“Is That English You’re Speaking?”
Why Intention Free Interpretation is an Impossibility

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"Textualism" is a very general and abstract term that represents a variety of views about the interpretation of legal texts. One strand of textualism is conceptual and descriptive; this strand makes claims about what texts actually mean. Another strand of textualism is normative; this strand makes claims about how judges ought to interpret particular kinds of legal texts, such as constitutions and statutes. In the first part of this paper, we consider an especially strong form of conceptual textualism—the position that texts can be interpreted without any reference, express or implied, to the meaning intended by the author of the text. The defining feature of this form of textualism is the insistence that intentions play no role in the production of meaning, and so we call this view “intention free textualism,” or “IF textualism.” We do not know if anyone actually is an IF textualist so defined, although loose remarks by some self-identifying textualists suggest that they might hold this position. In any event, whether or not IF textualists actually exist, it will be useful to drive a stake through the heart of intention free interpretation. Doing so will make it clear that what is at stake in the dispute between textualists and intentionalists does not concern the conceptual points about what interpretation is and what determines texts’ meanings. Rather, the actual dispute is a normative one over whether interpreters should look to the intentions of actual authors or hypothetical ones, and when, if we are to look to actual authorial intent,

1. By intentionalist, we mean one who claims that the meaning of a text is determined by what its actual author intended it to mean. By actual author, we do not mean to restrict ourselves to the person or persons who mechanically produced the marks or sounds in question—that is, the text. For us, the author can be one who adopts for his own purposes a text another has produced. Thus, Congress is the actual author of its statutes, even if legislative aides did the actual drafting. And judges are the actual authors of their opinions, even if written entirely by law clerks. (Of course, it is possible that an actual author intends whatever the drafter intended, in which case the author’s intent incorporates by reference the drafters’ intent.)
policy considerations (such as rule of law concerns) should lead us to ignore certain evidence of that intent.

Part I, therefore, establishes that IF textualism is a conceptual impossibility. Regardless of what position people claim to hold, no one can be such a textualist. Part I will establish that one cannot interpret texts without reference to the intentions of some author. Indeed, texts can only be identified as texts by reference to authorial intent. All of this is consistent, of course, with the possibility that one author might appropriate the marks made by another author and intend a meaning by them that is different from the meaning intended by their creator. It is also consistent with a reader’s imagining what a text would mean had someone other than its actual author composed it.² Leaving these possibilities aside, however, Part I establishes that one cannot interpret texts without reference to the intentions of some author.

In Part II we address how the actual meaning of a legal text—what its author(s) intended it to mean—might differ from the authoritative meaning that an authoritative interpreter gives it. Essentially, such a divergence is possible whenever the authoritative interpreter is debarred from considering certain types of evidence of authorial intent. The divergence actually occurs when the excluded evidence, had it been considered, would show the authorial intent to be different from what it appears to be given the restricted set of evidence.

In Part II we also consider the various interpretive postures that textualists might be advocating (assuming that they are not advocating IF textualism). What they are arguing against is clear enough, namely, full blooded intentionalism. Full blooded intentionalists consider all available evidence of the actual author’s intended meaning. A proponent of full blooded intentionalism might exclude certain evidence of intent on grounds of its general unreliability. But he nonetheless would allow consideration of all reliable evidence of authorial intent. This position is the “wholeheartedly faithful agent” position, contrary to what some textualists claim for their own position.

If full blooded intentionalism is textualism’s foil, what positions might textualists be taking in opposition? One possible textualist posture is that authoritative interpreters should exclude certain evidence of the

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² Just to be clear, we shall argue in Part I that one must envision an author attempting to convey some meaning if one wishes to discern the meaning of a text. Part I is not meant to show that interpretation is possible only if one examines the intent of the actual author. We consider the idea of hypothetical authors in Part II.
actual author’s intended meaning for various policy reasons (call this policy constrained interpretation). Thus, such textualists might exclude evidence of the intended meaning that is not generally available to the public, or that is manipulable by lawmakers, even if such evidence generally tends to prove the meaning intended by the lawmakers. The policy rationales for such evidentiary exclusions are rule of law ones. Indeed, it is conceivable that the rules of exclusion might vary depending upon whether the authoritative meaning—the intended meaning disclosed by the restricted set of evidence—is broader or narrower than the actual meaning (the intended meaning disclosed by all the evidence). Or the rules might vary depending upon whether the law is directed primarily to the general public or to technical experts, or whether it is criminal or civil.

Whenever the authoritative interpretation based on a restricted set of evidence differs from the meaning we think was actually intended—because we have viewed the excluded evidence—then the authoritative interpreter is less than a wholeheartedly faithful agent of the lawmakers. After all, the authoritative interpreter is not giving the law the meaning most likely intended by its authors (based on all we know) but is instead ascribing a meaning derived from a restricted set of evidence. Nonetheless, rule of law considerations may support this less than wholehearted faithfulness. For instance, many support on policy grounds the practice of stare decisis in statutory and even constitutional interpretation, even though the application of stare decisis suggests that the authoritative interpreter is not acting as a faithful agent of the lawmaker.3 Nonetheless, whenever an authoritative interpreter follows stare decisis (or adheres to any other policy constrained interpretive posture), what the authoritative interpreter deems the law to mean is, in some sense, not what it really means—that is, not what the actual lawmakers meant by it.

A second possible position is to interpret the law as readers (the median reader?) actually do interpret it with whatever evidence, and with whatever misconceptions, they happen to possess about the actual author’s intentions. This position, while conceivable, appears morally undesirable. The authoritative interpreter is essentially deferring to some median man on the street, who knows less than the authoritative interpreter.

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3. Whenever the precedent incorrectly interprets the intentions of the lawmakers, application of stare decisis in subsequent cases is obviously inconsistent with courts’ being faithful agents of the lawmakers. (Of course, lawmakers might endorse stare decisis as a doctrine, even if stare decisis occasionally thwarts its will; but this does not mean its will is not thwarted in those instances.) Even when the precedent correctly interprets the intentions of the lawmakers, so that application of stare decisis in subsequent cases does not result in a departure from those intentions, the courts applying stare decisis will not be acting as the lawmakers’ faithful agents; rather, they will be acting as faithful agents of the precedent setting court.
interpreter about the actual author’s intended meaning. Moreover, the restrictions on the evidence available to those polled, and how those polled are selected, introduce indeterminacy or arbitrariness into this methodology. Finally, if the polling extends beyond a tiny number of people, it may, because of Arrow’s Theorem,4 lead to the result that there is no authoritative meaning.

