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## Statutory Interpretation and the Lessons of Llewellyn

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# STATUTORY INTERPRETATION AND THE LESSONS OF LLEWELLYN

*John M. Breen*

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# STATUTORY INTERPRETATION AND THE LESSONS OF LLEWELLYN

*John M. Breen\**

*No language stands alone. It draws life from its background.*

K.N. Llewellyn<sup>1</sup>

*But in Utopia everyone's a legal expert, for the simple reason that there are, as I said, very few laws, and the crudest interpretation is always assumed to be the right one. They say the only purpose of a law is to remind people what they ought to do, so the more ingenious the interpretation, the less effective the law, since proportionately fewer people will understand it—whereas the simple and obvious meaning stares everyone in the face.*

Thomas More<sup>2</sup>

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\* Assistant Professor, Loyola University Chicago School of Law; B.A., University of Notre Dame, 1985; J.D., Harvard University, 1988. I could not have completed this work without the generous help and support of many people. I wish to thank Bernard and Kathleen Beazley for their support of scholarship at Loyola University Chicago in general and of my work in particular. I also wish to thank my colleagues at Loyola, especially Jeffrey L. Kwall, Jerry E. Norton, and Neil G. Williams for reviewing prior drafts of this Article. Thanks also to the faculty of the Cumberland School of Law at Samford University, where I presented an earlier version of this work as part of their Law and History Colloquium. I am especially grateful to Cumberland's Andrew R. Klein, William G. Ross, Barry A. Currier, George Wright, Stephen J. Ware, Jack Nelson, and Howard P. Walthall. Thanks also to Robert A. Hillman, Martin H. Redish, and E. Allan Farnsworth. I also greatly appreciate the hard work and patience of Valerie Stanley in preparing the manuscript, as well as Michael Neidigh, Anna Wermuth, and especially Sanders Lowery, for their excellent research assistance. All errors that remain are mine alone. Most of all I wish to thank Susan Nelligan Breen whose persistent encouragement and heartfelt support have sustained me throughout this lengthy project. This Article is dedicated in loving memory to Rev. William A. Ryan, C.M., Helen Ryan Nelligan, Sr. Catherine Anne McCorry, C.S.C., and Mary Ann McDevitt.

1. K.N. LLEWELLYN, *THE BRAMBLE BUSH* 79 (1951).

2. THOMAS MORE, *UTOPIA* (Penguin ed. 1965).

*Complete self-confidence is not merely a sin; complete self-confidence is a weakness.*

G.K. Chesterton<sup>3</sup>

## I. INTRODUCTION

Karl Llewellyn was a man who understood the power of context. Llewellyn knew that the meaning of a text was not simply a function of the words used to compose it. He knew that the meaning of a text varied with the identity of the author and the audience and the circumstances surrounding their encounter through the text. He knew that a change in context could radically alter the meaning of a text. He knew that what had been said in the past could affect the meaning of what is said in the present. Llewellyn understood that meaning was not conveyed by words alone. He understood that what is not written down may be of as much importance as what plainly appears in the “four corners” of the document. He understood that one’s background of experiences and beliefs comes into play well before the acts of textual composition and interpretation have visibly begun. Accordingly, Llewellyn was deeply skeptical of any legal system that would hope to guide men’s actions and direct the power of courts by words alone. Instead, Llewellyn believed that both the articulation and the interpretation of legal language was always done with a purpose in mind, and that one could best grasp the purpose by grasping the context in which the text was situated.

Llewellyn’s deep appreciation of the power of context is reflected only obliquely and intermittently in his academic writings.<sup>4</sup> It was not the focused study of any of his many law review articles or books. Instead, Karl Llewellyn’s understanding of the power of context and its importance for law appear most vividly in the Uniform Commercial Code (“UCC” or “Code”). Although this statute was the work of many individuals, more than any other person, Karl Llewellyn was responsible for the creation of the UCC.<sup>5</sup> Llewellyn

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3. G.K. CHESTERTON, *ORTHODOXY* 14 (1959).

4. See *infra* Part II.C.2-4.

5. See Arthur Linton Corbin, *The Uniform Commercial Code – Sales; Should It Be Enacted?*, 59 *YALE L.J.* 821, 821 (1950) (noting that “[w]ithout

acted as Chief Reporter for the Code from its inception in 1940 until his death in 1962.<sup>6</sup> Even in light of his other accomplishments, the Code stands as Llewellyn's greatest contribution and lasting legacy to American law and jurisprudence.

Llewellyn's influence over the Code, while pervasive, was particularly strong with respect to Articles 1 and 2. Article 1 sets forth the "General Provisions" for the UCC, including a lengthy definitions section and a number of principles of interpretation to be used with respect to agreements under the Code as well as the Code itself.<sup>7</sup> Article 2 contains the statute's rules governing the sale of goods.<sup>8</sup> Each article of the Code had a principal drafter or "reporter" assigned to it, and Llewellyn served as the reporter for both Articles 1 and 2.<sup>9</sup> Accordingly, "[t]he relationship of Llewellyn's philosophy to the Code's content and drafting style can be seen most clearly in these two articles."<sup>10</sup>

Articles 1 and 2 bear the imprint of a man who understood the power of context. These provisions clearly reflect the view that the meaning of a sales contract depends upon the commercial and

Llewellyn"); Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962) ("Make no mistake: this Code was Llewellyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from beginning to end he inspired, directed and controlled it.").

6. See WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 278-300 (1973).

7. See U.C.C. §§ 1-101 to 1-209. Llewellyn was the primary drafter of the definitions in section 1-201. See TWINING, *supra* note 6, at 300.

8. See U.C.C. §§ 2-101 to 2-725 (1995).

9. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1, at 3-4 (3d ed. 1988); TWINING, *supra* note 6, at 284-85, 300.

10. Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466 n.4 (1987) (also noting that "Llewellyn's Sales Act of 1940 became the 'first draft' of articles 1 and 2 and a testing ground for the idea of a Uniform Commercial Code"). See also Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay On the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 223 (1966) (noting that Llewellyn, as the "coordinator" of the drafters of the various articles, "exercised both tremendous influence and practical control over the whole project" and that, through the numerous Code drafts, "the sales article and the all-important introductory article (Article 1) retain most of the characteristics built into them by Llewellyn"). Llewellyn's control over the Code as a whole, and Articles 1 and 2 in particular, was also greatly enhanced by the work of his wife and former pupil Soia Mentschikoff as Assistant Chief Reporter for the Code. See TWINING, *supra* note 6, at 283-84, 286, 300-01.

historical context within which it is made and executed. Section 2-202, for example, contains the UCC's quite relaxed version of the parol evidence rule. The rule allows for the introduction of "any prior agreement or of [any] contemporaneous oral agreement" so long as it does not contradict the "final expression" of the parties' contract.<sup>11</sup> Section 2-202 likewise permits the introduction of "evidence of consistent additional terms"<sup>12</sup> in order to explain or supplement the final contract so long as that contract does not have an effective integration clause.<sup>13</sup> This section also allows the parties to introduce evidence of "course of dealing," "usage of trade," and "course of performance" in order to explain or supplement the final expression of the parties' agreement.<sup>14</sup> These sources of contextual evidence are so vital to the "true understanding" of the parties' sales agreement that "[u]nless carefully negated," the Code assumes that these sources "were taken for granted when the document was phrased," and thus "have become an element of the meaning of the words used."<sup>15</sup> Prior to the creation of the UCC, trade usage and prior dealings between the parties were not foreign to the law of contract interpretation, but the use of such evidence was severely restricted by the courts.<sup>16</sup> The clear, direct, and presumptive way in which the Code made contextual evidence an integral part of

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11. U.C.C. § 2-202.

12. *Id.* § 2-202(b).

13. See WHITE & SUMMERS, *supra* note 9, § 2-12, at 111-17 (arguing that only a strict merger clause that closely mimics the language of section 2-202 ought to be effective). For a discussion as to why courts should narrowly construe the ability of parties to exclude consistent additional terms by use of a merger clause, see *infra* notes 256-269 and accompanying text.

14. U.C.C. § 2-202. Other provisions in the Code define these terms and specify a hierarchical ordering among them. See *id.* §§ 1-205, 2-208. For an excellent overview of how courts initially responded to the Code's embrace of contextual evidence in the interpretation of sales contracts, see Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the U.C.C. Theory*, 1977 U. ILL. L.F. 811 (arguing that courts have subverted the theory of contextual meaning underlying the Code by subjecting usage of trade and course of dealing evidence to the requirement that it explain or supplement and not contradict express terms).

15. U.C.C. § 2-202 cmt. 2. The comment further remarks that "the course of actual performance by the parties is considered the best indication of what they intended the writing to mean." *Id.*

16. See UNIF. SALES ACT § 71, 1 U.L.A. 410 (1950); *infra* Part II.B.



contractual meaning was an important innovation present even in the early drafts of the statute.<sup>17</sup>

The significance of this change is nowhere more evident than in the Code's definition of "agreement." Section 1-201(3) defines "agreement" as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act."<sup>18</sup> Thus, under the Code, the background is no longer something that can be casually acknowledged and then ignored. Instead, the context of an agreement—the unspoken background of beliefs and understandings formed by repetition within an industry and familiarity among individuals, which are taken for granted by the parties involved—becomes central to the meaning of the contract. Contextual evidence is thus fully recognized as an "effective part" of the agreement itself.<sup>19</sup>

Llewellyn's approach to contract interpretation is present throughout the UCC, but is especially visible in Article 2. The theory behind this approach is that the meaning of a written agreement is determined not only "by the language used by [the parties]" but also by "their action[s], read and interpreted in the light of commercial practices and other surrounding circumstances."<sup>20</sup> That is, Llewellyn believed that the true meaning of a text can be correctly determined only by a proper appreciation of and reference to the context in which the text appears.

### A. *The Problem Stated*

That this contextual and historical approach to textual meaning should be so prominently featured in Llewellyn's Code nevertheless gives rise to an enigma. This enigma derives from the fact that the

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17. See *infra* Part II.C.5.

18. U.C.C. § 1-201(3). Eugene Mooney was the first commentator to note the significance of this change and its departure from Langdell and Williston's understanding of contract as formal promise. See Mooney, *supra* note 10, at 224-29.

19. U.C.C. § 1-201 cmt. 3.

20. *Id.* § 1-205 cmt. 1.

Code, as originally envisioned by Llewellyn, contained a starkly antithetical approach to interpretation. Beginning in the spring of 1951, the Code contained a provision that was plainly a-historical and a-contextual with respect to interpretation of the Code itself. Section 1-102(3)(g) provided that “[p]rior drafts of text and comments may not be used to ascertain legislative intent.”<sup>21</sup> In the first Code draft to have explanatory comments following the insertion of this provision, the drafters explained that section 1-102(3)(g) was intended

to preclude resort to prior drafts either of text or comment to ascertain intent. Frequently matters have been omitted as being implicit without statement and language has been changed or added solely for clarity. The only safe guide to intent lies in the final text and comments.<sup>22</sup>

Section 1-102(3)(g) was dropped from the Code in 1956 in response to criticism from the New York Law Revision Commission.<sup>23</sup> Since 1953, the Law Revision Commission had been engaged in a thorough study of the Code pursuant to a charge from then New York Governor Thomas E. Dewey.<sup>24</sup> In its final report to the New York legislature, the Commission stated that “it [did] not believe that

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21. UNIFORM COMMERCIAL CODE: PROPOSED FINAL DRAFT NO. 2 TEXT EDITION (Spring 1951) [hereinafter SPRING 1951 DRAFT] § 1-102(3)(g), *reprinted in* 12 UNIFORM COMMERCIAL CODE DRAFTS 28 (Elizabeth S. Kelly ed., 1984) [hereinafter U.C.C. DRAFTS].

22. UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (1952) [hereinafter 1952 OFFICIAL DRAFT] § 1-102 cmt. 2, *reprinted in* 14 U.C.C. DRAFTS, *supra* note 21, at 47.

23. *See* 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE (1957) [hereinafter 1956 RECOMMENDATIONS] § 1-102, *reprinted in* 18 U.C.C. DRAFTS, *supra* note 21, at 25-27.

24. *See* TWINING, *supra* note 6, at 293. In four years of study, from 1953 to 1956, the Commission compiled six lengthy volumes of hearings, memoranda, comments, and suggestions. *See* NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE, Legis. Doc. No. 65 (1954) [hereinafter N.Y. REPORT 1954]; NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1955: STUDY OF THE UNIFORM COMMERCIAL CODE, Legis. Doc. No. 65 (1955) [hereinafter N.Y. REPORT 1955]; NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1956: REPORT RELATING TO THE UNIFORM COMMERCIAL CODE, Legis. Doc. No. 65 (1956) [hereinafter N.Y. REPORT 1956].

courts and lawyers should be prevented or discouraged from using the many rules of interpretation ordinarily employed to determine [the] meaning of [a] text."<sup>25</sup> Because these rules authorized reference to the "immediate background and legislative history" of statutes, the Commission recommended that the prohibition be deleted.<sup>26</sup> Sensitive to the concerns of the Law Revision Commission and mindful of the need to gain New York's adoption of the UCC for the success of the entire Code project, the drafters acceded to the Commission's recommendation.<sup>27</sup> Today it is common for courts to refer to Code drafting history in resolving interpretive questions.<sup>28</sup> Although not a part of the current Code, it is clear that the prohibition against use of prior drafts of the Code and comments was a part of Llewellyn's original design for a comprehensive statute governing commercial transactions.<sup>29</sup>

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25. N.Y. REPORT 1956, *supra* note 24, at 26.

26. *See id.* (concluding that "[i]t is inadvisable to limit by statute the sources from which the reason for the text - and in this way the meaning of the text—may be found"); *see also infra* Part III.G.4.b.

27. With respect to the importance of New York's adoption of the UCC, *see* E. ALLAN FARNSWORTH, *CONTRACTS* § 1.9, at 27 (1982) (noting that with New York's adoption in 1962, "the complete success of the Code was assured"); TWINING, *supra* note 6, at 293 (noting that, of all the major commercial states targeted for adoption, "New York was the most important"); Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 806 (1958) (noting that "[l]egislative action in New York could obviously add tremendous force to the drive for enactment in other states"); William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 8-9 (1967) (discussing the Commission's study of the Code, and noting that New York was deemed by many to be "the most important commercial state in the country"). With respect to the influence the New York Law Revision Commission had on the drafting of the Code, *see* TWINING, *supra* note 6, at 295-98; Walter D. Malcolm, *Panel Discussion on the Uniform Commercial Code*, 12 BUS. LAW. 49, 49-54 (1956) [hereinafter Malcolm, *Panel Discussion*].

28. *See, e.g.*, *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1069-70 (7th Cir. 1992); *Julien Co. v. Rollins Cotton Co.*, 168 B.R. 647, 665-66 (Bankr. W.D. Tenn. 1994); *Northpark Nat'l Bank v. Bankers Trust Co.*, 572 F. Supp. 524, 530 (S.D.N.Y. 1983); *Getty Petroleum Corp. v. American Express Travel Related Servs. Co.*, 683 N.E.2d 311, 316 (N.Y. 1997); *United States Nat'l Bank of Or. v. Boge*, 814 P.2d 1082, 1089 (Or. 1991); *Southwestern Resolution Corp. v. Watson*, 964 S.W.2d 262, 263-64 (Tex. 1997) (*per curiam*).

