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## A RESPONSE TO PROFESSOR MANNING

*Caleb Nelson\**

PROFESSOR Manning's depiction of textualism is the standard view, and mine the heresy. Despite his elegant presentation, however, I fear that I remain a heretic. This brief rejoinder will explain why I continue to believe that the most important differences between textualism and intentionalism, as they are currently practiced, need not stem from fundamental disputes about the proper aims of interpretation.

The disagreements between Professor Manning and me may stem, in part, from the fact that we have different projects. I certainly agree that it is possible to articulate an interpretive method—which one can call “textualism”—that unambiguously pursues different goals than intentionalism. Such a theory might rigorously exclude any and all references to committee reports or statutory drafting history, might insist on adherence to the semantic meaning of statutory language even when doing so would produce absurd results, and might even refuse to correct obvious scrivener's errors.<sup>1</sup> But no textualist judge—not Justice Scalia, not Justice Thomas, not Judge Easterbrook—does any of these things. Nor is it obvious to me why they should. As my original article suggested, what they are currently doing strikes me as both theoretically coherent and (if one accepts some plausible empirical intuitions) normatively attractive. What is more, it can appeal to people who share the basic goals that have been associated with legal interpretation for centuries.

That response, however, fails to do justice to Professor Manning's rich and thoughtful presentation of the theory that he takes to animate current textualist practice. In many respects, moreover, I agree with what he says. For instance, I acknowledge that public choice theory has given textualists a distinctive view of the legislative process and that this view of the legislative process makes the typical textualist less receptive than intentionalists to claims that a federal statute “authoritatively reflect[s] any collective intent on

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<sup>1</sup> See John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 425 & n.22 (2005).

policy goals that transcend its own terms.”<sup>2</sup> Likewise, I too associate textualism with a tendency to accept “at face value” the apparent choice between rules and standards that statutory language reflects; although textualists are sometimes willing to apply background principles of construction that make statutory directives less rule-like than they seem on their face, Professor Manning and I agree that intentionalists do so more readily.<sup>3</sup> Finally, I entirely agree that because Congress is a collective entity without an individual brain, textualists view the concept of legislative intent as “a construct.”<sup>4</sup>

Despite this considerable common ground, though, I do disagree with portions of Professor Manning’s analysis. Indeed, the two parts of his essay strike me as being in some internal tension. At least in places, Part I associates textualism with the view that Congress is “a multi-member body without actual intentions”—or, rather, that the only collective intention properly attributable to Congress is the intention to enact statutory texts that will have whatever meaning the prevailing interpretive conventions give them.<sup>5</sup> If that were true, however, then Part II’s suggestion that textualists see their approach as “the best . . . way to preserve the unknowable legislative bargains that produced the final text”<sup>6</sup> would be indecipherable. Even if one could meaningfully speak of legislative bargains (as opposed to bargains reached by individual legislators whose personal intentions could not properly be imputed to the legislature as a whole), those bargains would simply entail adopting texts that will be interpreted according to prevailing conventions, and no set of interpretive conventions can be intrinsically better than any other set at preserving bargains of this sort.

The way out of this conundrum, I think, is to distinguish between two different claims: (1) the claim that Congress as an institution never has “unexpressed intentions about the words used in a statute”<sup>7</sup> and (2) the claim that such collective intentions sometimes do

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<sup>2</sup> Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347, 370 (2005).

<sup>3</sup> See Manning, *supra* note 1, at 422–23; Nelson, *supra* note 2, at 398.

<sup>4</sup> Manning, *supra* note 1, at 423; Nelson, *supra* note 2, at 362.

<sup>5</sup> See Manning, *supra* note 1, at 427, 432 (discussing Joseph Raz’s view of the minimum conditions necessary for something to count as a legislative act).

<sup>6</sup> *Id.* at 447.

<sup>7</sup> *Id.* at 432.

exist (in a sense that I will describe) but are largely “unknowable” to judges. I associate textualism only with the latter claim. As I will explain, moreover, someone who accepts the latter claim—which rests on the unknowability rather than the nonexistence of legislative intentions properly attributable to Congress as a whole—could view textualism as the interpretive approach likely to produce the best match between judicial outcomes and the collective legislative intentions that do in fact exist.

### I. THE DIFFERENCE BETWEEN UNKNOWABILITY AND NONEXISTENCE

All modern-day statutory interpreters agree that different legislators have different motivations, different levels of interest, and different amounts of control over different stages of the legislative process. These facts unquestionably make it hard to identify what Professor Einer Elhauge calls “enactable political preferences”—policy proposals that “could and would” have been enacted into law if only they had been on the legislative agenda at a particular time.<sup>8</sup> Even if outsiders like judges could reliably identify such proposals, moreover, the internal rules that allocate control over the legislative agenda are constitutionally authorized parts of the legislative process;<sup>9</sup> no one thinks that courts can legitimately bypass them by pretending that a proposal has become law simply because it would have passed if it had not been bottled up in a committee.<sup>10</sup> In some sense, then, it is surely true that neither textualists nor other statutory interpreters have any interest in enforcing “unexpressed” legislative intentions.<sup>11</sup> But that formulation obviously leaves many open questions about what statutory language should be understood to “express.”

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<sup>8</sup> See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 *Colum. L. Rev.* 2027, 2034 (2002).

<sup>9</sup> See U.S. Const. art. I, § 5.