A third posture is that of giving the law the meaning an idealized reader would give it. In other words, we construct an idealized reader, give her some evidence of actual authorial intent—not all, because then she would give the law its actual intended meaning—and then ask what intent she would ascribe to the author based on that limited set of evidence. Constructing an idealized reader looks arbitrary or indeterminate. Though textualists have sometimes advanced this idea, we do not understand the benefits of hypothesizing an ideal reader. It is difficult to see why we would do this rather than just restrict the evidence before the actual interpreter.

The first three positions leave an important role for the actual author. In all of them, authoritative interpreters are involved in a search, either directly or indirectly, for the intentions of the actual author. A fourth possible position is to have the interpreter construct an idealized author of the text and ignore the actual author. This position asks what an author with specified attributes would have meant by the law in question. One version of that position is Dworkin’s make the law “the best it can be,”5 which naturally becomes “the law just means what I would morally prefer that it mean.” There are other versions, however, depending upon what attributes we give our idealized author, including the language he speaks, whether he ever uses technical or secondary definitions, his facility with grammar and punctuation, and how rational and just he is. We think this interpretive posture suffers from arbitrariness and indeterminacy as well because by positing the right author, one can have text mean whatever one wishes.

We think the only plausible contenders are full blooded intentionalism and policy constrained interpretation. Whatever one chooses to call these postures, that is where the battle ought to be joined. The normative question ought to be whether (and to what extent) policy considerations ought to intrude into interpretation and cause constructed, authoritative

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meaning to diverge from the actual, authorial meaning. Whatever the
answer to this normative question, as a descriptive matter, we think it
clear that intentions must matter in interpretation.

I. THE CONCEPTUAL IMPOSSIBILITY OF INTENTION FREE TEXTUALISM

Self-described “textualists” hold a variety of positions on how one
ought to interpret legal texts. Indeed, there does not appear to be any
canonical description of textualism. At most, what unites textualists is
their stated refusal to consider the intentions of the laws’ authors to
determine what the laws mean. We shall argue that such IF textualism is
a conceptual impossibility—that authorial intentions constitute the
meanings of texts. If we are right, a charitable reading of textualists’
statements would not attribute IF textualism to them. Nevertheless, at
times, self-described textualists say things that appear to endorse IF
textualism.

Consider the most famous modern textualist, Justice Antonin Scalia,
and his discussion of textualism in A Matter of Interpretation.6 Justice
Scalia’s version of textualism seems to have three principal tenets. The first
is that a textualist searches for an “objectified” intent—the intent an idealized
reader who knows the entire corpus juris would gather from the particular
statute.7 The second is that textualists do not seek to enforce the “subjective
intent of the enacting legislature.”8 The third is that legislative history
should not be used as “an authoritative indication of a statute’s meaning.”9

The first is the most important principle, as the other two follow from it.
The reason for searching for an “objectified” intent is “that it 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.”10 After
all, “[i]t is the law that governs, not the intent of the lawgiver.”11

Legislators may intend whatever they want, “but it is only the laws that
they enact which bind us.”12 To govern by “unexpressed intent” is
tyrannical in the same sense that Nero’s posting of laws high up a pillar
was so: people will not be able to make sense of the law if they try to
discern the subjective intent of the legislature.13

6. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE
LAW (1997).
7. Id. at 17.
8. Id.
9. Id. at 29–30.
10. Id. at 17.
11. Id.
12. Id.
13. Id.
Justice Scalia derives the second principle from an examination of what judges actually do in practice. If the intent of the legislature mattered, then judges would not apply the rule that “when the text of a statute is clear, that is the end of the matter.” 14 Likewise, if legislative intent was the touchstone, judges would not assume that the enacting legislature was aware of all existing laws. Instead, they would pay attention to the text and the legislative history of the particular statute in isolation, for that is all the legislators likely had in mind. 15

The third principle follows directly from the first. If only objectified intent matters, then legislative history, which yields only indications of subjective intent, should not be viewed as relevant. 16 But, argues Scalia, even if the legislative intent was the touchstone of statutory interpretation, we should not look to legislative history to discern legislative intent. To begin with, on most contested matters brought before a court, there will be no legislative intent. On relatively detailed matters, it is “beyond belief” that a majority of both houses entertained any view. “For a virtual certainty, the majority was blissfully unaware of the existence of the issue, much less had any preference as to how it should be resolved.” 17 Moreover, legislative history is likely to be a highly unreliable indicator of any legislative intent that might exist. Members of Congress often do not read committee reports, much less prepare them. 18

Justice Scalia’s explication of textualism raises a series of questions. Is his version of textualism a quest for the intentions of the legislature with certain evidence barred from consideration (like legislative history), or is legislative intent completely irrelevant even when known with certainty? It appears on balance that Justice Scalia adopts the latter approach—actual legislative intent is always irrelevant. 19 We are unsure

14. Id. at 16.
15. Id. at 16–17.
16. Id. at 30–31.
17. Id. at 32.
18. Id. at 32–34.
19. However, at times Justice Scalia writes as if legislative intent does matter. See id. at 20–21 (discussing scrivener’s error doctrine and declaring that it is okay to correct statutes where there is a mistaken expression). We read his discussion of scrivener’s error as evincing concern for actual legislative intent, at least where there is supposedly a clear mistake of expression. Properly speaking, if legislative intent did not matter at all, statutes could not contain errors. After all, to speak of scrivener’s “error” or of legislative misspeaking is to suggest that what matters is not the objective meaning of the text but the intent of the person(s) who erred.

However, it is possible to understand Justice Scalia as instead claiming that an idealized reader will conclude that the authors (idealized or otherwise) made a mistake in
whether Justice Scalia is truly an IF textualist, however, because of his use of the concept of “objectified” intent. To speak of objectified intent might be to acknowledge that the intent of some author matters. Nonetheless, his reference to “objectified” intent, when placed in the context of the other statements quoted above, can be taken to mean that the text is meaningful apart from the actual author’s intent.\(^{20}\)

Our object here, however, is not exegetical. We do not care whether Justice Scalia—or other textualists such as John Manning\(^{21}\)—really are IF textualists. What we want to show is that such a position is a conceptual impossibility. We leave it to others to determine if any self-described textualist actually holds the position we discredit.

\[\textit{A. Argument One: Texts Cannot Declare the Language in Which They Are Written}\]

One cannot attribute meaning to marks on a page or to sounds without reference to an author, actual or idealized, who is intending to communicate a meaning through the marks or sounds. Consider the question of how to identify the relevant language of some communication. IF textualists cannot explain how they identify the language of the text they wish to interpret. Apparently, they assume that identifying the relevant language is unproblematic. Seeing the word “canard,” an IF textualist who speaks English will assert that the word means “fib.” After all, that is the ordinary, public meaning that would come to mind for the well-informed, reasonable English speaker. But a French textualist will attribute a different meaning to the word. To the French IF textualist, “canard” clearly means “duck” because that is the ordinary, public meaning for the well-informed, reasonable French speaker. Which of

expression and will fix it regardless of actual legislative intent. For instance, suppose a bill enacted on January 1, 2013 contains a sunset of January 1, 2004. Even if one could prove that the entire Congress actually wanted to have a sunset of January 1, 2004 (because they really did not want the bill ever to become operative), the idealized reader might find a “mistake in expression” and correct it to read January 1, 2014. Here, it is possible for the idealized reader to find and correct a legislative “error” where there is none.

