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TEXTUALISM AND THE PROBLEM OF SCRIVENER'S ERROR

John David Ohlendorf

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TEXTUALISM AND THE PROBLEM OF SCRIVENER'S ERROR

*John David Ohlendorf**

I. INTRODUCTION

On March 24, 1876, the Ohio General Assembly passed an act intended to revise and regulate the exercise of local police power in “cities . . . having at the last federal census a population of two hundred thousand and over.”¹ The act conferred general regulatory authority on a board of police commissioners to be appointed, for each city, by the Governor of the state.² Besides giving each police board control over the local police force, the act also gave the new boards “all the powers now vested in the board of health,”³ and so as part of the overhaul, section 18 of the act attempted to abolish all existing board of health offices.⁴ But a hitch somewhere in the process resulted in a drafting infelicity: the final language of Section 18 stated that “The *officers* of the board of health in cities to which this act is applicable . . . are hereby abolished.”⁵

One suspects that the venerable doctrine of *ita lex scripta est* was not held in such high regard in late 19th century Ohio that the officers serving on the existing local boards of health feared for their lives. In *State ex rel. Attorney General v. Covington*, the authority of the newly-created police and public-health boards of Cincinnati was challenged in a *quo warranto* action.⁶ The Attorney General, acting as relator for the state, argued that the 1876 statute was unconstitutional on grounds unrelated to the unfortunate 18th section, but the attorneys for the Attorney General apparently found in section eighteen an opportunity to introduce some humor into the courtroom, as well as take an additional jab at the statute: “Just what ‘abolished,’ as used in this section, was intended by the legislature to mean,” the attorneys noted, “might puzzle almost any one who would consult the dictionary for the technical definition of the word.”⁷ The counsel for the Cincinnati officials in defense, in a quite different spirit (apparently not finding the humor in the prospect of their clients being “abolished”) dryly responded:

[t]he eighteenth section of the act in question abolishes certain offices, as the legislature might properly do. The objection to this section is a mere play upon letters. The section has no sense, unless the word ‘officers’ is read ‘offices.’ To abolish officers is to abolish offices, and can mean nothing else.⁸

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1. Act of March 24, 1876, 73 Ohio Laws 70.

2. *Id.* §§ 1–2.

3. *Id.* § 2.

4. *Id.* § 18.

5. *Id.* (emphasis added).

6. 29 Ohio St. 102, 103 (Ohio 1876).

7. *Id.* at 105.

8. *Id.* at *110.

The court apparently agreed, correcting the error in an almost off-hand way.⁹

I suppose that scrivener's errors, like this one, make an easy prey for the gentle comedy of the bench and bar, much in the way that typographical errors in billboards, newspaper headlines, and church bulletins form an endless source of humor for late night talk show hosts. But theorists of legal interpretation have long seen that scrivener's errors pose a more serious problem. The doctrine surrounding scrivener's error stands considered as something of a cousin to the absurdity doctrine, which has roots extending to the earliest days of the American Republic.¹⁰ More recently, the post-legal-process revival of formalist approaches to statutory interpretation on the bench, and their systematic defense in the academy, has made the problem of scrivener's error increasingly relevant.

The problem for a thoroughgoing and consistent textualism is fairly obvious: textualists argue that the text passed by both houses of Congress and duly signed by the President (or passed, over his veto, by the requisite supermajorities) is the exclusive source of law.¹¹ But what is the textualist to do, then, when the text that makes it through these hurdles includes gaffes—like the Louisiana statute that allowed parties to impeach their opponent's testimony, on cross examination, "in any unlawful way,"¹² or the Arkansas law (Hart and Sacks' chestnut) that treated the court stenographer's transcript as a bill of exceptions on appeal *until* approved by the Chancellor, rather than *after* being so approved?¹³ In many cases of scrivener's error, the legislative history makes plain that the suspicious wording was unintentional, but it is a familiar and central part of the textualist credo that it is the text of the law, and not the legislative history, that governs.¹⁴ Often, a literal reading of an erroneous text will lead to patent absurdities, but some textualists have challenged the validity of the absurdity doctrine, as well.¹⁵ Is the textualist judge really left trying to "abolish" state officers and allowing *unlawful* impeachment of witnesses? If textualist theory rightly bars "imaginative reconstruction"¹⁶ based on legislative history and reinterpretation to avoid absurd results, is there conceptual room left for a doctrine of scrivener's error?

These questions are important ones, but surprisingly there has been a marked lack of effort, on the part of textualists, to answer them. Aside from a handful of attempts,¹⁷ textualist theorists have been either unconcerned or uninterested in the

9. See *id.* at 117.

10. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2388–89 (2003). I go on to challenge the relationship between the two doctrines. See *infra* note 67 and accompanying text.

11. See 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, 25 (Amy Gutmann ed., 1997).

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

13. See *Johnson v. U.S. Gypsum Co.*, 229 S.W.2d 671, 672–73 (Ark. 1950).

14. See, e.g., Scalia, *supra* note 11, at 29–37; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684–95 (1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 86–117 (2006).

15. See Manning, *supra* note 10, at 2390.

16. See generally RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 101–05, 273–78 (1990).

17. Manning's discussion of the problem is the best treatment of the issue to date, and it consists of a single footnote. Manning, *supra* note 10, at 2459 n.265. The three extended academic treatments of the problem of which I am aware, Michael S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV.

problem; even critics of textualism seem to have placed little emphasis on the threat posed by scrivener's error to textualist theory.¹⁸ Textualist judges, who come face to face with actual examples of scrivener's error, have gone a bit farther in articulating an approach to the problem,¹⁹ but it is hardly within their province to treat its conceptual moorings, theoretical implications, and evidentiary difficulties in any systematic way. The result has been a textualist approach to the problem that is unsatisfactory in significant respects.²⁰

This neglect is unfortunate. Scrivener's error poses a significant challenge to textualist theories of interpretation, and if textualism cannot come up with an adequate answer to the problem of scrivener's error, it is *prima facie* an unsatisfactory theory of statutory interpretation.²¹ Moreover, how textualists answer the challenge posed by scrivener's error has the deepest implications for the theoretical foundations of textualism. Finding conceptual room for a doctrine of scrivener's error within a textualist theory that rejects reliance on legislative history and the absurdity doctrine goes to the very root of what divides textualists from intentionalists.²²

The burden of this article is to provide conceptual moorings for a textualist doctrine of scrivener's error, to relate the problem of drafting errors to broader textualist theory, and to suggest how the theory of scrivener's error advocated here might make a difference in practice. In Part II, I briefly sketch the division in textualist theory between those who offer "intent-skeptical" justifications for textualism and those who prefer "non-intent-skeptical" arguments. Part III takes up again the task already begun: describing the challenge posed by scrivener's error to textualist theory. I review two attempts by textualists to address the scrivener's error problem, concluding that both ultimately fail, but in illuminating ways. Finally, in Part IV I lay out my own theory of scrivener's error, grounded in a non-intent-skeptical understanding of textualism that draws heavily on the work of Joseph Raz and Jeremy Waldron, and sketch how this newly-grounded doctrine

589 (2000); Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25 (2006); and David M. Sollors, *The Scrivener's Error Doctrine and Textual Criticism: Confronting Errors in Statutes and Literary Texts*, 49 SANTA CLARA L. REV. 459 (2009), have evoked little response.

18. There have been scattered attempts to use scrivener's error as a cudgel with which to beat textualists, *see, e.g.*, Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 377-83 (2005); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 45-48 (1994); Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 979-82 (2004); Recent Case, *Indep. Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), 105 HARV. L. REV. 2116 (1992), but no opponent of textualism seems to have laid out, in any systematic way, the challenge that Scrivener's error poses to the theory. The most systematic treatment of the problem is Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001).

19. *See* *Holloway v. United States*, 526 U.S. 1, 18-20 (1999) (Scalia, J., dissenting); *United States v. X-Citement, Inc.* Video, 513 U.S. 64, 82-83 (1994) (Scalia, J., dissenting); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1097-98 (9th Cir. 2006) (Bybee, J., dissenting).

20. *See infra* Part IV.C.

21. This is a bold claim, but I believe it is justified. *See infra* Part III.A.

22. The turn of phrase is, of course, brazenly appropriated from John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

will look when put into the field against the different types of scrivener's errors that are encountered by judges.

II. TEXTUALIST THEORY AND INTENT SKEPTICISM

Textualism might be defined roughly as that method of statutory interpretation that assigns to statutory texts the meaning that a reasonable person, familiar with the conventions of language generally in use by members of the relevant linguistic community, as well as any more idiosyncratic terms of art and general structural conventions used by the legislature, would understand the words of the text to have. Textualists “stick close to the surface meaning of texts, where possible,”²³ eschewing, on the one hand, the legislative history of the provision²⁴ and, on the other, broader attributions of legislative purpose that go beyond the scope of the text itself.²⁵ Scholars have offered many different justifications for the family of interpretive theories that are broadly textualist. For our purposes, these diverse arguments may be classified into two camps: intent-skeptical and non-intent-skeptical.

Intent-skeptical arguments for textualism center on the air of paradox surrounding the idea of collective intent. Can Congress—a group of discrete individuals but not an individual itself—meaningfully be said to have a unified intent? These intent-skeptical arguments form the oldest and the most familiar class of justifications for textualism. The general argument is often traced back, in its modern form, to the legal realist Max Radin,²⁶ but of course the argument is much older than this—Joseph Story was hardly expressing a novel idea when, in his 1833 *Commentaries*, he derisively asked: “What would be said of interpreting a statute of a State legislature by endeavoring to find out, from private sources, the objects and opinions of every member, how every one thought, what he wished, how he interpreted it? Suppose different persons had different opinions, what is to be done?”²⁷

In the modern debate, this intent-skeptical objection has found prominent exponents in Justice Scalia²⁸ and Judge Easterbrook. Easterbrook has shored up

23. VERMEULE, *supra* note 14, at 73.

24. See Scalia, *supra* note 11, at 29 (stating that “the objective indication of the words, rather than the intent of the legislature, is what constitutes the law”).

25. See *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (“[N]o legislation pursues its purposes at all costs.”); see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 63–64 (1988).

26. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”).

27. 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 310 n.1 (Little, Brown and Co. 1891) (1833). Story was attacking two canons of construction that Jefferson had recommended for constitutional interpretation.

28. See Scalia, *supra* note 11, at 32 (“[W]ith respect to 99.99 percent of the issues of construction reaching the courts, there is no legislative intent, so that any clues provided by the legislative history are bound to be false. Those issues almost invariably involve points of relative detail, compared with the major sweep of the statute in question. That a majority of both houses of Congress (never mind the

the point with insights imported from public choice theory, such as Kenneth Arrow's theorem concerning the aggregation of group preferences.²⁹ According to Arrow, although transitivity is generally considered an essential component of rational choice, given certain apparently reasonable conditions a multi-member body choosing from among three or more options will be unable to arrive at a transitive set of preferences (it may prefer A to B to C to A . . .).³⁰ Because the ordering of group preferences is intransitive, if members are allowed continually to challenge the preceding vote, the legislature will cycle endlessly between the alternatives until it is stopped arbitrarily by, for example, fatigue or agenda control.³¹ Easterbrook concludes that "[b]ecause legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."³² The text of the statute is the only aggregation of congressional preferences we have: attempting to recreate some "legislative intent" underlying the text is ultimately chimerical.

Although this argument has done yeoman's work in support of textualist theory, it is subject to several powerful rejoinders. First, the conditions necessary to make the theorem work often may not be met.³³ Second, as Professor Manning notes, even if collective intent is an empty concept, the use of legislative history might be justified in terms of delegation.³⁴ Third, it is not clear that the idea of collective intent is as bankrupt as textualists like Easterbrook have suggested. As Judge Posner has argued, "it is possible to overdo one's skepticism in this regard. Institutions act purposively, therefore they have purposes. A document can manifest a single purpose even though those who drafted and approved it had a

President, if he signed rather than vetoed the bill) ever entertained *any* view with regard to such issues is utterly beyond belief.").

29. See Easterbrook, *supra* note 14, at 547; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y. 61, 68 (1994).

30. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2nd ed., 1963) (suggesting that group preferences are often intransitive); Kenneth A. Shepsle, *Congress Is a "They" Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241-44 (1992) (using Arrow's theorem to argue that the idea of legislative intent is meaningless); see also Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

31. See Easterbrook, *supra* note 14, at 547 (stating "[e]very system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made.").

32. *Id.*

33. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 47-55 (1991).

34. See Manning, *supra* note 14, at 690-91. Manning explains that,

[P]ositivist theories of interpretation suggest that 'legislative intent' has little to do with the genuine intentions of legislators, and much to do with legislators' intentions to enact statutes that will be interpreted according to accepted interpretive conventions. That basic understanding of interpretive reality, which textualists ultimately share, leaves ample room for the claim that courts rely on legislative history not because it reflects actual intent, but because legislators now *expect* their ambiguities to be resolved according to its lights. If that is the case, then one might argue that Congress implicitly delegates law elaboration authority to committees and sponsors, when it enacts an ambiguous statute accompanied by a committee's or sponsor's explanation of its meaning.

Id. (citations omitted).

variety of private motives and expectations.”³⁵ We speak all the time about collectives—such as clubs, corporations, armies, or even whole nations—as intentionally or purposively pursuing certain goals or projects, some of them quite specific and detailed. The concept of group intent, then, doesn’t seem to be entirely empty.

Finally, Arrowian intransitivity and Condorcetian circles³⁶ may make us question whether committee reports reflect a genuine group ordering of preferences, but they do so at the cost of making *all* collective choices seem irrational, including the choice of statutory text.³⁷ If, as I shall argue in Part IV, authority is generally a matter of epistemic deference—following the value choices³⁸ made by agents we have reason to believe are capable of coming to a more accurate or more robust understanding of moral reality than we—then it is hard to see why we should obey this type of Congress at all: indeed, it is hard to see how any form of government other than monarchy is possible (or at least attractive). Intent-skeptical arguments are designed to show the undesirability of recourse to legislative history, but these arguments are themselves, in a way, undesirable: they seem to lead to a general weakening of the moral authority of the law itself.

But if intent skepticism begins to look less than compelling—or even undesirable—does the appeal of textualism begin to vanish as well? The short answer is “no”: not all justifications for textualism are based on skepticism about legislative intent. Textualists have offered a number of non-intent-skeptical arguments for the textualist approach; these arguments urge that, even if the concept of legislative intent is meaningful in some minimal sense, there are good reasons to “stick close to the surface meaning of texts,”³⁹ gleaning what we can about what the legislature intended from the text and structure of the law in front of us. Professor Manning has offered one such argument, and later I will offer a non-skeptical argument of my own, built up from the parts of existing textualist theory I find the most compelling.⁴⁰ For the present, what we have said about intent-skeptical and non-skeptical justifications of textualism is enough to illustrate a central divide within textualist theory. With this sketch of the terrain in hand, let us

35. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 195–96 (1986); accord Joseph Raz, *Intention in Interpretation*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 263 (Robert P. George ed., 1996) (“We find no problem in attributing intentions to corporations, groups, and institutions in ordinary life . . .”).

36. The endless cycling of group preferences that results from the intransitivity predicted by Arrow, see *supra* notes 29–32 and accompanying text, is often referred to as a “Condorcet circle” because it was first described by the 18th-century thinker Marquis de Condorcet in his book *ESSAI SUR L’APPLICATION DE L’ANALYSE À LA PROBABILITÉ DES DÉCISIONS RENDUES À LA PLURALITÉ DES VOIX* (1775).

37. Including, as Farber and Frickey urge (and Easterbrook himself acknowledges), choices made by courts. FARBER & FRICKEY, *supra* note 33, at 55. See also Easterbrook, *supra* note 30.

38. Laws do more than express brute value choices, of course—they create causes of action, they allocate funds, they set up institutions, etc. Because most of these actions crucially involve choices between values, however, I shall use the term “value choice” as shorthand for the legally operative content, of any type, expressed by legislation.