<sup>10</sup> See Frank H. Easterbrook, *Statutes' Domains*, 50 *U. Chi. L. Rev.* 533, 548 (1983) (“[Courts] might as well try to decide how the legislature would have acted were there no threat of veto or no need to cater to constituents.”).

<sup>11</sup> Manning, *supra* note 1, at 424, 432, 448; see also, e.g., Henry M. Hart, Jr., & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375 (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994) (“The words of the statute are what the legislature has enacted as law, and all that it has the power to enact. Unenacted intentions or wishes cannot be given effect as law.”).

In my view, the principle of legislative supremacy helps both textualists and intentionalists answer some of those open questions.<sup>12</sup> Subject to other constraints (such as the need for the people subject to legislation to have fair notice of the law's requirements and the need to keep legal interpretation from getting too expensive), it is surely desirable for there to be some connection between what members of the enacting Congress understood themselves to be doing and what judges take them to have done. Other things being equal, then, interpretive methods that identify legal directives consistent with the ones legislators thought they were establishing should be preferred to interpretive methods that systematically produce legal directives contrary to the ones legislators thought they were establishing.

According to Professor Manning, however, textualists believe that as a practical matter, this criterion is empty; it cannot help us choose one method of statutory interpretation over another, because collective legislative intentions do not really exist separate and apart from the interpretive conventions that we use to understand statutory texts. While we can presume that legislators as a group "intend to enact a law that will be decoded according to prevailing interpretive conventions," they may not "have *any* actual intent, singly or collectively," about what the law should be understood to mean "on any seriously contested interpretive question."<sup>13</sup> Even when a sizable number of legislators really do have some "semantic intentions"<sup>14</sup> of this sort, those individual understandings of the statutory language are unlikely to coincide; different legislators will understand the text differently.<sup>15</sup> The fact that many interpretive problems were not actually present to the legislators' conscious minds only adds to the problem; it is difficult enough to speak of individual "intent" on such problems, and the complexi-

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<sup>12</sup> Professor Manning shares this view. See Manning, *supra* note 1, at 423.

<sup>13</sup> *Id.* at 432–33.

<sup>14</sup> See Ronald Dworkin, Comment, *in* A Matter of Interpretation: Federal Courts and the Law 115, 116–17 (Amy Gutmann ed., 1997) (using this term to refer to "what some officials intended to *say* in enacting the language they used").

<sup>15</sup> See, e.g., Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870 (1930) ("The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given [statutory description] are infinitesimally small."); see also Manning, *supra* note 1, at 430 n.34 (associating modern-day textualists with Radin's point).

ties of the legislative process make it impossible to attribute any actual intentions on such problems to Congress as an institution.<sup>16</sup> On this view, the reason for the textualists' approach is not that it does a better job than other plausible alternatives of capturing "what [Congress] *actually* intends to convey,"<sup>17</sup> but simply that it is "the best that interpreters can do";<sup>18</sup> even though legislators cannot be presumed to have reached any collective understanding about how the prevailing interpretive conventions would play out on any particular interpretive question, they can at least be presumed to have expected courts to apply those conventions.

Many of the points that Professor Manning makes in reaching this conclusion are undeniably important to textualism. But if his ultimate conclusion were correct—if textualism were indeed premised on a rejection of the very existence of any collective semantic intentions (separate and apart from whatever our interpretive conventions take statutory language to mean), and if textualists were therefore committed to interpreting statutes according to whatever conventions were in vogue at the time of enactment—then I do not think that the new textualism would ever have emerged. As Professor Manning notes, textualism arose as a challenge to a reigning "orthodoxy" that dominated American jurisprudence after World War II,<sup>19</sup> and that encouraged judges to take a "purposivist" approach to the interpretation of statutes.<sup>20</sup> This approach, encapsu-

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<sup>16</sup> See Manning, *supra* note 1, at 431.

<sup>17</sup> *Id.* at 428.

<sup>18</sup> *Id.* at 438.

<sup>19</sup> See *id.* at 420.

<sup>20</sup> I should say a word about terminology, because the imprecision of my original article may have created some uncertainty about the group to which I was comparing textualists. My original article used the term "intentionalists" to refer to the textualists' principal rivals in the present-day judiciary—judges who really do exist, who are not textualists, and who speak of the need for fidelity to a species of legislative "intent." Perhaps I should have used the label "purposivists" instead, for these judges are the modern-day heirs of Hart and Sacks. Whatever label one uses, they are certainly not so simple-minded as to believe that the intentions they identify were held by each and every legislator who voted on a bill, or that a multi-member body "thinks" like a single individual. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 864–67 (1992) (discussing the complexity of the relationship between individual legislators' purposes, if any, and the purpose that can properly be imputed to a statute, and observing that "ascribing a purpose to a human institution is an activity related to, but different from, ascribing a purpose to an individual"); see also Nelson, *supra* note 2, at 362 ("Congress is a collective entity,

lated in the teaching materials of Professors Henry Hart and Albert Sacks, told courts to read statutory language in light of some constructive purposes, derived partly from the transparent commands of the particular statute in question, partly from broader themes evident in our legal system as a whole, and partly from the presumption that “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”<sup>21</sup> Nothing in this approach tells courts to do anything that textualists would regard as impossible or self-contradictory. From the 1950s until the 1970s, moreover, the interpretive conventions associated with this approach dominated American jurisprudence.<sup>22</sup> Yet textualists rejected them. If textualism simply entails reading statutes against the backdrop of prevailing interpretive conventions, how could textualists do so?