\(^{20}\) If intent plays a role in Scalia’s textualism, Scalia might believe that interpreters ought to search for the intentions of some idealized author. We discuss this interpretive posture in Part II of this paper.

\(^{21}\) Professor Manning has claimed that intent is a necessary concept for textualists. See John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 16–17 n.65 (2001). He suggests that the interpreter is to imagine a legislature that enacts laws against a backdrop of interpretive conventions establishing that actual legislative intent is irrelevant. See id. Thus, the interpreter is supposed to assume hypothetical legislators who intend that their subjective intentions be irrelevant in interpreting the statutes they pass. We doubt the coherence of a legislature’s intention that its own intentions be disregarded. The position is paradoxical.
these IF textualists is right? We believe that IF textualists cannot meaningfully answer this question.\(^\text{22}\)

Along the same lines, consider the following amusingly bewildering statement: “I am speaking English, not Schmenglish,” which in Schmenglish means “I am speaking Schmenglish, not English.” Is this statement in English or Schmenglish, and how will IF textualists decide? Once again, we do not believe that IF textualists have an answer, or at least an answer that does not smuggle in reference to authorial intent.

Our claim is that we must posit the existence of some author if we are to attribute meaning to these statements. If we know the real author of “canard” generally speaks French, we most likely would conclude that “canard” in this context means “duck.” If the author usually speaks English, we most likely would conclude that it means “fib.” If we are unaware of (or indifferent to) the author’s usual tongue (and likely intentions), we may imagine what we would have meant had we spoken the term, imagining ourselves as the authors.

This is not merely a problem across languages. Even within English, these issues arise. If someone walks into a restaurant and declares “I would like some chips,” what is meant by “chips?” Once again, we think we should understand “chips” by reference to the intentions of the speaker. If he is American, we might assume he means something like potato or tortilla chips. If he is English, we might assume that he means what Americans generally call french fries. If we do not care about satisfying the speaker’s request, we might decide that the sentence means what it would had a techie uttered it, in which case “chips” might refer to microchips.\(^\text{23}\)

\(^\text{22}\) It is possible that IF textualists might claim that both textualists in our hypothetical are right. It all depends upon the audience one assumes. If one assumes the relevant audience speaks English, then the reasonable person in that audience would read “canard” as “fib.” But this gives up the game because it constitutes an admission that there is no objectified meaning. Indeed, even within a particular language one can narrow the audience in a number of ways and yield different meanings. Of course, it is our contention that the correct audience to assume is that audience that would attribute the meaning intended by the author(s).

\(^\text{23}\) Textualists are likely to respond that modern textualism takes into account the “context” in which the language was spoken or written, thereby eliminating some of the indeterminacy and indicating whether microchips, potato chips, or fries is the proper meaning. As we explain later, we believe that invocations of context amount to unacknowledged invocations of authorial intent.
B. Argument Two: Texts Cannot Declare That They Are Texts

An even more fundamental problem for IF textualists is that texts cannot declare that they are texts or even declare which part of the putative text constitutes the text. Suppose a monkey typed the U.S. Constitution in our casebook. Are the ink marks made by the typewriter keys a text? We think not, unless one posits a hypothetical author with intent to convey a meaning. Without an author, real or hypothetical, intending to convey a meaning through these marks, our seemingly grand Constitution is nothing but a randomly generated mass of inked shapes that merely resembles a text. Or suppose a Martian composed the Constitution in our casebook, and that Martians treat what we take to be spaces between letters and words as the actual letters and words, and regard what we take to be letters and words as the actual spaces. If that is correct, then the “text” in our casebook is quite different from the text that we assume. The text that we assume to exist is actually no different in kind from meaningless marks made by waves on the beach, or by cloud formations in the sky; it is merely the meaningless residue of the Martian’s text.

Our simple point is that one cannot look at the marks on a page and understand those marks to be a text (that is, a meaningful writing) without assuming that an author made those marks intending to convey a meaning by them. The reason why no one treats the Constitution as a bunch of unintelligible lines and curves is because everyone assumes a particular kind of author for the Constitution. A few originalists latch onto the Constitution’s actual drafters (the Framers); others focus on those who purported to make it law (the Ratifiers); perhaps a majority insist on a search for “original meaning,” referring thereby to the meaning that an idealized, contemporary reader would have attributed to the document.24 “Living Constitution” advocates typically assume an author with the desires and fears that animate them and hence read the Constitution as if they had written it. Still others seem to rely upon multiple authors, sometimes reading portions of the Constitution as it would have been understood by the Founders, and other times reading the Constitution as if it were written yesterday by a modern, well-meaning chap. Whenever someone reads the Constitution or any other text, he explicitly or implicitly does so with an author in mind. And he has no choice but to do so.

24. Given our argument about the necessity of envisioning an author, the idealized reader contemplated by some originalists will have to hypothesize an author (actual or idealized) to make sense of a putative text. Hence, the idealized reader construct does not eliminate the need for some kind of author from which one can derive meaning. We explore this type of textualism in Part II.
C. Argument Three: Meaning Cannot Be Autonomous from Intent—One Must Always Identify an Author

This argument builds upon the previous one. Consider some people who come upon marks on the ground that are shaped like a “c,” an “a,” and a “t.” They begin to debate whether the marks mean “domestic tabby cat,” “any feline,” or “jazz musician.” They are then told that the marks were made by water dripping off a building. Their debate over meaning should now cease: no author, no meaning.25

Suppose now that they know that a person made the marks. They encounter him and tell him of their debate. He tells them that he never intended to make letters. Rather, he was marking out the contours of patches of a vegetable garden. The debate over meaning ought to cease: no intended meaning, no meaning.

Now suppose that the person did seek to make a word. The people debate the meaning of “cat.” The “author” then informs them that he was writing an ode to his beloved tabby. That should settle the debate: “cat” here means tabby. The alternatives—any feline and jazz musician—are just as much off the table as they were in the previous examples of no author and no intended meaning.