39. VERMEULE, *supra* note 14, at 73.

40. See *infra* Part IV and notes 95–104 for a discussion of Professor Manning’s argument for textualism; see *infra* Part IV and notes 162–79 for a sketch of my own argument.

return to the problem of scrivener's error and see what implications it might have for this foundational debate over skepticism, as well as for the appeal of textualism generally.

III. THE PROBLEM OF SCRIVENER'S ERROR: THRUSTS AND PARRIES

A. *The Challenge*

In this article's introduction, I mentioned three cases involving statutes that contained scrivener's errors: the Ohio statute that abolished public health officers, the Louisiana statute that allowed *unlawful* impeachment of witness testimony, and the Arkansas statute that made the trial transcript authoritative *until* approved by the Chancellor. Let me give two further examples to help highlight the problem that scrivener's error poses for any theory of statutory interpretation.

The 1874 case *Maxwell v. State*⁴¹ dealt with a Maryland statute that provided for "the general valuation and assessment of property in this state."⁴² The statute was long and complex, and there were problems from the very beginning. Section One of the statute evidently intended to provide that all property was subject to taxation, except for property falling within eighteen classes of exceptions. That this was the legislature's intention was apparent from the summaries in the margins, which stated: "Property of all kinds shall be taxed" next to the opening clause and "Exempt" next to the following eighteen clauses.⁴³ Further, the classes of exempt property included categories of property that one would expect to be exempt from taxation, such as "property belonging . . . to houses for public worship"; "all graveyards, cemeteries, and burying-grounds"; and "public hospitals, asylums and other incorporated literary, charitable or benevolent institutions for the relief of the indigent or afflicted."⁴⁴

The problem was with the text of the bill, which provided that "all property real, personal and mixed, of all kinds and descriptions whatever in this State"—except property in the eighteen classes of exceptions—"shall be exempt from taxation for State or local purposes."⁴⁵ So the act, on its face, made all real property *exempt* from taxation, except for the property in the eighteen classes belonging to charities, churches, and the like. Something had gone terribly wrong, it seemed; surely the Maryland legislature meant to say that all property except property belonging to one of the exceptions shall be *subject* to taxation. The Maryland Court of Appeals, in *Maxwell*, while acknowledging that it felt "quite sure [that] the Legislature intended to say something very different,"⁴⁶ dutifully followed the plain meaning rule⁴⁷ and held that the act meant what it said, making it unconstitutional⁴⁸ under Article Fifteen of Maryland's Declaration of Rights,

41. 40 Md. 273 (Md. 1874).

42. Act of Apr. 11, 1874, ch. 514, 1874 Md. 853.

43. *Id.* § 1.

44. *Id.*

45. *Id.*

46. *Maxwell*, 40 Md. at 292.

47. *See id.* at 291–94.

48. *See id.* at 294.

which stated that “every . . . person in the State . . . ought to contribute his proportion of public taxes”⁴⁹

My second example centers around 8 U.S.C. § 1101(a)(43), which classifies certain offenses as “aggravated felonies” for purposes of deportation or immigration. Subparagraphs F and G of paragraph 43 define the term “aggravated felony” to include “a crime of violence . . . for which the term of imprisonment at least one year” and “a theft offense . . . or burglary offense for which the term of imprisonment at least one year.”⁵⁰ As several courts have noted, both subparagraphs are “obviously missing a crucial verb,”⁵¹ but no court has had difficulty in concluding that the missing verb, probably an “is,” is merely a “drafting snafu” that poses no constitutional problems.⁵²

This second example points up the problem for textualism most starkly, because here it is quite impossible to interpret subparagraphs F and G according to their “surface meaning.” If textualism draws the meaning of a statutory text from the words alone, understood as a reasonable person would understand them in context, then that enterprise seems impossible for these provisions. They are, simply put, unmeaning. They are syntactically deviant, like Chomsky’s “colorless green ideas sleep furiously.”⁵³ The reasonable reader is unable to draw any meaning out of them whatsoever.

Textualism’s standard methodology for interpreting statutory text fails in the case of errors that result in deviances like missing verbs. If textualism asks judges to apply its standard methodology to these cases, it will be incoherent; if it simply ignores these cases, it will be incomplete, since it will have failed to specify an interpretive method for every type of statutory text that courts will foreseeably be called upon to interpret. To be a complete and coherent account of statutory interpretation, textualism needs to provide some method for dealing with these cases other than its standard method, even if this method is nothing more than Judge Bork’s “ink blot” strategy of acting as if inscrutable text had never been enacted.⁵⁴

Where the error results not in an unmeaning text but in a text with a very unlikely meaning, the challenge posed to textualism is less brazen but still compelling. A textualist judge can certainly interpret a statute as exempting all property from taxes based on its plain meaning, as the court in *Maxwell* did, even though the statute is obviously meant to impose a tax. There is no gap in the textualist methodology, here, but even the most stout-hearted textualist is likely to feel a little queasy.

The source of this queasiness, I think, is that textualists see themselves as faithful agents of the legislature and it is obvious that the legislature meant

49. MD. DECLARATION OF RIGHTS, art. XV (1864).

50. 8 U.S.C. § 1101(a)(43) (F) & (G) (2006).

51. See, e.g., *United States v. Graham*, 169 F.3d 787, 790 (3rd Cir. 1999).

52. See *United States v. Banda-Zamora*, 178 F.3d 728, 729 (5th Cir. 1999). *Accord Graham*, 169 F.3d at 790–91; *United States v. Pancheo*, 225 F.3d 148, 153–54 (2d Cir. 2000); *United States v. Maldonado-Ramirez*, 216 F.3d 940, 943–44 (11th Cir. 2000).

53. NOAM CHOMSKY, SYNTACTIC STRUCTURES 15 (1968).

54. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990).

something else, here. If, as I shall suggest a little later, legislative supremacy, like much authority, is a case of epistemic deference,⁵⁵ then it makes little sense to defer to a choice that the legislature so clearly did not intend to make. Deferring to the considered value choices of the legislature when those choices have emerged from a legislative process designed to insure openness, mutual compromise, and deliberation seems perfectly reasonable. Ordinarily, I will argue, the single best place to look for these choices is the text of the statute.⁵⁶ But when the choice embedded in the statute is one that the legislature clearly did not intend to make and it is clear which contrary choice the legislature *did* intend to make, following the text does not make one the legislature's faithful agent.

Moreover, the costs of strictly following the standard methodology can be quite vivid. The costs of striking down a tax statute as unconstitutional because of a scrivener's error are very real: the state will be forced to forgo this revenue until the legislature corrects the statute (a correction which, of course, also entails certain costs). We can certainly imagine errors that would cause much higher costs. More to the point, these costs are being imposed for reasons that seem easily avoidable: when it is clear what Congress actually intended to write, the fix seems painless enough.⁵⁷ An interpretive theory that fails to provide for the correction of

55. See *infra* notes 151–153 and accompanying text.

56. See *infra* notes 178–181 and accompanying text.

57. Professor Nagle, in a thoughtful article, has disputed this point. See John Nagle, *Textualism's Exceptions*, 15 ISSUES IN LEGAL SCHOLARSHIP 1 (2002), available at <http://www.bepress.com/ils/iss3/art15> [hereinafter Nagle, *Textualism's Exceptions*]; see generally John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267 (1996). Nagle argues that the costs of the scrivener's error exception to the plain meaning rule (and, relatedly, of the absurdity doctrine) outweigh the benefits. Nagle gives three types of costs associated with the exceptions, which "(1) conflict with the theoretical argument for textualism; (2) undermine the need for, and likelihood of, legislative correction of statutory mistakes; and (3) encourage claims of absurdity and drafting error that consume the precious time and other resources of judges, attorneys, and litigants alike." Nagle, *Textualism's Exceptions*, at 2. Category (1) clearly assumes that the scrivener's error doctrine *is* in theoretical conflict with textualism; it is the burden of this article to argue the contrary. The cost represented by category (3) is fairly trivial and is unlikely to hold up its end if correcting scrivener's error turns out to be even mildly beneficial. By analogy, surely Nagle wouldn't attack the "self-defense" affirmative defense to battery on the ground that litigants and courts end up wasting their time arguing whether or not the defendant was acting in self-defense.

Category (2) costs pose a more difficult problem. Nagle's argument here is similar to the fear that judicial review will dampen Congress' incentive to pass only constitutional statutes—a phenomenon that Adrian Vermeule aptly has called "a form of moral hazard." VERMEULE, *supra* note 14, at 261. This also goes to Nagle's benefits estimate: he argues that the usefulness of judicial error correction is limited, since other institutional actors can correct the errors instead. Nagle, *Textualism's Exceptions*, at 8–12. Three observations seem in order, here. First, I am not entirely sure that legislative apathy will be the necessary consequence of the continued correction of scrivener's errors. While knowledge that courts are in the error-correcting business could conceivably make Congress less interested in the activity, it is also plausible that fear of courts mistaking its true intentions might make Congress *more* interested in supervising the activity. Second, it's not clear that more judicial and less legislative correction of errors is categorically undesirable. To be sure, if all scrivener's errors are considered as a class, Congress is probably the more-efficient error corrector, since it is plausibly in the best position to determine whether it made a drafting error. Some errors, however, are relatively easily and conclusively discovered. Below, I advocate restricting permissible judicial correction of scrivener's errors to these cases, where the evidence of error is near-conclusive. For this class of errors, the judiciary might well be the most-efficient error corrector. The optimal approach might be some sort of

scrivener's errors like the one in *Maxwell* is, I think, *pro tanto* less desirable than one that does so provide.

If textualists are unable to articulate a theory of scrivener's error compatible with textualism, then, textualism itself may seem undesirable at best and incoherent or incomplete at worst. Moreover, if only some justifications for textualism are compatible with a satisfactory solution to the scrivener's error problem, this constitutes a reason for favoring these justifications over the justifications that are not able to accommodate a solution to the problem. Before we reach this point, though, we need to see if textualism is actually compatible with an answer to the problem of scrivener's error. As a first cut at determining this, I briefly survey the existing textualist solutions to the scrivener's error problem. I conclude that each of these existing solutions is unsatisfactory and go on to articulate my own solution, which aspires to build on the successes of the existing approaches while avoiding their failings.

B. Existing Textualist Approaches: Review and Critique

Before reviewing the existing textualist approaches to scrivener's error, I pause to emphasize a point that came out in the discussion above: textualists see themselves as operating within the confines of the faithful agent approach. Later, I will argue that there are good reasons for this, reasons that stem from the moral authority of law itself.⁵⁸ For now, it should be sufficient to note that textualists have traditionally seen themselves as operating within the faithful agent paradigm⁵⁹ and that a fair reading of the text, structure, and history of the Constitution would seem to be compatible with the faithful agent theory.⁶⁰

division of labor between the judicial and legislative branches. Third, Nagle's institutional point is subject to an institutional counterpoint. Even assuming that concerted judicial refusal to correct drafting errors would result in greater congressional error-correction and that this would be a good thing, an individual judge, faced with an uncorrected scrivener's error, does not have the power to effect the type of concerted judicial action necessary to bring this benefit about. The benefit that might result if all judges refused to correct errors is not "marginal and divisible," VERMEULE, *supra* note 14, at 118–32, 261–62, in such a way that an individual judge's choice not to correct would bring about any portion of this benefit. For an individual judge, the decision is between correcting *this* error or declining to do so.

On the benefits side, Nagle asserts that the scrivener's error exception is employed in very few cases, but he comes to this conclusion by looking only at those scrivener's errors that current textualists would correct. Nagle, *Textualism's Exceptions*, at 5–6. To the extent that the underlying argument is over whether existing textualist theory justifies correction of scrivener's errors either too seldom or too frequently, there is something circular about basing a benefits estimate on the current practice of textualist judges in this respect. Finally, if the central argument of this article is correct, Nagle ignores the most important benefit of all: when textualists fail to correct a scrivener's error, they are failing to defer to the actual value choices of the legislature. On the premises of the faithful agent theory, eliminating this failure would result in a superior allocation of epistemic deference and therefore would be a substantial benefit.

58. See *infra* Part IV.A.

59. See Manning, *supra* note 22, at 95–96;

60. Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (arguing that the faithful agent theory is mandated by the structure and history of the Constitution), 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) (arguing that the history of the Constitution condones a more eclectic, cooperative approach to statutory interpretation).

For a textualist approach to scrivener's error to *be textualist*, then, it must operate within the confines of the faithful agent theory. I emphasize this now because, as the following discussion of the purportedly textualist approaches to scrivener's error will show, the reasons one might advance for correcting a scrivener's error can usefully be separated into two categories: fidelity-based and non-fidelity-based. A fidelity-based reason argues that a scrivener's error should be corrected because enforcing the statute as corrected better carries out the intent of the legislature. So, for example, the court in *Maxwell* might have argued that the tax statute should be read, contrary to the surface meaning of the text, as exempting only specific categories of property, such as property owned by charities, from taxation, because correcting this error better effectuates the choices that the legislature meant to make.

On the other hand, non-fidelity-based reasons argue that a scrivener's error should be corrected because this advances some other goal not tethered to the legislature's intent. So the *Maxwell* court might also have argued that the error should be corrected because exempting all property from taxation, except for property falling within one of the eighteen exceptions, is an absurdity of constitutional proportions. If it had taken this tack, the court would have corrected the error not because it was acting as the legislature's faithful agent but because it was enforcing higher, constitutional law.

At first blush, one might expect that textualists could offer only fidelity-based reasons if they wanted to remain within the faithful agent paradigm, but this is not quite so. To see this, one need only recognize that textualists accept the validity of judicial review. Judicial review is most emphatically not based on fidelity to the legislative will, but some acceptance of judicial review is seen as compatible with the faithful agent theory. So some deviation from the legislature's will—some acceptance of non-fidelity-based reasons for decision—is acceptable within the faithful agent theory. The difficulty is to discern what exactly the minimum content of the faithful agent theory is.

I. Manning

A good place to start the exploration of this problem is Professor Manning's approach to scrivener's error. Manning has not offered any systematic theory of scrivener's error, but in a lengthy footnote to his article on the absurdity doctrine he provides a few notes towards such a theory.⁶¹ To get a grasp on Manning's approach to scrivener's error, we need to begin by examining his criticism of the absurdity doctrine. First, Manning examines the absurdity doctrine as "a form of strong intentionalism"⁶² and argues that it should be abandoned for the familiar textualist reasons for resisting intentionalism: intent skepticism⁶³ and process concerns.⁶⁴

But Manning goes on to write that "the absurdity doctrine's legitimacy might

61. See Manning, *supra* note 10, at 2459 n.265.

62. *Id.* at 2420.

63. *Id.* at 2408–31; see also *supra* notes 26–40 and accompanying text.

64. Manning, *supra* note 10, at 2431–46; see also *infra* notes 162–173 and accompanying text.

rest on grounds other than legislative intent.”⁶⁵ Specifically, “when judges invoke the absurdity doctrine to avoid an unreasonable result, one might ascribe their behavior to *judicial* power to ‘enrich positive law with the moral values and practical concerns of a civilized society,’ even when such action requires displacing clear statutory outcomes.”⁶⁶ This justification cannot be parried by the textualists’ traditional tool-kit of anti-intent arguments; it must be countered by resort to “the institutional allocation of power among the branches” of federal government.⁶⁷ In other words, justifying the absurdity doctrine in terms of judicial power implicates the scope of the faithful agent theory.