Professor Manning’s answer is that in the opinion of the textualists, the alternative interpretive conventions associated with textualism are likely to do a better job of protecting “whatever legislative bargain or bargains were needed to ensure enactment.”<sup>23</sup> That strikes me as exactly right, but it is premised on a rejection of the strongest possible version of the critique of collective intentions; it

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and so the concept of legislative ‘intent’ is obviously something of a construct for textualists and intentionalists alike.”).

At times, Professor Manning contrasts these sophisticated intentionalists (or purposivists) with what he calls “classical intentionalists.” See Manning, *supra* note 1, at 444 n.84. If by “classical intentionalists” one means simple-minded intentionalists who equate meaning entirely with subjective intent, then textualism is indeed qualitatively different from classical intentionalism—but classical intentionalism is also extinct. If, on the other hand, Professor Manning is using the phrase “classical intentionalism” to refer to the approach that was in fact “the orthodoxy” after World War II and that remains textualism’s principal rival in the judiciary, see *id.* at 420, then he too is using the phrase “classical intentionalists” to refer to the Legal Process school and its heirs. As he suggests, moreover, the difference between textualism and that school “does not hinge on the distinction between objective and subjective intent.” *Id.* at 444 n.84.

<sup>21</sup> Hart & Sacks, *supra* note 11, at 1377–80.

<sup>22</sup> See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 624 n.65 (1996) (observing that “[the] Legal Process materials dominated statutory interpretation during much of the post-World War II period”); see also, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 26–28 (1988) (calling the Hart and Sacks approach “[t]he leading intentionalist theory” and observing that it enjoyed “three decades of near hegemony”).

<sup>23</sup> Manning, *supra* note 1, at 444. Professor Manning also advances some constitutional arguments, but I think that they ultimately reduce to the same point.

presumes the potential existence of a (collective) “legislative bargain,” and it insists that some interpretive conventions will come closer than others to identifying such bargains. Thus, I do not understand Professor Manning’s depiction of textualism to rest on a strong denial of the very existence of actual collective intentions of a sort that we want judicial outcomes to match.

Of course, neither textualists nor their rivals in the present-day judiciary attribute all statutory meaning to the specific intentions of members of the enacting legislature. Most present-day statutory interpreters seem perfectly prepared to accept Joseph Raz’s view that the minimal degree of intention necessary for something to count as a legislative act is quite minimal indeed: it simply entails an intention that “the text of the Bill on which [the legislator] is voting will . . . be law” and that it will be “understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country.”<sup>24</sup> Naturally, we expect responsible legislators to do “much more” than that,<sup>25</sup> rather than thinking of legal interpretation as something that only courts can do, individual legislators will normally try to get some sense of the meaning of statutory language before they vote on it.<sup>26</sup> But this obligation (which Professor Raz calls a “moral requirement”) is not subject to judicial review in any strong sense; a legal system such as ours can leave each legislator in charge of deciding “what exactly one needs to know and to intend” in order to satisfy it.<sup>27</sup> Thus, both textualists and their present-day rivals can agree that a statute would have meaning even if we knew that all members of Congress and the President enacted it without any knowledge at all of its contents.

Still, most statutes are not the products of such irresponsibility. Rather than simply voting for the words of a bill (whatever they may be) with the intention that those words will be interpreted according to prevailing conventions (whatever *they* may be), many

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<sup>24</sup> Joseph Raz, *Intention in Interpretation*, in *The Autonomy of Law* 249, 267 (Robert P. George ed., 1996) (footnote omitted).

<sup>25</sup> *Id.*

<sup>26</sup> That is why Professor Waldron can refer to “the *reciprocity* of intentions that conventions comprise.” See Manning, *supra* note 1, at 433 (quoting Jeremy Waldron, *Legislators’ Intention and Unintentional Legislation*, in *Law and Interpretation* 329, 339 (Andrei Marmor ed., 1995)) (emphasis added).

<sup>27</sup> Raz, *supra* note 24, at 267.

individual legislators try hard to satisfy Raz's "moral requirement." They cast their votes on the basis of some understanding of what each bill means—an understanding that they or their advisers (including party leaders and staff members) form by applying an amalgam of linguistic conventions (including usages common to English speakers, more specialized conventions common to legislative draftsmen, and additional interpretive principles that might not otherwise reflect legislative habits but that courts or other interpreters have embraced). These understandings will rarely be comprehensive or universally shared; some of the interpretive questions that later arise in court will be entirely orthogonal to the semantic intentions held by individual members of the enacting legislature, and others will involve issues on which there was a cacophony of different understandings. But if we were omniscient about the semantic understandings acted upon by individual members of the enacting legislature, it is certainly possible that we would identify some issues on which those understandings (1) really did exist and (2) were sufficiently cohesive to be aggregated, in a nonarbitrary way,<sup>28</sup> into a "collective" intention about the statute's meaning. Indeed, this sort of collective intention is possible even when legislators' underlying policy preferences lend themselves to cycling, and even when the outcome of the legislative process depends entirely on who controls the agenda.<sup>29</sup>

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<sup>28</sup> Cf. Nelson, *supra* note 2, at 371 ("[T]he fact that the notion of 'intended meaning' requires some aggregation of competing views does not mean that it is entirely incoherent, or that every possible method of aggregation is just as sensible as every other possible method of aggregation."); *id.* at 362 ("[T]he fact that collective intent is a construct does not mean that it has no relationship to anyone's actual intent . . .").