The same point applies to other examples of “mindless” “texts.” If “trunk” is produced by an elephant who paints with his trunk, or by legislators each drawing letters randomly from a hat, it is useless to ask whether it means the main axis of a tree, the rear storage compartment of a car, or the nose of an elephant, or even what language it is in. Without an author who intends a meaning, such marks are meaningless. “Texts” without authors and intended meanings are not texts; and texts with intended meanings are texts only with respect to the intended meanings.26

25. If they continue to debate the meaning, they must be debating what the marks would have meant if, contrary to fact, an author intending to convey a meaning had made them. Because they are each free to imagine a different hypothetical author, there is no single correct answer to the question they are debating. Only if they agree on the characteristics of a hypothetical author—for example, what would most jazz columnists have meant by “cat”—does it become answerable. But notice that even if they play this game, they are not debating the meaning of the marks made by the dripping water; rather, they are debating what the marks would have meant had they been made (or appropriated) by particular people intending to convey some meaning thereby.

26. Put a different way, texts are individuated by their intended meanings. Consider the word “cats” that I cut out of a magazine article on “The Big Cats of Africa” and paste it into my ode to tabbies. In the magazine article, those marks meant one thing—lions, leopards, and cheetahs—because that is what the article’s author meant by
D. Argument Four: Texts Can Have “Deviant” Meanings
Because Those Meanings Are Intended

How did “cat” come to mean jazz musician? Because it was used by some people with the intent that it be understood as referring to a jazz musician. That is ultimately how all words acquire their meanings. And the word “cat” meant jazz musician the very first time it was used with such an intention, even before it was listed as a definition in the dictionary. Similarly, if a speaker says “Gleeg, gleeg, gleeg,” it means what the speaker intended it to mean, even if to others it sounds like nonsense.27 And if your mom is Mrs. Malaprop, and she asks you to make sure the “autobahn” is pulled next to the sofa when she comes to visit you—and you know that she intends for you to move the “ottoman”—then if you are a dutiful child, you will pull up the ottoman and not attempt to relocate a German highway.28 “Strategery” has entered into common use (at least in some circles) as a synonym for “strategy.” It acquired that meaning as soon as Will Farrell of Saturday Night Live so used it; and it continues to have that meaning because President Bush, his political aides, and the public continue to so use it.

E. Argument Five: Unexplained Exceptions to IF Textualism: The Use of Context, the Avoidance of Literal Absurdities, and Casualness Regarding Punctuation

People who might be IF textualists frequently soften their textualism’s hard edges by adopting a number of moves that seem inexplicable given IF textualist premises. For instance, such textualists are quick to admit that texts must be read in context. They agree that a “keep off the grass”

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

28. Is Mrs. Malaprop misspeaking in English, or is she speaking “Malapropenglish”? Is slang that has yet to be validated by the Oxford English Dictionary “English” or something else? We cannot see that this is answerable in any way other than by arbitrary stipulation. What we can say is that it does not matter insofar as we are trying to discern what Ms. Malaprop means by “autobahn.”
sign usually means something different on a lawn from what it means over a drug counselor’s office. But why should we take context into account? And what additional information do we include within “context”?

The additional contextual information is, unsurprisingly, information that provides evidence of the intent of the actual author. For example, writing in dissent in Smith v. United States, Justice Scalia invoked context to adopt a narrow reading of the phrase “using a firearm” as it appears in a federal criminal statute. But the context he invoked clearly was meant to reveal the intentions of an author:

When someone asks, ‘Do you use a cane?’, he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of ‘using a firearm’ is to speak of using it for its distinctive purpose, i.e., as a weapon.

Properly speaking, an IF textualist should be unconcerned with what the author intends as opposed to the objectified intent—what the utterance means to a reasonable user of the language. But here Scalia seems to invoke the speaker’s intent.

We believe that context is universally regarded as relevant only because it is evidence of authorial intent. Indeed, the 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 same general criticism applies to invocations of the absurdity and scrivener’s error doctrines. Those who seemingly advance an IF textualism use these doctrines to avoid the odd readings that application of such a textualism would yield. In so doing, these scholars once again back away from their strong textualism by bringing in authorial intentions through the backdoor. For to say that some reading is absurd and therefore ought to be rejected is to say nothing more than that the author of the text could not have intended such a reading. Recognizing the intentionalist foundations of the absurdity doctrine, some textualist

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31. Id. at 242.

32. Keeping in mind the earlier point that the language is itself a product of authorial intent, language cannot exist, much less be understood, in the absence of intent.
scholars (to their credit) have criticized prominent judicial textualists for their recourse to the absurdity doctrine because implementation of that doctrine is ultimately a means of effectuating the intent of the legislature.\footnote{John F. Manning, \textit{The Absurdity Doctrine}, 116 \textit{Harv. L. Rev.} 2388, 2391 (2003); John C. Nagle, \textit{Textualism’s Exceptions}, \textit{Issues in Legal Scholarship: Dynamic Statutory Interpretation, Article 15}, at 1 (2002), available at \url{www.bepress.com/ils/iss3/art15}.}

Even the most ardent strong textualists cling to the scrivener’s error doctrine, however.\footnote{John C. Nagle is the only textualist we know of who has rejected the scrivener’s error doctrine. \textit{See} Nagle, \textit{supra} note 33, at 4.} In his recent attack on the absurdity doctrine, John Manning briefly discusses and defends a narrow scrivener’s error doctrine in a footnote. “[W]hen an internal textual inconsistency or an obvious error of grammar, punctuation, or English usage is apparent from reading a word or phrase in the context of the text as a whole, there is only the remotest possibility that any such clerical mistake reflected a deliberative legislative compromise.”\footnote{See Manning, \textit{supra} note 33, at 2459–60 n.265.} But the existence of a legislative compromise must be irrelevant to the IF textualist. IF textualists claim that when Congress passes legislation, it does not matter whether any member has actually read the legislation. Hence, it cannot matter whether some provision was an intended compromise as opposed to a mistake. Moreover, so far as the IF textualist is concerned, there can be no “errors” in statutory text. The text results from the clash of interests, and it is whatever it is, warts and all. To speak of errors, mistakes, or of a “legislature [that] obviously misspoke,” as Justice Scalia has,\footnote{See \textit{Scalia}, \textit{supra} note 6, at 21.} is to have a baseline of legislative intent, for it is only against that baseline that it is possible to speak of legislative misspeaking.\footnote{In a world where judges actually applied IF textualism, legislators opposed to particular bills would have incentives to slip in “mistakes,” knowing that true blue intention free textualists would not “correct” them. We mention this, not as an argument against intention free textualism, but as an argument that one cannot regard apparent “mistakes” as necessarily unintentional. Some “mistakes” might well be intentional.}

For an IF textualist, a statute means what it would mean to “a skilled, objectively reasonable user of words.” So if a statute containing ten provisions about “cars” has an eleventh dealing with “cas,” the eleventh should be understood as gibberish, no more meaningful than Judge Bork’s Ninth Amendment inkblot.\footnote{We are reminded of a Gary Larson cartoon that by itself is a reductio of IF textualism. In it, a plane is flying over a desert island on which a haggard, disheveled man has carved in the sand H-E-L-F and is now waving his arms at the plane. The caption, representing the co-pilot’s words to the pilot, reads “Wait! Wait! . . . Cancel that, I guess it says ‘helf.’” The co-pilot is obviously a committed IF textualist. \textit{See} Larry Alexander, \textit{All or Nothing at All? The Intentions of Authorities and the Authority...}} To correct the mistake is to pay...
homage to the false god of legislative intent. One would be either implementing actual legislative intent or implementing the intent of some hypothetical legislator (an author who intended to refer to cars). Either way one would be abandoning the stand against the use of intentions in discerning the meaning of the text.