After reviewing the original and contemporary understanding of the constitutional structure, Manning’s conclusion is that this structure embodies “a conception of limited judicial power that is quite difficult to square with the absurdity doctrine’s assumptions.”⁶⁸ Original understanding of “the separation of legislative and judicial powers reflects a rule-of-law tradition that rejects ad hoc alterations of clear and general laws,” and “the core of the post-New Deal constitutional order” is that “when legislation does not implicate suspect classifications or fundamental rights, the default constitutional standard of rationality review instructs courts to respect the often-awkward lines of legislative compromise drawn by duly enacted statutes.”⁶⁹

Central to the faithful agent theory is the judiciary’s duty to suppress its own all-things-considered judgment of the best disposition of the case at bar in deference to the highest valid law on point. Where that law is the Constitution, judges enforcing constitutionally entrenched value choices are acting as faithful agents of the constitutional order, and where that law is a federal statute, the judges should act as faithful agents of Congress. But where judges abandon Congress’s value choices in favor of their own ideas of the good, the right, or the reasonable, they are operating outside the faithful agent theory altogether. The gravamen of Manning’s critique of the absurdity doctrine, then, is that where that doctrine is justified in terms of judicial power, it runs contrary to the faithful agent theory, and where it is justified—within the faithful agent paradigm—in terms of legislative intent, it runs contrary to the traditional textualist arguments against strong intentionalism.

Manning takes pains, however, to differentiate the absurdity doctrine from the correction of scrivener’s errors; in so doing, he articulates three exemplary types of errors which he suggests may be properly correctable: cross-reference errors, where Congress uses a cross-reference “that, in context, could refer only to a nearby section other than the one actually named”; the use of a particular word that “simply [does] not make linguistic sense in the context of the sentence as a whole”; and “common mistake[s] of grammar or punctuation that make[] linguistic nonsense of an otherwise comprehensible sentence.”⁷⁰ Manning’s impulse to

65. Manning, *supra* note 10, at 2431–32.

66. *Id.* at 2432 (quoting *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J., dissenting)).

67. *Id.* at 2432–33.

68. *Id.* at 2433.

69. *Id.*

70. *Id.* at 2459 n.265.

differentiate the problem of scrivener's error from the absurdity doctrine is laudable; indeed, I largely accept his critique of the absurdity doctrine and agree that any viable textualist approach to scrivener's errors must be able to differentiate itself from the absurdity doctrine or fall prey to the criticism of being outside the bounds of the faithful agent theory. That said, I think that Manning's own attempt at differentiating the two is ultimately inconsistent with other strands of his thought.

Begin with Manning's three exemplary types of correctable errors. The first type, cross-reference errors, should be ignored, because this type of error is reductive: a mistaken cross reference is not an independent type of error; if Congress references the wrong section of an act, the *result* may be an error—in fact, the mistaken reference may make the provision unmeaning. But the mistaken reference is only an error because of this erroneous result. Take, for example, 18 U.S.C. § 3565(b)(3), which requires courts to revoke probation and resentence a defendant to imprisonment if “the defendant . . . refuses to comply with drug testing, thereby violating the condition imposed by section 3563(a)(4).”⁷¹ But § 3563(a)(4) reads, “The court shall provide, as an explicit condition of a sentence of probation . . . for a domestic violence crime . . . that the defendant attend a public, private, or private nonprofit offender rehabilitation program.”⁷²

Section 3565(b)(3) deals with defendants who fail to comply with drug testing but references a paragraph of the code dealing with domestic violence crimes. Next-door to § 3563(a)(4), however, is *paragraph 5* of § 3563(a), which reads, “[T]he court shall provide, as an explicit condition of a sentence of probation . . . for a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter.”⁷³ It seems far more likely that Congress meant for § 3565(b)(3) to reference paragraph 5, rather than paragraph 4, and simply made a reference error.⁷⁴ But the point is that this mistaken reference to paragraph 4 instead of paragraph 5 is mistaken because it results in § 3565(b)(3)'s revocation of parole for drug-test evaders who also fail to attend a court-ordered rehabilitation program for domestic violence offenders; it is not mistaken because § 3565(b)(3) references § 3563(a)(4) rather than § 3563(a)(5), in and of itself. Reference errors are only errors if they result in substantive errors.

Manning's other two examples of correctable scrivener's errors—word usage and grammar errors that result in linguistic nonsense—are both errors that result in a syntactically deviant text: like the omission of a crucial verb in 8 U.S.C. §§ 1101(a)(43)(F) & (G), discussed above.⁷⁵ Manning's stated justification for distinguishing between the absurdity doctrine and errors like these is that, while correcting purported absurdities threatens to undo implicit legislative

71. 18 U.S.C. § 3565(b)(3) (2006).

72. *Id.* § 3563(a)(4).

73. *Id.* § 3563(a)(5).

74. See *United States v. Coatoam*, 245 F.3d 553, 555 (6th Cir. 2001) (holding that § 3565(b)(3) meant to refer to § 3563(a)(5)); *accord* *United States v. Paul*, 542 F.3d 596 (7th Cir. 2008) (same).

75. *Supra* notes 50–52 and accompanying text.

compromises,⁷⁶ “there is only the remotest possibility that any such clerical mistake reflected a deliberate legislative compromise.”⁷⁷ This seems to be a fidelity-based reason for error-correction: if it is clear that the wording of a provision is unintended, and doesn't represent a deliberate compromise, then courts should feel free to correct it.

But shouldn't this apply to non-deviant errors as well? If it is clear that the legislature meant for witness testimony to be impeached in lawful, rather than unlawful ways, shouldn't the court enforce this corrected reading of the statute despite the fact that allowing impeachment “in any unlawful way”⁷⁸ is not strictly unmeaning so long as it is clear that the wording was unintentional, and did not reflect a deliberate compromise? Manning might respond that we can only be sure that an implicit compromise isn't involved when the error *does* result in a deviant text. But this seems to confuse an evidentiary concern with the conceptual distinction between scrivener's error and absurdity. The *conceptual* question of whether there is theoretical room for a doctrine of scrivener's error separate from the absurdity doctrine must be distinguished from the *evidentiary* question of how we know when we're confronted by a scrivener's error.⁷⁹ When the text of a statute is deviant, it is abundantly clear that the value choice Congress intended to make is not expressed by the surface meaning of the text, since *nothing comprehensible whatsoever* is expressed by the surface meaning of the text. Manning recognizes this. But sometimes we can be sure that non-deviant texts contain scrivener's errors, too, by looking at the legislative history.

A good example is 49 U.S.C. § 14704, which provides relief for certain violations by interstate carriers. Subsection (a)(2) deals with carrier violations of applicable regulations, providing that carriers shall be “liable for damages sustained by a person as a result of an act or omission” that violates certain regulations.⁸⁰ It is clear that parties aggrieved by a violation of these regulations can bring an administrative complaint to either the Secretary of Transportation or the Surface Transportation Board,⁸¹ and courts have also interpreted this subsection as creating a private right of action.⁸² Subsection (b), on the other hand, addresses certain instances of carrier overcharging, providing that “[a] carrier . . . is liable to a person for amounts charged that exceed the applicable rate for transportation or service,”⁸³ if that applicable rate is in effect under § 13702, which provides that certain carriers, such as carriers that transport household goods, must file their rates with the Board.⁸⁴ And subsection (c) establishes that a party can elect to pursue an

76. See Manning, *supra* note 10, at 2421–31.

77. *Id.* at 2459 n. 265.

78. *Scurto v. Le Blanc*, 184 So. 567, 574 (La. 1938).

79. *Cf. infra* notes 234–35 and accompanying text.

80. 49 U.S.C. § 14704(a)(2) (2006).

81. *Id.* § 14701.

82. See *Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc.*, 192 F.3d 778 (8th Cir. 1999); James C. Sullivan, *Private Rights of Action to Enforce the Truth-In-Leasing Regulations in Court*, 32 *TRANSP. L.J.* 159, (2005). If a plaintiff elects to pursue § 14701's administrative remedy, subsection (b)(1) also provides a private right of action to enforce a final order issued by the Secretary or Board.

83. 49 U.S.C. § 14704(b).

84. *Id.* § 13702.

action for overcharges under subsection (b) either by way of civil action or administrative complaint.⁸⁵

Section 14705 deals with limitation periods for these actions. Subsection (b) provides an 18-month limitation period for “civil action[s] to recover overcharges,” and a three-year limitation for administrative complaints regarding overcharges.⁸⁶ Subsection (c) provides that “[a] person must file a[n administrative] complaint . . . to recover damages under section 14704(b) within 2 years after the claim accrues.”⁸⁷ But § 14704(b) *also* deals with overcharges. So subsection (b) of Section 14705 gives a limitation period of 3 years for administrative actions to recover overcharges, and subsection (c) provides that administrative complaints regarding overcharges under § 14704(b) must be filed within 2 years.

This scheme is not contradictory. As at least one court has noted, § 14705(b)’s limitation period presumably covers administrative actions regarding *all* overcharges, not just the overcharges—in violation of § 13702—covered by § 14704(b).⁸⁸ So the effect of § 14705(b) and (c) is to provide a 3-year limitation period for most administrative overcharge actions but a 2-year period for actions regarding overcharges in violation of § 13702. Although not contradictory, this result seems a little odd, especially considering that *no* provision of § 14705 provides a limitation period for § 14704(a)(2), the provision dealing with carrier violations of regulations, leaving that provision to be governed by the default 4-year limitation period from 28 U.S.C. § 1658(a).⁸⁹ Legislative history provides an explanation. The clause dealing with carrier violations of regulations, now our § 14704(a)(2), was originally placed in § 14704(b)(2), in both the House and Senate bills.⁹⁰ As part of subsection (b), this clause would have been subject to § 14705(c)’s two-year statute of limitations.⁹¹ But shortly before the bill came to the floor, the House amended its bill to make a number of changes, including moving the language allowing non-overcharge damages from (b)(2) to (a)(2).⁹² After conference committee, the House’s numbering of this clause was adopted, apparently without realizing that the renumbering had affected the applicable statute of limitations.⁹³ The Surface Transportation Board itself has recognized that

85. *Id.* § 14704(c).

86. *Id.* § 14705(b).

87. *Id.* § 14705(c).

88. *See* Owner-Operator Indep. Drivers Ass’n v. United Van Lines, 556 F.3d 690, 695 (8th Cir. 2009). Moreover, it is possible that Congress intended to draw a distinction between actions for overcharges, covered by § 14705(b), and actions for damages for exceeding the tariff rate, covered by (c). *Compare* Davis v. Portland Seed Co., 264 U.S. 403, 420 (1924) (drawing a distinction between overcharges and damages), *with* United Van Lines, 556 F.3d at 694–95 (suggesting that such a distinction is no longer relevant).

89. 28 U.S.C. § 1658(a) (2006) (“Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.”).

90. *See* Sullivan, *supra* note 82, at 167–70.

91. Even though § 14705(c)’s limitation period applies, by its terms, to “a complaint with the Board or Secretary,” some courts have interpreted this language as extending to civil actions. *See* Fitzpatrick v. Morgan S., Inc., 261 F.Supp.2d 978, 984 n.5 (W.D. Tenn. 2003).

92. *Fitzpatrick*, 261 F.Supp.2d at 983.

93. *Id.*

the numbering problem is merely a “technical error.”⁹⁴

In cases like this, the text that results from the error is non-deviant, but it is nevertheless clear from the legislative history that there has been an error—that the curious text does not reflect an implicit legislative compromise. But if Manning’s justification for allowing correction of scrivener’s errors is that they clearly do not reflect deliberate compromises, he should be willing to correct an error clearly indicated by the legislative history, unless he is unwilling to allow judges to consult legislative history to discover an error on some collateral ground.

Manning might hold legislative history unreliable for the purposes of establishing the existence of a scrivener’s error, for example, for the same reasons that textualists find legislative history unreliable generally. In Part II, we saw that these reasons could be divided into two categories: intent-skeptical and non-intent-skeptical.⁹⁵ I will argue at greater length in Part IV that the best non-skeptical arguments for textualism are compatible with consulting legislative history to determine whether a scrivener’s error has occurred.⁹⁶ More importantly for present purposes, *Manning’s own argument* against consulting legislative history generally does not apply to this particular use of legislative history. To see why, we need to take a closer look at Professor Manning’s justification for textualism.

While important strands of Manning’s thought are intent-skeptical,⁹⁷ Manning’s core arguments for textualism are non-skeptical. For example, Manning’s argument against Hart-and-Sacks-style purposivism rests not on an argument that legislatures just cannot have purposes but instead on concern for bicameralism and presentment, emphasizing the power these procedural protections give to minorities to stop legislation or demand legislative compromises.⁹⁸ “Giving precedence to semantic context (when clear),” Manning writes, “is necessary to enable legislators to set the level of generality at which they wish to express their policies. In turn, this ability alone permits them to strike compromises that go so far and no farther.”⁹⁹

Manning’s argument against the use of legislative history is also non-skeptical. He argues that by giving dispositive weight to legislative history, judges allow Congress to delegate the power to resolve statutory indeterminacy—effectively, the power to create law—to agents who act outside Article I’s bicameralism and presentment requirements,¹⁰⁰ constituting an unconstitutional legislative self-delegation.¹⁰¹

This argument has at least two advantages over the simpler but less-articulated textualist contention that “[w]e are governed by laws, not by the intentions of legislators.”¹⁰² First, by suggesting that judges can properly interpret only by

94. Nat’l Ass’n of Freight Transp. Consultants, 61 Fed. Reg. 60140, 60141 n.3 (Nov. 26, 1996) (declaratory order proceeding).

95. *Supra* notes 23–40 and accompanying text.

96. *Infra* Part IV.B.

97. *See infra* notes 110–116 and accompanying text.

98. *See* Manning, *supra* note 22, at 103–09; Manning, *supra* note 10, at 2437–38.

99. Manning, *supra* note 22, at 99.

100. *See* U.S. CONST. art. I, § 7, cl. 2.

101. *See* Manning, *supra* note 14, at 695–731.

102. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

looking at the text, textualists lay themselves open to the charge of inconsistency: after all, textualists themselves look at sources external to the text of the law, such as dictionaries, canons of construction, and other laws.¹⁰³ Indeed, unless they intend to abandon the central teaching of philosophy of language, at least since Wittgenstein first proclaimed that “the meaning of a word is its use in the language,”¹⁰⁴ that “language is intelligible by virtue of a community’s shared conventions for understanding words in context”¹⁰⁵ in favor of the metaphysically implausible conceptualism of their formalist forbearers, it seems textualists must admit that *no* interpretation can go forward without looking outside the four corners of the text. The argument from the nondelegation doctrine solves this problem by differentiating between external sources deemed permissible by textualists and legislative history. Only consultation of the latter enables Congress to bypass the procedural protections of bicameralism and presentment.

Second, the primitive assertion that only the text of the law can be authoritative leaves textualists open to the rejoinder that intentionalists don’t consider legislative history to be *authoritative*; they merely consider it one place to look, among others, in determining a provision’s meaning.¹⁰⁶ Manning’s nondelegation argument bars this move by making any dispositive reliance on legislative history impermissible. To see this, imagine that Congress, wishing to make value choice ϵ without going through bicameralism and presentment, leaves the statutory text indeterminate with respect to ϵ but embeds ϵ into the legislative history. Bicameralism and presentment are circumvented whenever courts, interpreting the statutory text, impose ϵ rather than decline to impose it, based on the legislative history. Courts need not treat the legislative history as “authoritative,” or on par with the text; Congress is enabled to evade bicameralism and presentment whenever the weight of the legislative history, no matter how trivial, is by itself the deciding factor in a court’s choice to impose ϵ .

Manning’s nondelegation argument, then, is a powerful critique of the use of legislative history, not subject to many of the pitfalls of other similar but more primitive arguments. But this argument simply doesn’t cut any ice against the use of legislative history to discover scrivener’s error. Assuming that the legislative history demonstrates conclusively that Congress¹⁰⁷ thought it was enacting value choice X when in fact it enacted a text that embodied choice X’, then choice X *actually* has survived the requisite procedural hurdles. X’ is, *ex hypothesi*, a

103. See Manning, *supra* note 14, at 702–05.

104. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 18 (G.E.M. Anscombe trans., Blackwell Publ’g 3d ed. 2001).