<sup>29</sup> Suppose, for instance, that Congress is considering how to spend a particular pot of money. All members of Congress would like to spend the entire pot on their most preferred program, but each chamber is evenly divided into three groups with competing preferences: members of Group 1 prefer Program A to Program B and Program B to Program C, members of Group 2 prefer B to C to A, and members of Group 3 prefer C to A to B. Depending on who controls which aspects of each House's procedures and what sorts of deals can be struck, one could imagine a variety of different ways in which the money could be spent. But if Congress ultimately enacts a bill providing for half of the money to be spent on Program A and for the remainder to be divided evenly between Program B and Program C, the fact that the members' policy preferences were subject to cycling does not mean that their semantic intentions are similarly cyclical. It is entirely possible for legislators with diverse policy preferences to share much the same understanding of the meaning of the words that they end up enacting.

Quite sensibly, Professor Manning doubts that questions on which such collective intentions genuinely existed would generate any serious interpretive disputes, and hence that courts would ever confront them. But to the extent that different judges take different interpretive approaches, and to the extent that some of those approaches either are relatively uninterested in actual collective intentions or relatively inaccurate at identifying them, cases might well be worth litigating even though the legislature did in fact have some collective understanding of the statutory language. In any event, interpretive methods must be designed for all cases, not just for the ones that provoke litigation. The contrary view is self-defeating, because the interpretive methods that courts are in the habit of using will affect which cases get litigated; if those methods pay no attention to collective semantic intention (on the theory that it hardly ever exists in the hard cases that actually get litigated), then cases that would previously have been classified as “easy” will start finding their way to court.<sup>30</sup>

Professor Manning’s real point, I think, is not that textualism rests on a denial of the very possibility of collective semantic intentions (separate and apart from whatever meaning courts impute to a statute), but simply that textualists believe such collective intentions to be largely “unknowable.”<sup>31</sup> Even if an omniscient observer who knew each individual legislator’s semantic understandings could sometimes aggregate them to identify an actual collective understanding (which can meaningfully be said to have “existed” because it is constructed in a nonarbitrary way from the individual understandings that existed), judges are not omniscient observers. According to the textualists, judges who try to reconstruct the legislature’s collective understandings (if any) by engaging in case-by-case investigation of individual legislators’ actual semantic intentions are doomed to failure; they do not know enough to identify reliably whatever collective understandings did in fact exist. Instead, “the best that interpreters can do” is to give the statutory language the meaning that it would have had to “a reasonable per-

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<sup>30</sup> See generally Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. Chi. L. Rev. 149 (2001) (discussing the pathologies that can arise when courts base decisions about interpretive doctrine on common features of the cases that they are currently observing).

<sup>31</sup> Manning, *supra* note 1, at 450.

son conversant with applicable conventions” (to wit, the interpretive conventions that textualists accept).<sup>32</sup>

I agree entirely with this point, but it supports rather than contradicts the thesis of my original article. Textualism does indeed rest on the view that the legislature’s actual collective intentions are largely unknowable to judges even when they do exist; textualists are skeptical of judges’ abilities to reach accurate determinations of collective semantic intentions by investigating the actual intentions of individual members of Congress. But this skepticism does not mean that interpreters must abandon any concern for collective semantic intentions. While conceding that ontological certainty about those intentions is impossible, skeptics could plausibly believe that judicial outcomes will better match whatever collective semantic intentions actually existed if judges consistently use the relatively rule-like interpretive conventions associated with textualism than if they use the more holistic methods associated with modern-day intentionalism.<sup>33</sup> After all, generalizations based on empirical intuitions are often the best way to handle conditions of uncertainty.<sup>34</sup> Over time, moreover, consistent use of rule-like methods might establish a more predictable interpretive background that enables responsible legislators to communicate their collective intentions more successfully than they would otherwise be able to do.<sup>35</sup> For both of these reasons, people who want to maximize the overlap between the interpretations adopted by

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<sup>32</sup> *Id.* at 433.

<sup>33</sup> Cf. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74, 79 (2000) (arguing that the empirical uncertainties endemic to statutory interpretation should “push[] interpretive doctrine . . . toward rules rather than standards”).

<sup>34</sup> For a simple statistical illustration, suppose you know that a particular barrel contains one hundred marbles, sixty of which are red and forty of which are yellow. You are blindfolded and told to draw a marble out of the barrel at random, guess its color, and return it to the barrel. This exercise is repeated a hundred times. If you want to maximize the expected accuracy of your guesses (that is, the number of times that your guesses will match the true but, to you, unknowable reality), you should simply follow an inflexible generalization: whenever you choose a marble, you should always say that it is red. Although this strategy can be expected to produce errors 40% of the time, any alternative strategy will predictably be even worse. On average, for instance, someone who guessed “red” sixty times and “yellow” forty times would be wrong 48% of the time.

<sup>35</sup> See, e.g., Vermeule, *supra* note 33, at 140 (“If the default rules are fixed, Congress can, over time, incorporate the content of the background rules into its anticipations of judicial behavior.”).

courts and the collective understandings that Congress actually entertained, but who concede that those understandings are largely unknowable to judges, might well gravitate toward the relatively rule-based methods associated with textualism.