In this vein, consider the embarrassing (for IF textualists) Seventeenth Amendment. The Seventeenth Amendment famously replaced state appointment of Senators with popular election of Senators. But if one paid no attention to the actual authors’ intentions, the amendment would seem to have required popular election of the Senate for a six-year period only. If one completely unaware of the intent behind the Seventeenth Amendment were asked to make sense of it, it would seem that he would read it to require a temporary six year trial of popular election for Senators. We believe that those who seemingly champion IF textualism ignore the rules of punctuation in reading the Seventeenth Amendment for the same reason they ignore absurd readings—because they know the actual authors did not intend them. Invocation of context only helps the textualist if the context supplied to the interpreter goes to the intention of the Seventeenth Amendment’s authors and shows the punctuation to be a mistake. Otherwise, it is hard to see how one can view the amendment as making a permanent change in how Senators are selected.

Our claim is not merely that seeming proponents of IF textualism have embraced a host of exceptions that are inconsistent with IF textualism’s core premises. Others have already made that assertion. Instead, our claim is that these exceptions all point in one direction—toward a


39. Some might argue that we are caricaturing textualism by insisting that faithful intention free textualists cannot rely upon the absurdity and scrivener’s error doctrines. After all, some such textualists believe that they can hold onto such doctrines. We hope that we have not caricatured textualism. Instead, our goal is to point out how IF textualism would apply shorn of its ill-fitting excrescences.

40. U.S. Const. amend. XVII, § 1 (“The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote.”).

41. That is the reading produced by giving the commas the meaning that standard grammar would give them. See Peter Jeremy Smith, Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammarian Were a Strict Textualist?, 16 Const. Comment. 7, 14 (1999).

42. See, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation 41–47 (1994).
healthy (but underappreciated) concern for authorial intent. That is why we believe that many textualists, despite their protestations to the contrary, are ultimately interested in the intentions of actual authors. What produces confusion is that although textualists often claim that authorial intentions do not matter, operationally they act as if authorial intentions do matter. This explains our extreme reluctance to characterize any self-described textualist as an IF textualist.

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IF textualism is an impossibility. Although some textualists might claim to be completely unconcerned with authorial intentions, they have no choice but to attend to them. Indeed, many textualists seem to pay attention to legislative intent in particular when they invoke the absurdity and scrivener’s error doctrines. But the inevitability of recourse to intentions is also true in a more fundamental way. We cannot know the language of the text without reference, at least implicitly, to the language (and its meanings) that the authors intended to speak, and without allowing for the possibility—indeed, probability—that the authors intended a nonstandard variant of some standard language. Indeed, we cannot identify marks or sounds as texts without implicitly assuming authors and intended meanings.

II. THE REAL ISSUES IN INTERPRETATION:
EVIDENCE AND IDEALIZATION

If IF textualism is an impossibility because one must always have recourse to some author, real or otherwise, what other positions could textualists be advocating? We know that they are rejecting full blooded intentionalism of the sort in which interpreters gather all the evidence available of the authorially intended meaning. That position is their foil. Moreover, their position would not be a fundamental alternative to intentionalism if their claim were merely that one ought to exclude from consideration on grounds of unreliability some evidence of the authorial intent—for example, some forms of legislative history. No full blooded intentionalist should advocate use of unreliable evidence of authorial intent.

As we see it, this leaves textualists with four possible positions. First, textualists might wish to exclude certain evidence of authorial intent for reasons other than its unreliability but otherwise interpret as would an intentionalist. This position is one that we believe is tenable, although it perhaps problematically rests on norms that must be deemed superior in authority to those posited by the lawmakers whose laws are being interpreted.
Second, textualists might advocate interpreting laws based on asking some sample of readers—or some median reader—what meaning they believe the actual authors intended. This position is unattractive for a host of reasons.

Third, textualists might advocate interpreting laws based on the intentions that a purely hypothetical construct—an idealized reader—would attribute to the law’s author. We find this position, to the extent it differs from the first one, to be quite problematic.

The fourth textualist position would have the interpreter read the text as if it were written by, and thus carried the intended meaning of, an idealized author. We find this position to be perhaps the most problematic of all.

A. Position One: Textualism as Rule of Law Restricted Intentionalism

According to this version of textualism, the interpreter should seek out authorial intent, but in doing so should refuse to consider certain kinds of evidence thereof, even if reliable. For example, we might have reliable evidence that a law, which appears to be written in standard English and which can be given a sensible meaning therein, was actually written in nonstandard English, or Schmenglish. We could imagine an interpretive norm to the effect that lawmakers will be irrebuttably presumed to use standard English in writing laws. We might tell a rule of law story about the justification of such a norm, such as the need for the general public to know the laws, and so forth. And we might give a similar rationale for excluding even reliable legislative history—that is, that such history is not generally available, or that it can lead to nontransparent manipulations of the lawmaking process.

We find this version of textualism coherent and perhaps plausible. To accept it, however, we would need to see clear statements of the specific norms excluding various types of evidence of lawmakers’ intentions and what the provenance and authority of those norms was deemed to be. Notice that because the evidence of authorial intentions excluded by such norms is reliable evidence, the interpreter will end up in a situation in which the authoritative meaning of the law is different from what the interpreter knows was the meaning intended by the lawmakers. To many, this will not be a devastating criticism; for in applying stare decisis to statutory and constitutional interpretations by courts, the courts countenance a similar gap between authoritative meanings and actual meanings. Moreover, if our interpretive norms exclude certain kinds of
evidence of lawmakers’ intentions, the lawmakers will legislate in light of those norms, thereby narrowing the gap between the meaning they actually intend and the meaning that they will be deemed to have intended. (For instance, if they know their intentions will be interpreted as if they had expressed them in standard English, they will try to use standard English and not Schmenglish in writing the laws.) Still, the gap between what the interpreter knows the lawmakers actually intended and what, per these norms, the interpreter will deem them to have intended remains a constant possibility under this version of textualism.