105. Manning, *supra* note 10, at 2396; see also WITTGENSTEIN, *supra* note 104, at 16, 75–90, 94–95 *passim*.

106. See Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 597–99 (1994).

107. I am assuming away the role of the President throughout this discussion. Arguably, the fact that a President must concur in a bill before it becomes law makes it much more difficult for legislative history to show that there is indeed an error. But there seems to be no *a priori* reason to doubt that it might still be possible for legislative history to demonstrate the existence of an error. For example, a President’s signing statement may show that he shared Congress’s understanding of the provision in question, or the legislation may have passed by a veto-proof majority that demonstrably shared an understanding of the text that shows a scrivener’s error has occurred.

mistake; disallowing the use of legislative history to show that this is so does not serve any process goals, since a consensus in favor of X already survived the process.¹⁰⁸

What about intent-skeptical arguments, then—do these bar the use of legislative history to demonstrate error? The answer, I think, is yes, and this ultimately shows that Manning's conceptual approach to scrivener's error is inconsistent. My claim is that fidelity-based reasons for correcting a scrivener's error are incompatible with intent-skepticism. Recall that a fidelity-based reason calls for correction of a clerical error because enforcing the text as corrected would better carry out legislative intent. This requires belief in some fact-of-the-matter about legislative intent, no matter how thin, that *lies behind* the text of the statute. What else could it mean for the act of reading a statute *against* the text to be *more* in line with legislative intent than reading the statute *according* to the text? But intent-skepticism *just is* the belief that there *is no fact-of-the-matter* about legislative intent separate from the enacted text.

If this is so, what are the implications for Manning's approach to scrivener's error? As I argued above,¹⁰⁹ Manning's most notable justifications for textualism are non-skeptical; these justifications, then, are not incompatible with a fidelity-based approach to scrivener's error. But intent skepticism is nevertheless an important strand of Manning's thought. This is most apparent in his 2005 article *Textualism and Legislative Intent*.¹¹⁰ There he argues that "the only meaningful . . . legislative intentions are those reflected in the *public meaning* of the final statutory text."¹¹¹ Although "the textualists' view of the legislative process . . . by no means necessitates a wholesale rejection of any useful conception of legislative intent,"¹¹² it does necessitate rejection of "perhaps the most important premise of classical intentionalism: the idea that behind most legislation lies some sort of policy judgment that is meaningfully identifiable, shared by a legislative majority, and yet imprecisely expressed in the public meaning of the text that has made its way through Congress's many filters."¹¹³ Textualists, "given their assumptions about the legislative process, necessarily believe that intent is a construct."¹¹⁴ This "objectified intent"¹¹⁵ is to be gathered from "the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words."¹¹⁶

But if this is so, if there is no "judgment that is meaningfully identifiable,

108. Manning might protest that the legislative history is strategic: a disingenuous attempt by a few legislators to *make it look* like a scrivener's error has occurred. Such an argument is ruled out for the purposes of the above hypothetical, since I have openly assumed away any concerns about the accuracy of the evidence of the error. However, in practice, this may be a real concern. For reasons to doubt that the concern is warranted for some common types of legislative history, *see infra* notes 219–221 and accompanying text.

109. *See supra* notes 97–106 and accompanying text.

110. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005).

111. *Id.* at 424.

112. *Id.* at 432.

113. *Id.* at 438.

114. *Id.* at 423.

115. Scalia, *supra* note 11, at 17.

116. Manning, *supra* note 110, at 424.

shared by a legislative majority, and yet imprecisely expressed in the public meaning of the text,”¹¹⁷ then why should we care if “there is only the remotest possibility” that a suspicious text “reflected a deliberate legislative compromise”?¹¹⁸ If there can be no meaningful conception of legislative intent that is not constructed from the text itself, the search for textual provisions that do not reflect genuine legislative intent just doesn’t make any sense. Manning’s proffered justification for correcting scrivener’s errors, apparently fidelity-based, is at war with his views on the incomprehensibility of legislative intent. And importantly, Manning’s conception of legislative intent not only undermines the use of legislative history to demonstrate the existence of scrivener’s errors, it undermines the correction of errors resulting in deviance, as well. No matter how unlikely it may be that a deviant text reflects a deliberate legislative compromise, on Manning’s understanding of intent as a construct, this can only be beside the point, since there is nothing behind the text to appeal to.

This may not leave Manning’s approach to scrivener’s error entirely unmoored. Manning’s repeated emphasis on errors that make “linguistic nonsense of an otherwise comprehensible sentence”¹¹⁹ points the way towards an alternative justification for correction of scrivener’s errors, at least ones that result in deviant texts. Correcting these deviant errors might be justified on the grounds that this is the minimum step necessary to make any sense whatsoever out of the text in question. For example, consider the provision of the Iowa State Tort Claims Act at issue in *Jones v. Iowa State Highway Comm’n*.¹²⁰ Section 25A.14 of that act exempted the State from any liability for “any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, *abuse or process*, libel, slander, misrepresentation, deceit, or interference with contract rights.”¹²¹ In *Jones*, the plaintiffs conceded that they were bringing a claim for abuse of process, but argued that the statute, by its terms, did not exempt such claims.¹²² The court rejected this argument because “[t]he term ‘abuse of process’ has long been recognized as an actionable tort On the other hand ‘abuse or process’ is meaningless in the context in which it appears in the section. If we were to recognize the literal language of the statute, we would be hard put to ascribe *any* sensible meaning to the words”¹²³

Along these lines, Manning might argue that the point isn’t that Congress cannot be assumed to have intended to enact a text that makes no sense but rather that no meaningful legal content at all can be drawn from the text unless the error is corrected. Understood this way, the argument for correction is non-fidelity-based: the judge who corrects a statute in this way is not purporting to act more closely in line with legislative intent, he is *imposing* minimum conditions of meaningfulness on the legislature so as to serve the independent value of “mak[ing] sense rather

117. *Id.* at 438.

118. Manning, *supra* note 10, at 2459–60 n.265.

119. *Id.*

120. 207 N.W.2d 1 (Iowa 1973).

121. IOWA CODE § 25A.14(4) (1971) (emphasis added).

122. *Jones*, 207 N.W.2d at 2.

123. *Id.*

than nonsense out of the *corpus juris*.”¹²⁴

While this reason is non-fidelity-based,¹²⁵ I don't think it goes beyond the bounds of the faithful agent theory. This is so because, on the textualist's understanding of legislative intent as a construct built up from the text, there simply is no meaningful legislative intent present to be faithful to, if the text is incomprehensible. This arguably separates scrivener's error from statutory absurdities: while it would be incompatible with the faithful agent theory to interpret a text against the legislative intent constructed from the fair meaning of the text because it results in what the judge thinks is an absurdity, in the case of deviant texts there is no legislative intent present to defer to and the best the judge can do is either ignore the text outright or make the best sense out of it that she can. Where the fix is obvious and easy, correcting the text might be justified by important non-fidelity based values.

The problem with this account of scrivener's error is not that it is unfaithful to legislative supremacy but rather that it fails to satisfactorily solve the problem. Imposing minimum conditions of meaningfulness on statutory texts can at most justify the correction of deviant texts. It cannot be used to justify correcting non-deviant errors, like those in *Maxwell*, which mistakenly “exempted” most of the property in the state from taxation;¹²⁶ *Scurto*, which authorized any “unlawful” impeachment of testimony;¹²⁷ or *Covington*, which abolished the “officers” of municipal health boards.¹²⁸ But this class of errors contains arguably the most significant and egregious errors we have encountered. We have already seen that an account of statutory interpretation that cannot provide for the correction of these types of errors is for that reason less desirable than one that can. If another textualist account of scrivener's error is able to deal with non-deviant errors as well as deviant ones, it is, *ceteris paribus*, preferable to Manning's.

2. Gold

Running somewhat parallel to this second interpretation of Manning's approach, Professor Andrew Gold has offered an alternative textualist account of scrivener's error. Taking off from the standard textualist search for objectified

124. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991). Scalia's line is from a slightly different context, of course, but it seems to fit well, here.

125. There is also an interpretation of this tack that is fidelity-based: if intent is constructed from the meaning that a reasonable reader would derive from the text and a reasonable reader would gloss over errors that make the text unmeaning in favor of a reading that is meaningful, then imposing minimum conditions of meaningfulness is just a way of more faithfully adhering to intent as a construct. Since this is essentially Professor Gold's argument, I postpone discussion of it until the next section, *see infra* Part III.B.2, where I argue that this approach cannot differentiate scrivener's error from absurdity. Manning's tack could be understood as a narrower version of Gold's argument that argues that a “reasonable reader” would gloss over only *deviant* errors. Such an approach would still be unable to justify correction of non-deviant errors; however, leaving Manning in a position perhaps somewhat more conceptually satisfying, but functionally identical, to the position resulting from the non-fidelity-based interpretation of this line of argument.

126. *See Maxwell v. State*, 40 Md. 273 (Md. 1874); *see supra* notes 41–49 and accompanying text.

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

128. *See State ex rel. Attorney Gen. v. Covington*, 29 Ohio St. 102 (Ohio 1876); *see supra* notes 6–9 and accompanying text.

intent, Gold argues that linguistic conventions “permit judges to conclude that an intended meaning exists without knowing what was actually intended.”¹²⁹ But occasionally, when faced with “an outcome which is so unthinkable, or a word choice which is so clearly mistaken, that a literal interpretation of the statute’s words would deviate from the conventional understanding of the statutory language,” judges should follow this “conventional understanding” rather than the “literal interpretation.”¹³⁰

This is a strong theory; it covers more ground than Manning’s, authorizing correction of all errors resulting in deviant texts and some non-deviant errors that are patently absurd. But the theory is able to cover this large class of errors because it is conceptually blunt: rather than drawing a line between unintended consequences and unintended texts, the theory dictates correction of scrivener’s errors only because they are a subclass of extreme absurdities. Like Manning, therefore, Gold would not allow correction of texts which are facially non-absurd but which the legislative history indicates are mistakenly worded; and *unlike* Manning, Gold *would* allow limited use of the absurdity doctrine.

The theory’s failure to distinguish between scrivener’s errors and the absurdity doctrine may seem like reason enough to reject it. Recall that above I endorsed Manning’s conclusion that the absurdity doctrine is inconsistent with the conjunction of the faithful agent theory and the rejection of strong intentionalism.¹³¹ But Gold’s approach to absurdity is unique; it purports to offer fidelity-based reasons for endorsing the absurdity doctrine (and the correction of scrivener’s errors) that are consistent with intent skepticism. It therefore merits a close second look.

I have previously asserted that this type of theory is impossible: that fidelity-based reasons for error correction are inconsistent with intent-skepticism because fidelity-based reasons for overriding a clear text necessarily assume the existence of an intelligible notion of legislative intent lying behind the text. Gold attempts to avoid this problem through the concept of constructive intent: a reasonable interpreter can construct an intent for a text that runs contrary to the literal import of the text, avoiding belief in any *actual* intent, and then remain faithful to this constructed, non-literal intent. I will argue that Gold’s attempt ultimately fails. Despite his best efforts, he ends up violating the faithful agent theory.

Take the Louisiana statute at issue in *Scurto* that allowed parties to impeach witness testimony “in any unlawful way.”¹³² Gold, I presume, would be willing to admit that the literal meaning of this text is that “parties can impeach witness testimony in any unlawful way.” That is, this is the meaning expressed according to the relevant semantic and syntactic conventions; call it A. Yet Gold would instruct the judge to interpret the statute as expressing B: that “parties can impeach witness testimony in any lawful way.” What reason does Gold have for asking judges to ascribe B, rather than A, to the text?

Gold would argue that while the semantic and syntactic linguistic conventions

129. Gold, *supra* note 17, at 29.

130. *Id.*

131. See *supra* notes 62–69 and accompanying text.

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

indicate that the statute is expressing A, there are higher-level linguistic conventions that compel us to read it as expressing B, not A. For example, after recognizing the distinction, familiar to modern philosophy of language,¹³³ between “speaker’s meaning” and “sentence meaning,”¹³⁴ Gold discusses John Searle’s argument that “the notion of the literal meaning of a sentence only has application relative to a set of contextual or background assumptions,”¹³⁵ and concludes that these types of “[p]resumptions about the use of language can include questions of gross injustice, at least at the margins.”¹³⁶

The contribution of context to an utterance’s meaning is the subject of the field of pragmatics, which leans heavily on the work of Grice, Searle, and John Austin.¹³⁷ And the idea that a text’s meaning can only be understood in context is certainly uncontroversial among modern textualists.¹³⁸ But it is also critical to the survival of textualism as an independent theory of statutory interpretation, I think, to follow Manning in differentiating between “semantic context” and “policy context.”¹³⁹ The textualist can properly interpret a statutory text in light of contextual understandings of what is physically possible and how words are ordinarily used. Textualists certainly would not want to say that the semantic conventions memorialized in dictionaries and the syntactic conventions found in Strunk and White exhaust the content of the linguistic conventions within a linguistic community. Account must be taken of other conventions, such as the higher order conventions that govern phenomena like indirect speech acts¹⁴⁰ and metaphor.¹⁴¹

But textualists must take care to distinguish these types of contextual cues from the “policy context” of a statute.¹⁴² Including “questions of gross injustice” within the semantic context¹⁴³ squints towards Hart and Sacks’s presumption that legislators are “reasonable persons pursuing reasonable purposes reasonably.”¹⁴⁴ Declining to apply Puffendorf’s celebrated statute that penalized anyone who

133. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS passim* (1989); JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS passim* (1979).

134. See Gold, *supra* note 17, at 43–46.

135. SEARLE, *supra* note 133, at 117; another excellent—and perhaps more accessible—exploration along these lines can be found in Donald Davidson, *A Nice Derangement of Epitaphs*, in *THE ESSENTIAL DAVIDSON* 251 (2006).

136. Gold, *supra* note 17, at 70–71.

137. See, generally, GRICE, *supra* note 133; SEARLE, *supra* note 133; JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969); J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); *SEMANTICS VERSUS PRAGMATICS* (Zoltán Gendler Szabó ed., 2005).

138. See Manning, *supra* note 22, at 79–85; Scalia, *supra* note 11, at 37 (stating that “in textual interpretation, context is everything.”).

139. See Manning, *supra* note 22, at 92–96.

140. See SEARLE, *supra* note 133, at 30–57.

141. Compare *id.* at 76–116, with ISRAEL SCHEFFLER, *BEYOND THE LETTER: A PHILOSOPHICAL INQUIRY INTO AMBIGUITY, VAGUENESS AND METAPHOR IN LANGUAGE* 79–130 (1979). It is not clear how relevant the conventions governing metaphor are to the relatively prosaic texts of statutes, but related phenomena, such as synecdoche and euphemism, are almost certainly relevant.

142. See Manning, *supra* note 22, at 92–96.

143. See Gold, *supra* note 17, at 70–71.

144. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

“drew blood in the streets” to a surgeon attempting to save the life of someone fallen in the street¹⁴⁵ because “one might expect the term ‘drew blood’ to describe a violent act”¹⁴⁶ is a perfectly acceptable application of semantic context. But refusing to apply the statute in this way because no one can reasonably be assumed to have made that value choice is to follow one’s own views about the good and the right instead of the policy views clearly expressed in the enacted text. To import conventional policy considerations into the textualist enterprise of statutory interpretation is to undermine the very foundation of textualism: deference to the value choices of the legislature. Gold’s theory, it turns out, is not fidelity-based after all; it contravenes the faithful agent theory in the same way that the more conventional underpinnings of the absurdity doctrine do and must be rejected for that reason.

3. *Some Early Conclusions*

In this section, I have surveyed—and ultimately rejected—two textualist approaches to the problem of scrivener’s error. While the section has done predominantly negative work, that work allows us to draw some positive conclusions, which it will be helpful to review before moving on. I take the central conclusions of this section to be twofold: first, fidelity-based reasons for correcting scrivener’s errors are incompatible with intent-skeptical justifications for textualism, and second, non-fidelity-based reasons for correcting scrivener’s errors are either too weak to solve the problem or too strong to be counted as consistent with the faithful agent theory. While not all non-fidelity-based reasons for error correction lead to a violation of the faithful agent theory, we can now conclude, after surveying both theories, that the non-fidelity based reasons that *are* compatible with the faithful agent theory, such as imposing minimum conditions of reasonableness on the legislature, are able to solve only a small subset of scrivener’s errors, leaving correction of some of the most egregious and obvious errors ungrounded. Non-fidelity-based reasons for error correction that are robust enough to solve the entire set of errors end in asking judges to overrule the policy judgments of the legislative text in favor of their own views of the good and the right, and are for that reason inconsistent with the faithful agent theory, and hence with textualism.

