Interpreters who favor such readings are resisting one of the important effects of truly rule-like directives—what Professor Schauer calls the "intertemporal allocation of power" toward past legislators and away from present-day implementing officials. See Schauer, supra note 83, at 160. Textualists do not find this sort of entrenchment so troubling. See Scalia, supra note 2, at 22 (criticizing Professor Eskridge's theory of dynamic interpretation for illegitimately shifting policymaking authority to "unelected judges").

[199] See supra note 192.

express provisions, the more cases will have to be resolved by direct application of the general policy that the statute reflects, and the more standard-like the statute will be in practice.

On this view, the differences between textualism and intentionalism boil down to two basic ideas—one about methodology and one about the normative tendencies that interpreters display when their methodology runs out. Within certain constraints, all mainstream interpreters seek the meaning intended by the enacting legislature. As a methodological matter, however, textualists may believe that a relatively rule-based approach to statutory interpretation is likely to bring judges closer to that goal than the more holistic techniques favored by intentionalists. As a normative matter, moreover, textualists are more likely than intentionalists to resolve uncertainties in favor of "ruleness"; when the meaning intended by the enacting legislature is concededly unclear, it is unusual for intentionalists to settle upon a more rule-like interpretation than textualists. For people seeking to describe how textualism and intentionalism really differ, these twin ideas offer a far more productive starting point than the distinction between "subjective" intent and "objective" meaning.

Admittedly, textualists themselves might not embrace this way of thinking about their approach; although Justice Scalia surely would agree that his method of interpretation is more rule-based than that of the typical intentionalist, he probably would not characterize it as a different way of achieving roughly the same goals as intentionalism. But the way in which textualist judges characterize what they do in individual cases does not necessarily establish what the ultimate goals of textualism are. After all, one of the features of rule-based approaches is that the officials who implement them need not keep the rules' ultimate purposes in the forefront of their minds. The very idea of "ruleness" entails a sharp distinction between rules and their underlying rationales,[200] and so rules have a tendency to take on lives of their own. As a result, even if textualism does indeed entail a relatively rule-based approach to determining intended meaning, one should not be surprised that some of its advocates have come to scoff at the search for legislative intent.

[200] See supra note 85.

All that the textualist rhetoric really signifies, however, is that textualist judges need not frame their approach to each individual case in terms of the legislature's likely intent. It does not follow that legislative intent is irrelevant to textualism. In this respect as in others, the difference between textualism and intentionalism may simply reflect the contrast between rules and standards.