29. Although section 1-102(3)(g) did not appear in the Code until the

The view of interpretation set forth in section 1-102(3)(g) and its accompanying comment stands in stark contrast to the view expressed in section 2-202 and the related sections 1-201(3), 1-205, and 2-208. Although both sections 1-102(3)(g) and 2-202 acknowledge that the full meaning of a text may depend upon something outside the document in question, each prescribes a different interpretive method in response. Whereas section 2-202 encourages further inquiry into the context which gives rise to this meaning, section 1-102(3)(g) mandates a stalwart retreat into the "four corners" of the text at hand. Although section 2-202 allows courts to examine the prior drafts and collateral agreements of the contracting parties, section 1-102(3)(g) prohibits courts from having recourse to legislative history and other extrinsic aids. Whereas section 2-202 is predicated on the belief that "the true understanding of the parties as to the agreement" may be found in trade usage, and prior dealings between the parties, as well as in agreements not found in the final written contract,<sup>30</sup> by contrast, section 1-102(3)(g) was based on the belief that "[t]he only safe guide to intent lies in the final text and comments."<sup>31</sup> Simply put, one provision is deeply contextual and

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Spring 1951 Draft, the comment that explains and justifies the prohibitions contained in the rule first appeared in the May 1950 Draft. See UNIFORM COMMERCIAL CODE: PROPOSED FINAL DRAFT, TEXT AND COMMENTS EDITION (May 1950) [hereinafter MAY 1950 DRAFT] § 1-102 cmt. 3, reprinted in 10 U.C.C. DRAFTS, *supra* note 21, at 45; see also N.Y. REPORT 1956, *supra* note 24, at 165-66 (commenting on this point). It is quite clear, however, that well before the publication of the May 1950 Draft, Llewellyn wished to limit the materials courts could review in their search for legislative meaning. From the very beginning of the Code project, Llewellyn stated that it would be desirable to provide an authoritative interpretation of the Code to guide courts. See Karl N. Llewellyn, *Memo No. 1 to William H. Schnader on Code* (May 19, 1940) [hereinafter *Memo No. 1*] in KARL LLEWELLYN PAPERS [hereinafter KLP], J.II.1.a, at 3 ("No Code can either hope for adoption or hope for use, if adopted, without the kind of buttressing by a book which Williston gave his Sales Act, and the Negotiable Instruments Law failed to get. A Code law, as I see it, will stand or fall on what it gets in the way of buttressing from such an authoritative textbook."). This citation follows the form used in RAYMOND M. ELLINGWOOD, JR. & WILLIAM L. TWINING, *THE KARL LLEWELLYN PAPERS: A GUIDE TO THE COLLECTION* (rev. ed. 1970) (cataloguing the Llewellyn archive in the library of the University of Chicago Law School). See also *infra* Part III.F-G.

30. See U.C.C. § 2-202 cmt. 2 (1995).

31. 1952 OFFICIAL DRAFT, *supra* note 22, § 1-102 cmt. 2, at 47.

historical in its approach to interpretation, while the other is strictly a-contextual and a-historical.

Llewellyn's embrace of these radically different interpretive approaches raises a number of questions worthy of inquiry. What can account for this odd combination? What can explain the startlingly queer juxtaposition of these antithetical approaches to interpretation? What could possibly cause a careful drafter and thoughtful jurist like Llewellyn to suddenly disregard his deeply felt appreciation for context when the object of interpretation was no longer an agreement under the Code but the Code itself? Are contracts and statutes so radically different that they require these antithetical interpretive approaches, or do they share something common that overshadows their differences? Can these disparate methods of interpretation be reconciled or are they hopelessly incoherent? What role do these different approaches foresee for courts? What values did Llewellyn seek to foster by requiring courts to refer to the context of sales agreements and by prohibiting the use of legislative history in statutory construction? Was the New York Law Revision Commission correct in its approval of the Code's approach to contract interpretation? Was it also correct to suggest that contextual evidence should be available to courts in the interpretation of statutes?

### *B. The Contemporary Debate*

The answers to these questions are no mere historical curiosity. They are not simply details from a legal history that may be of interest to academics but which are ultimately irrelevant to current legal practice. Rather, the questions raised by this strange episode in the history of the UCC are of immediate relevance today.

In the past fifteen years, there has been an enormous growth of interest in statutory interpretation.<sup>32</sup> While some attribute this growth to the "dynamic" theories of interpretation championed by

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32. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281 (1989) (remarking that "there has been something of a renaissance of scholarship about statutory interpretation"); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) (tracing the history of the revival of interest in statutes).

academics,<sup>33</sup> others believe that the “new textualism” advocated by several prominent federal judges has been responsible for this renewed interest.<sup>34</sup> Certainly the new textualism of Justice Antonin Scalia<sup>35</sup> and Judge Frank Easterbrook<sup>36</sup> has inspired an abundance of commentary from legal scholars, much of it critical in nature.<sup>37</sup>

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33. See Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 767 n.1 (1991) (asserting that “William N. Eskridge, Jr., now leads the renaissance in statutory interpretation analysis”).

34. See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59 (1988) [hereinafter Easterbrook, *Role*]; Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Statutes*]; Frickey, *supra* note 32, at 245 (identifying Richard Posner, Frank Easterbrook, and Antonin Scalia as the persons who “triggered the revival of interest in this subject”).

35. Much of Justice Scalia’s textualist approach to statutes is best evidenced in the rhetoric of his opinions. For cases that incorporate Scalia’s method, see Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 590-600 (1998) (Scalia, J., concurring); Hohn v. United States, 524 U.S. 236, 254-65 (1998) (Scalia, J., dissenting); Schlup v. Delo, 513 U.S. 298 (1995) (Scalia, J., dissenting); MCI Telecomm. Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 544-56 (1992) (Scalia, J., concurring in part and dissenting in part); Union Bank v. Wolas, 502 U.S. 151, 163 (1991) (Scalia, J., concurring); West Virginia Univ. Hosp. v. Casey, 499 U.S. 83 (1991); Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring). For a defense of his position in a more scholarly format, 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 3 (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

36. See, e.g., Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998); NBD Bank v. Bennett, 67 F.3d 629 (7th Cir. 1995); Israel Aircraft Indus. v. Sanwa Bus. Credit Corp., 16 F.3d 198 (7th Cir. 1994); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992); In Re Grabill Corp., 976 F.2d 1126, 1128-30 (7th Cir. 1992) (Easterbrook, J., dissenting); Chapman v. United States, 908 F.2d 1312 (7th Cir. 1990), *aff’d.*, 500 U.S. 453 (1991).

37. The sheer number of law review articles generated in response to the new textualism is remarkable. See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*]; Bradley C. Karkkainen, “Plain Meaning”: *Justice Scalia’s Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL’Y 401 (1994); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Stephen

Likewise, the advocates of dynamic interpretation have not been without their critics.<sup>38</sup>

### 1. Dynamic interpretation

Briefly put, those who favor a dynamic approach believe that judges who interpret statutes should attempt "to weave [them] into today's legal system, to make [them] responsive to today's conditions."<sup>39</sup> Judges are not to act like historians "searching out the facts of the past"<sup>40</sup> but are instead to provide us with "visions of a normative present and future."<sup>41</sup> Although they generally regard statutory text and legislative history as relevant,<sup>42</sup> proponents of "dynamic" interpretation do not believe judges should be limited to these sources in their search for meaning. The "background assumptions about law, society, and the operation of the statute itself" when it was enacted may no longer be valid when a claim is ripe for review.<sup>43</sup> Accordingly, where "[t]he passage of time has rendered most of the legislative history obsolete," that history ought to be viewed as "less important."<sup>44</sup> Moreover, judges should consider "the subsequent

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A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93 (1995); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235; Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990) [hereinafter Zeppos, *Fact-Finding*].

38. See, e.g., Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911 (1996); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994); see also Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

39. Aleinikoff, *supra* note 37, at 49-50.

40. *Id.* at 57.

41. *Id.* at 59.

42. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) [hereinafter Eskridge, *Dynamic*].

43. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 333 (1989) [hereinafter Eskridge, *Spinning*].

44. Eskridge, *New Textualism*, *supra* note 37, at 689. As Eskridge further

evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time."<sup>45</sup> Only by honestly confronting assumptions that are "revealed as flawed" by changed circumstances, by overcoming a "blind adherence to the textual language and legislative history,"<sup>46</sup> and by "tak[ing] into account evolutive considerations, or social and legal circumstances not anticipated when the statute was enacted"<sup>47</sup> can judges genuinely serve the purposes that underlie the statute and thereby promote legislative supremacy.<sup>48</sup>

## 2. New textualism

New textualism also purports to augment the principle of legislative supremacy,<sup>49</sup> but it does not seek to further this goal by

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explains, "[t]he problems that concerned the original legislature have either been solved or have changed, new problems have arisen in response to changes in society or even to the statutory scheme, and new legal developments provided a different context for evaluating the statute." *Id.* at 689-90.

45. Eskridge, *Dynamic*, *supra* note 42, at 1483.

46. Eskridge, *Spinning*, *supra* note 43, at 337.

47. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 359 (1990).

48. See Eskridge, *Spinning*, *supra* note 43, at 337; see also Aleinikoff, *supra* note 37, at 42 ("As time passes, courts may shift the 'purpose' of the statute to accommodate changed circumstances."). In their critique of dynamic interpretation, Redish and Chung distinguish two distinct strains. One they identify as "functionalist," the other as "neo-republican." See Redish & Chung, *supra* note 38, at 831-40. The functionalist strain "is less concerned with the institutional source of policy decisions than with the practical consequences that flow from those decisions." *Id.* at 834. Accordingly, this strain assigns a curative role to the judiciary with considerable discretion so that courts can "rehabilitate" what are thought to be "bad outcomes" through dynamic interpretation. See *id.* The neo-republican strain focuses on the pathology in the law-making process identified by public choice theory. See *id.* at 838. Thus, this strain "emphasizes the rent-seeking nature of legislative behavior and attempts to rectify what it perceives to be the failure of Congress to legislate in the public interest." *Id.* at 837-38. In the brief exposition of dynamic interpretation provided above, I have stressed what is common to both strains, namely, "that judges should be allowed to look beyond originalist sources in resolving questions that arise under a statute." *Id.* at 833.

49. See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) [hereinafter Easterbrook, *Foreword*] (arguing that legislative supremacy requires courts interpreting statutes to "be honest agents of the political branches [because t]hey carry out decisions they do not make"); see also Redish & Chung,



encouraging the use of extra-textual sources. Instead, new textualism seeks to make judges "faithful agents" of the legislature<sup>50</sup> by "curtail[ing] opportunities for judicial lawmaking by limiting the tools available to judges seeking to escape plain statutory meaning."<sup>51</sup> Thus, unlike dynamic interpretation, new textualism seeks to limit the discretion exercised by judges in the interpretation of statutes. Proponents of this theory contend that recourse to legislative materials other than the statute itself will not constrain judges, but will instead enable them to introduce their own policy choices into the adjudicative process.<sup>52</sup> The primacy that the statutory text enjoys

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*supra* note 38, at 818 (noting that new textualism has "retained the originalist commitment to the legislature's supreme policymaking function").

50. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). But see Easterbrook, *Foreword, supra* note 49, at 60; Eskridge, *New Textualism, supra* note 37, at 626.

51. Eskridge, *New Textualism, supra* note 37, at 654 (further explaining that Justice Scalia has argued that a textual focus "reduces the possibility of judicial usurpation of Congress' lawmaking responsibilities, by curtailing judges' discretion to impose their own values onto the statute itself").

52. See Aleinikoff, *supra* note 37, at 31 (paraphrasing Scalia's approach as: "If activist judges manipulate legislative history to achieve their own goals, stop relying on it."); Easterbrook, *Role, supra* note 34, at 62 ("The use of original *intent* rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court."); Eskridge, *New Textualism, supra* note 37, at 648 (noting the new textualist concern that "judges' use of legislative history, especially when it alters the apparent textual meaning, increases their discretion to make illegitimate policy choices"); Redish & Chung, *supra* note 38, at 821 (asserting that new textualism is "perhaps best understood as an attempt to cabin judicial discretion"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 (1989) (noting that by focusing on the statutory text, adherents of new textualism hope to "minimize judicial discretion by barring judges from relying on policies and principles of their own").

Not surprisingly, many have argued that, to the contrary, the added context of legislative history works to restrict judicial discretion. See Eskridge, *New Textualism, supra* note 37, at 674-75 (asserting that "it is mildly counter-intuitive that an approach asking a court to consider materials generated by the legislative process, in addition to statutory text . . . canons of construction . . . and statutory precedents . . . leaves the court with *more* discretion than an approach that just considers the latter three sources"); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 27 (1988) ("To the extent that courts are willing to rely consistently on specific extrinsic legislative materials to determine the legislative understanding, the problem of legislative uncertainty can be obvi-

under new textualism derives in part from the fact that only “[t]he words of the statute, and not the intent of the drafters, are the ‘law.’”<sup>53</sup> Neither legislative history nor legislative intent, however conceived, has survived the constitutional rigors of bicameral passage and presentment to the executive.<sup>54</sup>

*a. skepticism regarding legislative intent*

New textualism’s emphasis on the statutory text also derives from a deep-seated skepticism about the existence of a coherent and identifiable “legislative intent.” “Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable.”<sup>55</sup> Although “[e]ach member may or may not have a design” it is nonetheless “difficult, sometimes impossible, to aggregate these lists [of designs and preferences] into a coherent collective choice.”<sup>56</sup>

Further, the notion that legislative intent is chimerical in nature has been given added intellectual vigor with the introduction of

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ated.”).

The corollary to this assertion, and the opposite of what new textualists claim, is that the failure to consider legislative history will actually invite judges to exercise greater policy-making discretion in the resolution of cases involving statutes. See Eskridge, *New Textualism*, *supra* note 37, at 667-68 (“Once the statutory text is unencumbered by evidence of original legislative expectations, it is free to evolve dynamically, especially where the statute is open-textured.”); Maltz, *supra*, at 11 (arguing that if legislatures cannot establish the context of their enactments through legislative history then they “have the power only to create a kind of free-floating text; by creating an appropriate interpretational context, judges would have the power to determine the actual political/legal implications of that text”); Redish & Chung, *supra* note 38, at 825 (arguing that by ignoring legislative history “new textualism can be seen to permit virtually unfettered judicial discretion in through the back door”); *id.* at 828 (remarking that “exclusive focus on text, without any attempt to discern an underlying legislative purpose, may ultimately undermine the new textualist’s goal of judicial deference to legislative policymaking”); Sunstein, *supra*, at 430 (noting that legislative history “provides a sense of the context and purpose of a statutory enactment” and that “[w]ithout reference to the history, interpretation sometimes becomes far less bounded”).

53. Easterbrook, *Role*, *supra* note 34, at 60; *see also* SCALIA, *supra* note 35, at 17 (“It is the law that governs, not the intent of the lawgiver.”); *infra* notes 629-630, 679-683, 719-722 and accompanying text.

54. *See infra* notes 681-682 and accompanying text.

55. Easterbrook, *Statutes*, *supra* note 34, at 547.

56. *Id.*

public choice theory into legal scholarship. Public choice theory, as developed by Kenneth Arrow,<sup>57</sup> demonstrates that the specific choice selected by a group of individuals with different priorities is contingent upon the order in which the several options are considered. Thus, the legislators who have "control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support."<sup>58</sup> In addition, legislators may behave in a "strategic" fashion by voting against a measure which they prefer to one alternative because they believe it will increase the likelihood that a third alternative which they most prefer will be enacted.<sup>59</sup> They may also behave strategically by "logrolling," that is, trading votes on one measure in order to obtain votes on another.<sup>60</sup> These practices enhance the skepticism with which proponents of new textualism

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57. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). For an excellent exposition of Arrow's Theorem, see Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

58. Easterbrook, *Statutes*, *supra* note 34, at 547 (footnote omitted); see also Sunstein, *supra* note 52, at 447 n.148 ("Even if legislators vote according to their actual preferences, the outcome may not reflect a coherent aggregation of preferences because the outcome eventually chosen depends on the order in which different proposals were considered rather than on a collective preference for that outcome."). For a simple demonstration of this phenomenon, called "cycling majorities," see Farber & Frickey, *supra* note 57, at 425-27 n.9. See also Eskridge, *New Textualism*, *supra* note 37, at 643; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 n.53 (1997). Professor Manning forcefully argues that courts should not refer to contextual evidence, such as legislative history, in the process of statutory interpretation because this would violate the constitutional principle of non-delegations. For a convincing response to Manning see Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 238-42 (1998). Clearly the use of legislative history in statutory construction is not delegation in the strict sense, rather these extra-statutory materials are simply the reasonable basis for an inference regarding the intended meaning of the statutory text. See *infra* notes 706-714, 731-740 and accompanying text.