I conclude that an adequate textualist solution to the problem of scrivener’s error is incompatible with intent skepticism. To the extent that a theory of statutory interpretation that fails to adequately address the problem of scrivener’s error is for that reason undesirable,¹⁴⁷ it is incumbent on textualists to give non-intent-skeptical justifications for their textualist methodology and show how those justifications lead to an adequate solution to the scrivener’s error problem. It is to this task that I now turn.

145. See *United States v. Kirby*, 74 U.S. 482, 487 (1868).

146. Manning, *supra* note 10, at 2461.

147. See *supra* Part III.A.

IV. THE SCRIVENER'S ERROR DOCTRINE: A NEW CONCEPTUAL GROUNDING

A. Textualism

The non-intent-skeptical justification for textualism that I find most compelling takes off from the important jurisprudential work of Joseph Raz, Andrei Marmor, and Jeremy Waldron. According to Raz's "Normal Justification Thesis":

The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply to him directly.¹⁴⁸

In turn, Marmor has noted:

[T]his normal justification thesis is in fact compound, consisting of two distinct types of justification. In some cases, compliance with the authority's directives can only be justified on the basis of the assumption that the authority is likely to have better access to the right reasons bearing on the issue than its alleged subjects. . . . At other occasions, it is enough to show that the authority is *better situated* than its alleged subjects to make the pertinent decision; that is, without thus being committed to the presumption that there are certain reasons for action, whose identification and ascertainment are more accessible to the persons in authority.¹⁴⁹

The first case Marmor calls the "expertise branch" of the normal justification thesis, while the latter category largely consists in the authority's ability to solve collective action problems. I will concentrate here on the first branch of the justification thesis, for three reasons. First, I think it poses the harder case for textualists, and that the arguments presented below are applicable to the collective action branch in a fairly straightforward way.¹⁵⁰ Second, I think much of the collective action branch can also be cast in terms of epistemic deference: that is, the subject defers to the value choices¹⁵¹ made by the authority because the authority has better access to information of a certain kind than does the subject.¹⁵² Finally, I

148. Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295, 299 (1985).

149. ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 134 (2005).

150. *See id.* at 132–39.

151. The term "value choice," of course, more straightforwardly applies to choices subject to the expertise branch than the collective action branch. Can the choice of which side of the road to drive on, a classic coordination problem, really be described as a *value* choice? This quibble is to some extent semantic; I will continue to use "value choice" to describe these types of cases because values are certainly implicated and because the very act of deeming a choice authoritative, it strikes me, lends that choice a normative valence.

152. For example, coordination problems, one of the largest categories in the collective action branch, can straightforwardly be cast in terms of epistemic deference. The coordination problem for A and B can be shown schematically as follows, where the possible outcomes are 1 and 2, with 1 the most preferred and 2 the least preferred for each player:

think that the expertise branch generally plays a larger role in justifying legislation.¹⁵³ For these reasons, I will describe obedience to authority in terms of epistemic deference to authoritatively enacted value choices.

Jeremy Waldron has offered a justification of textualism based on the argument that any reason we have for considering a statute adopted by a multi-member lawmaking body as worthy of epistemic deference “is also a reason for discounting the authority of the views or intentions of particular legislators considered on their own.”¹⁵⁴ Waldron considers three arguments for deferring to such bodies. First, “The Utilitarian Argument”: from the utilitarian point of view, if each legislator votes the interests of her constituents and the constituents are proportionally represented in the legislature, then the resulting legislation will tend to reflect the optimal satisfaction of individual interests.¹⁵⁵ Second, “Condorcet’s Jury Theorem”: according to this theorem, multi-member decision-making bodies have a lower probability of error than an individual decider.¹⁵⁶ Finally, “Aristotelian Synthesis”: multi-member bodies have higher epistemic capabilities than individuals because “a number of individuals may bring a diversity of perspectives to bear on the complex issues under consideration, and . . . they are capable of pooling these perspectives to come up with better decisions than any one of them could make on his own.”¹⁵⁷ But each of these justifications of *group* authority also demonstrates that the capabilities of each *member* of the group are significantly lower than the capabilities of the group as a whole.¹⁵⁸

This alone is not enough to get us to textualism: the three arguments justify according authority to whatever decisions are made by the group, and these decisions, so far as we’ve gone, might just as well be expressed in an amorphous intent as a canonical text. The crucial step in the argument is to insist that “[t]here simply is no fact of the matter concerning a legislature’s intention apart from the

		B	
		Do X	Do Y
A	Do X	1, 1	2, 2
	Do Y	2, 2	1, 1

Here, clearly, the problem for A is simply that she doesn’t know which one B is going to pick, and the same for B, *mutatis mutandis*. If an authority exists who A has reason to believe *does* know which B will pick, and if the authority informs A that B will pick, say, X, then this constitutes a reason for A to choose X; and analogously, again, for B. The fact that the authority knows that B will pick X because the authority has made the choice of X salient through a system of sanctions doesn’t obscure the fact that it is in part because of this *knowledge* on the part of the authority that it is advantageous for A (and B) to defer to the authority. A similar interpretation might be possible for partially-competitive games like the prisoner’s dilemma and the battle of the sexes. See the remarks on the role of communication in these types of games in R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY* 110–11 (1957), and MORTON D. DAVIS, *GAME THEORY: A NONTECHNICAL INTRODUCTION* 77–82 (1970).

153. Cf. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 333 (1994) (arguing that “laws like the prohibition of rape and murder” are hard to describe in terms of collective action problems).

154. JEREMY WALDRON, *LAW AND DISAGREEMENT* 138 (1999).

155. *Id.* at 133–34.

156. *Id.* at 134–36.

157. *Id.* at 137.

158. *Id.* at 138–42.

formal specification of the act it has performed.”¹⁵⁹ This act “is the text of the statute as determined by the institution’s procedures. Those procedures make [the legislators] *one* in action, and their identification of something as the text of a statute makes [the legislators] *one* as the authors of a deed. Before that, however, and beyond that, [the legislators] are many, and no further status as part of the *unum* can be attributed to anything else that any of [them] says or thinks.”¹⁶⁰

Despite the different flavor from the intent-skeptical arguments considered earlier,¹⁶¹ then, Waldron’s textualism is intent-skeptical as well. Moreover, what makes it skeptical is precisely what makes it textualist. In the remainder of this section, I hope to sketch an argument for confining the interpretation of statutes to their text that is similar to Waldron’s but that leaves room for a conception of legislative intent that, although thin, is robust enough to support a fidelity-based argument for correction of scrivener’s error.

The first step in my argument is also Waldron’s first step: showing that the reasons we have for epistemically deferring to the legislature’s value choices only apply to those choices that have survived appropriate procedural hurdles.¹⁶² I take it that for reasons very much like the ones Waldron offers there are sound reasons for epistemically deferring to the legislature; I will not repeat or expand on those reasons here. But there are a number of procedural constraints that we impose on legislators before we take their value choices as worthy of epistemic deference. First, as Waldron emphasizes, we require them to *act as a legislature*, that is, collectively and orderly. The only way for a body made up of diverse members with diverse points of view to act as one in an orderly fashion is for them to adopt certain procedures such as quorum requirements, rules of order and debate, and voting rules.¹⁶³ Relatedly, legislative choices are worthy of deference on epistemic grounds only if the legislators had the opportunity to know what it was that they were debating and voting on—if we defer to legislative value choices, it must be because the legislators *intended* to choose them, and for them to have *intended* to choose them, they must have been aware of what their choices were.¹⁶⁴

This last, I think, is close to what Raz is getting at in his noted suggestion that intentions must be relevant to statutory interpretation in at least a minimal way.¹⁶⁵ “[T]o assume that the law made by legislation is not the one intended by the legislator,” Raz writes, “we must assume that he cannot predict what law he is making when the legislature passes any piece of legislation.”¹⁶⁶ But if that is so, it is hard to see why we care about who we elect as legislators, why we seek to make

159. *Id.* at 142.

160. *Id.* at 145.

161. *Supra* notes 26–40 and accompanying text.

162. *Cf.* WALDRON, *supra* note 154, at 138 (“[A]ny reason we have for according Raz-ian authority to the resultant legislation is also a reason for discounting the authority of the views or intentions of particular legislators considered on their own.”).

163. *Id.* at 73–77.

164. Of course, we might want courts and citizens to prescind from questioning in particular cases whether legislators were voting with full knowledge, on second-order, rule-consequentialist grounds. But this does not affect the first-order argument that value choices can be worthy of epistemic deference, based on legislative competency, only if the choices were knowing and intentional.

165. *See* Raz, *supra* note 35, at 256–60, 262–68.

166. *Id.* at 258.

them accountable to the electorate, or why we impose procedural requirements on their legislative choices. So legislators, it seems, must have some minimum amount of control over the content of the enacted law. However, this minimum control is satisfied, Raz goes on to suggest, so long as legislators “know that they are, if they carry the majority, making law, and they know how to find out what law they are making” by establishing “the meaning of the text in front of them, when understood as it will be according to their legal culture.”¹⁶⁷

Second, we generally expect that if a legislature presents a value choice as authoritative, more members supported the choice than opposed it: otherwise we would have a reason to *reject* the value choice. But as Manning has emphasized, we also want minorities to have their say; we want the legislature to adopt procedures that will subject its proposed measures to fair and open debate and disagreement, rather than procedures that allow the majority to ride roughshod over the minority.¹⁶⁸ Depending on our view of the role of government, we may even want to require supermajorities at certain points in the process so as to slow the pace of legislation.¹⁶⁹ But whether or not we are able to agree on the desirability of less legislation,¹⁷⁰ we should be able to agree that we want to design procedures that promote robust deliberation within the legislature. If we are epistemically deferring to the legislature because it is a multi-member body, presumably one of the advantages we hope to gain from such a body is the full airing-out of different points of view. But, this is only possible if the legislature follows orderly procedures designed to ensure open debate.¹⁷¹

Finally, and relatedly, if we want minorities to have a say and choices to be subject to full and fair debate, we presumably want to allow compromise between parties within the legislature who cannot come to a consensus. That is, we want to allow legislators an option other than “vote for X” or “vote against X,” such as “vote for X in return for Y,” or “vote for only 60% of X.” For this to be possible, the legislature must follow procedures that allow amendments and allow the legislature to choose between rules or standards¹⁷² and between different levels of generality.¹⁷³

All of these process considerations provide us with reasons to epistemically defer to value choices that have emerged from legislatures *of a particular kind*, that have adopted those choices after following *particular processes*. If a legislative body fails to follow the right processes in enacting a given value choice, that choice might be entirely unworthy of our epistemic deference, since it lacks the procedural credentials that form the basis for this deference in the first place. For example, if we learned that a statute was enacted by a group of legislators that constituted less than the minimum quorum for business, or if we discovered that legislators were

167. *Id.* at 267.

168. See Manning, *supra* note 14, at 678–79; Manning, *supra* note 10, at 2437–38.

169. See Manning, *supra* note 14, at 708; THE FEDERALIST NO. 62, at 290 (James Madison) (Modern Library ed., 2000) (“[T]he facility and excess of lawmaking seem to be the diseases to which governments are most liable . . .”).

170. Which, of course, may depend on the degree to which we are satisfied with the legal status quo.

171. See WALDRON, *supra* note 154, at 75–82.

172. See Easterbrook, *supra* note 14, at 546–47.

173. See Manning, *supra* note 22, at 103–09.

not allowed to know anything more than the title of the act when they voted for it, we would presumably have very little reason to defer to that statute.

The second step in the argument is to note that we care about the *prescriptive content*—that is, the discrete set of value choices—expressed by the laws that are being imposed on us, not the form of words that is used. For example, if the legislature passes a law that says “no vehicles in the park” and “vehicles” is interpreted, based on legislative history, to include bicycles, the same prescriptive content has been enforced as if the legislature had passed a law saying “no vehicles in the park, and vehicles shall include bicycles for the purposes of this statute.”¹⁷⁴ And since we care about the value choices that are enforced, it is those choices that we want to pass through the procedural hurdles that constrain legislation. So if the only dispositive reason to include bicycles as “vehicles” is a piece of legislative history that expresses the opinion of only a minority of legislators, then the choice to include bicycles as “vehicles” is not worthy of deference, since we have no reason to believe that this choice actually survived the procedural hurdles.

The final step in the argument emphasizes that to reap the epistemic benefits of the process considerations discussed above, at least two conditions must be met. First, for a legislature’s set of value choices to be of any epistemic value, the set must be consistent: it cannot command both P and \sim P.¹⁷⁵ This means the product of the legislature’s deliberation must be unified, in a way.¹⁷⁶ One way the legislature might speak with one voice is by appointing a single member from its body to speak *for* it, either as to all issues or as to a specific area of law. But by delegating all legislative authority to one legislator, the legislature would undermine the distinctive benefits of group lawmaking—we could achieve the same result simply by electing a dictator outright and cutting out the middlemen. The value choices of an elective dictator might be worthy of epistemic deference under plausible conditions (Hobbes, at least, seems to have thought so¹⁷⁷), but one of our working premises has been that group deliberation and decision is epistemically superior to a single individual’s deliberation and decision. Delegating all decision making authority to a single member of the group loses much of this superiority.

So the second requirement is that each individual legislature must be given the opportunity to help define the contours of each value choice. Otherwise the unique

174. This well-worn example originated with Hart, to my knowledge. H.L.A. HART, *THE CONCEPT OF LAW* 126 (2d ed. 1994).

175. However, it need not be coherent. That is, if a law contains value choices A, B and C, A cannot entail \sim B or \sim C, etc. But there is no reason to insist (or, indeed, to expect), that A, B and C will “hang together,” or follow from a single, coherent value theory, in the way that, for example, Dworkin’s theory of Law as Integrity would require. See RONALD DWORKIN, *LAW’S EMPIRE* 176–84, 219–24 (1986). I do not say that such coherence would not be desirable, merely that such coherence is not *required* for a set of value choices to perform any minimal sort of epistemic role, in the way that consistency is.

176. See WALDRON, *supra* note 154, at 144 (“[T]he form of legislation, as of all collective decision-making, is *e pluribus unum*.”); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 66 (2006) (“[L]egal documents . . . only function well when they speak with one voice, even if the process which generated that voice was messy and divisive.”).

177. See THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 80–84, 109–13 (Michael Oakeshott ed., Oxford 1955) (1651).

epistemic benefits of group deliberation and lawmaking are squandered. Focusing legislative debate on the content of a text satisfies these twin conditions. Indeed, it's hard to see how else it would be possible for multiple legislators to agree together on a specific set of value choices while preserving every individual legislator's ability to contribute to the shape and scope of each value choice. One might say that the existence of a shared text enables a collective legislative intent to form.

Now for a legislature to impose value choices on its citizens it must *communicate* those choices to its citizens. That is, laws cannot constitute reasons for action—citizens cannot epistemically defer to the value choices expressed by those laws—unless there is a way for the citizens to ascertain the prescriptive content expressed by those laws.¹⁷⁸ And for reasons having to do with the special properties of the written word,¹⁷⁹ the textual medium is aptly suited to the task of communicating the legislature's value choices to the citizenry. The text performs two critical roles in the creation and implementation of statutes, then: it makes it possible for a multi-member legislature to bring their minds together and create a unified intent, and it allows the legislature to communicate that intent to subordinates, for implementation.