B. Position Two: Textualism as Man on the Street Interpretation

Textualists could be seen as advocating interpreting legal texts as would some sample of average members of the public. Such a method might be thought by some to have rule of law benefits, particularly in giving the average citizen clear notice of what the law means. We believe that any such theoretical benefits are largely chimerical because the position faces a devastating problem of indeterminacy. One aspect of this problem relates to how much background context we ought to provide to the average interpreter. If we take the law to mean whatever it would mean to a collection of people who are provided no context whatsoever—other than, perhaps, that its authors were English speakers and enacted the law on a given date43—then we might as well construct a computer program that incorporates dateable dictionaries and rules of syntax, grammar, and punctuation and ask the computer to spit out the law’s meaning. On the other hand, if we allow those sampled to use their varying understandings of the law’s context—or if we allow them to seek further evidence of authorial intent (and if so, how much?)—then either their readings will converge on the authoritative interpreter’s (for example, the judge’s) reading, in which case, why poll?, or the readings will vary from one person to the next. If the number of people polled is more than two, and the number of possible statutory meanings is more than two, we may get no dominant meaning from the polling.44 In that case, the law will have no authoritative meaning, even though the authoritative interpreter (for example, the judge) will be quite confident about the meaning intended by the lawmakers. Whatever the benefits of

43. The requirement that the language and date be identified—so that those polled know which language’s dictionary and grammatical rules to consult—is just a reflection of the general point established in Part I, namely, that the meaning of texts is a product of authorial intent, and that therefore acontextual meaning is an impossibility.

44. This is because of Arrow’s Theorem. See Arrow, supra note 4. Furthermore, the number of possible meanings of statutes, as opposed to words, typically will be greater than two.
such an interpretive method—that is, whatever advance notice, however uncertain, might be provided to the public about the law’s meaning—we do not believe that officials should delegate the assignment of meanings to laws to random individuals with varying understandings of what the lawmakers were seeking to accomplish.

Nor does asking one median member of the public instead of several members make the polling method more attractive. It does mitigate the problem of no dominant meaning. But it substitutes an equally daunting problem, namely, that of identifying who is the “median” member of the public. Because there is an indefinite number of dimensions on which one can identify a median member of the public, the concept of a median member of the public is indeterminate. We will derive different authoritative interpretations depending upon the qualities of the median man on the street. Given the indeterminacy of meaning resulting from man on the street interpretation, we view the supposed notice benefits of this mode of interpretation to be largely imaginary. The man on the street method will not make the public more aware of the law’s meaning. That is because the public will not be able to predict the meaning that will emerge from the method due to the indeterminacy of the notion of the median member of the public on which the method is based. And given that the median member of the public, however designated and however much evidence of authorial intent he is allowed to seek, will be less knowledgeable regarding what the lawmakers meant by a legal text than the executive or the judge, it is not at all evident why we would want the latter to defer to the former in the absence of the benefits of determinate advance notice.

C. Position Three: The Idealized Reader

Textualists frequently have recourse to the construct of an idealized contemporaneous (with the enactment) reader and how he would interpret the text. Judge Easterbrook has said that textualists interpret language by asking how “a skilled, objectively reasonable user of words” would have understood the text. Justice Scalia has claimed that judges should read the federal statutes “as any ordinary Member of Congress would have read them, and apply the meaning so determined.”45 But of course, textualists do not end here. Scanning the

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45. The obvious and profound differences between these two idealized readers highlight the general failure of textualists to specify the characteristics of the idealized reader.
case law. John Manning notes two addenda. Textualists consider the context of the statute and also take into account background legal conventions. Hence, the idealized reader is a lawyer (or at least someone who knows the standard legal conventions) who knows the factual background surrounding the statute’s enactment.

We have already observed that supplying the idealized reader the “context” of the statute is but a backdoor means of reintroducing the author’s intent. Here we wish to make different points about the use of the idealized reader. To begin with, the idealized reader will search for clues illuminating the actual author’s intent. Indeed, we think that people, when asked to interpret something, typically seek the actual author’s intent as the source of meaning. (Recall the “autobahn next to the sofa” example.) This raises the possibility that textualists, in creating a construct to generate an “objective” meaning, have instead just created an abstraction that merely filters authorial intention. The more (direct or indirect) evidence an idealized reader is given of what an author meant by a text, the more the reader will read the text as meaning what the author intended.

Moreover, even if the textualist forbids the idealized reader from seeking the intent of the actual author, the idealized reader will still have to search for some intent. If we are correct that one must envision an author whenever attempting to make sense of text (indeed to even identify it as such), the idealized reader will have to imagine a hypothetical author (or authors). Though there may be certain advantages to treating a text generated by a multi member body as if one person created it, one of those advantages is not an ability to dispense with the search for intent.

Assuming that the idealized reader selects a hypothetical author (rather than multiple authors), there is a benefit to textualism’s abstraction. With the selection of one author, it becomes much more likely that every statute has a meaning. After all, the more authors a text has, the more likely it is that there is no shared intent as to the meaning of the text. And for the intentionalist interested in authorial intent, if there is no intent that is shared by the requisite number of legislators, the text has no authoritative intention to give it meaning and therefore has no meaning. Hence, if one prefers more meaningful legislation to less, there is an advantage to hypothesizing one author when there are multiple real authors.

46. As noted earlier, some people might eschew actual authorial intentions, hypothesize an author, and then seek to divine this imagined author’s intentions. But if the actual author’s will were authoritative for the interpreter—as it typically is in one’s mother’s requests, and as it is thought to be when dealing with statutes and constitutions—then the actual author’s intentions would be the logical source of meaning.

47. Of course, this assumes that we are better off with more legislation rather than
Another potential benefit arises if we require that the idealized reader be an average member of the general public. In this situation, if the law would be incomprehensible to members of the general public, then there is no law, even if a well-versed lawyer would be able to tease out some meaning. Moreover, this approach has the benefit that people generally might know what the law requires without having to consult with high priced experts or go to court.48

Unfortunately, most modern textualists assume that their idealized reader knows the standard legal conventions and the entire corpus juris. Hence, the meanings generated by this reader are unlikely to have any of the advance notice and rule of law benefits mentioned above for most average folk are unlikely to know either standard legal conventions or the entire corpus juris. If the average Joe attempts to read statutory text, he is often likely to identify a meaning that is entirely different from the one generated by the textualist’s idealized reader. It seems to us that the only benefit secured by modern textualists is the avoidance of the problems with discerning or securing multiple individual intent.