59. See Farber & Frickey, *supra* note 57, at 427 n.13; Sunstein, *supra* note 52, at 447 n.148.

60. See Easterbrook, *Statutes*, *supra* note 34, at 548; Farber & Frickey, *supra* note 57, at 427 & n.12; Sunstein, *supra* note 52, at 447 n.148.

regard the concept of legislative intent.<sup>61</sup> For them, “talk about the collective intent of a legislature is fiction compounded.”<sup>62</sup>

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61. See Easterbrook, *Role*, *supra* note 34, at 63 (remarking that “the original intent approach to legislation ignores the fact that laws are born of compromise”); Easterbrook, *Statutes*, *supra* note 34, at 548 (concluding that “because control of the agenda and logrolling are accepted parts of the legislative process, a court has no justification for deciding cases as it thinks the legislature would in their absence”); see also Aleinikoff, *supra* note 37, at 28 (concluding that “[p]ublic choice theory provides a new basis for the old claim of the realists that ‘legislative intent’ is and can only be a fiction”); Redish & Chung, *supra* note 38, at 874 (“Public choice theory disputes that individual motivations can be aggregated to form a coherent and public-regarding legislative intent or purpose that can then be applied to resolve a specific interpretive issue.”); Sunstein, *supra* note 52, at 447 (noting that public choice theorists “conclude that statutes reflect unprincipled ‘deals’ and not intelligible collective ‘purposes’”); *id.* at 450 (arguing that there are strong normative arguments against interpreting statutes according to public choice theory). But see Farber & Frickey, *supra* note 57, at 435 (concluding after surveying other public choice literature that there are “very strong reasons, both empirical and theoretical, for believing that actual legislatures do not suffer from the instability and incoherence some public choice theories have predicted”); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 195-96 (1986-87) (“Public-choice theory makes the attribution of unified purpose to a collective body increasingly difficult to accept—though I think it is possible to overdo one’s skepticism in this regard.”). See generally Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

In addition to these criticisms, there are also strong reasons for believing that, even if the insights of public choice theory are correct, they do not lead to a rejection of legislative intent as a hopelessly incoherent concept. This is because public choice theory focuses on the reasons why legislators vote for proposed legislation. In this regard, “public choice has confused motive with purpose.” Redish & Chung, *supra* note 38, at 875. That is, “the *reason* that legislators vote for a particular statute is irrelevant to the authority of the statute.” Maltz, *supra* note 52, at 7. In other words, one’s motive for voting for or against a proposed statute may be wholly unrelated to the meaning of the statute. Motivation and intention are not the same thing. See also Kay, *supra* note 38, at 236 n.49 (“Thus, the fact that an enactor favored a provision because he received a bribe is irrelevant to his intent with respect to the effect of the rule.”); cf. Eskridge & Frickey, *supra* note 47, at 326 (confusing intent and motive).

62. Eskridge, *New Textualism*, *supra* note 37, at 642; see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (remarking that “the quest for the ‘genuine’ legislative in-

Even assuming that a coherent statutory intent does exist, proponents of new textualism doubt the ability of courts to ascertain this intent and faithfully apply it to the case at hand. This doubt derives both from the creation of the materials, which comprise legislative history and from the use of these materials by courts. First, proponents of new textualism fear that committee reports, sponsor statements, hearing transcripts, and the like may not accurately reflect either the legislators' common assent or even what they jointly considered.<sup>63</sup> The legislative record may be incomplete,<sup>64</sup> or it may contain language that supports the narrow interest of some specific constituent or political contributor but does not reflect the views of the wider legislative body.<sup>65</sup> Most often, the materials that make up the legislative history will not have been drafted personally by a legislator but by a legislative aide or lobbyist.<sup>66</sup>

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ment is probably a wild-goose chase"); Sunstein, *supra* note 52, at 433 (concluding that "legislative intent, like legislative purpose, is largely a fiction in hard cases—a problem aggravated by the extraordinary difficulties of aggregating the 'intentions' of a multimember body").

63. See Eskridge & Frickey, *supra* note 47, at 327 ("Committee members and bill sponsors are not necessarily representative of the entire Congress, and so it is not necessarily accurate to attribute their statements to the whole body.") (citation omitted); Redish & Chung, *supra* note 38, at 830 ("To be sure . . . the process of creating legislative history is subject to abuse and manipulation.").

64. As a practical matter, collecting all legislative history is a "philosophical impossibility." See Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1215-16 (1990) ("On the practical side there lies the task of exhaustively documenting the complex reality that is the legislative process. Must a transcript of every telephone call, every lunch-table conversation with a lobbyist, and every arm-twisting message from the White House or the Democratic National Committee chairman be available to explain why Congress employed a particular verbal subterfuge to render indistinct the politically charged consequences of pending legislation? Just the documentation of the public portion of the legislative process, if exhaustively undertaken, is a daunting task.").

65. See Eskridge & Frickey, *supra* note 47, at 327 ("Interest groups often have their legislative allies pack committee reports and stage planned colloquies to suggest a meaning for the statute that they cannot place in the statutory language.") (citation omitted).

66. See *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment). In *Blanchard* Scalia wrote:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and

Consequently, the legislative history “may contain material that simply lacked the political force to make its way into the statute.”<sup>67</sup>

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at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

I decline to participate in this process. It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

*Id.*

This same criticism may, however, prove too much for the new textualist. It is often the case that legislators do not read the actual text of a bill before they vote on it. *See* Farber, *supra* note 32, at 290 (“Most legislators do not have time to actually read and come to an independent understanding of the statutes on which they vote.”); Zeppos, *Fact-Finding, supra* note 37, at 1311-12 (“It strains credulity to argue that members of Congress read the text of all the bills they vote upon, or that the President carefully reads each bill he signs. The sheer volume of statutes and the numerous commitments placed on members make it impossible for them to read all bills.”) (citation omitted).

Moreover, the statutory text is frequently drafted by non-legislators. “Virtually no members of Congress draft their own legislation. Rather, that task is left to committee staff, the Office of Legislative Counsel, or lobbyists.” *Id.* at 1313 (citation omitted). This was certainly the case with respect to the Uniform Commercial Code, which was jointly prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. *See* WHITE & SUMMERS, *supra* note 9, § 1, at 1-6; Braucher, *supra* note 27, at 799-800; Schnader, *supra* note 27, at 1-7. This of course raises questions concerning the relevance of prior Code drafts and comments. In short, although such materials may not be “legislative,” they are nevertheless “authoritative” in the original sense of that word, i.e., having a special significance (“authority”) because of their relation to the author. *See infra* Part IV.A.

67. Farber & Frickey, *supra* note 57, at 444 (citation omitted); *see also* Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring in the judgment) (arguing that the means by which legislative history is generated and courts’ reliance upon it create “strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process”).

Accordingly, new textualists conclude that legislative history ought to be ignored because it is not reliable.<sup>68</sup>

Second, proponents of new textualism are also fearful that courts will manipulate legislative history by stressing what supports their favored interpretations while minimizing the importance of that which does not. New textualists worry "that judicial interpretation of a statute will be skewed by legislative history planted just for that purpose."<sup>69</sup> They fear that "under the guise or even under the self-delusion of pursuing unexpressed legislative intents, common law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."<sup>70</sup> Thus, the proponents of new textualism believe that the skill and judgment necessary both to fairly review the legislative history behind a statute and to incorporate that history into a balanced opinion exceeds the capacity of most judges.<sup>71</sup> Even where judges are up to the task, research of legislative history constitutes a wasteful allocation of judicial resources.<sup>72</sup> Rather, by focusing on the importance of the statutory text and by refusing to rely on legislative history, new textualists hope to encourage better statutory drafting and greater deliberation in the process of enactment.<sup>73</sup>

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68. See Easterbrook, *Role*, *supra* note 34, at 65 ("The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person.").

69. Farber & Frickey, *supra* note 57, at 445; see also Aleinikoff, *supra* note 37, at 29 (summarizing the new textualist position that "legislative reports once written to inform legislators about pending legislation, and legislative floor debates once intended to provide a forum for deliberation, are now primarily constructed to influence future interpreters") (citation omitted).

70. SCALIA, *supra* note 35, at 17-18; see also Eskridge, *New Textualism*, *supra* note 37, at 648 ("As Judge Leventhal once said, citing legislative history is like 'looking over a crowd and picking out your friends.'") (citation omitted); Easterbrook, *Role*, *supra* note 34, at 66 (concluding that an "appropriately modest judicial role would depend less on imputed intent—'intent' that ultimately can be found only in the mind of the judge").

71. See *infra* notes 667-669 and accompanying text.

72. See *infra* notes 670-671 and accompanying text.

73. See *United States v. Taylor*, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring in part) ("It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes law, the people must obey. I think we have an obligation to conduct our exegesis in a fashion which

### C. *The Thesis Presented*

To a remarkable extent, Llewellyn's own views of statutory construction presaged these current theories of interpretation. For example, like the proponents of new textualism today, Llewellyn largely rejected the idea of legislative intent as imaginary. Like the advocates of dynamic interpretation, however, Llewellyn believed that statutory construction was essentially the search for purpose and the creative application of that purpose to the facts at hand.<sup>74</sup>

Although the historical and jurisprudential connections between Llewellyn's thought and these current theories are many and varied, I do not wish to explore them in depth in this Article. Nor do I propose to review in detail all the faults and merits of either new textualism or so-called dynamic interpretation. My goal is much more modest than this.

The simple thesis I wish to advance is that legislative history is always relevant to the process of statutory interpretation. That is not to say that legislative history will always provide a ready solution to the interpretive question at hand, nor is it to suggest that the reliability of such history as a reflection of the legislature will never be in

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fosters that democratic process."); *see also* Eskridge, *New Textualism*, *supra* note 37, at 677 (concluding that "Justice Scalia seems to argue, if Congress is aware that its statutes will be read with a strict literalism and with reference to well-established canons of statutory construction, it will be more diligent and precise in its drafting of statutes"); Farber, *supra* note 32, at 298 (arguing that judges "must not allow legislators to use statutes to strike poses, knowing that courts will bail them out later"); Sunstein, *supra* note 52, at 457-58 (arguing that a new textualist approach might "tell Congress to be careful with statutory language" and that such an approach may "force Congress expressly to deliberate on an issue and unambiguously to set forth its will"). *But see* Aleinikoff, *supra* note 37, at 25 (arguing that "a textualist court may think it is improving the legislative process" while in reality it "may actually be imposing huge costs on a legislature too busy to redraft 'unclear' statutes or not prescient enough to provide for future possibilities") (citation omitted); Farber & Frickey, *supra* note 57, at 458-59 (arguing that under public choice theory a new textualist approach to statutes would result in numerous "undesirable practical effects"); Redish & Chung, *supra* note 38, at 831 (noting that, although one could argue "that new textualism's exclusive focus on text and its refusal to examine legislative history could ultimately prove beneficial, by giving Congress an incentive to adopt clearer, more precise texts," that this view "ignores the inescapable ambiguities and uncertainties that inherently flow from attempting to apply general directives to specific fact situations").

74. *See infra* Part III.A.



doubt. Inevitably there will be instances in which the legislative record will be of little help in resolving the immediate issue before the court. Likewise, it will sometimes be the case that the legislative record is plainly unreliable because of the circumstances surrounding its creation. These matters go to the *weight* to be accorded statutory history, however, not to its *relevance*. They suggest caution in the use of legislative materials and a healthy respect for the way in which such materials can be manipulated by legislators, judges, and advocates. They do not suggest the complete elimination of such materials from the interpretive process. On the contrary, courts should be free to take such contextual sources into account in the interpretation of statutes just as they are free to consider contextual sources in the process of contract interpretation.

My argument in support of this thesis consists of three parts. In Part II of this Article, I shall explain in greater detail Llewellyn's historical and contextual approach to contract interpretation. As will be shown, Llewellyn's contribution in this regard "was not a radical innovation."<sup>75</sup> At common law and under the Uniform Sales Act, some courts had in fact recognized the importance of contextual evidence in determining the meaning of contracts.<sup>76</sup> Instead, the rules introduced by Llewellyn in the UCC were "an attempt to state the governing principle clearly and to follow the better reasoned opinions that recognized the value of evidence that explained the commercial context of a disputed transaction."<sup>77</sup> Under the Code's new approach, the introduction of contextual evidence became an integral part of contract construction rather than an occasional and haphazard event. In relaxing the parol evidence rule and in easing the introduction of contextual evidence, the Code aimed to help courts arrive at "the true understanding of the parties as to the agreement."<sup>78</sup> It is after all, "[t]he parties themselves [who] know best what they have meant by their words of agreement."<sup>79</sup> Thus, the stated goal of

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75. Kirst, *supra* note 14, at 812.

76. *See id.* at 812-13.

77. *Id.* at 813; *see also infra* note 189 and accompanying text.

78. U.C.C. § 2-202 cmt. 2 (1995).

79. *Id.* § 2-208 cmt. 1.

contract interpretation under the Code is much the same as it was at common law, namely, ascertaining the intent of the parties to the contract.<sup>80</sup>

Although the stated goal has remained the same, clearly the methods employed for discerning this intent have changed substantially. This point is significant because, as I shall argue in detail below, it demonstrates that what is commonly described as “the intent of the parties to the contract” is and always has been a matter of convention.<sup>81</sup> The means we employ may aspire to capture the “real” intent of the parties, but, at best, they will yield an accurate approximation. The fact that the intent of the parties can be understood only as a matter of convention does not undermine the legitimacy of the inquiry as there is no alternative available. If the intent of those who authored the contract is relevant to its meaning, then those who interpret the text must satisfy themselves with some conventional understanding of that intent.

In Part III of this Article, I shall explain Llewellyn’s views of statutory interpretation, paying particular attention to Llewellyn’s work on the UCC. By precluding the use of legislative history in statutory interpretation, Llewellyn hoped to foster judging in the “Grand Style” or “Manner of Reason” according to which judges would “not only . . . read the statute but also . . . implement [it] in accordance with purpose and reason.”<sup>82</sup> In drafting the Code, Llewellyn sought to craft provisions “which make sense on their face, and which can be understood and reasonably well applied even by mediocre men.”<sup>83</sup> He believed that he could write a statute that was so clear and explicit in purpose as to make recourse to legislative

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80. See *infra* notes 247-252, 290-296 and accompanying text.

81. See *infra* Part II.C.6.

82. Karl N. Llewellyn, *On the Current Recapture of the Grand Tradition*, in KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 215, 217 (1962) (reprinted from 9 U. CHI. L. SCH. REC. 6 (1960)) [hereinafter Llewellyn, *Current Recapture*]; see also *infra* Part III.C.

83. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 37-38 (1960) [hereinafter LLEWELLYN, *THE COMMON LAW TRADITION*]; see also Karl N. Llewellyn, *Plans for Uniform Commercial Code* (Dec. 1944) [hereinafter *Plans*], in KLP, *supra* note 29, at J.VI.1.e, at 5 (“The principle of the *patent reason*: Every provision should show its reason on its face. Every body of provisions should display on their face their organizing principle.”).

history unnecessary. Thus, Llewellyn's disdain for the use of statutory history derived not only from a skepticism concerning the existence of legislative intent, but also from the confidence he had in his theory of "patent reason" as a means of creating legislation. Where the reason behind a provision was less than patently clear, the statutory text would be supplemented by the official comments which would function as a sort of uniformly packaged legislative history.<sup>84</sup>

In this way, Llewellyn sought to mollify the calcification that occurs when fluid policies are fixed in statutory language by codifying principles that would continue to grow and expand like the common law. Indeed, he hoped to lay down "rules to be developed by the courts, as common law rules are themselves developed by the courts, and molded to the succession of unforeseen circumstances."<sup>85</sup> Llewellyn believed that one of the greatest virtues of the common law was its adaptability. He believed that it was difficult for the fixed language of a statute "to deal with circumstances utterly un- contemplated at the time of its passage."<sup>86</sup> A common law rule, by contrast, "expands or shifts direction according to the reason which is its life."<sup>87</sup> He feared that recourse to history would degenerate into

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84. See, e.g., Karl N. Llewellyn, *Commercial Law Materials, Part III, Selected Comments on Revised Sales Act* (Spring 1948), [hereinafter *Selected Comments*], in KLP, *supra* note 29, at J.X.2.h, at 2 ("[T]he courts are expressly authorized to consult the Comments in interpreting and applying the principles of the Act. The Comments thereby acquire a status more than equivalent to that of a Committee Report on the basis of which a proposed bill has been enacted by the legislature."); see also TWINING, *supra* note 6, at 326 (describing the comments as "the main device for articulating and explaining the policies of the Code provisions"); *infra* notes 436-461, 645-654 and accompanying text.

85. Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 562 (1940) [hereinafter Llewellyn, *Federal Sales Act*]; see also *infra* notes 413-435 and accompanying text.

86. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950) [hereinafter Llewellyn, *Remarks*].

87. REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT (1941) [hereinafter 1941 DRAFT] § 1-A(c) cmt., at 47, reprinted in 1 U.C.C. DRAFTS, *supra* note 21, at 327. Llewellyn summed up this principle of common law growth in an adage: "Whither the reason leads, thither goeth the rule, as well." Llewellyn, *Current Recapture*, *supra* note 82, at 229. The concomitant principle of limitation he described as "where the reason stops there stops even the enacted rule." *Id.*; see also *Selected Comments*, *supra* note 84,

a kind of rigid formalism in which words would matter more than policy. By precluding courts from fixating on the drafting history behind the Code, Llewellyn hoped to keep his statute up-to-date in the ever-changing world of commerce and thereby avoid the problem of statutory obsolescence.<sup>88</sup>

I shall conclude the Article in Part IV by arguing that Llewellyn was wrong to attempt to prohibit courts from referring to prior drafts of the Code and comments. More importantly, courts and legislatures today should resist the misguided impulse to restrict the materials that judges and lawyers may consult in the process of statutory interpretation.

The best approach to the interpretation of any legal text is the approach exemplified by Article 2's open invitation to consider fully the context in which the text in question is generated. This context includes the intent of the draftsmen as reflected in the background assumptions and tacit understandings that they had in mind. It also includes their attempts to articulate the meaning that they sought to communicate to one another and to the world. This contextual approach to interpretation correctly reflects the essential nature of linguistic meaning, namely, the fact that language is always used by someone with a purpose in mind who is situated within a particular historical and social context. Language is always language and it does not stop being language even when it is used in a statute. Although Llewellyn was an acknowledged leader among the legal realists of his generation, to ignore the nature of language in the process of statutory interpretation, to pretend that the statutory text was not created within a particular context and that it was not the work of someone, is plainly counterfactual and fundamentally "unrealistic." Thus, I shall argue that ultimately Llewellyn's approach to the interpretation of agreements under Article 2, reflected in sections 1-201(3), 1-205, 2-202, and 2-208, cannot be reconciled with his original vision for the interpretation of the Code itself under the now discarded section 1-102(3)(g).

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*in KLP, supra* note 29, at J.X.2.h, at 2 (“[T]he rule follows its reason wherever the reason leads.”). Stated in such a crude fashion neither adage describes the proper boundaries of demarcation for a legal rule.

88. Indeed, Llewellyn repeatedly referred to the Code as “a semi-permanent piece of legislation.” *Selected Comments, supra* note 84, *in KLP, supra* note 29, at J.X.2.h, at 2; *see also infra* notes 404-412 and accompanying text.

Although statutes and contracts surely differ in many important respects<sup>89</sup> because each involves the *use* of language, their similarities are profound. Neither statutes nor contracts come into existence in an instant, complete and fully-formed. Instead, each is the product of a complex set of interactions among individuals which frequently include drafting, negotiation, and debate. As such, even the most basic contract or statute emerges from a social and historical context that informs its identity. Even Athena, who came into the world fully-formed from the mind of Zeus, emerged from a particular context. She did not come from the head of Poseidon or Hera or Hades but from Zeus, and this source of origin informed her identity.<sup>90</sup>

The Code definitively rejected both the notion that business agreements are formed in the abstract and the theory that their meaning can be understood without considering the process of formation. To treat a statute as if it were formed in the abstract and as if its meaning were wholly independent of the process of drafting and enactment is equally fallacious.

Indeed, I shall argue that, contrary to both the new textualists of today and Llewellyn's own approach, reference to the full context out of which the statute emerges actually furthers the goals of statutory interpretation that Llewellyn sought to advance while upholding the rule of law. Llewellyn believed that statutory interpretation was principally the determination of purpose and the application of that

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89. For a thoughtful piece distinguishing the two, 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). Professor Movsesian cites to a number of sources that have suggested the analogy between contracts and statutes. See *id.* at 1147 n.6. In addition to these sources, see also FARNSWORTH, *supra* note 27, §§ 7.10, 7.12, at 513, 520; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI. KENT L. REV. 441, 445-46 (1990) [hereinafter Easterbrook, *What Does*]; Farber, *supra* note 32, at 310, 313. For an article that, like this piece, finds support for the use of legislative history in statutory interpretation in the use of contextual evidence in contract interpretation see Ross & Tranen, *supra* note 58. Although Professor Ross and Mr. Tranen reach conclusions similar to the conclusions I reach in this piece, we made our way to these conclusions quite independently of one another. I discovered their fine article only several months after I finished my work on the present piece.

90. See HESIOD: THEOGONY, WORKS AND DAYS, SHIELD 36 (Apostolos N. Athanassakis trans. 1983).

purpose to a specific set of facts.<sup>91</sup> Guided by an equitable sense of the situation, courts should, according to Llewellyn, either expand or curtail a statute according to its purpose.<sup>92</sup> A judge, however, cannot know whether one is expanding or curtailing a statute according to its purpose unless he or she understands that purpose in the first instance. The best way to grasp the meaning of any text is to situate the text within the context in which it was articulated. Thus, to further the interpretation of statutes "in accordance with purpose and reason,"<sup>93</sup> courts should have recourse to contextual evidence, including legislative history. Indeed, contrary to Llewellyn's fears, the proper use of contextual evidence will not hasten statutory obsolescence<sup>94</sup> nor will it encourage courts to base their decisions on words rather than on policies.<sup>95</sup> It is surely possible that the use of contextual evidence in statutory interpretation may regress into a mechanical formalism.<sup>96</sup> It is also possible that judges may manipulate this evidence in bad faith in crafting their opinions.<sup>97</sup> The mere possibility of abuse, however, does not justify the prohibition required by former section 1-102(3)(g) and urged today by so-called new textualists.

Indeed, any number of provisions taken from the UCC demonstrate the failure of this noncontextual method of interpretation, a method that "commands us to ignore a significant portion of the context that we would ordinarily use."<sup>98</sup> I shall conclude my argument by briefly reviewing some examples which clearly illustrate the value of referring to prior drafts of the Code and comments. Reference to contextual evidence will not always yield decisive results in statutory construction. In much the same way, contextual evidence will sometimes fail to clarify the intent of the parties to a sales

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91. See generally *infra* Part III.

92. See *infra* notes Part III.A-C.

93. Llewellyn, *Current Recapture*, *supra* note 82, at 217.

94. See *infra* Part III.D-E.

95. See *infra* Part III.B-C.

96. See *infra* Part III.G.

97. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Leventhal as having said that citing legislative history is like "looking over a crowd and picking out your friends"); see also *infra* Part IV.C.1.

98. Solan, *supra* note 37, at 256.

contract. Nevertheless, I shall argue that these examples demonstrate both the error of former section 1-102(3)(g) and of those today who would prohibit courts and lawyers from having recourse to legislative history.

## II. LLEWELLYN, CONTEXTUAL EVIDENCE, AND THE INTERPRETATION OF CONTRACTS

In order to appreciate the importance that Llewellyn attributed to contextual evidence in the interpretation of contracts and how his ideas were incorporated into the UCC, we must first understand the law as it existed prior to the Code. While this prior law did not wholly exclude contextual evidence from the interpretative process, it was far less receptive to the use of such evidence. The significant changes brought about by UCC section 2-202 and other Code sections demonstrates Llewellyn's sensitivity to context and his clear rejection of the folly of textualism with respect to contracts. These changes also make Llewellyn's embrace of this folly with respect to statutes under UCC section 1-102(3)(g) all the more in need of explanation.

### A. *The Parol Evidence Rule at Common Law*

Always in theory and often in practice the common law restricted the use of contextual evidence in the interpretation of contracts. Under the rubric of the parol evidence rule the common law employed a number of concepts and doctrines that accorded the written terms of the contract "a position of interpretive priority."<sup>99</sup> For example, under the plain meaning doctrine, courts often found "that the words of a writing [were] too 'plain and clear' to justify the admission of parol evidence as to their interpretation" or that "testimony [was] admissible only when the words of the writing [were] themselves 'ambiguous.'"<sup>100</sup> Likewise, common law courts

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99. Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 186-91 (1989) (describing Samuel Williston's "classical model" of contract); see also WHITE & SUMMERS, *supra* note 9, § 2-9, at 95 (describing the effect of the parol evidence rule as "giv[ing] preference to the written version" of the agreement).

100. 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 542, at 108-09 (1960) (citation omitted). Corbin goes on to say that "[s]uch statements as-

frequently held that the written contract at issue constituted “a complete and final integration” of the parties’ agreement and so refused to consider extrinsic evidence that would vary or contradict the integrated writing.<sup>101</sup>

In practice, however, courts frequently referred to material outside the “four corners” of the written contract. Indeed, they had to do so for several reasons. First, as a matter of logical priority, the court must initially determine the existence of a written, legally binding contract. Before such a contract is established “there is no rule which excludes [parol] evidence.”<sup>102</sup> No written document, however, is sufficient in itself to establish its own status as a legally binding agreement.<sup>103</sup> Evidence that is extrinsic to the contract and perhaps “parol” in nature will be necessary to identify and authenticate the parties involved, the document itself, and the signatures contained within it.<sup>104</sup> Thus, as a logical matter “[i]t seems,

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sume a uniformity and certainty in the meaning of language that do not in fact exist; they should be subjected to constant attack and disapproval.” *Id.* at 109-10 (citation omitted).

101. See *El Zarape Tortilla Factory, Inc. v. Plant Food Corp.*, 90 Cal. App. 2d 336, 341-43, 203 P.2d 13, 17-18 (1949); *Sumner v. General Motors Acceptance Corp.*, 186 S.E. 747, 748 (Ga. Ct. App. 1936); *City of Des Moines v. City of West Des Moines*, 56 N.W.2d 904, 905-07 (Iowa 1953); *State Highway Dep’t v. Duckworth*, 172 So. 148, 150 (Miss. 1937); *Wilkins v. Bailey Eng’g Co.*, 91 A.2d 98, 100 (N.J. Super. Ct. App. Div. 1952); *Cohn v. Krauss*, 67 N.E.2d 62, 64 (Ohio Ct. App. 1943); *First Nat’l Bank of Scranton v. Payne*, 37 A.2d 568, 569 (Pa. 1944); *Wood v. Southern Shale Brick Corp.*, 4 S.E.2d 360, 362-63 (Va. 1939); *Mitterhausen v. South Wis. Conference Ass’n of Seventh-Day Adventists*, 14 N.W.2d 19, 21 (Wis. 1944). Today the rule of integration is still recognized, both in the law of sales in particular and in contracts in general. See *United States v. Rockwell Int’l Corp.*, 124 F.3d 1194, 1200-01 (10th Cir. 1997); *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477, 482 (9th Cir. 1995); *Midwest Great Dane Trailers, Inc. v. Great Dane Ltd. Partnership*, 977 F. Supp. 1386, 1390-91 (D. Minn. 1997); *In re Pandeff*, 201 B.R. 865, 872 (S.D.N.Y. 1996); *Urschel Farms, Inc. v. DeKalb Swine Breeders*, 858 F. Supp. 831, 837 (N.D. Ind. 1994); *Traumann v. Southland Corp.*, 842 F. Supp. 386, 390-91 (N.D. Cal. 1993); *I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co.*, 695 N.E.2d 1030, 1036 (Ind. Ct. App. 1998); *Handy Boat Serv., Inc. v. Professional Servs., Inc.*, 711 A.2d 1306, 1308-09 (Me. 1998); *Farley Inv. Co. v. Webb*, 617 A.2d 1008, 1010 (Me. 1992); *Michigan Nat’l Bank v. Laskowski*, 580 N.W.2d 8, 10-11 (Mich. Ct. App. 1998).

102. 3 CORBIN, *supra* note 100, § 576, at 382.

103. See *id.* § 573, at 358-60.

104. See *id.* § 577, at 386-87 (“At all events, no one doubts that the execution of a written contract has to be proved. Some parol testimony is required to



therefore, that some parol evidence is required in order to exclude other parol evidence."<sup>105</sup>

Second and related, common law courts allowed the use of contextual evidence to demonstrate that the contract in question was the result of fraud or legal mistake. Even an agreement which contained an express statement declaring that it was a complete and accurate integration did "not prevent proof of fraudulent representations by a party to the contract, or of illegality, accident, or mistake."<sup>106</sup>

Third and most importantly, application of the plain meaning doctrine and the bar against extrinsic evidence required common law courts to look beyond the "four corners" of the written document. Clearly the circumstances surrounding the formation and performance of a contract "must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear."<sup>107</sup> Consequently, although courts often recited rules stating that the plain meaning of words would be strictly followed, as Professor Corbin notes, "this [was] always limited by adding some such clause as the following: 'in the absence of relevant evidence indicating that the words were used with a different meaning.'"<sup>108</sup>

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prove the 'execution' of the document—the genuineness of the signature, the delivery as a true offer or acceptance or both, the expression of assent by each party. These cannot be proved by mere inspection of the document, although much corroborative evidence can be obtained by careful inspection and common sense interpretation.") (citation omitted).

105. *Id.* § 588, at 522; *see also* WILLIAM L. CLARK, JR., HANDBOOK OF THE LAW OF CONTRACTS § 219, at 542-43 (4th ed. 1931) (discussing the reasons for admitting parol evidence).

106. 3 CORBIN, *supra* note 100, § 578, at 405-06 (footnotes omitted); *see also id.* § 573, at 366 ("The 'parol evidence rule' has never been asserted to exclude evidence of mistake; but the question of what constitutes such a mistake is not an easy one to answer."); *id.* § 580, at 431 (discussing the use of extrinsic evidence for these purposes in greater detail).

107. *Id.* § 542, at 101-03 (citations omitted).

108. *Id.* § 542, at 106-07; *see also id.* § 543, at 147-49 (observing that courts allow the introduction of extrinsic evidence to eliminate ambiguity, but that frequently ambiguity is not evident "until the attempt is made to apply the words to existing facts by the use of parol evidence") (citation omitted); *id.* § 579, at 414-20 (observing that, even in cases in which the court requires no assistance in discussing the plain and clear meaning of contract terms, the court still "has had the aid of parol evidence of the surrounding circumstances. The

Similarly, although courts excluded extrinsic evidence offered for the purpose of varying or contradicting the terms of an integrated agreement, they allowed such evidence when offered as an aid to the interpretation of those terms.<sup>109</sup> It is, however, clear that “[t]he terms of any contract must be given a meaning by interpretation before it can be determined whether an attempt is being made to ‘vary or contradict’ them.”<sup>110</sup> Thus, in accord with the logic of interpretation, that is, the interplay between text and context, many common law courts made use of extrinsic evidence in explaining the meaning of contract terms.<sup>111</sup>

Courts also admitted extrinsic evidence in order to determine initially whether or not the contract in question was an integrated agreement. Some courts assumed that the contract was a complete and accurate integration based on a cursory examination of its structure and form. Others, however, saw the fallacy of this approach. Despite appearances, “[t]he writing cannot prove its own completeness and accuracy. Even though it contains an express statement to that effect, the assent of the parties thereto must still be proved.”<sup>112</sup> These courts admitted extrinsic evidence in order to resolve the question of integration.

The rules regarding the primacy of the written agreement and the actual practices of courts regarding extrinsic evidence were thus paradoxically at odds. “The very testimony that the ‘parol evidence rule’ [was] supposed to exclude [was] frequently, if not always, necessary before the court [could] determine that the parties [had] agreed upon the writing as a complete and accurate statement of terms.”<sup>113</sup> In spite of the strict disdain for extrinsic evidence reflected in the many variations of the parol evidence rule, “the courts frequently avoid[ed] their actual application of the rules to the facts before them.”<sup>114</sup>

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meaning to be discovered and applied is that which each party had reason to know would be given to the words by the other party”) (citations omitted).