But this text must be interpreted, must be understood, in the *normal* way unless there is a *special* reason to understand it in a different way. And the *normal* way of

178. See MARMOR, *supra* note 149, at 87–88 (“[O]nly an agent capable of communication with others can have authority over them”); RAZ, *supra* note 148, at 303 (“[I]t must be possible to identify [an authoritative] directive as being issued by the alleged authority”); WALDRON, *supra* note 154, at 99.

179. For example, a written text has a “fixation that enables it to be conserved.” PAUL RICOEUR, *What is a Text: Explanation and Understanding*, in FROM TEXT TO ACTION 105, 106 (James M. Edie ed., Kathleen Blamey & John B. Thompson trans., Nw. Univ. Press 1991) (1986); see also JACQUES DERRIDA, OF GRAMMATOLOGY 36 (Gayatri Chakravorty Spivak trans., John Hopkins University Press 1976) (1967); NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 21 (1985). This permanence allows the statute, embedded in written form, to outlive the body that enacted it. Second, the written word has a certain protestant quality: copies of it can be easily, cheaply, and widely distributed, allowing every court to enforce the value choices of the legislature without direct, in-person instruction by the legislators. Moreover, this quality enables citizens to know for themselves the content of their laws. Cf. NEIL POSTMAN, BUILDING A BRIDGE TO THE 18TH CENTURY: HOW THE PAST CAN IMPROVE OUR FUTURE 188 (1999) (“When Gutenberg announced that he could manufacture books . . . he did not imagine that his invention would undermine the authority of the Catholic Church. And yet, less than eighty years later, Martin Luther was, in effect, claiming that with the word of God available in every home, Christians did not require the papacy to interpret it for them.”); NEIL POSTMAN, TECHNOLOGY: THE SURRENDER OF CULTURE TO TECHNOLOGY 65 (1992) (“[O]f course, printing vastly enhanced the importance of individuality.”); MARSHALL MCLUHAN, *The Print: How to Dig It*, in UNDERSTANDING MEDIA 215, 218 (W. Terrence Gordon ed., Gingko Press 1997) (1964) (“Perhaps the supreme Quality of the print . . . is simply that it . . . can be repeated precisely and indefinitely—at least as long as the printing surface lasts. . . . The message of the print and of typography is primarily that of repeatability.”); Scalia, *supra* note 11, at 17 (describing “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”). Third, because the written word endures and can be so easily disseminated, it promotes openness and accountability in government. These and other qualities of the written word have been explored by scholars in the field of media ecology, who study the ways in which the message which is communicated is affected by the medium through which it is conveyed, see generally LANCE STRATE, ECHOES AND REFLECTIONS: ON MEDIA ECOLOGY AS A FIELD OF STUDY (2006), and by such continental philosophers as Jacques Derrida and Paul Ricoeur.

understanding a text can only be the way that an average reader, familiar with the relevant conventions current in the relevant linguistic community, would understand it. And a *special* reason for understanding the text in any way other than the normal way must be a reason that has the same procedural *bona fides* as the text itself, if it is to be worthy of deference. Understood in this way, textualism is not a limitation on the ways in which Congress can use its words. Like Humpty Dumpty, Congress can use its words to mean whatever it wants them to mean,¹⁸⁰ textualists insist only that Congress go through the ordinary bundle of procedural hurdles before it uses its words in ways that differ from their standard, conventional meaning.¹⁸¹

B. Scrivener's Error—Theory

In the last section I offered a normative justification for textualism. The justification did not insist that a particular type of interpretive methodology is conceptually necessary, or that it is, as a descriptive matter, the only type of interpretation that is possible. Rather, the justification asserts that statutory interpretation is a tool that is designed to play a particular role in the social enterprise of law and authority, that this social enterprise fulfills certain ends or purposes, such as the allocation of epistemic deference to those we deem to be in the best position to make certain value choices, and that textualism is a desirable account of statutory interpretation because it best allows the social practice of law to fulfill these purposes.

But having just laid out the case against intentionalist interpretation, it may seem hard to make out the textualist case for correcting scrivener's errors. After all, evidence that a particular statutory provision should read "lawful" instead of "unlawful"¹⁸² is certainly a reason against the standard, conventional reading of the text, and it is a reason that doesn't seem to have passed through the ordinary bundle of procedural constraints. Isn't such a reading barred by the case I just finished making? Indeed, isn't the theory of textualism just offered thoroughly intent-skeptical?

Before suggesting an answer to these questions it might be worthwhile to pause and reflect on the conditions we should expect the answer to satisfy—the criteria of adequacy of any textualist solution to the problem of scrivener's error, if you will. These conditions can usefully be placed into two broad categories: conditions the theory must meet if it is to be "textualist," and conditions it must meet if it is to adequately solve the problem of scrivener's error. We should already have a fairly clear idea of what the conditions in the first category look like. Our earlier discussion of textualism has revealed that for the proposed theory to be textualist, it must be consistent with the faithful agent theory.¹⁸³ Further, the theory

180. See LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 164 (Lothrop Publ'g Co. 1898) (1865); see also Spence, *supra* note 106, at 585–89.

181. No textualist would assert, for example, that Congress cannot make "green" mean "red" if it wants to, by including a definitions section that says "'green' shall refer to the color ordinarily called 'red,' for the purposes of this statute."

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

183. See *supra* notes 57–60 and accompanying text.

should be consistent with the rejection of the ordinary use of legislative history.¹⁸⁴ As to the second category, for a proposed solution to adequately solve the problem of scrivener's error it must do two things. First, it must explain why a textual segment that is the result of a scrivener's error should not be followed. Second, the argument must show why the error should not only be ignored but should be *corrected*: why the courts should enforce as part of the statute a command that is not, strictly speaking, contained in its text.

The sense in which the justification for textualism just sketched is not intent-skeptical—and the key to an adequate textualist solution to the problem of scrivener's error—can be seen, I want to suggest, in the familiar distinction between the legislature's intent to enact certain words and its intent that those words be interpreted in a certain way.¹⁸⁵ Any theory of statutory interpretation applies to only a tiny subset of existing texts. In the case of the theory outlined above, there is no reason to epistemically defer to the value choices expressed by the conventional meaning of the texts found in the *Harvard Law Review*, or the *New York Times*, or the *Complete Tales and Poems* of Edgar Allan Poe. A theory of statutory interpretation relies, that is, on a set of criteria that identifies certain textual segments to which it applies. Using the criteria to pick out these textual segments is a prior step to applying the theory's interpretive methodology. According to the textualist theory advocated here, legislative intent, while properly ignored at the stage of interpreting statutes for the reasons discussed in the previous section, is crucial to identifying which texts should count as statutes in the first place.

Before we can even identify a text as a statute, we have to identify a set of markings *as a text*. That is, before we can apply our criteria of *statutory* identity, we need to apply criteria of *textual* identity. Steven Knapp and Walter Benn Michaels famously argued, in a series of articles, that authorial intent must form a part of this set of criteria for determining textual identity.¹⁸⁶ Briefly examining

184. See *supra* Part IV.A.

185. See Fried, *supra* note 17, at 591 (discussing “the distinction between the intent of a legislature with respect to the words it meant to enact and its intent with respect to the *consequences* of those words”). The first type of intent is merely the intent *to enact certain words into law*, and is therefore less expansive than Dworkin's “semantic intention,” which includes “what Congress . . . intended to say in speaking as it did.” Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 11, at 115, 117. The second category of intentions is similar in content to Marmor's panoply of aims, further intentions, and application intentions. MARMOR, *supra* note 149, at 165–72. Another exploration along these lines which I have found very helpful is Michael Hancher, *Three Kinds of Intention*, 87 MOD. LANGUAGE NOTES 827 (1972).

186. See Steven Knapp & Walter Benn Michaels, *Against Theory*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 11 (W. J. T. Mitchell ed., 1985) [hereinafter Knapp & Michaels, *Against Theory*]; Steven Knapp & Walter Benn Michaels, *A Reply to Our Critics*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 95 (W. J. T. Mitchell ed., 1985); Steven Knapp & Walter Benn Michaels, *A Reply to Richard Rorty: What is Pragmatism*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 139 (W. J. T. Mitchell ed., 1985); Steven Knapp & Walter Benn Michaels, *Against Theory* 2, 14 *CRITICAL INQUIRY* 49 (1987) [hereinafter Knapp & Michaels, *Against Theory* 2]. Knapp and Michaels' argument, and the central example on which it largely rests, can be traced back to the slightly earlier work of another literary theorist, P.D. Juhl. See P.D. JUHL, *INTERPRETATION: AN ESSAY IN THE PHILOSOPHY OF LITERARY CRITICISM* 71–76 (1980). The line of argument is also frequently associated with Stanley Fish. See STANLEY FISH, *Working on the Chain*

their argument will help to illustrate the distinction between the intention to utter a text and the intention to mean something by that utterance.

The central thrust of Knapp and Michaels' argument is centered around the following example: imagine that you come across the first stanza to Wordsworth's poem *A Slumber Did my Spirit Seal* carved out in the sand, along the beach. As you gaze at the marks in the sand, a wave washes over the words, and as it recedes, you are amazed to see that the *second* stanza of the poem is now etched in the sand.¹⁸⁷ According to Knapp and Michaels, unless you posit some unconventional author—such as the ghost of Wordsworth, or a team of scientists, perhaps testing some water-activated chemical—you must recognize at this point that the marks in the sand are not words but “merely seem to resemble words.”¹⁸⁸ “As long as you thought the marks were poetry, you were assuming their intentional character. . . . But to deprive them of an author is to convert them into accidental likenesses of language. They are not, after all, an example of intentionless meaning; as soon as they become intentionless they become meaningless as well.”¹⁸⁹

Now, as David Couzens Hoy points out, assigning meaning to marks we know were produced unintentionally doesn't seem to be strictly *impossible*,¹⁹⁰ but it does seem to be very far from what we mean by the concept of *interpretation*. Knapp and Michaels, in a later article, point to the difference between interpreting a text and writing a new one: to claim that she is producing an interpretation of a text rather than a different text, an interpreter needs “a criterion of textual identity that will allow the text to remain the same while its meaning changes.”¹⁹¹ In yet another article, they produce a *reductio ad absurdum* to show that author's intention is the only possible such criterion:

[I]f we agree that *some* marks produced by chance are meaningful, do we want to claim that *all* marks produced by chance are meaningful? Presumably not. Presumably the only marks that have meaning are the ones that look like the marks humans make when they are using marks to mean something. . . . But what about marks that don't look like words in any known language, but that *will* look like words in some language when that language (say, five hundred years from now)

Gang: Interpretation in Law and Literature, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 87, 98–100 (1989). The line of argument has also found its way into the legal literature. See, e.g., Alexander & Prakash, *supra* note 18. Although Alexander and Prakash do not cite Knapp and Michaels, their intellectual (as well as stylistic!) debt to the authors of *Against Theory* is obvious. Long before Alexander and Prakash wrote, however, the argument had been imported into the debate over legal interpretation by Knapp, Michaels, and Fish themselves. See, e.g., Steven Knapp & Walter Benn Michaels, *Intention, Identity, and the Constitution: A Response to David Hoy*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 187, 187 (Gregory Leyh ed., 1992) [hereinafter Knapp & Michaels, *Response to Hoy*]; Stanley Fish, *Play of Surfaces: Theory and the Law*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 297, 297 (Gregory Leyh ed., 1992); Walter Benn Michaels, *The Fate of the Constitution*, 61 *TEX. L. REV.* 765 (1982).

187. See Knapp & Michaels, *Against Theory*, *supra* note 186, at 15–16.

188. *Id.* at 16.

189. *Id.*

190. David Couzens Hoy, *Intentions and the Law: Defending Hermeneutics*, in *LEGAL HERMENEUTICS*, *supra* note 186, at 173, 177; see also Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 *SAN DIEGO L. REV.* 465, 474–77 (2005).

191. Knapp & Michaels, *Against Theory 2*, *supra* note 186, at 53.

has evolved? . . . To think that *some* marks produced by chance are texts is thus apparently to commit oneself to the view that *all* marks produced by chance, whether they were texts once or are texts now, will eventually be texts, and will be texts in an infinite number of languages.¹⁹²

I think this argument is fairly strong, but from here Knapp and Michaels make an important but, I think, unwarranted leap. While their argument may show that intention forms a necessary part of any criteria-set of textual *identity*, this tells us nothing about the possible criteria of textual *meaning*.¹⁹³ Knapp and Michaels generally confuse these two throughout their discussion in these later articles, but, as I have argued above, they seem entirely separable. It may be true that we can only consider a text *to be* a text if it was intended as such by someone, but it takes an additional argument to show that in interpreting the *meaning* of that text we must confine ourselves to the meaning that the author intended it to have.

Above, I have argued that intention simply doesn't have this kind of relevance to the question of meaning, at least in the case of statutory interpretation. But before one can apply this argument, one additional step is needed: we not only need to identify a series of marks as a text, but we need to identify a text as a statute, valid in our jurisdiction; and for this second step, intention also turns out to be highly relevant. From the perspective of the justification for textualism offered above, it shouldn't be hard to see why: the ordinary reasons for epistemically deferring to the legislature's textually embedded value choices simply don't apply to textual segments that the legislature never intended to enact.

The solution I have been sketching satisfies, then, the first condition that a proposed theory must meet if it is to adequately solve the scrivener's-error problem: it justifies disregarding a duly-passed textual segment that is the result of a scrivener's error, despite textualism's standard interpretive methodology. My claim has been that the criteria of textual and statutory identity that underlie textualism demand that unintended textual segments deserve no epistemic deference and hence do not even count as part of the statutory cannon, the object to which textualism's standard methodology is applied. To see the case for *correcting* errors—the second condition—we need to recall that the text performs two critical roles in the process of making legislation. First, it makes it possible for a body of legislators, each with his or her own values, commitments, and projects, to come together as one and agree on a unified set of value choices. Voting serially to embed certain discrete choices in a text allows consensus to form around undisputed points and enables negotiations, compromises, and trade-offs in areas of disagreement. Second, once the text has enabled a single harmony to emerge from the cacophony, it is ordinarily the exclusive means of communicating this resultant, harmonious set of choices to others.

192. Knapp & Michaels, *Response to Hoy*, *supra* note 186, at 190–91.

193. For an argument along similar lines, see Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV 1, 47–49 (2009) (“We could agree that the intention of an agent to convey meaning is necessary for the text thereby produced to bear meaning . . . without agreeing that the meaning that the text thereby bears must be the meaning that its author intended.”). See also Sinnott-Armstrong, *supra* note 190, at 473–74 (“One intention is the intention to mean something as opposed to nothing, that is, to say something meaningful. Another intention is the intention to mean something in particular as opposed to something else.”).

Even statutory texts that contain scrivener's errors have successfully performed the first function. A statute that includes a clause permitting the "unlawful" impeachment of witnesses, where there is conclusive evidence that a passing majority of legislators intended the clause to read "lawful" rather than "unlawful," has successfully allowed the legislature to unite around a course of action that contains the permission of lawful witness impeachment. This value choice is worthy of our deference, on the theory of authority sketched earlier, since it surmounted all of the procedural hurdles that we required. Even erroneous textual segments succeed in performing the first function of statutory texts, then, but they are less than fully successful in performing the second function. Because the wording is erroneous, they communicate the *wrong* value choices to government officials further along in the chain of authorities who carry out the law. However, the error in wording need not be a complete bar to communication—and therefore implementation—of the law. Where the choice the legislature took itself to be making and passing along is obvious, a mere mistake in wording should not prevent other officials and citizens from following the value choices that emerged from the proper process and can be understood, despite the mistake.