The upshot is simple. I agree with Professor Manning that textualists are interested in “how ‘a skilled, objectively reasonable user of words’ would have understood the statutory text.”<sup>36</sup> My only point is that some textualists may be interested in this datum less as an end in itself than as the best means of generating matches between the legal directives that courts enforce and Congress’s actual collective understandings of the statutes it enacts. In contrast to the view that textualism necessarily entails seeking the text’s conventional meaning as an end in itself, my suggestion is consistent *both* with the textualists’ general approach *and* with the exceptions that they are willing to recognize.<sup>37</sup>

An analogy to the interpretation of private contracts helps illustrate my point.<sup>38</sup> As Professors Alan Schwartz and Robert Scott have recently noted, just about everyone agrees that “the appropriate goal of contract interpretation is to have the enforcing court find . . . the solution . . . that the parties intended to enact.”<sup>39</sup> Still, there have long been two schools of thought about how best to do so. One school, associated with Samuel Williston, urges courts simply to presume that the parties were using what Professors Schwartz and Scott call “majority talk”—the linguistic conventions that sophisticated contracting parties and courts usually use.<sup>40</sup> The other school, associated with the *Restatement (Second) of the Law of Contracts*, allows courts to investigate the possibility that the parties were instead using what Schwartz and Scott call “party

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<sup>36</sup> Manning, *supra* note 1, at 434 (emphasis omitted) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 *Harv. J.L. & Pub. Pol’y* 59, 65 (1988)).

<sup>37</sup> See *supra* text accompanying note 1.

<sup>38</sup> By invoking this common analogy, I do not mean to suggest that statutes and contracts should necessarily be interpreted in the same way. Different types of legal documents serve different functions, and one might favor a textualist approach to statutes even if one would approach contracts differently. See Mark L. Movsesian, *Are Statutes Really “Legislative Bargains”?* *The Failure of the Contract Analogy in Statutory Interpretation*, 76 *N.C. L. Rev.* 1145 (1998).

<sup>39</sup> Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *Yale L.J.* 541, 568–69 (2003).

<sup>40</sup> *Id.* at 570, 618.

talk”—idiosyncratic linguistic conventions peculiar to themselves.<sup>41</sup> One’s position on this debate will naturally reflect one’s intuitions about the likely behavior of contracting parties and the likely limitations on courts’ omniscience. But people with certain intuitions may well surmise that in the aggregate, courts will better reflect the meaning intended by contracting parties if they conclusively presume (absent contrary indications in the text itself) that the parties were using “majority talk.”<sup>42</sup> By the same token, textualists can believe that judges interpreting statutes will better reflect the meaning intended by Congress if they apply the relatively rule-like interpretive conventions associated with textualism than if they look for signs of idiosyncratic “Congress talk.”<sup>43</sup>

In sum, interpretive methods can and do produce “meaning” on interpretive questions as to which members of the enacting legislature had no collective intention. But when courts apply those methods to interpretive questions on which members of the enacting legislature *did* have collective semantic intentions (such as a collective intention to establish no law at all), the methods can fairly be assessed by how well the results that they produce match

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<sup>41</sup> *Id.* at 570; see also, e.g., Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 Cal. L. Rev. 1127, 1133–34 (1994) (recounting the same debate in terms less sympathetic to the Willistonians). See generally Restatement (Second) of Contracts § 201 (1981).

<sup>42</sup> See Schwartz & Scott, *supra* note 39, at 618 (concluding that “a textualist interpretive theory is the best default” for contract interpretation and urging courts to presume that contracts between sophisticated parties are written in “majority talk” unless the contracts themselves opt out of this set of interpretive conventions).

<sup>43</sup> By this phrase, I mean to refer to linguistic usages peculiar to the individual legislators who enacted a particular proposal. Textualists are open to the possibility of a less idiosyncratic type of “Congress talk,” in which Congress’s consistent practices can infuse particular terms with technical meaning. Indeed, one of the cases that Professor Manning discusses, *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991), illustrates precisely this phenomenon. Drawing upon evidence from a host of roughly contemporaneous statutes, Justice Scalia concluded that when Congress enacted the relevant provisions of 42 U.S.C. § 1988 in 1976, it was in the habit of using the phrase “attorney’s fees” as a legislative term of art that did not include fees for expert witnesses. See *W. Va. Univ. Hosps.*, 499 U.S. at 88–91 (citing numerous statutes enacted before, during, and after 1976 that refer separately to “attorney’s fees” and “expert witness fees”); *id.* at 90 (concluding that “when a shift [of expert fees] is intended,” federal statutes address them separate and apart from “attorney’s fees”). Although Professor Manning takes Justice Scalia to have been asking how “a reasonable person” would have used the phrase “attorney’s fees” in this context, see Manning, *supra* note 1, at 442–43, Justice Scalia seemed more interested in how *Congress* typically used the phrase.

the collective intentions that actually existed. My original article suggested that at least some textualists embrace textualism because they think that it produces more accurate results along this dimension than intentionalism.<sup>44</sup> Far from defeating this suggestion, the fact that textualists consider collective semantic intentions to be largely unknowable explains why it might be true.