109. See CLARK, *supra* note 105, § 221, at 546-47.

110. 3 CORBIN, *supra* note 100, § 543, at 130-31.

111. See CLARK, *supra* note 105, § 221, at 549-51.

112. 3 CORBIN, *supra* note 100, § 582, at 448-49.

113. *Id.* at 450.

114. *Id.* § 542, at 128-29.

In sum, the common law rules restricting the use of extrinsic evidence in contract construction were a source of great uncertainty and risk. They were, in Llewellyn's terminology, mere "paper rules."<sup>115</sup> That is, courts frequently recited the "well-settled" rules strictly limiting the use of parol evidence only to then make liberal use of that evidence in a variety of ways. No matter how authoritative and oft-repeated the recitation, judicial actions spoke louder than judicial words. In Llewellyn's view "non-law" could not convincingly be made to "look like law."<sup>116</sup> Thus, when given the opportunity as part of the Code project, Llewellyn attempted to draft real rules that would provide guidance to courts and predictability to practicing attorneys.<sup>117</sup>

### B. *Extrinsic Evidence Under the Uniform Sales Act*

The Uniform Sales Act ("Sales Act") was promulgated by the National Conference of Commissioners on Uniform State Laws in 1906.<sup>118</sup> By 1941 the Sales Act had been adopted by a total of thirty-four states.<sup>119</sup> Drafted by Professor Samuel Williston of the Harvard

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115. See *infra* Part III.B.

116. K.N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243, 1269 (1938) [hereinafter Llewellyn, *Rule of Law*] (describing Langdell and Williston's view of contract law as being "at clear variance with both the decisions and with sense, on too many points for comfort" and describing Williston's treatise as "a desperate, though often skillful, effort to make non-law look like law"); see also Karl N. Llewellyn, *Statement to the Law Revision Commission* [hereinafter *Statement*], in 1 N.Y. REPORT 1954, *supra* note 24, at 34 ("The existing law is doubtful or empty throughout almost the whole area discussed by the Code's opponents.").

117. See K.N. Llewellyn, *On The Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 261 (1942) [hereinafter Llewellyn, *On the Good*] ("I stand on the proposition that the new Sales Act has as its job not only to make its sense and purposes far clearer to the non-specialist and to the interested layman than does the older phrasing of the rules, but that it must also give to counsel and to court a sharper and a more predictable guidance."). The Code's drafting history is replete with statements which assert that added predictability is one of the goals behind the statute. See, e.g., 1941 DRAFT, *supra* note 87, at 8-19, 25-27; *infra* note 299, 360-372 and accompanying text.

118. See UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS 2 (1959) [hereinafter 1958 OFFICIAL TEXT], *reprinted in* 20 U.C.C. DRAFTS, *supra* note 21, at 298; see also WHITE & SUMMERS, *supra* note 9, § 1 at 2-3; Schnader, *supra* note 27, at 2.

119. See Braucher, *supra* note 27, at 799.

Law School, the statute was largely based on the English Sale of Goods Act.<sup>120</sup>

Under the Sales Act, Williston acknowledged the value of contextual evidence. Section 71 of the Act provides:

Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.<sup>121</sup>

The terms "contract to sell or a sale" are defined elsewhere in the Sales Act to mean agreements that involve the transfer of ownership in goods from the seller to the buyer, either at the time of formation or at some time in the future.<sup>122</sup> Although the statute does not strictly require such contracts to be in writing in order to be enforceable,<sup>123</sup> the statute of frauds contained within the Sales Act clearly contemplated the use of some writing in the vast majority of cases.<sup>124</sup>

Section 71 reflects this background. It recognizes the priority of written contract terms because it is these terms that give rise to the parties' rights, duties, and liabilities "by implication of law."<sup>125</sup> Nevertheless, the statute clearly provides that these terms can be voided ("negatived") or changed ("varied") by three means: express agreement, course of dealing between the parties, and custom.<sup>126</sup>

That section 71 allowed the parties to alter their contractual obligations by express agreement should be unobjectionable to even the most ardent textualist. In this respect, section 71 simply embodies

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120. See *TWINING*, *supra* note 6, at 277; *Llewellyn, Federal Sales Act*, *supra* note 85, at 558; *Wiseman*, *supra* note 10, at 473-74 n.31.

121. UNIFORM SALES ACT § 71, 1 U.L.A. 410 (1950).

122. See *id.* § 1, 1 U.L.A. 2.

123. Section 3 of the Sales Act provides that "a contract to sell or a sale may be made in writing . . . or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties." *Id.* § 3, 1 U.L.A. 66.

124. See *id.* § 4(1), 1 U.L.A. 71 (referring to "some note or memorandum in writing of the contract or sale . . . signed by the party to be charged or his agent"); see also 2 SAMUEL WILLISTON & GEORGE J. THOMPSON, *A TREATISE ON THE LAW OF CONTRACTS* §§ 505-538, at 1474-1565 (2d ed. 1936).

125. *Alaska Pac. Salmon Co. v. Reynolds Metals Co.*, 163 F.2d 643, 656 (2d Cir. 1947).

126. See UNIFORM SALES ACT § 71, 1 U.L.A. 410.

the principle of "freedom of contract." Within the wide parameters of what "public policy" allows, the parties are masters of their own bargain. Accordingly, under section 71 courts have allowed the written terms of an agreement to negate implied warranties of quality created under the statute.<sup>127</sup>

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127. See, e.g., *Alaska Pac. Salmon*, 163 F.2d at 656; *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 94 F. Supp. 311 (D. Del. 1950), *rev'd on other grounds* 190 F.2d 817 (3d Cir. 1951); *Minneapolis Threshing Mach. Co. v. Hocking*, 209 N.W. 996 (N.D. 1926); *Marks v. Kucich*, 42 P.2d 16, 18 (Wash. 1935); *Valley Refrigeration Co. v. Lange Co.*, 8 N.W.2d 294, 297 (Wis. 1943).

The UCC itself, like many other modern statutes, allows the parties to "contract out" of the effects of various provisions. See U.C.C. § 1-102(3) (1995). The question of how far the principle of freedom of contract should extend in allowing individuals to avoid the effects of the statute was hotly debated in the UCC drafting process. See AN ACT RELATING TO SALES OF PERSONAL PROPERTY AND TO CONTRACTS FOR THE SALE THEREOF, AND TO RIGHTS, OBLIGATIONS, AND REMEDIES ARISING OUT OF SUCH SALES OR CONTRACTS AND IN CONNECTION WITH FINANCING OR OTHER TRANSACTIONS COMMONLY ASSOCIATED THEREWITH, AND TO MAKE UNIFORM THE LAW OF SUCH MATTERS (1941), *reprinted in* 1 UNIFORM COMMERCIAL CODE CONFIDENTIAL DRAFTS 24, 42-43, 75, 100 (Elizabeth Slusser Kelly & Ann Puckett eds., 1995) (commenting on §§ 1-C, 8, 17, and 23).

It might be suggested that section 71 does more than simply allow the parties to alter by express agreement the legal effect that legislation or other laws would have on the contract. It is possible to read section 71 as permitting the parties to void or vary the contract terms themselves by express agreement. The UCC contains just such a provision. See U.C.C. § 2-209 (1995). If in fact section 71 does address the issue of contract modification, then it leaves a number of questions unanswered. It does not indicate whether the effectiveness of an express agreement modifying the contract terms will turn on whether the agreement is oral or written or whether the express agreement was made before or after the time of formation. Although section 71 appears to raise these questions, it does not attempt to resolve them. Instead, courts turned to the common law for answers.

If, on the one hand, the parties entered into an express agreement *prior* to executing the final written contract, then such an agreement, whether written or oral, would likely be barred under the parol evidence rule. In his treatise, Williston insists that "[a]ll courts agree that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject matter are excluded from consideration whether they were oral or written." 3 WILLISTON, *supra* note 124, § 632, at 1817 (footnote omitted); *see also id.* § 646, at 1865; 3 CORBIN, *supra* note 100, § 576, at 382. As noted above, the critical issue in this analysis was whether or not the contract in question was "integrated," that is, a final expression of the parties' agreement designed to supercede prior agreements on the same subject matter. See 3 CORBIN, *supra* note 100, § 633; FARNSWORTH, *supra* note 27, §

Section 71 also provides that the legal rights and obligations arising under the contract could be voided or modified “by the course of dealing between the parties” and “by custom, if the custom be such as to bind both parties.”<sup>128</sup> Each of these two distinct forms of contextual evidence is concerned with the parties’ expectations as they relate to the meaning and legal effect of contract language. Indeed, American courts often referred to “custom” and the parties’ “usage” interchangeably.<sup>129</sup> Although the two concepts share a common principle, they do not enjoy the same history at common law, nor are they subject to the same standard of proof. The principle underlying each “is that an agreement is to be read in the light of a common practice or method of dealing.”<sup>130</sup> The idea of trade usage, however, did not appear in the English common law until the eighteenth century, whereas the first appearance of custom is clearly medieval.<sup>131</sup>

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7.3, at 451-52; *see also supra* notes 101, 109-12 and accompanying text.

If, on the other hand, the parties entered into an express agreement *after* executing the final written contract, such an agreement might well be effective. The parol evidence rule does not apply to post-contractual negotiations. “Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties.” 3 CORBIN, *supra* note 100, § 574, at 371; *see also id.* § 577, at 401 (remarking that if an oral agreement was made “subsequent in time” to a written contract, “the parol evidence rules does not purport to exclude proof of it”); 3 WILLISTON, *supra* note 124, § 632, at 1817 (“All courts agree also that subsequent agreements may be shown, and are not rendered ineffective by the prior writing.”). Indeed, the freedom to modify an existing contract by a subsequent, written agreement appears to be exactly what section 71 contemplated. In this way courts construed section 71 to be merely declaratory of the common law. Depending on the nature of the contract, however, at common law a subsequent express agreement memorialized in writing might not be effective. If the original contract as modified by a subsequent oral agreement fell within the statute of frauds, courts frequently refused to enforce the agreement by invoking the statute. *See* FARNSWORTH, *supra* note 27, § 6.2, at 399-400; 2 WILLISTON, *supra* note 124, § 593, at 1705.

128. UNIFORM SALES ACT § 71, 1 U.L.A. 410 (1950).

129. *See* CLARK, *supra* note 105, § 221, at 551-55; 3 WILLISTON, *supra* note 124, § 649, at 1872.

130. FARNSWORTH, *supra* note 27, § 7.13, at 529; *see also* 3 CORBIN, *supra* note 100, § 556, at 243 (“The usage or custom of men is one of those circumstances, so well known to one of the parties that he thinks it unnecessary to refer to it in words—a fact that the other party also knows or has reason to know.”).

131. *See* FARNSWORTH, *supra* note 27, § 7.13, at 529 (remarking that the term “usage of trade” which appears in the UCC is “relatively new and favored

At common law, "custom" was understood as a social practice which, by its longevity and uniformity, had "become the law of the matter to which it relates."<sup>132</sup> That is, custom was thought of as "an independent source of authority, a kind of lesser law used to supplement the common law."<sup>133</sup> According to Williston, usage differs from custom in that it is "a fact and not opinion or rule of law."<sup>134</sup> He defined usage as a "habitual or customary practice among a certain class of people, or in a trade, a neighborhood or a large geographical area."<sup>135</sup> For Williston, usage "derives its efficacy from the assent thereto of parties to the transaction."<sup>136</sup> Custom, by contrast, "derives its efficacy from its adoption into the law, and when once established is binding irrespective of any manifestation of assent by the parties concerned."<sup>137</sup> Because custom could itself carry the authority of law,<sup>138</sup> the medieval common law courts developed a

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by the Code over the more traditional and narrower term *custom*"); 3 WILLISTON, *supra* note 124, § 649, at 1873 (asserting that the "earliest decision of importance recognizing the validity of usage . . . was decided in the latter half of the eighteenth century by Lord Mansfield," but that custom "has from early times been recognized as a source of law"); Joseph H. Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101, 1102-04 (1965) (crediting Lord Mansfield with introducing the concept of "trade usage").

132. 3 WILLISTON, *supra* note 124, § 649, at 1873 (citing cases).

133. Levie, *supra* note 131, at 1102.

134. 3 WILLISTON, *supra* note 124, § 649, at 1872.

135. *Id.* at 1872-73.

136. *Id.* at 1873.

137. *Id.*

138. To say that custom carried the authority of law independent of any action by the law-making authority is to somewhat misstate the issue. As Levie astutely remarks: "The distinction between custom and law is not easy to draw when a rule of law grows out of custom. Once custom is established by litigation, judicial notice will be taken of its existence, and the difficulty is compounded." Levie, *supra* note 131, at 1102 n.8. Levie further notes that one way out of this conceptual puzzle is simply "to declare, together with a school of jurisprudence of which the most famous member is Ehrlich, that custom is law." *Id.* at 1103 n.8. Llewellyn was clearly sympathetic to such a sociological view of law. As he remarked in his early socio-historical "sketch" of contract law, "it is vital to remember that law in its beginning is almost undifferentiated from other forms of social pressure." Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 711 (1931) [hereinafter Llewellyn, *What Price*]; see also Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter Llewellyn, *Realistic*] (remarking that "the clearer visualization of the problems involved

number of demanding criteria concerning proof of custom. A customary practice had to satisfy each of these criteria before it could be recognized as a legally enforceable norm. If it failed to satisfy any one of them, then, according to the language of section 71, the custom would not "be such as to bind both parties to the contract or the sale."<sup>139</sup>

In applying section 71 of the Uniform Sales Act, courts held that the statute simply recognized the standards for custom already well-established at common law.<sup>140</sup> The common law required that, in order to be enforceable, a custom had to be reasonable, legal, certain, universal, notorious, and ancient.<sup>141</sup> Briefly put, these criteria demanded respectively: that a custom not be unconscionable; that it not contradict the positive law; that it be definitive and thus capable of ready application; that it be uniformly followed by all subject to it; and that it be well-known and well-established over time.<sup>142</sup> Furthermore, the relative absence of custom as an independent source of law in the United States and the basic similarity between custom and usage led many American courts to apply the same rigorous standards of proof to matters of usage.<sup>143</sup>

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moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior"); Karl N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355 (1939-40) [hereinafter Llewellyn, *Law Jobs*]; KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941) (observing the law-ways and juristic method of the Cheyenne).

139. UNIFORM SALES ACT § 71, 1 U.L.A. 410 (1950).

140. See, e.g., *Alex J. Mandl, Inc. v. San Roman*, 170 F.2d 839 (7th Cir. 1948); *Joannes Bros. Co. v. Czarnikow-Rionda Co.*, 201 N.Y.S. 409 (Sup. Ct. 1923); *Albus v. Toomey*, 116 A. 917 (Pa. 1922).

141. See *Levie*, *supra* note 131, at 1103-06.

142. See CLARK, *supra* note 105, § 221, at 551-55 (referring to custom and usage interchangeably and citing numerous cases); *Levie*, *supra* note 131, at 1103-06 (citing numerous cases).