The case for textualism, I have argued, is bottomed on a conception of authority that counsels epistemic deference to the value choices embedded in a legislatively enacted text. From this, we can meet the two conditions that any approach to scrivener's error must meet in order to justify the correction of such errors. First, if we have near-conclusive evidence that an otherwise valid statute contains a scrivener's error and for that reason contains a textual segment that the legislature in fact did not intend to enact, there is no reason for us to defer to the value choices embedded in that piece of unintentional legislation.¹⁹⁴ Put differently, intention forms a necessary part of the criteria used to identify valid statutes, just like the criteria used to identify texts. Believing that a text has been intentionally passed by the legislature is a precondition to treating it as a valid statute in the first place, on the theory of authority we have been assuming.¹⁹⁵

194. See Recent Case, *supra* note 18, at 2120 ("When the actual words of a statute conflict with the joint legislative and executive understanding of its meaning, enforcing the literal words frustrates the very purposes of bicameralism and presentment.").

195. This accords with Raz's conclusion that "the interpretation of statutes, etc., in accord with authors' intentions is a universal feature of legal systems which recognize legislation as a source of law, for it is implied by the very notion of legislation." Raz, *supra* note 35, at 280. Interestingly, Raz seems to suggest at one point that his requirement of minimal intention has no implications for cases of scrivener's error. He writes:

Given that normally legislation is institutionalized in a way which virtually removes the risk of a slip of the tongue, loss of physical control, and other explanations of misfired action, and given that any conceivable theory of authority puts a high premium on relative clarity in demarcating what counts as an exercise of authority and what does not, the possibility of having to go behind what is said to establish what was meant becomes very rare. For practical purposes it may altogether disappear.

Id. at 270. The examples of scrivener's errors given throughout this article may be sufficient to suggest that the phenomenon is not as rare as Raz might think. Moreover, it is hard to see how Raz's argument that legislators must have some minimal intentional control over the content of law in order to satisfy any realistic theory of authority can be squared with treating known scrivener's errors as binding. No legislator *chooses* to make a mistake, and no legislature can choose not to, or choose what the content of that mistake will be. See Recent Case, *supra* note 18, at 2120 ("Scriveners' errors occur frequently and

Second, if there is near-conclusive evidence that a particular, concrete value choice *did in fact* survive the procedural hurdles and that the legislative majority that passed the statute *did in fact* take itself to be embedding that choice in the text it enacted, the reasons that generally counsel deference to the outcomes of the legislative process also counsel deference to these value choices, despite the fact that they were not communicated in the ordinarily exclusive way, through the conventional meaning of the enacted text. Despite the error, the text has enabled a unified intent to emerge from the legislature and has succeeded in enabling later legal actors to divine this intent.

An example may help to make these rather abstract considerations more concrete and easier to grasp. Take the clerical error in 28 U.S.C. § 1453, which caused some headaches in the circuit courts, until Congress corrected the error in 2009. Section 1453 deals with the removal to federal court of class action lawsuits; (c)(1) provided that “a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals *not less than 7 days after entry of the order*.”¹⁹⁶ Read literally, the provision allowed parties to appeal an order disposing of a motion to remand only if they applied for the appeal *after seven days had passed* since the order was entered, a fairly absurd requirement. Beginning in 2005, a series of circuit courts confronted the peculiar text, with each court holding that the error ought to be corrected to read “not more than 7 days,” since “no logical purpose [is] attained by requiring a party to wait seven days before seeking to appeal an order granting or denying a motion to remand, and then allowing that party to seek appellate review at any time in the future after the period has passed.”¹⁹⁷ Moreover, “the uncontested legislative intent behind § 1453(c) was to impose a seven-day deadline for appeals.”¹⁹⁸ In 2009, Congress corrected the error and simultaneously expanded the window for application for review to 10 days.¹⁹⁹

According to the theory I am defending, the courts properly corrected the error. Assuming that that the evidence of error was as conclusive as the courts thought, no real choice to enact a text requiring a waiting period of seven days ever cleared the hurdles of the lawmaking process, so such a choice deserved no more

are the unintentional mistakes of the Congress’s clerical staff—no degree of legislative responsibility can either anticipate or eradicate them.”). So long as mistakes happen and can be identified as such, interpreting them as valid enactments would seem to deprive the legislature of the minimum necessary control over the content of these provisions of the law. Raz’s emphasis on “clarity in demarcating what counts as an exercise of authority and what does not” is well taken, however; throughout this discussion, I have been assuming that scrivener’s errors can be clearly identified. I discuss some of the practical implications of the importance of clarity below, see *infra* notes 247–255 and accompanying text. The point is highly relevant for the development of practical scrivener’s error doctrine, but given that at least *some* scrivener’s errors *do* exist and *can* be clearly identified, I am not sure how relevant the question of clarity is to the conceptual questions underlying that doctrine, discussed in this section.

196. 28 U.S.C. § 1453(c)(1) (2006) (emphasis added).

197. *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006).

198. *Morgan v. Gay*, 466 F.3d 276, 277 (3d Cir. 2006). *Accord* *Estate of Pew v. Cardarelli*, 527 F.3d 25, 27–28 (2d Cir. 2008); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005).

199. Act of May 7, 2009 U.S.C.A.N. (123 Stat.) 1607, 1608 (2009).

deference than if the clerk taking the freshly-passed text to be published had been waylaid by lobbyists opposed to the bill who had surreptitiously substituted the word “less” for “more.” On the other hand, the choice to enact a text embedding a 7 day *limitation* period *was* supported by a legislative majority that *had* survived the requisite procedural constraints: this choice was the very choice that the legislature had taken itself to be enacting, according to the conclusive (we’re assuming) evidence. An obvious error in *communicating* this choice should not be taken as affecting the deference-worthiness of the choice itself.

The proposed solution thus justifies both disregarding a statutory provision that was unintentionally enacted and enforcing as part of the statute the provision that the legislature intended to enact. It is therefore an adequate solution to the problem of scrivener’s error. I submit that this approach to scrivener’s error also meets the two conditions that any such theory must meet in order to be textualist: it justifies correction of scrivener’s errors while adhering to the faithful agent theory and remaining consistent with a principled rejection of both the ordinary use of legislative history and purposivism. It plainly falls within the confines of the faithful agent theory, since the reasons for error correction are fidelity-based. The value choices of Congress, the theory holds, deserve the epistemic deference of its faithful agents in the judiciary, and those agents ought to prescind from their own all-things-considered judgments as to the wisdom, desirability, or goodness of those choices, even when it is hard to see what values are furthered by application of a seemingly over or under-inclusive rule. The theory only demands that to be deference-worthy, these choices need to be embedded in a text that Congress took itself to be enacting into law. The justification offered by the theory for correcting scrivener’s errors, then, is strictly fidelity-based, and therefore falls within the faithful agent theory, where textualism has long found its home.

The theory also rejects the ordinary use of legislative history, although not on intent-skeptical grounds, since it relies on a non-intent-skeptical justification for textualism itself. Judges ought to decline to give potentially dispositive weight to materials such as sponsor’s statements and committee reports because those materials have not survived the crucible of procedural constraints through which we demand any legislative value choice to pass before according it epistemic deference. Those value choices that do clear these procedural hurdles, moreover, can ordinarily only be communicated through the enacted text. Judges ought to ignore the choices expressed by the conventional meaning of the purported legislative text only in the very rare case where there is near-conclusive evidence that the text itself does not meet, in certain respects, the fundamental criteria we must use in identifying some texts as valid statutes in the first place—criteria that include the requirement that the text be *intentionally* passed.²⁰⁰

Finally, this approach to scrivener’s error is equipped to deal with errors that do not result in a deviant text, as well as those that do, as the above discussion of

200. Since it adheres to the faithful agent theory and is consistent with the rejection of the ordinary use of legislative history, the theory is also consistent with Manning’s reasons for rejecting the absurdity doctrine. Although I have not emphasized the distinction between textualism and purposivism in this article, the proposed theory is also consistent with the rejection of purposivism, since it requires an interpreter to respect the legislature’s choice to express its value choices at a certain level of generality. See *supra* note 173 and accompanying text.

28 U.S.C. § 1453 demonstrates. It is for that reason more desirable, *ceteris paribus*, than the theories we examined in Part III, none of which was capable of justifying the correction of the entire class of scrivener's errors.

C. Scrivener's Error—Practice

Up to now, I have been tacitly assuming away an issue that, we can now see, is tremendously important: I have assumed that the evidence for believing there is an error in the text is "near-conclusive." But I have said little or nothing about what kind of evidence, or how much of it, judges ought to demand before finding a text to contain a scrivener's error. We can see at once that how we answer these questions determines to a great degree the usefulness and desirability of the theory. If the evidentiary requirements of the theory are quite low and condone the correction of alleged errors whenever an argument for correction passes the laugh test, the suggested approach to scrivener's error would be fidelity-based in name only, surreptitiously undermining the epistemic justification of textualism.

On the other hand, if the evidentiary requirements were quite strict, allowing correction of only the most obvious and egregious errors, the theory would be undesirable for the very reasons we rejected the existing approaches to scrivener's error: it would fail to justify correction of the entire class of errors in fact, if not in theory. In this final section I address these evidentiary concerns, describing the types of evidence I would admit and the level of evidence I would require and articulating the ways in which the proposed theory would differ in practice from the approach to scrivener's error that is current among textualist judges.

The errors that most easily satisfy any plausible evidentiary requirement are those that result in deviant texts. If the provision at hand is missing a verb, like 8 U.S.C. §§ 1101(a)(43)(F) & (G), discussed earlier,²⁰¹ there is no question that there has been a "drafting snafu."²⁰² Or, to take a fresh example, a 1909 Nevada law regulated the primary system for state elections.²⁰³ In 1911, the Nevada legislature amended Section 2 of the act but left out a crucial comma: § 2, as amended, provided, *inter alia*, that "[t]his act shall not apply to *special elections to fill vacancies to the nomination of party candidates for presidential electors*, nor to the nomination of officers of the incorporated cities, whose charters or ordinances now or may hereafter provide a system of nominating candidates for such offices, nor to the nomination of officers for reclamation and irrigation districts."²⁰⁴

As the Nevada Supreme Court noted, the final version of the bill was apparently missing a comma after "vacancies."²⁰⁵ To exempt both "special elections to fill vacancies" and "the nomination of presidential electors" from the scope of the law makes at least linguistic sense, but the court was at a loss to divine what "a special election to fill vacancies to the nominations" could conceivably be.²⁰⁶ In the case of deviant texts like this one, no evidence of scrivener's error is

201. *Supra* notes 50–52 and accompanying text.

202. *United States v. Banda-Zamora*, 178 F.3d 728, 729 (5th Cir. 1999).

203. Act of March 23, 1909, ch. 198, 1909 Nev. Stat. 273.

204. Act of March 23, 1911, ch. 165 sec. 1, § 2, 1911 Nev. Stat. 334.

205. *State ex rel. Allen v. Brodigan*, 125 P. 699, 700–02 (Nev. 1912).

206. *Id.* at 701.

needed beyond the face of the text itself; it takes no argument to show that “colorless green ideas” cannot “sleep furiously,”²⁰⁷ that a meaningless statutory provision cannot conceivably “reflect[] a deliberate legislative compromise.”²⁰⁸

The evidentiary question is much more difficult for most non-deviant errors. A first question, which we’ve skirted several times but have not yet directly addressed, is whether the textualist can properly consider legislative history in determining whether or not she is faced with an error. Because legislative history is so closely associated with the intentionalist style of interpretation that textualists take as their target,²⁰⁹ and because the abuses of legislative history have been so notorious,²¹⁰ textualists are justifiably suspicious of any and all uses of legislative history.²¹¹ But I want to suggest that occasionally legislative history can properly be used to support a claim of scrivener’s error.

Recall from above²¹² that 49 U.S.C. § 14704 addressed two types of violations by interstate carriers: actions that violated certain regulations, in subsection (a), and certain illegal overcharges, in subsection (b).²¹³ Section 14705, in turn, created limitation periods, with (b) limiting administrative complaints regarding general overcharges to 3 years,²¹⁴ and (c) providing a two-year limitation for complaints “under section 14704(b).”²¹⁵ But the reference to § 14704(b) was odd, since that subsection *also* dealt with overcharges, albeit a limited class of them, while actions under § 14704(a)(2) went unaddressed by the limitations section of the statute. We discovered above that the legislative history of the provision provided a very plausible explanation for this peculiarity: in the original language of both the House and Senate bills, (a)(2) had been numbered (b)(2) and accordingly would have been subject to § 14705(c).²¹⁶ One of a series of last minute amendments had changed the numbering of this provision in the version that ended up being adopted by the conference committee, and then by both houses, even though “in the Conference Report Congress specifically stated that it intended to preserve the relevant statute of limitations, which was two years under the former Interstate Commerce Act.”²¹⁷ Moreover, “Congress specifically stated that it intended to make the limitations period uniform for all types of carriers,” and the “statute of limitations for the parallel provisions governing rail and pipeline carriers is two years.”²¹⁸ Here, the legislative history provides a crucial evidential link on the way to discovering error: standing alone, the fact that the statute leaves the (a)(2) claims to be governed by the default four-year statute of limitations is odd, but hardly so absurd that it could

207. CHOMSKY, *supra* note 53, at 15.

208. Manning, *supra* note 10, at 2459 n.265.

209. *See, e.g.*, Easterbrook, *supra* note 25, at 62-65.

210. *See* Scalia, *supra* note 11, at 29-37; Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1012-23 (1992).

211. *See* Scalia, *supra* note 11, at 29-37; Easterbrook, *supra* note 25. *But see* Manning, *supra* note 14, at 731-37 (discussing limited uses of legislative history that could be accepted by textualists).

212. *Supra* notes 80-94 and accompanying text.

213. 49 U.S.C. § 14704 (2006).

214. *Id.* § 14705(b).

215. *Id.* § 14705(c).

216. *Fitzpatrick v. Morgan S., Inc.*, 261 F.Supp.2d 978, 983 (W.D. Tenn. 2003).

217. *Id.*

218. *Id.*

not have been intended. But the drafting history of the provision suggests that this result was, in fact *not* intended and thus provides us with near-conclusive proof that the reference to (b) is a scrivener's error.

Importantly, the drafting history in this case has two features that justify our reliance. First, the evidence goes to show that the text that was ultimately passed was not the text the legislature took itself to be passing. But for the last minute renumbering, (a)(2) would have been numbered as (b)(2)—the textual content the legislature plausibly thought it was passing. This relates to the distinction between intended wording and intended meaning discussed earlier: any evidence that legislators thought § 14705 should be interpreted to cover § 14704(a)(2) would, on its own, be evidence of intentions that had not passed the bundle of procedural hurdles we require choices to clear before they become law. Interpreting based on this evidence would be barred by the process-based argument for textualism. But the evidence here goes to show something more fundamental: that the textual reference to 14704(b) was unintended, and as such, does not pass the criteria of identity we use to identify certain texts as valid statutes in the first place.

Second, most of the legislative history here is of a kind that is relatively free from manipulation. Textualists have developed a sensitivity to the risk that legislative history is disingenuous.²¹⁹ With sponsor's statements and committee reports, it is all too easy for individual legislators to insert whatever they want into the legislative record in the hopes of influencing interpreters further down the pipe—indeed, it is fear of this kind of behavior that underlies much of the textualist's insistence that any reason for a non-conventional interpretation must itself have cleared all of the relevant procedural hurdles. Knowledge by legislators that judges are willing to consult legislative history, even if just to find scrivener's errors, might produce strategic behavior on their part: legislators might seek a way to plant the legislative record with false suggestion that a scrivener's error has occurred.²²⁰

To the extent that consulting legislative history—even for these limited purposes—creates these risks, textualists are right to be suspicious. But most of the legislative history in this case consists of the history of the bill's organization and the various structural incarnations it went through as it made its way to becoming law. Even where the argument from legislative history relies on committee reports or statements by individual legislators, it does so only to provide additional evidence for an inference that is drawn from the structural history of the bill. Legislative history of this kind—evidence of the prior organization and numbering of provisions—is uniquely, even if not completely, resistant to manipulation and, when backed up by evidence drawn from less reliable sources, can form the basis of a powerful inference that an error in draftsmanship has occurred.²²¹

So legislative history may occasionally provide very persuasive evidence that there has been a drafting error. Another source courts often look to in determining whether there has been an error is the absurdity of the literal reading of the statute.