## II. THE RELEVANCE OF SEMANTIC INTENTION TO “MEANING”

Of course, consciously held semantic intentions are not the only sort of legislative intentions that either textualists or intentionalists might try to capture. Professor Manning properly notes that intentionalists, at least, are also interested in another sort of collective intention. I completely agree with him that when intentionalists identify “a sufficiently dramatic mismatch” between the conventional semantic import of a statutory provision and the purposes that the enacting legislature apparently was trying to serve, they are willing to infer exceptions or embellishments inspired by those purposes.<sup>45</sup> Textualists are slower to do so.

It is certainly possible to see this distinction in cosmic terms, as relating to the basic purposes of interpretation. For intentionalists, one might say, identifying any collective semantic intentions that members of Congress consciously held is but one step in the process of interpretation. Rather than simply enforcing statutory directives as Congress formulated them, intentionalists are prepared to consider how reasonable members of the enacting Congress *would have* formulated the directives *if* they had contemplated the circumstances that the interpreters now confront. On this view, inten-

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<sup>44</sup> As my original article noted, of course, everyone agrees that interpretive methods must be assessed on some other dimensions too. There is a consensus, for instance, that the people subject to a statute should have fair notice of the law’s requirements; that is why even intentionalists restrict themselves to publicly available materials when trying to discern what the enacting legislature meant. Likewise, there is a consensus that the costs of interpretation should stay within reasonable bounds; an interpretive approach that promised some tiny improvement in the accuracy with which interpreters glean whatever collective semantic intentions exist, but that could achieve this improvement only at astronomical cost, can surely be rejected on this ground. See Nelson, *supra* note 2, at 359. Some people may be drawn to textualism because they believe that it performs better than intentionalism on these other dimensions, while still performing adequately along the dimension on which I am focusing here.

<sup>45</sup> Manning, *supra* note 1, at 440; see also Nelson, *supra* note 2, at 400 (echoing this point).

tionalists see their aim as fidelity to the policy judgments that statutory language (imperfectly) reflects, rather than as fidelity to the statutory language itself. The point of textualist interpretation, by contrast, is simply to identify and enforce the “semantic import” of statutory language (read in its proper context).<sup>46</sup>

This stark view of the contrast between textualism and intentionalism is widespread. But I am not sold on it, for two reasons. First, I do not think that the differences that really do exist between textualist and intentionalist judges are as cut-and-dried as this portrayal suggests. Second, many of those differences may simply reflect different intuitions about how best to approximate one particular policy judgment that the enacting legislature might (or might not) have made—a disagreement that again relates to *methods* rather than *goals*. I will take these points one by one.

To appreciate the first point, consider how modern-day interpreters might react to Blackstone’s example of an old statute giving the lord of a manor power to judge all cases arising within the manor. Blackstone argued that in the absence of a clear statement to the contrary, this statute should not be understood to reach cases in which the lord was himself a party; the likely purposes of the statute do not require this application, and “it is unreasonable that any man should determine his own quarrel.”<sup>47</sup>

Intentionalists are likely to agree with Blackstone’s interpretation. In some sense, of course, this result might contradict the collective “semantic intention” that members of the enacting legislature consciously held; when they enacted this statute, members of the legislature presumably meant to use the word “all” in its conventional way. But there is a difference between saying that “the lord of the manor has power to judge all cases arising within the manor” and saying that “the lord of the manor has power to judge all cases arising within the manor, *including even those in which he himself is a party.*” Absent such a clear statement, intentionalists might surmise that when the legislature used the word “all,” its members simply were not thinking about cases in which the lord was himself a party. Given the background presumptions of Anglo-American law, moreover, it seems highly probable that the legisla-

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<sup>46</sup> Manning, *supra* note 1, at 439–40.

<sup>47</sup> 1 William Blackstone, *Commentaries* \*91.

tors would have collectively intended *not* to make manorial lords judges in their own cases if this potential application of their words had occurred to them. On these facts, intentionalists would almost certainly read the statutory language to contain an implicit exception: in this context, the statement that the lord of the manor has power to judge all cases arising within the manor “means” only that he has power to judge cases in which he himself is not a party.<sup>48</sup>

Despite the textualists’ emphasis on “semantic import,” I suspect that many textualist judges would reach the same result. To be sure, they might take a more rule-like approach than intentionalists to the process of inferring exceptions. But in situations of this sort, at least some textualists seem willing to apply canons of construction that operate like default rules for interpreting contracts, and that reflect the presumptive desires of members of the enacting legislature on issues that the legislators appear not to have considered one way or the other. In Judge Easterbrook’s words, rules of this sort “are desirable not because legislators in fact know or use them in passing laws but because [they] serve as off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them.”<sup>49</sup> While legislators will sometimes want to opt out of these rules and will need to draft specific provisions to do so, “[t]he general reduction in the costs of legislating makes up for the costs of reversing the background rule in the event it should be ill-adapted to some given statute.”<sup>50</sup>

Not all canons are like this; many reflect more straightforward generalizations about the surface-level semantic intentions held by members of Congress. But Judge Easterbrook is absolutely right to suggest that some canons reflect the same sort of intentions that

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<sup>48</sup> Note that this conclusion need not be phrased in terms of what the enacting legislature would have done if it had thought about this issue. While intentionalists sometimes use that rhetorical device, they would lose nothing by casting their conclusions in terms of the implications of the decisions that the enacting legislature did in fact reach (and recorded in authoritative statutory language). Read in its proper context, they could say, the language at issue here does not authoritatively signify a collective decision to make manorial lords judges in their own cases. See Nelson, *supra* note 2, at 407–08 (discussing what advocates of “imaginative reconstruction” see themselves as doing).