Of course, this “average reader” approach is itself not strictly empirical, nor is it determinate. It requires us to determine how the median reader—not the average reader, since meanings cannot be “averaged”—would read a legal text. To be determinate, we would have to spell out all sorts of characteristics of the median reader, such as whether he had a median IQ, had a median knowledge of public affairs (which is meaningless, since there is no unitary scale of such knowledge), was of a median age, had a median geographical location (again a meaningless notion), had a median education (again, meaningless, since there is no single educational continuum), and so forth. The notion of the idealized reader is, indeed, radically indeterminate. And making it more determinate, without making the idealized reader into someone who actually knows what we know about the authorial

less. A textualist extremely dubious of the concept of collective intent might say that we are indeed better off with more legislation rather than less, and we would have much less if legislation were treated as meaningless in the absence of a collectively shared legislative intent. Other textualists might be happier with less legislation.

48. This mode of interpretation differs from the mode discussed in the previous section in that in the previous section, the law means whatever it means to a specific, real, “average” citizen. Here we replace a flesh and blood interpreter with a hypothetical reader. The judge is supposed to determine what a hypothetical, average citizen would make of a statute. Of course, our criticisms of the average citizen approach mentioned in the previous section apply equally here. How the judge constructs the qualities of the hypothetical, average reader will affect the resulting interpretations.
intent, is likely to produce arbitrary stipulations, such as that the idealized reader went to public high school in Delaware and reads the Washington Post front page cursorily but not the New York Times.49

Finally, although intentionalists have the aggregate intent problem and must face the fact when there are multiple lawmakers, it is possible that on some occasions, when no dominant authorial intent and hence no dominant meaning will exist, textualists of the idealized reader type have a mirror image problem, the problem of a surfeit of meaning. For the idealized reader whom the textualist stipulates, precluded as that reader is from looking to all the evidence of actual authorial intent, may conclude that a text has two or more meanings that are equally supported by the evidence to which he is restricted. For the textualist, the text then just does have these multiple meanings. There is no deeper metaphysical fact, like intent, of which these multiple meanings are merely evidence. The multiple meanings just are the metaphysical fact at issue. The text just means two or more things, however silly or pernicious that is as a practical matter.50

D. Position Four: The Idealized Author

The final position that a textualist might hold is that legal texts should be interpreted by reference not to an idealized reader of the text, but by reference to an idealized author. In other words, legal texts should be interpreted to mean what they would have meant had they been authored by this single idealized lawmaker rather than by the one or several actual lawmakers.51

The problems with this approach should be obvious. In order for it to yield interpretations, we need to specify the attributes of the idealized author. What language does he speak? Does he always use primary

49. The indeterminacy of the idealized reader is due to the countless ways that her traits can be stipulated. The indeterminacy of the average or median reader considered in the preceding section is due to the countless dimensions along which one can be average or median, some of which (for example, geographical location) do not admit of averaging or have a median.

50. Occasionally, intentionalists likewise will face situations where evidence of meaning is in equipoise. Yet intentionalists can take satisfaction in knowing that intentionalism theoretically always yields no more than one meaning, the meaning attributable to the author of the text. (It may yield no meaning when multiple authors mean conflicting things.) So although textualism sometimes will yield multiple meanings, intentionalism will always yield no more than one meaning, even if that meaning is sometimes difficult to discern.

51. Our colleague Michael Rappaport claims to hold a version of the idealized author position, at least for federal constitutional and statutory law, based on his understanding that such an interpretive stance was intended by the Framers or Ratifiers of the Constitution. In other words, Rappaport, applying full blooded intentionalism, ends up with textualism of the idealized reader variety.
definitions of words, or does he sometimes (when?) use secondary definitions, or technical definitions, or terms of art? Is his grammar and punctuation perfect? How rational is he? How just? And so on. How we construct the idealized author will determine what the authoritative interpretation is. And the obvious question then is why not construct this idealized author to be ideal? In other words, why not, as Ronald Dworkin advocates, “interpret” every law to be the best law it can be?52 And if we don’t get the best law from assuming the lawmaker is writing in standard English, why not assume the lawmaker is writing in Schmenglish, a language in which the law would be ideal from the interpreter’s vantage point?53 We think this natural progression leading to what is in effect the reauthoring of the law by the interpreter is a reduction of the position and surely a horrific prospect for self-styled textualists.

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These four positions that textualists could be advocating, given the impossibility of IF textualism, appear to us to exhaust the possibilities. Positions two, three, and four are, we believe, difficult to defend, even if they can be made determinate. Position one, however, is at least a tenable position, though it leads to the possibility that the authoritative meaning of the law can differ from the meaning we know was intended, perhaps by all the authoring lawmakers. That does not mean that the position is normatively unattractive. But it does mean that relative to a full blooded intentionalist, a policy constrained interpreter of the position one variety is less than a faithful agent of the lawmaker.

III. CONCLUSION

Sometimes seeming IF textualists make the strong claim that only the
text of statutes is law, and that intent, authorial or otherwise, is not. This is said to follow from constitutional text and structure, where the Presentment Clause\(^5\) describes how to make law and what constitutes the law. Legislative intent (among other things) never goes through bicameralism and is never presented to the President, or so it is claimed. Hence, it is not law and must be irrelevant to questions of statutory interpretation. End of inquiry.

Yet this account of what is relevant to statutory meaning is entirely too simplistic. Everybody, textualist or otherwise, looks beyond the four corners of a statute to discern its meaning. Textualists look at dictionaries, context, the extant corpus of law, and their own vocabularies and experiences, among other things. Though none of these goes through bicameralism and presentment, they are legitimate considerations nonetheless.

These “extratextual” factors are legitimate for the reason that a statute is not simply (or even primarily) its text but is principally its meaning. Statutes forbid, compel, or authorize. Texts alone do not accomplish these tasks; meaning does. The text is just a means of conveying meaning, just as a pictogram or utterances are methods of conveying meaning. All of the extratextual factors discussed above help illuminate a statute’s meaning; and therefore, though they are extratextual, they are not “extrastatutory.” Those who consult these sources, textualists or not, have not run afoul of the Presentment Clause.

If laws are meanings, and not the text standing alone as a set of marks or sounds; and if we are right that meaning is the product of and cannot exist without intent; then one must inevitably search for intent to give meaning to laws. Accordingly, searching for intent as a method of determining legal meaning is no more illegitimate than examining dictionaries and the like to discern legal meaning. More to the point, the Presentment Clause throws up no obstacles to intentionalism.

Though we have argued that one must search for intent in order to find meaning, we have not said much about what constitutes good or bad evidence of meaning. An intentionalist may choose to exclude some evidence about authorial intentions on the theory that the evidence may be more prejudicial than probative or may be prone to manipulation. Hence, IF textualists may be correct in concluding that one ought not examine legislative history in finding statutory meaning. But IF textualists would be correct for the wrong reasons. They would be correct not because intent (including legislative history) is irrelevant to statutory meaning, but because legislative history might be an unreliable indicator of authorial meaning. We do not have any final views on the

\(^{5}\) U.S. Const. art. I, § 7, cl. 2.
value of legislative history in discerning statutory meaning. We just note that the disputes about the merits of IF textualism and intentionalism are not primarily about the use of legislative history.