219. See, e.g., Scalia, *supra* note 11, at 29–37; Note, *supra* note 210, at 1012–23.

220. I am grateful to Professor Manning for pressing me on this point.

221. See Recent Case, *supra* note 18, at 2121 (“[L]egislative history is likely to provide a coherent, reliable and judicially administrable means of identifying linguistic errors. . . . It is likely to be reliable, because the capacity to manipulate information about drafting errors is severely limited.”).

This too can be an important source of probative evidence that a statutory text contains a clerical error. Consider the Kentucky statute at issue in *Bird v. Board of Commissioners*.²²² There, the Kentucky legislature had imposed a tax for the construction of turnpikes, “provided that the width of the macadam²²³ shall not be less than eight inches nor more than fifteen inches.”²²⁴ So the tax could only be used to finance roads that were less than fifteen inches wide! Here, the absurdity of the statute as written is almost dictated by the laws of physics: unless the legislature is to be understood as financing turnpikes for toy cars, the wording must be erroneous. Indeed, the evidence of error here is nearly as strong as in the case of the deviant texts discussed above.

Harder cases arise when the error results in texts that strike us as clearly erroneous because of our policy intuitions, rather than because of the necessary nature of things like turnpikes and automobiles. Recall the statute in *Scurto v. LeBlanc*, which we’ve trotted out so many times, that allowed impeachment of testimony “in any unlawful way.”²²⁵ Here, the intuition seems so strong that the Louisiana legislature just couldn’t have intended to allow “unlawful” impeachment that no additional evidence seems necessary to conclude that we must be faced with a drafting error. Indeed, it’s hard to know what it could even mean to lawfully provide for the unlawful impeachment of testimony: isn’t the statute self-defeating?²²⁶

Contrast *Scurto* with the famous case of *United States v. Locke*.²²⁷ There, the Court dealt with the annual filing requirements of the Federal Land Policy and Management Act of 1976. That act requires the owners of certain classes of mining claims to file certain documents each year “prior to December 31.”²²⁸ One would have expected the statute to require filing of the documents “on or before December 31.” The statute as worded creates the odd result that someone who files on the last day of the year has filed too late and is in violation of the Act. The appellees in *Locke*, who were in exactly this position, argued that the statutory language was a scrivener’s error; that Congress had meant to set the deadline at the end of the year, rather than one day before.

Justice Marshall, writing for the Court, rejected the appellees’ argument, on the grounds that “[t]o attempt to decide whether some date other than the one set out in the statute is the date actually ‘intended’ by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute.”²²⁹ But of course this argument is a bit disingenuous: a deadline of on

222. 24 S.W. 118 (Ky. 1893).

223. Macadam is defined as “[b]roken stone for spreading upon a road way; the road way so made.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1016 (Harold Whitehall ed., 1952).

224. *Bird*, 24 S.W. at 118.

225. *Scurto v. Le Blanc*, 184 So. 567, 574 (La. 1938).

226. By providing by law for the *unlawful* impeachment of testimony, the statute seems to be making lawful all types of impeachment that had heretofore been unlawful. This seems to mean that “unlawful impeachment of testimony” now describes an empty set.

227. 471 U.S. 84 (1985).

228. 43 U.S.C. § 1744(a) (2006).

229. *Locke*, 471 U.S. at 93.

or before December 31 is hardly an “arbitrary one.” December 31 is the end of the calendar year and hence a natural point at which to set a deadline. Indeed, as Justice Stevens pointed out in his dissent, “no one has suggested any rational basis for omitting just one day from the period in which an annual filing may be made,” and setting the deadline at this point in fact feels a little like “a trap for the unwary.”²³⁰

Marshall’s argument that “the United States Code is sprinkled with provisions that require action ‘prior to’ some date, including at least 14 provisions that contemplate action ‘prior to December 31,’”²³¹ fares better, I think. Stevens attempts to parry the thrust by showing that “[e]ven of the provisions refer to a one-time specific date” and that “each of the specific dates mentioned in the 11 provisions is long past; thus, contrary to the Court’s premise, this decision would have no effect on them because they require no future action.”²³² But this response cuts little ice against Marshall’s basic point that the deadline of one day before the end of the year is not unique to this statute, which significantly dampens the plausibility that it was an isolated scrivener’s error. If the formulation has been used 14 different times, it seems far more likely that it is intentional and reflects some hidden goal or compromise. Without more evidence of error, the deadline is odd, I think, but the implausibility that it reflects some hidden legislative goal does not rise to the level needed to correct it as a scrivener’s error. Providing for unlawful impeachment of testimony is so absurd, as a policy matter, as to make it extremely unlikely that such a turn of phrase was intentional. Providing for a deadline of one day before the end of the year is certainly odd but not quite unthinkable in the same way.

At this point, I might seem subject to a charge of inconsistency. Earlier, I rejected recourse to the “policy context” of a statute as inconsistent with the faithful agent theory.²³³ But haven’t I just now endorsed the use of the selfsame policy considerations as a valid source of evidence for rooting out scrivener’s errors?

The seeming inconsistency vanishes once we recall the distinction between the conceptual reasons for correcting clerical errors and the evidentiary reasons for suspecting that we are faced with such an error.²³⁴ Above, I criticized Gold because he relied on the policy intuitions of the average reader to ground his conceptual justification for correcting errors and absurdities: that higher-order conventions allowed judges to simply gloss over the literal meaning of a text when that meaning grossly violated widespread intuitions about justice.²³⁵ I criticized this theoretical account for impermissibly relying on the interpreter’s policy judgments in preference to the policy judgments that the legislature clearly embedded in the statutory text; this substitution of the interpreter’s value choices for those of the legislature’s, I argued, is incompatible with the commitment to legislative supremacy that bottoms the theory of textualism, properly understood.

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

231. *Id.* at 96 n.12.

232. *Id.* at 125 n.15 (Stevens, J., dissenting).

233. *See supra* notes 140–146 and accompanying text.

234. *See supra* note 79 and accompanying text.

235. *See Gold, supra* note 17, at 64–76.

But my theoretical account of scrivener's error is quite different; it is fidelity based, *crucially relying* on an understanding of deference to legislatively selected values to justify the correction of texts that inadequately express those value selections. Relying on the profound policy absurdity of certain texts as an *evidentiary matter* to help us know when we are dealing with a clerical error does nothing to change the fact that once we have determined, based on the evidence, that we are faced with such an error, we are justified in correcting that error, according to my theory, for reasons sounding in legislative supremacy rather than our own intuitions about the good and the right.

There is no reason, then, to ignore such policy considerations when trying to determine if we are up against a clerical error. At the other extreme, many textualist judges refuse to look at other evidence of error until they have determined that the text of the statute is absurd or indeterminate.²³⁶ For example, in *Holloway v. United States*,²³⁷ the Court dealt with the intent requirement in the federal carjacking statute.²³⁸ The provision in question provides certain federal criminal penalties for “[w]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle” connected with interstate or foreign commerce.²³⁹ The question at issue in *Holloway* was whether the intent mentioned in the statute required proof “that the defendant had an unconditional intent to kill or harm in all events,” or if the requirement was satisfied by “conditional intent,” that is, intent to cause death or bodily harm *should certain events take place*, for example, should the owner of the car resist the theft.²⁴⁰

The Court held that conditional intent sufficed; Scalia dissented, on the grounds that “in customary English usage the unqualified word ‘intent’ does not usually connote a purpose that is subject to any conditions precedent except those so remote in the speaker’s estimation as to be effectively nonexistent—and it *never* connotes a purpose that is subject to a condition which the speaker hopes will not occur.”²⁴¹ Saliently for our purposes, Scalia also urged that “[i]t is not at all

236. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (“I think it entirely appropriate to consult all public materials, including the background of *Rule 609(a)(1)* and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of . . .”); *Lamie v. United States Tr.*, 540 U.S. 526, 536–42 (2004) (holding that “[t]he plain meaning that § 330(a)(1) sets forth does not lead to absurd results requiring us to treat the text as if it were ambiguous,” and therefore “[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent In the meantime, we must determine intent from the statute before us.”); *Clinton v. City of New York*, 524 U.S. 417, 454–55 (1998) (Scalia, J., concurring in part and dissenting in part) (“There is nothing whatever extraordinary—and surely nothing so bizarre as to permit this Court to declare a ‘scrivener’s error’” in granting natural persons, but not corporations, standing to challenge the Line Item Veto Act); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1097–98 (9th Cir. 2006) (Bybee, J., dissenting) (denial of rehearing en banc) (“We cannot declare Congress’s choice of the statutory language . . . a clerical error simply because we disagree with the logic of the terms that Congress used,” since the provision at issue “makes perfect sense; it is fully grammatical and can be understood by people of ordinary intelligence.”).

237. 526 U.S. 1 (1999).

238. 18 U.S.C. § 2119 (2006).

239. *Id.*

240. *Holloway*, 526 U.S. at 3.

241. *Id.* at 13 (Scalia, J., dissenting).

implausible that Congress should direct its attention to this particularly savage sort of carjacking—where killing the driver is part of the intended crime,”²⁴² emphasizing that this hypothetical purpose underlying the statute “was a *plausible* congressional purpose in enacting this language—not what I necessarily think was the real one. I search for a plausible purpose because a text without one may represent a ‘scrivener’s error’ that we may properly correct.”²⁴³

The upshot of this seems to be that Scalia, and the textualists who follow him, is more than willing “to consult all public materials,” including legislative history, “to verify that what seems to us an unthinkable disposition . . . was indeed unthought of,”²⁴⁴ but only if he can find no “*plausible* congressional purpose in enacting th[e] language.”²⁴⁵ From the perspective of the theory I have been defending, this threshold requirement of finding absurdity or indeterminacy before launching a search for other reliable evidence of error is misguided. It seems to confound the correction of scrivener’s error with the absurdity doctrine: the very two doctrines I have argued any plausible textualist theory of scrivener’s error must keep distinct.²⁴⁶

The conceptual justification for the absurdity doctrine is that judges ought to rescue Congress from the absurd consequences of its improvidently over or under-inclusive value choices. Following Manning, I have asserted that this is at war with textualism’s rejection of strong intentionalism, on the one hand, and commitment to the faithful agent theory, on the other. But I have argued that the conceptual justification for correcting a clerical error is quite different: judges and citizens owe no deference to value choices Congress did not make and did not intend to enact. And this justification is entirely unconnected to a threshold requirement of facial absurdity or ambiguity. Such a requirement might be justified on the alternative ground that it prevents freewheeling use of the power to correct scrivener’s error by restricting the number of errors courts can correct; but since the restriction is unconnected with the justification underlying the doctrine, it would be as arbitrary a restriction as limiting the correction of scrivener’s errors to cases heard on Tuesdays and Thursdays. While facial absurdity can provide compelling evidence that a court is faced with a scrivener’s error, the requirement that a court must find facial absurdity or ambiguity before going on to consider the possibility of error is rootless and should be abandoned.

A final restriction on the correction of scrivener’s errors occasionally deployed by textualists fares better. The restriction comes out of Scalia’s dissent from *United States v. X-Citement Video, Inc.*,²⁴⁷ which dealt with a provision of the Protection of Children Against Sexual Exploitation Act of 1977,²⁴⁸ which provided federal criminal penalties for anyone who “knowingly transports or ships in interstate or foreign commerce . . . any visual depiction . . . involv[ing] . . . a minor

242. *Id.* at 19.

243. *Id.* at 19 n.2.

244. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

245. *Holloway*, 526 U.S. at 19 n.2 (Scalia, J., dissenting).

246. *Cf.* Scalia, *supra* note 11, at 20 (discussing scrivener’s error in the context of purposivism).

247. 513 U.S. 64 (1994).

248. 18 U.S.C. § 2252 (2006).

engaging in sexually explicit conduct.”²⁴⁹ The question facing the court was whether the statute required that the defendant know that one of the performers in the “visual depiction” was in fact a minor: that is, does “knowingly” apply not only to “transports or ships,” but also to the fact that the visual depiction “involves . . . a minor”?²⁵⁰ The Court held that the scienter requirement did extend to the performer’s age, despite the fact that this was contrary to the most natural reading of the text.²⁵¹

Scalia dissented, rejecting the majority’s ungrammatical reading of the statute. While admitting that “I have been willing, in the case of civil statutes, to acknowledge a doctrine of ‘scrivener’s error’ that permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result,” Scalia refused to extend that doctrine to this case because the majority’s reading would “give the problematic text a meaning it cannot possibly bear” and because “the *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; otherwise we might be rewriting the statute rather than correcting a technical mistake. That condition is not met here.”²⁵²

Scalia’s first requirement—that the corrected reading cannot give the text a meaning it cannot bear—starts off down the wrong path. If the theoretical undergirding of the doctrine of scrivener’s error tells us to correct those errors *because they are errors*, we should clearly care little about ensuring that the corrected reading squares with the wording of the text we are finding erroneously-worded in the first place. That this requirement gets us nowhere can be seen by trying to apply it to errors that result in deviant texts: textual provisions that are not well-formed and are for that reason unmeaning clearly can bear *no meaning*, so the search for a corrected meaning that the text will bear is hopeless.

But Scalia’s second requirement is sound. If a court is to ignore a value choice seemingly expressed by the text in favor of the value choice it believes Congress actually meant to enact, it must be sure of what that corrected choice is. This follows from the two crucial roles played by the statutory text: unless we are sure of what the actual but erroneously-expressed choice was, we cannot be sure that the text has enabled a unified legislative intent to form around a value choice. And if we are unsure of what that choice was, the text clearly has not performed its function of communicating it to us. If a court enforces its best guess in a situation like this, it is not deferring to the legislative will; it is legislating from the bench. Such an exercise of judicial power runs contrary to the theory of authority-as-deference that I have argued underwrites textualism. Confidence about the correct reading of an erroneously worded statute, then, can very properly be called “the *sine qua non* of any ‘scrivener’s error’ doctrine.”²⁵³

Generally, near-conclusive proof that an error has occurred will carry with it near-conclusive proof of the correct reading. At least most of the examples we

249. *Id.* § 2252(a)(1)(A).

250. *X-Citement Video*, 513 U.S. at 67.

251. *Id.* at 78.

252. *Id.* at 82 (Scalia, J., dissenting).

253. *Id.*

have considered have met this requirement. In *Scurto*, for example, the very fact that allowing “unlawful” impeachment of testimony is so obviously an error shows that the legislature meant to allow “lawful” impeachment.²⁵⁴ Similarly, the high improbability that the Maryland statute at issue in *Maxwell* really meant to exempt nearly all property from taxation also meant that it was highly *probable* that the legislature had meant to make all but the specifically exempted classes of property *subject* to taxation.²⁵⁵ But when a court is faced with a statute that clearly contains an error but is unable to ascertain the intended reading of the statute with any certainty, it should decline both to apply the erroneous text and to invent a plausible “corrected” text through judicial fiat.

V. CONCLUSION

In this article I have tried to show how an approach to scrivener’s error can find conceptual room in a textualist theory of statutory interpretation. After reviewing a few prominent textualist answers to the problem of scrivener’s error, I concluded that non-fidelity-based reasons for correcting errors are either too narrow to justify correction of the entire class of errors or too broad to be consistent with the faithful agent theory, and that fidelity-based reasons are inconsistent with intent skepticism. Intent-skeptical justifications of textualism are, for this reason, less desirable than non-skeptical justifications. I then articulated a non-skeptical argument for textualism that relies on the reasons for according authoritativeness to legislative value choices and argued that this justification shows why, when faced with a scrivener’s error, judges ought to enforce the value choice that the legislature intended to embed in the statutory text rather than the one actually expressed by the text. Finally, I argued that syntactic deviance, absurdity, and legislative history are all sources of evidence on which textualist judges may properly draw to determine the existence of an error but that the judge must also be sure of what Congress actually meant to say, before she can enforce a corrected reading of a statute.

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

255. See *Maxwell v. State*, 40 Md. 273 (Md. 1874).