143. See 1941 DRAFT, *supra* note 87, intro. cmt. to §§ 59-59-D, at 253 (observing that the law "has laid down such stringent tests before 'a usage is such as to bind both parties' that few of the existing usages daily relied on in commerce could satisfy the test"); *Levie*, *supra* note 131, at 1103 (remarking that because the law of trade usage was never fully explicated, courts tended "to refer to the stringent tests for custom in difficult cases falling into the intermediate zone"); see also 3 WILLISTON, *supra* note 124, § 649, at 1873-74 (noting that the method of developing and changing law based on custom is of less importance in the United States); *id.* §§ 657-661, at 1896-1905 (observing that the similarities between custom and usage often result in confusion). Williston



### C. Contextual Evidence Under the Uniform Commercial Code

As should be apparent from this brief survey of contract law prior to the Code, Karl Llewellyn did not invent the use of contextual evidence. Instead Llewellyn's contributions to this area were largely a matter of emphasis and clarification. The Uniform Sales Act and the common law clearly recognized the relevance of custom and usage in the process of contract interpretation. There were in fact "numberless well-considered cases" in which contextual evidence was used "to establish a meaning that the written words of the contract would never have been given in the absence of such proof."<sup>144</sup> Nevertheless, prior to the advent of the Code, the use of contextual evidence was hardly uniform. Many courts strictly applied the stringent tests for proof of custom, usage, and course of dealing, while others were more lenient. Indeed, because the case law "was inconsistent [and] the governing principles unclear . . . the fate of a litigant who relied on such evidence [was] uncertain."<sup>145</sup>

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suggested that courts have not and should not always apply each of the requirements for proof of custom in determining the existence and application of a purported usage. *See id.* In this it is likely that Williston's reading of the law was colored by his desire to keep custom and usage relatively distinct. For example, he remarks that because the efficacy of usage turns upon the assent of the parties, "the law should impose no more stringent requirement of reasonableness than it does where express terms of a contract are in question" but that "there seems no doubt that a more rigorous test is in fact imposed." *Id.* § 659, at 1898. Likewise, he asserts that the requirement that custom "must have existed for a considerable length of time" does not apply to proof of usage. Instead, the critical issue is that at the time of contracting, the usage was "so notorious as to justify belief that the parties contracted with reference to it." *Id.* § 661, at 1903. He concludes, however, that "[t]he degree of proof that is necessary to satisfy a court that a particular usage existed, and that the contract must be interpreted with reference to it, may indeed vary according to the generality of the usage and the length of time which it has been in existence." *Id.*

144. 3 CORBIN, *supra* note 100, § 555, at 232 (citing numerous cases); *see also* 3 WILLISTON, *supra* note 124, § 650, at 1874 (noting that "there are now numerous decisions (not all of them of recent date) where words with a clear normal meaning have been shown by usage to bear a meaning which nothing in the context would suggest") (citing cases). Williston's statement would have been more precise if he had not distinguished context and usage but had instead seen the latter as constituting part of the former.

145. Kirst, *supra* note 14, at 812.

## 1. The need for reform

This uncertainty troubled Llewellyn and was a major impetus behind his revised approach to contextual evidence in the UCC. “We hear of ‘the course of dealing’ as an aid to ‘interpreting the contract,’” he remarked in his famous article on the law of warranty, “[b]ut we never know *when* we shall hear of it; nor to *what* extent.”<sup>146</sup> According to Llewellyn, the failure of the Uniform Sales Act to settle the question of proof of custom, usage, and course of dealing was an “embarrassing matter” in need of attention.<sup>147</sup> “[I]f usage can be determined with some reasonable reliability,” he believed, then “the only sound policy” would be to grant it “as full a scope as reason will permit.”<sup>148</sup> For Llewellyn, the relevance of contextual evidence to the interpretive process was never in question. Indeed, by his reckoning, no “sane Court ha[d] for half-a-century doubted the wisdom of fully incorporating the relevant usage of trade into the agreement and into the decision on adequacy of performance.”<sup>149</sup> The problem instead was the absence of “any reliable way of determining what the usage of the trade really was”<sup>150</sup> and the lack of a clear understanding of “the relation of usage to particular [contract] language.”<sup>151</sup> Although the procedural innovations that

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146. K.N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 375 (1937) [hereinafter Llewellyn, *On Warranty Part II*].

147. *Id.* at 392 (“The Act leaves wholly untouched that most embarrassing matter: the *proof* of custom, or of usage, or even of course of dealing. It welcomes all three of these, in terms, and repeatedly; but no one who has watched the process of ‘proof’ and ‘rebuttal’ before a jury can feel that the Welcome on the doormat much helps the litigant.”) (footnote omitted); *see also* Llewellyn, *Realistic*, *supra* note 138, at 441 (“The rule that certain oral and essential terms of an agreement are without force, if the balance of the agreement has been committed to writing, and looks on its face to be complete, raises considerable doubts as to its furtherance of security of transactions—sufficiently so as to have made our rules on the subject rather intricate and uncertain, and our judicial practices at times highly uncertain.”); 1941 DRAFT, *supra* note 87, intro. cmt. to §§ 59-59-D, at 253 (“It is to be further noted that the *law* about the effect of ‘business custom’ is quite as uncertain as are the jury-verdicts.”).

148. 1941 DRAFT, *supra* note 87, § 1-D cmt., at 55. In this same passage Llewellyn remarks that this policy favoring the wide use of usage was in fact “the policy of the Original Act.” *Id.*

149. *Id.* intro. cmt. to §§ 59-59-D, at 253.

150. *Id.*

151. *Id.* § 1-D cmt., at 55.

Llewellyn sought to introduce did not survive the drafting process,<sup>152</sup> the rules he proposed stressing the importance of contextual evidence did survive, and have gone on to profoundly influence the manner in which courts interpret contractual language.<sup>153</sup>

## 2. Llewellyn's distrust of words and the priority of facts

The ideas embodied in those provisions of Article 2 that relate to contextual evidence can be seen in Llewellyn's thought as it developed over the years. Although much of Llewellyn's work on these matters can be found in unpublished manuscripts generated during the years in which the UCC was drafted,<sup>154</sup> Llewellyn's sensitivity to context as a source of meaning can be seen intermittently throughout his many published articles and books. These materials show that Llewellyn's sensitivity to context derived from two related sources: the distrust Llewellyn had for words standing alone as a guide to action, and the importance he ascribed to facts in all things legal. As

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152. The "reliable procedure" that Llewellyn proposed for determining usages of trade and other "questions of mercantile fact" was to submit such questions to a special tribunal of "merchant experts" under the direction of a court. *See generally* 1941 DRAFT, *supra* note 87, §§ 59-59-D, at 254-57. Under this scheme, each party would choose an equal number of tribunal members who would then jointly select an additional member. *See id.* The 1941 Draft also required that the merchant experts selected be disinterested. *See id.* The proposed statute did not list the qualifications necessary for serving as a merchant expert. Instead, the statute assumed that the party selecting an expert would choose someone properly qualified since "it is *specialized* knowledge and competence which are needed." *Id.* intro. cmt. to §§ 59-59-D, at 253. The merchant experts selected would then render a written unanimous verdict on the issues submitted to them. *See id.* § 59-C, at 255. In order to avoid constitutional invalidation, the statute further stated that the merchant tribunal's findings would then be received into evidence and presented to the impaneled lay jury. *See id.* § 59-D, at 256-57. The statute permitted the jury members to disregard the merchant tribunal's findings only if they could do so "in conscience." *Id.* Unlike Llewellyn's revision of the standards for contextual evidence and his clarification of the importance of such evidence in the interpretive process, these procedural innovations did not survive the drafting process. For an excellent discussion of the special merchant rules drafted by Llewellyn, including the provisions concerning merchant expert tribunals, see generally Wiseman, *supra* note 10, at 512-15, 527-29.

153. *See, e.g.,* George I. Wallach, *The Declining "Sanctity" of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651 (1979).

154. *See infra* Part II.C.5.

Llewellyn succinctly stated, he found “[o]verwhelming . . . the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies.”<sup>155</sup>

The distrust Llewellyn harbored for “mere words” and his keen attention to facts derived from his study of common law rules. In his reading of court opinions, Llewellyn observed a wide chasm between the rules announced by courts and the actual practices of judges in deciding cases.<sup>156</sup> The traditional approach to legal rules which Llewellyn came to disdain was formulated “in terms of words; it center[ed] on words; it ha[d] the utmost difficulty in getting beyond words.”<sup>157</sup> Contrary to this prevailing formulation, Llewellyn and his fellow legal realists doubted the efficacy of legal verbiage to dictate results.<sup>158</sup> Instead, Llewellyn believed “that the use . . . of words . . . as the *center* of reference in thinking about law, is a block to clear thinking about matters legal.”<sup>159</sup> He insisted “on treating words as mere tools in attempting to deal with things more tangible.”<sup>160</sup> He wanted “law to deal . . . with things, with people,

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155. Llewellyn, *What Price*, *supra* note 138, at 751.

156. This led Llewellyn to develop the distinction between what he called “real rules” and “paper rules.” See *infra* notes 336-345 and accompanying text.

157. Llewellyn, *Realistic*, *supra* note 138, at 443.

158. See Karl N. Llewellyn, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 183, 192 (1941) [hereinafter Llewellyn, *My Philosophy*] (“The health of work in law, on the part of the determining or acting official, does not lie, and never will lie, in our civilization, in regularity of practice, in the sense of conformity merely to an external pattern, whether the pattern be one of words or of any other kind.”); Llewellyn, *On the Good*, *supra* note 117, at 260 (faulting lawyers for often acting and speaking “as if fixed rules of law were all of law, as if all rules were a single kidney, as if, finally, the *reason*, explicitly and accountably stated for guidance and for explanation, were not the heart of all sound work in things of law”); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931) [hereinafter Llewellyn, *Some Realism*] (describing one of the legal realists’ common points of departure as “a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions”).

159. Llewellyn, *Realistic*, *supra* note 138, at 442.

160. K.N. Llewellyn, *On Philosophy in American Law*, 82 U. PA. L. REV. 205, 212 (1934) [hereinafter Llewellyn, *On Philosophy*].

with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles—not with words alone.”<sup>161</sup>

Thus for Llewellyn, facts enjoyed a certain priority over language.<sup>162</sup> Whether in adjudication or in legislation, facts give rise to rules, not the other way around.<sup>163</sup> Whether written in broad generalizations or narrow categories, a rule cannot “justify itself, except in terms of fact and need.”<sup>164</sup> In order to be meaningful, Llewellyn insisted that a rule “must state clearly how to deal with cases on the raw facts as they arise.”<sup>165</sup> No matter how precise a legal formula may be with respect to the legal consequences which are to follow from its application, if it is not “guided to the facts which may emerge, the supposed rule can acquire no meaning *in life* (as distinct from, say, a meaning in logic).”<sup>166</sup> Accordingly, Llewellyn

161. Llewellyn, *Some Realism*, *supra* note 158, at 1223.

162. *See id.* at 1222 (“Before rules, were facts; in the beginning was not a Word, but a Doing.”); K.N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 722-23 (1936) [hereinafter Llewellyn, *On Warranty Part I*] (“[M]en get to thinking of Rules as Things, and forget the tremendous extent to which the operation of any form of words depends upon *some person's* classification of the facts in cases, and the tremendous extent to which any shift in *tendency to classify facts* is likely to be accompanied by a parallel (though delayed) tendency to change the words, or scope, or nature, of the ‘Rules’ concerned.”) (footnote omitted).

163. *Cf.* Kirst, *supra* note 14, at 813 (“The goal of the drafters was to create a Code responsive to business reality . . .”); Patterson, *supra* note 99, at 171 (“Llewellyn thought that contract doctrine should respond to commercial reality and not, as the classical theorists imagined, the other way around.”) (footnotes omitted).

164. K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 190 (1938) [hereinafter Llewellyn, *Through Title*]; *see also* Llewellyn, *Current Recapture*, *supra* note 82, at 225-26 (“Today a distinction without a reason expressly given is rare; and almost always the reason given goes to reason of fact, which is reason of life, as seen by the court.”). For a discussion of what Llewellyn meant by “need,” *see infra* note 173 and accompanying text.

165. K.N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, I, 48 YALE L.J. 1, 12 (1938) [hereinafter Llewellyn, *Offer and Acceptance Part I*].

166. *Id.* at 14; *see also id.* at 28 (“Any rule which merely defines a term of art *in terms of legal consequence* (rather than in terms of operative fact) will, be it repeated, remain without significance in life until it is accompanied and supplemented by other rules which root it in the soil of fact.”). Meaningless rules, by contrast, “*evidence doctrine which has either failed to study the fact situation or has lost touch with it.*” *Id.* at 17; *see also* Llewellyn, *Realistic, su-*

concluded that if legal rules are to have meaning in life, they cannot consist of abstract legal formulae.<sup>167</sup> Instead, they must have some descriptive content. They must be “root[ed] . . . in the soil of fact.”<sup>168</sup>

Moreover, the generality of the language used and the facts to which they refer must be limited. Life, as Llewellyn might have said, is lived in the particular.<sup>169</sup> Thus, judges and other lawmakers should avoid “verbally simple rules—which so often cover dissimilar and non-simple fact situations” and should instead group “cases and legal situations into narrower categories than has been the practice in the past.”<sup>170</sup> This approach would, Llewellyn believed, make “the study of law a study in [the] first instance of particularized situations and what happens in or can be done about them.”<sup>171</sup>

### 3. The need for congruence between life and rules

The importance Llewellyn attached to tangible facts in the composition of legal formulae went beyond mere word choice. Facts should also influence the formation of the policies contained within

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*pra* note 138, at 454 (observing “the tendency of the crystallized legal concept to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition”).

167. See Patterson, *supra* note 99, at 210 (concluding that “Llewellyn substituted an emphasis on the primacy of the particular for classicism’s preoccupation with abstraction”); Wiseman, *supra* note 10, at 514 (describing by contrast Williston’s approach to legal problems as being the use of “unitary abstract principles whose application did not turn on an understanding of the facts and circumstances of a particular case”); *id.* at 538 (concluding that courts, lawyers, and commercial actors have “all benefit[ed] from the realist commitment to resolving legal problems by reference to their factual circumstances rather than to abstract legal categories”).

168. Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 28.

169. Cf. Llewellyn, *On Warranty Part I*, *supra* note 162, at 715 (“History . . . involves . . . time, place, background, present circumstance, and particular men. A respectable study of even a single doctrine, and even with artificial elimination of the ‘man’ element, amounts to a minor monograph.”) (footnote omitted).

170. Llewellyn, *Some Realism*, *supra* note 158, at 1237.

171. Llewellyn, *Realistic*, *supra* note 138, at 460 (footnote omitted); see also Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 26 (providing an example of how a single term, such as “bills of lading,” often addresses “divergent situations-in-life,” but that careful thought can discover “a criterion for significant subdivision of what had broadly and blindly been regarded as a single unit-type”).

legal rules.<sup>172</sup> That is, Llewellyn believed that our choice of the legal rules themselves should reflect the actual practices of those they were designed to regulate.<sup>173</sup>

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172. See Mooney, *supra* note 10, at 231 (describing one of Llewellyn's primary points as being that a "modern commercial law of business contracts must be rooted in the actual fact patterns of our modern, credit-oriented, on-going transactional economic system"); Wiseman, *supra* note 10, at 493 ("As a realist, Llewellyn viewed law as a means to social ends and reorganized the need to reexamine the law constantly to ensure that it fit the society it claimed to serve. As a scholar and draftsman of sales law, he advocated that the law conform to a normative vision of merchant reality.").

173. Llewellyn drafted the UCC with this principle of derivation firmly in mind. See *Statement, supra* note 116, in 1 N.Y. REPORT 1954, *supra* note 24, at 34 ("What the Code says fits with modern business and finance."); Walter D. Malcolm, *Report, The Proposed Commercial Code*, 6 BUS. LAW. 113, 125-26 (1951) (describing two principles that appear "repeatedly throughout the Code" as being, first, "that the *practices* of businessmen and business houses are important factors in construing their contracts and actions and in determining their rights and liabilities" and, second, "that many of the changes effected by the Code are designed to adapt rules of law to the way that business is actually carried on"). The standards of commercial reasonableness and usage imbue virtually every provision in Article 2. See, e.g., U.C.C. §§ 2-103(1)(b) (defining "good faith"), 2-105(6) (defining "commercial unit"), 2-201(2) (discussing merchant exception to statute of frauds), 2-302 (defining unconscionability), 2-305 (discussing open price terms), 2-503 (defining tender of delivery), 2-504 (discussing shipment of goods by seller), 2-508 (discussing cure by seller), 2-513 (discussing the right to inspection), 2-602 (discussing buyer's rightful rejection), 2-603 (discussing merchant duties as to rejected goods), 2-605 (discussing waiver of buyer's objections), 2-607(3) (discussing notification of breach), 2-608 (discussing revocation of acceptance), 2-609 (discussing right to adequate assurances), 2-614 (discussing substituted performance), 2-615 (discussing failure of presupposed conditions), 2-704 (discussing completion of goods or salvage sale), 2-706 (discussing resale of the contract goods), 2-712 (discussing purchase of cover); see also David Melnikoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185-86 (1967) (remarking that "[t]he word *reasonable*, effective in small doses, has been administered by the bucket" in the Code).