<sup>49</sup> Easterbrook, *supra* note 10, at 540.

<sup>50</sup> *Id.*

default rules of contract interpretation get at; they have less to do with semantics than with presumptive policy judgments.<sup>51</sup> Take, for instance, the various canons that support inferring exceptions to seemingly unqualified statutory language.<sup>52</sup> Many of these canons identify policy judgments that members of Congress probably did not intend to make, and they encourage courts to reformulate statutory language accordingly. When courts apply these canons, they are reading statutory language to “mean” what the legislature presumptively would have said if its members had been thinking about the situations that the canons address. In an important sense, these canons are formalized versions of the same sort of analysis that intentionalists sometimes apply on a more ad hoc basis.

Once these canons are in place, of course, textualists can assert that their application simply involves enforcing the semantic import of the statutory text, as understood according to the prevailing conventions that govern the interpretation of such texts. But this response is a bit of a dodge, because it does not tell us why these particular canons arose in the first place or how textualists determine their true scope. If one accepts this sort of dodge, moreover, then the distinction with which we began evaporates; intentionalists too could say that they always follow the “semantic import” of statutory language (read against the backdrop of canons telling interpreters to infer exceptions to seemingly broad statutory language when doing so would serve the purposes that a reasonable interpreter would impute to the enacting legislature).

In any event, even in the absence of any specific canons of construction, many textualist interpreters are willing to deviate from what they identify as the semantic import of statutory language when necessary to avoid absurd results. In such cases, at least, textualists concededly reformulate statutory language to reflect policy judgments that they impute to the enacting legislature.<sup>53</sup> Thus, it

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<sup>51</sup> See *id.* (observing that background rules of contract interpretation reflect the provisions that courts “think the parties would have picked had they thought of the subsequently surfacing problems and been able to bargain about them beforehand at no cost,” and using a “similar approach” to evaluate a proposed canon of statutory interpretation).

<sup>52</sup> For a few examples of such canons, see Manning, *supra* note 1, at 436 n.55.

<sup>53</sup> See John F. Manning, *The Absurdity Doctrine*, 116 *Harv. L. Rev.* 2387, 2420 n.123 (2003) (citing statements by Justice Scalia and Judge Easterbrook acknowledging this limitation on their willingness to enforce semantic meaning).

cannot be quite right that textualism (at least as it is actually practiced<sup>54</sup>) is entirely concerned with “semantic import” and not “policy judgments.” As Professor Manning acknowledges, moreover, it is absolutely routine for textualists to blur these categories by basing decisions about “semantic import” on the policies that the enacting legislature apparently was trying to advance.<sup>55</sup>

Of course, even if there is not a qualitative difference along these lines between textualists and intentionalists, there is certainly a quantitative one. As my original article noted, textualists are significantly less willing than intentionalists to infer purpose-based exceptions to (or embellishments upon) the conventional meaning of statutory language.<sup>56</sup> Another way of putting the same point is that statutory directives tend to be more rule-like in the hands of textualists than in the hands of intentionalists; textualists are less likely than intentionalists to read statutory language as implicitly inviting judges to recur to the substantive purposes that the enacting legislature allegedly was trying to promote. But this difference need not be seen as reflecting any fundamental disagreement about the nature of statutory “meaning” or the relationship that it bears both to conscious semantic intentions and to underlying policy judgments. Without positing any gulf between textualists and intentionalists on this philosophical question, one can distinguish their approaches in the more prosaic terms suggested by my original article: textualists disagree with intentionalists about the interpretive practices that are most likely “to honor the enacting legislature’s choice between rules and standards,” and textualists also have a greater tendency than intentionalists “to resolve doubts on that score in favor of rules.”<sup>57</sup>

Textualists certainly agree with intentionalists that it can sometimes be appropriate for courts to apply background principles of

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<sup>54</sup> Cf. Manning, *supra* note 1, at 425 n.22 (suggesting that this aspect of textualist practice is inconsistent with textualism properly understood).

<sup>55</sup> See *id.* at 439 n.65 (citing many cases); see also, e.g., *In re Erickson*, 815 F.2d 1090, 1092–93 (7th Cir. 1987) (Easterbrook, J.) (suggesting that if an insolvency statute listed “chairs” among the items that a person can keep free and clear of his creditors, this exemption should not be read to protect Chippendale chairs, “because the function of the statute is to leave the person a place to sit rather than to protect an antique valued (and valuable) for its beauty and age rather than its comfort”).

<sup>56</sup> Nelson, *supra* note 2, at 400.