In sum, to implement a statute, one must first discern its meaning. In discerning statutory meaning, one inevitably will have to consult things beyond statutory text. The dispute between textualists and intentionalists superficially concerns which things beyond the text one may examine to determine meaning. But the disagreement is much deeper than that. If a law is but its meaning and meaning is the product of intent, then discerning intent must be the goal of every legal interpreter. The normative question must be whose intent matters: the intent of the actual lawmakers or that of some construct.
APPENDIX I: TEXTUALISM AND THE FAITHFUL AGENT PREMISE

Textualists have claimed that textualism “starts from the faithful agent premise—that a federal court is responsible for accurately deciphering and implementing the legislature’s commands.”55 However, “textualists believe that when a statutory text is clear, that is the end of the matter.”56 Borrowing from interest group and game theory, textualists cite several reasons for enforcing objectified intent rather than authorial intent. For instance, “in a complex legislative process that includes agenda manipulation and logrolling, it is impossible to reconstruct what a legislature would have ‘intended’ if put to a choice between the letter and purpose of the law.”57 Moreover, textualism enforces legislative compromises that come from the clash of political interests. Resort to intent or purpose has the potential to upset these compromises.58 Finally, Congress might choose to use rules rather than standards, and when it chooses to do so, interpreters should not allow an elusive search for intent to potentially upset the decision to have an objective rule.59 Hence, textualism is more faithful to Congress than are modes of interpretation that resort to intent or purpose, or so some textualists have claimed.

Contrary to the claims of textualists, textualists are not faithful agents of Congress. Textualists rightfully presume that Congress is composed of individuals who know English and who know general legal conventions about how the courts will read statutes. Hence, in the ordinary course, Congress will choose a set of marks that when interpreted by the reasonable reader will generate the meaning that members intended to convey. But if Congress mistakenly provides that “carp” shall be fitted with emission controls rather than “cars” as the members of Congress intended, textualists, eschewing evidence of what Congress intended, may read the law to require emission controls on fish. This mode of interpretation is more accurately described as being faithful to a hypothetical author rather than to the actual authors.

To see the unfaithfulness of textualism, consider this analogy. If a grandmother requests that her grandson not marry “outside the faith,” by which she means that her son should marry a Lutheran, the grandson who knows what his grandmother means by “the faith” is unfaithful to his grandmother’s wishes if he subsequently marries a Catholic. That is

55. Manning, supra note 21, at 7.
56. Id.
57. Id.
58. Id.
59. Id.
so even if a reasonable ecumenical, American listener would proclaim that Catholicism and Lutheranism are both part of the same faith, namely, Christianity. The grandson may protest that he is being faithful to her objectified meaning, but he has merely allowed his grandmother to choose the vocalizations and has delegated the meaning of her request to the hypothetical reasonable listener. He might even declare that holding his grandmother to objectified meaning will give her the proper incentives to follow standard English usage and grammar—she will be a better English speaker for it. But in the end, whether or not he has been faithful to some objectified meaning, he clearly has been unfaithful to her.

Textualists acknowledge that Congress has the right to place a set of marks on a page. But they forbid Congress from selecting the meaning of those marks. Instead, the meanings of those marks are supposed to be fixed according to a set of rules that are (relatively) independent of Congress. Should Congress intend secondary or nonstandard meanings, it may well have its will thwarted; for the reasonable reader, if so constructed, may generate an objectified meaning that ignores Congress’s intended secondary or tertiary meanings. Whatever the merits of textualism, it does not strike us as a theory where the interpreter acts as a faithful agent of Congress.
APPENDIX II: THE LAWMAKER’S INTENDED MEANING VERSUS THE LAWMAKER’S INTENDED GOALS

The intentionalist interprets legal texts, like all texts, by reference to their intended meanings. Legal texts not only have intended meanings, however; legal texts are meant to achieve certain goals. But the goals they are meant to achieve are not the same thing as the meanings they are intended to convey.

Consider again your mom’s request that you put the “autobahn” next to the sofa. What she means is that you put the ottoman next to the sofa. What the purpose—the more general intent—behind her request is may be that she wants to prop her feet up on the ottoman. But perhaps she is unaware that the ottoman is broken and will not support her feet. She has thus made two mistakes. She uttered “autobahn” meaning the thing commonly referred to as an “ottoman.” When told that “autobahn” commonly refers to a German highway, she can truthfully say that that is not what she meant when she used the term.

But she also made a mistake about what would make her comfortable. When she discovers, after you pull up the ottoman, that it will not support her feet, her correct response is that although she did request the ottoman, she made a mistake in doing so.

Let us label the first sort of mistake a mistake about what to say to convey what one means. Intentionalists will want to correct those mistakes. Indeed, as Part I argues, sayings are merely conveyances for intended meanings. They can be ill chosen, as your mom’s expression would have been had she addressed her request to a stranger. But if we know the intended meaning, the manner of its conveyance, and whether it would have been ill chosen in different circumstances, is ultimately of no consequence.

Textualists frequently imply, however, that intentionalists also want to correct the second kind of mistake that your mom has made, namely, a mistake regarding whether what she meant to say would accomplish what she intended to accomplish by saying it. John Manning, for instance, in criticizing the absurdity doctrine, argues that it is employed to correct not merely lapses in expression, but also lapses in foresight.60 Elsewhere he implies that the doctrine is employed to correct deviations from values that the legislature is presumed to hold.61 But intentionalists, while recognizing that a gross mismatch between what a lawmaker intended to accomplish and a candidate meaning is evidence that the

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60. Manning, supra note 33, at 2401.
61. Id. at 2407.
meaning was not the intended one, do not advocate departing from the intended meaning whenever the interpreter concludes the lawmaker made a mistake regarding what that meaning would accomplish or how well that meaning serves the lawmaker’s values. In your mom’s case, the faithful agent intentionalist will pull up an ottoman rather than an autobahn, but he will not feel bound by her request to pull up something more comfortable than the ottoman merely because he might believe that she has a more general intent to be comfortable. The intentionalist does not advocate ascending up the ladder of generality of intention, at the pinnacle of which all laws turn out to be the Spike Lee law: do the right thing. He only advocates honoring the intent of the lawmaker at the specific level of generality that the lawmaker meant to convey, even if at that level it thwarts the lawmaker’s more general intentions.62

62. Sometimes, of course, it may be difficult to disentangle mistakes that affect meaning from those that do not. See Alexander, supra note 38, at 376–77.