Some commentators have argued that in treating the business practices of merchants as normative, Llewellyn abdicated any role courts might have in imposing a moral standard on commercial transactions independent of the current morals of the marketplace. Professor Richard Danzig has argued that Llewellyn believed "that the law ought to be developed and assessed against a backdrop of the everyday world in which it operates." Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 624 (1975). According to Danzig "Llewellyn saw law as an articulation and regularization of unconsciously evolved mores—as a crystallization

of a generally recognized and almost indisputably right rule (a 'singing reason'), inherent in, but very possibly obscured by, existing patterns of relationships." *Id.* (footnote omitted). For Danzig, Article 2 does not set forth definitive standards by which courts are to judge merchant conduct. It simply encourages courts to look for the standards inherent in merchant practices. Thus, for Danzig, Article 2 "is not, in the main, an example of lawmaking, it is a guide to law-finding. It does not tell judges the law, it tells them how to find the law." *Id.* at 626. Because the Code defers to the mores of the marketplace Danzig says one may rightly ask "to what extent and in what manner a sense of moral imperative is reflected in [its] provisions." *Id.* at 628. Danzig concludes that while the absence of any stated moral imperative in the Code does constitute "a renunciation of legislative power and responsibility," *id.* at 622, it suggests an abdication of ethical judgment only in a round-about way. Llewellyn was neither a moral relativist nor an agnostic, unwilling to stake out a moral ground on which to stand. For Danzig, Llewellyn was instead a natural lawyer who believed "that values have an objectively ascertainable existence and a near universal acceptance and thus can be judicially discovered." *Id.* at 629; *see also infra* note 372-377.

Danzig finds fault in this approach. First, insofar as discovery works as a method "it tends to confine the impact of the law to a reaffirmation of the predominant morals of the marketplace. Practices well below the market's moral median may be constrained but since the median is the standard, by definition it will be unaffected." *Id.* at 629. Accordingly, under the Code, law will tend to follow the lead of business rather than set the pace. Under this model of deference, the law could never launch a ship like *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932). Second, Danzig contends that questions of value are in reality matters of political choice to be decided, not questions of fact to be discovered. Under the Code, judges will impose their own values on the cases before them and then justify their results in terms of objective discovery. The Code thus "masks critical choices as technical assessments and allocates them to decisionmakers (judges) of low visibility and low responsibility from the standpoint of the public." Danzig, *supra*, at 630. Thus, the abdication of ethical judgment effected by the Code is an abdication in favor of courts. *See also* John A. Sebert, Jr., *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360, 362 (1981). For Danzig, this is an abdication which readily follows from the failure, the unreality of natural law.

Professor Zipporah Wiseman, by contrast, believes that Llewellyn has been unfairly treated. She contends that he is not guilty of the charge of wholly deferring to the marketplace as a source of legal norms used to govern commerce. *See* Wiseman, *supra* note 10, at 492 (arguing that "[i]n advocating merchant reality as a standard, Llewellyn was arguing for an approach that accepted the marketplace norms of speed and efficiency" but that Llewellyn's "vision also encompassed a normative belief that the law should encourage the better practices and control the worst abuses of the market"). Wiseman forcefully argues that "Llewellyn's willingness to incorporate the realities of the market in the law did not extend to a total abdication of judicial control to the expedencies of the market." *Id.* at 494. She insists that Llewellyn "did not



believe 'merchant reality' was a justification for legalizing practices that he considered oppressive or sharp-dealing." *Id.* In support of her thesis, Wiseman distinguishes three categories of provisions and proposed provisions under the UCC which relate to this point. First, she cites to a number of Code provisions which simply "codify the common practices and understandings of the marketplace." *Id.* at 505. These include the provisions on usage of trade and firm offers. *See id.* at 505-06. Second, Wiseman discusses several provisions which guarded against the work of sharp dealers by establishing "some outer bounds of unfairness between merchants in their dealings." *Id.* at 506. These include, among others, the merchant exception to the statute of frauds. *See id.* Third, Wiseman discusses those few rules drafted by Llewellyn which "imposed substantial new obligations on merchants for the benefit not only of other merchants but also of the consumers who bought or simply used their goods." *Id.* at 507. The provision she has in mind here is the rule extending liability to manufacturers for injury "in person or property" incurred by anyone "in the ordinary course of use or consumption by reason of the defect" in the goods. *See* 1941 DRAFT, *supra* note 87, § 16-B(1), at 122. A much less radical version of this provision ultimately became U.C.C. § 2-318. Although Llewellyn's original version of the rule failed to gain acceptance, Wiseman cites this as an example of Llewellyn's willingness to draft rules embodying moral standards independent from the standards of the marketplace. *See* Wiseman, *supra* note 10, at 495 (Llewellyn sought "to impose his own 'better' rules in the interest of fostering a better reality").

Llewellyn's own writings add some support to Wiseman's thesis. He insisted that "a realist's interest in fact, and in the meaning of people to law and of law to people, in no measure impairs interest on his part for better law." Llewellyn, *Through Title*, *supra* note 164, at 162 (footnote omitted). Instead, he believed that only a close "examination of the fact-situations to which the concepts [of sales law] are applied and of the results of the application" will yield "an effective attack on the problem of better law." *Id.* at 161, 163; *see also id.* at 175 n.25 ("I do not regard the dominance of bargain in our economy as even remotely justifying passive acceptance by court or other tribunal of the letter of an 'agreement' merely because a 'writing' turns up under that label . . . . This means need for control, lest old rules based on Adam Smithian postulates be made tools of outrage."). He cautioned that his "plea for merchants' law to be recognized" should not be misconstrued as a blind acceptance of merchant practices. K.N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 903 (1939) [hereinafter Llewellyn, *First Struggle*]. Llewellyn made clear that the application of merchant rules in the law of sales requires both "firm court understanding" as well as "firm court control." *Id.* at 903-04.

On balance, Llewellyn's own words and Wiseman's forceful arguments appear to relieve Llewellyn personally of the charge that Llewellyn "sold-out," as it were, to the marketplace. Wiseman rightly criticizes Danzig for failing to consider Llewellyn's early drafts of Article 2 in Danzig's brief review of the Code's legislative history. *See* Wiseman, *supra* note 10, at 468-69 n.13. As Wiseman acknowledges, however, many of the more progressive rules proposed by Llewellyn were either diluted or ultimately rejected in the course of

As a general matter, the purpose of any legal norm is to control or guide the behavior of those subject to it.<sup>174</sup> As Llewellyn observed, however, “[g]uidance for a particular society must plant its feet in that society. And guidance for a positive legal scheme must rub elbows with that scheme, or grow chimerical.”<sup>175</sup> The law, in other words, must coincide with the real tangibles of life on a fundamental level. If this basic congruence is lacking, then the law will suffer a fatal impotence. “‘Law’ without effect approaches zero in its meaning.”<sup>176</sup> If lawmakers fail to consider the “present and probable behavior of the persons sought to be affected,” then the desired results they obtain “will be an accident.”<sup>177</sup> No legal doctrine “which too much misfits life can hope to fit the cases.”<sup>178</sup> Instead, both “policy and principle must fit the facts, and must be rebuilt to fit the

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the drafting process. Thus, Danzig’s criticism of the Code itself remains, I believe, largely valid. The method employed by Llewellyn in the Code does not itself establish a standard of conduct which commercial actors are to follow. The judgment as to what is right, the identification of conduct that is moral and furthers the common good, is the most contentious judgment in all of law. The UCC slyly avoids making this judgment. By employing the standard of “commercial reasonableness,” the Code converts a paradigmatic question of law into a question of fact. Merchants, lawyers and judges must look out into the marketplace in order to discover the propriety of merchant conduct. Because the standard of “commercial reasonableness” is a floating standard, however, it rises or falls like a buoy with the tide of moral practice in a given trade. Such practices are real; thus the standard employed by the Code is not vacuous but deeply meaningful. Cf. *id.* (accusing Danzig of contending that standards of commercial reasonableness are “vacuous”). What is regarded as proper at one point in time may not, however, remain so forever. If the official standards of merchants were to regress, the Code does not (aside from the general language of section 1-103) provide courts with any means of resisting such change. Finally, contrary to Danzig’s assertions, assessments of commercial reasonableness will not “vary unpredictably from judge to judge.” Danzig, *supra*, at 630. So long as the merchants who embrace such standards still constitute a relatively cohesive group and the larger society finds such standards generally acceptable, the law applying the standards of commercial reasonableness should remain fairly certain and consistent.

174. See Llewellyn, *Realistic*, *supra* note 138, at 458.

175. Karl N. Llewellyn, *One “Realist’s” View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3, 6 (1939) [hereinafter Llewellyn, *Natural Law*].

176. Llewellyn, *Some Realism*, *supra* note 158, at 1249.

177. Llewellyn, *Realistic*, *supra* note 138, at 459.

178. Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 31 (criticizing the dichotomy between bilateral and unilateral contract in the orthodox doctrine of offer and acceptance).

changing facts."<sup>179</sup> Only by fitting the real circumstances of life can law hope to be reasonable and effective. Only then can law hope to be (in Llewellyn's words) "law-in-action."<sup>180</sup>

Llewellyn's deep appreciation for facts also accounts for his pedagogical emphasis on "real life" business transactions.<sup>181</sup> Llewellyn questioned the usefulness of the fanciful scenarios and outrageous hypotheticals popular in the law school classrooms of his day. He seriously doubted that "safe conclusions as to business cases" could be gleaned from "the idiosyncratic desires of one *A* to see one *B* climb a fifty-foot greased flagpole or push a peanut across the Brooklyn Bridge."<sup>182</sup> Accordingly, Llewellyn believed that legal

179. Llewellyn, *On Warranty Part II*, *supra* note 146, at 409; *cf.* Llewellyn, *On Philosophy*, *supra* note 160, at 212 (concluding that the legal realists' "lines of thinking are so much closer than any others to the actual behavior of the better bar, and that their judgments of policy come backed by facts").

180. Llewellyn, *Realistic*, *supra* note 138, at 435 n.3 (attributing to Roscoe Pound the distinction between "law-in-books" and "law-in-action," ROSCOE POUND, *THE SCOPE AND PURPOSE OF SOCIOLOGICAL JURISPRUDENCE* (1912)); *see id.* at 447 n.12 (describing "case-law wisdom-in-action" as where the judge "visualize[s] in advance the effects of the decision" and "sees his problem not as the mere making of an abstract paper formula, but as the devising of a way of working in court which will in due course affect people") (emphasis omitted); K.N. Llewellyn, *Book Review*, 40 HARV. L. REV. 142, 144 (1926) (reviewing MORTON C. CAMPBELL, *CASES ON MORTGAGES OF REAL PROPERTY* (1926) (asserting that the study of law needs to focus on "law-in-action," by which he means "what the courts and all quasi-judicial bodies actually do" and "the actual ordering of men's actions"); *cf.* Llewellyn, *On Philosophy*, *supra* note 160, at 205 ("But life-in-action a theory can gain only when it serves men's needs."); Llewellyn, *Some Realism*, *supra* note 158, at 1237 (describing one of the legal realists' common points of departure as "[a]n insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects").

181. *See* Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 36 (concluding that the unilateral contract "is not an important type on which an innocent law student's teeth should be cut to the eternal misshaping of his view of Contract, but belongs in the freak-tent as an interesting and often instructive curiosity"); Llewellyn, *Through Title*, *supra* note 164, at 163 (remarking that his work on "title" concerns the mercantile aspects of sales and has "no application to a farmer's horse trade, and almost none to the purchase by Mrs. Sweeney of a fountain pen or of a new oil burner . . . [nor any application] when a boardinghouse keeper turns her furniture over to her landlord for back rent just before the sheriff arrives with an attachment for the coal bill").

182. K.N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 785 (1939) [hereinafter Llewellyn, *Offer and Acceptance*

education should stress factual analysis and the influence of true-to-life facts on the development of legal doctrine.<sup>183</sup> This emphasis was part of his struggle to “unhorse” the law of sales,<sup>184</sup> to update it, to bring it forward from the face-to-face bargains struck with cash in hand over a cracker barrel at the general store, to the faceless, impersonal, credit-driven, transcontinental, industrial transactions of modern day. The common law of sales may have been suitable for the “horse trading” of medieval England or the American frontier. “The trouble lies in trying to fit cases built on such a foundation into non-horse trade.”<sup>185</sup> The contemporary circumstances under which agreements are made should, Llewellyn thought, influence the legal

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*Part II*]; see also *id.* at 789 (concluding that “the classical dichotomy in Offer and Acceptance has little relation to the living fact of the business contracting which it divides”); *id.* at 813 (demonstrating that genuine unilateral contracts do not ever actually occur in business); Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 36 (comparing the basic division of contracts into categories of unilateral and bilateral to the division of the population into categories of bearded ladies and non-bearded ladies and thus doubting the usefulness of the dichotomy as “training material” in a “crowded curriculum”); Mooney, *supra* note 10, at 218 (praising Llewellyn for emphasizing “that business arrangements, not family transactions, are a more reasonable foundation upon which theories of contract should be based”).

183. In the introduction to his famous casebook, Llewellyn self-consciously set forth “the aims and method of the book, and the theoretical base on which it rests.” KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* ix (1930) [hereinafter LLEWELLYN, *CASEBOOK*]. There he summarized his goal as being “to do full justice to doctrine, but to illuminate its growth and meaning by stressing the facts of cases, and the policy considerations.” *Id.* at xvi. A broad exposure to a wide variety of factual settings was, he believed, the only way to adequately prepare new lawyers.

We are training men for the practice of law, not for the classroom. Moreover, I know of no way for the student to see which of a group of facts are vital, except by seeing more states of fact and holdings than the printing of opinions *in extenso* will allow.

*Id.* at xvii; see also *id.* at xiii-xiv (“The emphasis of the book is on the meaning of the law in situations of fact, especially as they appear before the lawyer in his office.”).

184. See generally K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939) [hereinafter Llewellyn, *Across Sales*]; Llewellyn, *First Struggle*, *supra* note 173. Professor Wiseman believes that Llewellyn obtained the image of the horse-trader (the antithesis of the modern industrial seller) from Professor Nathan Isaacs. See Wiseman, *supra* note 10, at 477 n.43.

185. Llewellyn, *On Warranty Part II*, *supra* note 146, at 382 n.103 (emphasis omitted).

obligations imposed on the parties involved.<sup>186</sup> The significant differences between distinct kinds of sales and distinct kinds of buyers and sellers—retailers, consumers, manufacturers, distributors—led Llewellyn to favor rules more narrowly tailored to specific contexts.<sup>187</sup>

#### 4. Llewellyn's appreciation of context in general

More importantly for present purposes, Llewellyn also came to see that the specific contexts in which agreements are made greatly influence the meaning of the words as used by the parties. Just as Llewellyn doubted the efficacy of legal rules composed of abstract language divorced from purpose,<sup>188</sup> so he believed that in the case of contracts, mere words standing alone were insufficient to convey the understanding of the parties to one another or to the world.

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186. See Llewellyn, *On Warranty Part I*, *supra* note 162, at 713 ("If your notion of commerce is the wandering peddler, the horse-trader, the side-show at the fair, then you think well of arm's-length bargaining, single-occasion deals, and devil take the fool. If, on the other hand, you think of trade in terms of goodwill and future business, you will find no hardship in imposing on a seller various obligations resting in first essence on good faith, and then on contract: what did he agree to deliver?"); see also *id.* at 720-21 (presenting two conceptions of the market, one based on the present sale "horse-trader," the other on the seller who engages in repeat orders and future deliveries); Llewellyn, *Through Title*, *supra* note 164, at 167-68 (criticizing the "lump-title" approach taken under the Uniform Sales Act as fitting reality "only in that rare case in which our economy resembles that of three hundred years ago: where the whole transaction can be accomplished at one stroke, shifting possession along with title, no strings being left-behind—as in cash purchase of an overcoat worn home"); see also Wiseman, *supra* note 10, at 505 ("Llewellyn's decision to restrict the application of the merchant rules to mercantile situations, rather than apply them to all buyers and sellers, was explicitly premised on the unfairness of imposing burdens and obligations on nonmerchant buyers and sellers with different needs and different knowledge.").