<sup>57</sup> *Id.*

interpretation that make statutory directives less rule-like than they seem on their face.<sup>58</sup> Likewise, intentionalists agree with textualists that when members of the enacting legislature have considered the difference between rules and standards and have deliberately chosen to enact provisions with a certain degree of ruleness, courts should respect that choice.<sup>59</sup> As Professor Manning indicates, the basic difference between textualists and intentionalists on this front is simply that when a statutory directive is cast at a certain level of ruleness, textualists are more likely than intentionalists to take the text “at face value.”<sup>60</sup> The simplest explanation for this difference, moreover, is the one that Professor Manning himself offers: when a statutory directive is cast in relatively rule-like terms, intentionalists are more willing than textualists to ascribe that formulation to “legislative inadvertence”<sup>61</sup> (or, perhaps, to legislative expectations that courts will interpret the formulation according to the principles associated with intentionalism<sup>62</sup>). Textualists, by contrast, think it better to assume that the enacting legislature made a deliberate policy decision for the directive to be just as rule-like as it seems.<sup>63</sup>

Again, one need not describe this disagreement as entailing a fundamental difference between interest in “policy judgments” and interest in “semantic import.” After all, the choice between rules and standards is itself an important policy judgment, and both textualists and intentionalists are interested in identifying and respecting the decisions that Congress authoritatively makes on this front.

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<sup>58</sup> See, e.g., *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 Harv. L. Rev. 1834, 1913–14 (1999) (Easterbrook, J.).

<sup>59</sup> See Nelson, *supra* note 2, at 400–02.

<sup>60</sup> Manning, *supra* note 1, at 424.

<sup>61</sup> *Id.* at 440.

<sup>62</sup> Cf. Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 Sup. Ct. Rev. 343, 389 (“Congress has not legislated on the assumption that courts would be powerless to flesh out statutory enactments.”).

<sup>63</sup> See, e.g., *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) (“Congress may prefer standards over rules in some statutes, yet choose rules over standards in others. . . . [T]he [Truth in Lending Act] is rule-based, and we disserve that legislative choice by deciding that standards really are the way to go.”); cf. John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 20 (2001) (“[T]extualists contend that enforcing the purpose, rather than the letter, of the law may defeat the legislature’s basic decision to use rules rather than standards . . .”).

The relevant disagreement is at least partly about methods rather than goals: conceding that we want courts to honor Congress's deliberate legislative choices between rules and standards, are courts more likely to do so by applying the interpretive principles associated with intentionalism (which push in the direction of standards) or by applying the interpretive principles associated with textualism (which reflect more willingness to believe that Congress meant its statutory directives to be as rule-like as they seem on their face)?<sup>64</sup>

I do not take Professor Manning to deny this point. To the contrary, he himself observes that the textualists' position on this issue rests upon the view that textualism is "the best . . . way to preserve the unknowable legislative bargains that produced the final text."<sup>65</sup> Neither textualists nor intentionalists are necessarily uninterested in those bargains; they may simply have different intuitions about how to approximate them most accurately.

#### CONCLUSION

I have enormous respect for Professor Manning, and I am honored and grateful that my article has drawn his response. As a fan of rules, moreover, I urge readers to apply a strong presumption that in case of disagreements between us, Professor Manning is right and I am wrong. But I fear that textualism as he depicts it falls into what is sometimes called a "positivist trap";<sup>66</sup> it loses any basis for evaluating proposed refinements in interpretive conventions, and it loses the normative appeal that it might otherwise have for people (like me) who consider legislatures capable of having collective intentions that stand separate and apart from what judges say they are.

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<sup>64</sup> As I argued in my original article, I do not believe that the debate is entirely methodological; it has a normative component too. All interpretive methods are designed both to identify a range of permissible meaning and to help resolve ambiguities within that range. Insofar as their interpretive methods serve this latter function, intentionalists seem quicker than textualists to resolve ambiguities in the direction of standards.

<sup>65</sup> Manning, *supra* note 1, at 447.

<sup>66</sup> See, e.g., Anthony D'Amato, *Elmer's Rule: A Jurisprudential Dialogue*, 60 *Iowa L. Rev.* 1129, 1145 (1975); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 *B.U. L. Rev.* 885, 888 (1981).

To illustrate what I mean, turn the clock back two decades and imagine that it is 1984. One of the parties in *Chevron v. Natural Resources Defense Council*<sup>67</sup> is urging the Supreme Court to announce a new default rule that when a statute administered by a federal agency contains an ambiguity, the statute should be understood to give the agency authority to select one of the permissible interpretations in a way that binds courts. A commentator<sup>68</sup> urges the Court to think about this proposal as follows: Until now, the Court has consulted various factors to decide “on a statute-by-statute basis” whether Congress intended to delegate interpretive authority to the agency.<sup>69</sup> The Court is being asked to replace this prevailing interpretive approach with an “across-the-board presumption” that Congress does indeed intend to delegate interpretive authority unless it makes a contrary specification.<sup>70</sup> This generalization admittedly would not be “a 100% accurate estimation of modern congressional intent,” because Congress sometimes collectively intends *not* to delegate interpretive authority and more commonly forms no intention on this issue at all.<sup>71</sup> Still, the prevailing practice of statute-by-statute evaluation (without any guiding presumption) is not “100% accurate” either, and the results that it produces are “becoming less and less so.”<sup>72</sup> The proposed default rule might reflect a sensible estimate of the trend of current legislative practice, and it would also provide “a background rule of law against which Congress can legislate” (thereby potentially focusing Congress’s attention on the issue of interpretive authority and making it easier for Congress to convey its actual intentions when it does form them).<sup>73</sup> For both these reasons, the Court’s switch to the more rule-like approach might generate results that are more consistent with whatever collective intentions actually exist than the outcomes being reached under prevailing interpretive conventions.

Could such a commentator be considered a textualist?

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<sup>67</sup> 467 U.S. 837 (1984).

<sup>68</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511.

<sup>69</sup> *Id.* at 516.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 517.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 516–17.