187. See Wiseman, *supra* note 10, at 470, 538 (describing Llewellyn's approach as doing away with "verbally simple rules" and grouping "legal situations into narrower categories" than has been the practice in the past) (quoting Llewellyn, *Some Realism*, *supra* note 158, at 1237); cf. Llewellyn, *Through Title*, *supra* note 164, at 169-70 (remarking that, with respect to the concept of title, there are "too many kinds of seller in contract with too many kinds of buyer in too many kinds of transaction," for a completely unitary approach, but expressing confidence that "we can isolate types, either of transaction, or of party, or of issue, and get light on how to better deal with those types").

188. See *infra* Part II.C.2.

Likewise, just as Llewellyn believed that the facts of commercial reality should in part determine the applicable legal rules, so he also believed that the commercial context should influence the interpretation of business contracts. The parties naturally have recourse to the context of their bargain. In order to grasp the parties' true understanding, Llewellyn believed that courts should have access to this same contextual evidence.<sup>189</sup>

Well before he began work on the Uniform Commercial Code, Llewellyn's scholarly writing reflected the importance he attached to context in the interpretation of language in general and of contract language in particular.<sup>190</sup> Llewellyn believed that language was not simply words, but "words used against the slowly moving background and context of a given culture."<sup>191</sup> Thus, for Llewellyn, language cannot itself establish its own meaning. Instead, meaning is a matter of the use of language by someone within a particular context. As Arthur Corbin, Llewellyn's teacher and mentor, would later write, "words in themselves have no meaning," rather "it is men who give meanings to words."<sup>192</sup>

Because meaning depends upon context and usage, the nature of language includes the possibility of error, of misunderstanding. The reader who is aware of the background out of which the author writes is more likely to understand the author's meaning, while the reader who ignores or misapprehends this background and substitutes another is more likely to fail to grasp this meaning. The text will still

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189. See Kirst, *supra* note 14, at 812 (describing the Code project as "an attempt by the drafters first to understand the commercial context of business transactions and then to provide a statutory framework responsive to that context"); Patterson, *supra* note 99, at 188-89 ("In Llewellyn's view, context was the single most important determinant to the meaning of contract language.") (footnote omitted).

190. See, e.g., LLEWELLYN, CASEBOOK, *supra* note 183, at xi (describing the approach taken in his casebook as gaining "an understanding of the business situation" as "a means [of] making the legal job intelligible"). In his casebook, Llewellyn included a number of cases dealing with issues of custom and trade usage. See *id.* at 1044-45.

191. Karl N. Llewellyn, *Law and Language* (May 1961) (unpublished manuscript), in KLP, *supra* note 29, at B.IV.9, at 1.

192. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965); see also *id.* at 165 n.7 ("Meaning of a word always depends on context.").

have a meaning for the reader, but it may not be the meaning the author intended to convey.

Perhaps the most striking illustration of Llewellyn's appreciation for the role of context in understanding (and misunderstanding) a given text appears in his famous exchange with Dean Pound. In March of 1931, Pound published *The Call for a Realist Jurisprudence*,<sup>193</sup> an essay in which he purported to describe the new school of jurisprudence popular among "our younger teachers of law."<sup>194</sup> Although not polemic in nature, Pound's piece was certainly critical "of a number of ideas that he attributed to juristic realism."<sup>195</sup> Working with his fellow legal realist, Jerome Frank, Llewellyn decided to publish a response to Pound's attack.<sup>196</sup> In *Some Realism About Realism—Responding to Dean Pound*, Llewellyn ably demonstrated that Pound's claims regarding the legal realists were largely unfounded or overstated. Acknowledging the importance of context and usage in interpretation, Llewellyn began his critique of Pound's essay with a caveat: "We have done our best to reach and state [Pound's] meaning. But we may misinterpret."<sup>197</sup> In a footnote, Llewellyn explained that he sought to avoid any misinterpretation by offering to submit a draft of his response to Pound for review, but that Pound declined.<sup>198</sup> Accordingly, because of the critical role context plays in the process of interpretation, Llewellyn concluded that some misunderstanding on the part of the reader was "inevitable."<sup>199</sup> "Words are read against the reader's background," Llewellyn observed, "and distorted accordingly."<sup>200</sup>

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193. See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

194. *Id.* at 697, 700-09.

195. TWINING, *supra* note 6, at 72 (footnote omitted). In his book, Twining also analyzes the exchange between Pound and Llewellyn and situates it within a wider historical context. See *id.* at 70-83.

196. See *id.* at 72-73. In the asterisked footnote on the first page of the article, Llewellyn acknowledges that Jerome Frank did not "sign his name as joint author" because "it was [Llewellyn's] fist which pushed the pen" but that "the paper could not have been written without [Frank's] help." Llewellyn, *Some Realism*, *supra* note 158, at 1222.

197. Llewellyn, *Some Realism*, *supra* note 158, at 1228.

198. See *id.* at 1228-29 n.19.

199. *Id.* at 1229 n.19.

200. *Id.*

In the case of business agreements, Llewellyn believed that judges and lawyers could avoid such distortion if they had recourse to the commercial context out of which such agreements emerged.<sup>201</sup> Llewellyn knew that understanding the interplay of text and context was not an easy task. "It is true that 'business understanding' of what an agreement means, and indeed of whether an agreement exists, is by no means unambiguous" in part because the "ways and norms of business practice" are often "hazy at the edge."<sup>202</sup> Without attempting to grasp the commercial background of agreements, however, Llewellyn believed that courts would retreat into the familiar but inaccurate formalism of the day and "work from that bias."<sup>203</sup> In contrast to this formalism, Llewellyn believed that attention to the actual business relation between the parties would reap dividends since it is "vibrant with legal implication."<sup>204</sup> So much of what constitutes the parties' relationship is not formalized. So much of what constitutes the parties' obligations is not articulated in the written contract but is a matter of "tacit agreement"<sup>205</sup> and the "common understanding in fact" shared by the parties.<sup>206</sup>

The play of personality, the unrecorded adjustment from day to day, further factual agreement from time to time, informed by usage, and by initiative and acquiescence which

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201. See generally Llewellyn, *What Price*, *supra* note 138.

202. *Id.* at 722.

203. *Id.* at 724.

204. Llewellyn, *On Warranty Part II*, *supra* note 146, at 375; see also *id.* at 376-78 (faulting courts for failing to appreciate the "standing relation" between contract parties with respect to the supposed separateness of multiple occasions for performance and the adequacy of the performance tendered); *id.* at 395-96 (observing that merchant buyers and sellers frequently resolve quality and warranty issues by reference to trade practice or to the parties' actual dealings).

205. See Llewellyn, *What Price*, *supra* note 138, at 745 ("If the parties did not actually think thus, they at least had generalized and hardly mistakable attitudes which needed but the pointing of attention and the sharpening of wits to reach these same results."); see also Llewellyn, *On Warranty Part II*, *supra* note 146, at 386 (stating that a court may imply an obligation by "read[ing] the parties' intention when the parties have not spoken").

206. Llewellyn, *On Warranty Part I*, *supra* note 162, at 722 (also noting that "the obligation implicit, because tacit, tends ever to be followed by the obligation imposed by force and arms, but in the guise of tacit understanding") (footnote omitted).



do not even call for conscious agreeing—these are what fill the contract frame-work with a living content . . . .<sup>207</sup>

Llewellyn firmly believed that courts should consider this informal but living content. He insisted that courts should “acquire a willingness to take in commercial understanding” and that if they did not, contract interpretation would remain riddled with serious problems.<sup>208</sup>

##### 5. The role of context under the UCC

The foregoing review of Llewellyn’s earlier published writings clearly indicates that he considered context to be important in the interpretation of texts in general and of business contracts in particular. It was not until Llewellyn began work on the Code, however, that he wrote extensively about the importance of contextual evidence. The most important aspect of this work can be found in the successive drafts of what became UCC sections 1-201(3) (defining “agreement”), 1-205 (defining “course of dealing” and “usage of trade”), 2-202 (parol evidence rule), and 2-208 (defining “course of performance”). In addition, Llewellyn wrote lengthy unpublished commentaries on these provisions which he used as law school course materials and which he may have circulated among other Code drafters.<sup>209</sup> Finally, the importance of contextual evidence in

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207. Llewellyn, *What Price*, *supra* note 138, at 731.

208. *Id.* at 745. Reference to the commercial context in the process of contract interpretation was, for Llewellyn, uncontroversial. He believed that the more difficult issue was “where doubt arises as to whether the common reading prescribed by commercial sense . . . has not been overridden by deliberate negation of the parties.” *Id.*; *see also id.* at 722-23 n.45 (describing his approach for discerning the parties’ social (“non-legal”) obligation to perform as deriving from a “double-barreled objective interpretation of words and acts” including a “reading of the whole situation to get the base-line” and a “reading of words and acts for trace of a variant” from the baseline). Under the UCC, Llewellyn resolved this difficult issue by assuming the applicability of trade usage and prior dealings “[u]nless carefully negated” by the parties. U.C.C. § 2-202 cmt. 2. (1995). An even stronger statement of Llewellyn’s solution to this problem appears in *Selected Comments*, *supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 21 (“But when course of dealing, usage, or circumstances are to be negated by language, then the language should go, knowing the background, into *clear* negation of that background.”).

209. *See* Kirst, *supra* note 14, at 827 (remarking that such commentary makes for “weak legislative history” as nothing indicates that the Code spon-

the interpretation of agreements under Article 2 can also be found in the critical commentary that accompanied the promulgation of the Code,<sup>210</sup> in particular the work of the New York Law Revision Commission.<sup>211</sup> These diverse sources reflect the significant changes in contract law effected by the Code and the central role Llewellyn attributed to contextual evidence in contract interpretation.

*a. Llewellyn's concept of agreement*

Perhaps the most radical innovation introduced by the UCC is its definition of "agreement." The Code effected a fundamental change by replacing the classical conception of contract as "promise" with the idea of contract as "agreement-in-fact."<sup>212</sup> This new conception "presupposes that the meaning of the agreement of the parties does not depend exclusively or even primarily on the written terms of one or another document."<sup>213</sup> Instead it reflects Llewellyn's preference for concrete facts over legal verbiage as well as his deep appreciation for context.

The definition of "agreement" ultimately adopted in the Code states that the term

sors or legislators actually read these materials); Patterson, *supra* note 99, at 194. *But see infra* note 235 and accompanying text.

210. *See, e.g.,* Corbin, *supra* note 5, at 824 (approving of the Code's incorporation of merchant custom and usage); Ernst Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427 (1950); Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950).

211. *See* TWINING, *supra* note 6, at 293-98; *supra* note 24.

212. Mooney, *supra* note 10, at 224 (arguing that Llewellyn "built the Code so as to embody a commercial contract construct substantially different from the orthodox contract construct by statutorily substituting obligation-based-on-transaction for obligation-based-on-promise").

213. Patterson, *supra* note 99, at 175; *see also* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 274 (1985) (remarking that the Code "effectively reverses the common law presumption that the parties' writing and the official law of contract are the definitive elements of the agreement"); Kirst, *supra* note 14, at 811-12 (stating that the Code "represents a fundamental change in the law of contracts" in that it "reduced the emphasis on the written agreement, and required attention to the bargain of the parties in fact, as found not only in the language of the parties, but also in course of dealing, usage of trade, or course of performance") (footnotes omitted).

means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act. (Sections 1-205, and 2-208, and 2A-207). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts. (Section 1-103). (Compare "Contract").<sup>214</sup>

This definition is purely descriptive in nature. It does not purport to establish the legal-normative consequences which may attach to the facts it describes. For this, it refers the reader to the Code's definition of "contract."<sup>215</sup> In separating fact from the legal significance of fact, Llewellyn was avoiding what he considered to be a major flaw in the then current legal system. For Llewellyn, a rule "which merely defines a term of art in terms of legal consequence (rather than in terms of operative fact) will . . . remain without significance in life until it is accompanied and supplemented by other rules which root it in the soil of fact."<sup>216</sup> If a rule does not have some descriptive component that "signal[s] and sharpen[s] the real issue," then the rule is "meaningless" for the judge if not for the linguist.<sup>217</sup>

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214. U.C.C. § 1-201(3) (1995). Obviously, Llewellyn was not involved in any way in drafting Article 2A, but the drafters of that Article built upon his foundational work with respect to the importance of contextual evidence.

215. The Code defines "contract" to mean "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." *Id.* § 1-201(11).

216. Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 28 (emphasis omitted); *cf.* Mooney, *supra* note 10, at 224 (criticizing the classical conception of contract because "it cannot be defined in concrete terms because [promise] signifies a mixture of fact and law") (footnote omitted).

217. Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 28. Anticipating the distinction between "agreement" and "contract" he would later make in drafting the Code, in the same law review article Llewellyn asserted "that our thinking, teaching, deciding and especially opinion-writing would gain much in clarity and simplicity if it were our practice to use one pure fact-word for the problematical fact set-up and a different word for the category-in-issue which is charged with legal consequence." *Id.* at 29; *see also id.* at 30-31 (rules that are pigeonholes, that set forth a system of classification, a "vocabulary about legal consequence" can still possess "utility" so long as they indicate which "facts fit which of the rival pigeonholes, and why").

The descriptive component of “agreement” is the fact of the parties’ bargain, the “reality of consent”<sup>218</sup> to an arrangement in which one party’s performance is given in exchange for the other’s. Although the concept of agreement as bargain-in-fact first appeared in the April 1944 Draft of the Uniform Revised Sales Act,<sup>219</sup> the idea was part of Llewellyn’s thinking well before this time.<sup>220</sup> Indeed, Llewellyn insisted that, as an historical matter, agreement preceded promise as the basis of contractual obligation.<sup>221</sup> He maintained that a hundred years earlier “the operative facts” of contract were “facts of agreement.”<sup>222</sup> It was only later, in response to the legal mind’s

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218. Cf. Llewellyn, *What Price*, *supra* note 138, at 728 n.49 (concluding that “agreement” is truly “an elusive concept”).

219. The 1944 Draft defined “agreement” to mean “the bargain in fact as found in the language of the parties or in course of dealing, usage of trade or course of performance or by implication from other circumstances.” UNIFORM REVISED SALES ACT (SALES CHAPTER OF PROPOSED COMMERCIAL CODE) PROPOSED FINAL DRAFT NO. 1, § 9(2) (1944) [hereinafter 1944 DRAFT], *reprinted in* 2 U.C.C. DRAFTS, *supra* note 21, at 17. The same section defined “contract” as “the total obligation in law which results from the parties’ agreement as affected by this Act and any other applicable rules of law.” *Id.* Except for a slight change in word order the same definitions for these terms appear in the current UCC. Arguably, some version of these definitions appeared earlier in the drafting process. The 1941 Draft defined “contract” as “the full legal obligation of the parties, whether that obligation arises from particularized terms or by operation of law or otherwise as by usage of trade, or course of dealing.” 1941 DRAFT, *supra* note 87, § 1. The 1941 Draft had no definition for “agreement,” however, the 1940 Draft defined “sale” to “include a bargain and sale as well as a sale and delivery.” DRAFT FOR A “UNIFORM SALES ACT, 1940” APPENDED TO AND PART OF A REPORT ON THE UNIFORM SALES ACT TO THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 12 (1940) [hereinafter 1940 DRAFT], *reprinted in* 1 U.C.C. DRAFTS, *supra* note 21, at 179.

220. See, e.g., Llewellyn, *What Price*, *supra* note 138, at 708 (referring to “agreements-in-fact” as distinguished from “promises” and remarking that the “law of contract takes its beginning . . . in the notion that legal officials should enforce, or should at least draw into reckoning, certain of men’s bargains or promises”) (footnote omitted).

221. See Llewellyn, *Offer and Acceptance Part II*, *supra* note 182, at 796 (arguing that “the traditional base-line of a century back” was “that the essential basis of contracting is *Agreement*”); see also Llewellyn, *Across Sales*, *supra* note 184, at 728 (concluding that the law of contract became part of the law of sales “when Contract was conceived not as a matter of obligation, exclusively, but as a matter in first instance of agreement”).

222. Llewellyn, *Offer and Acceptance Part II*, *supra* note 182, at 796.

desire for certainty, that overt expression became a requirement. Then the “doctrinal emphasis shifted from *agreement* to *promise* as being the essential subject-matter of Contract.”<sup>223</sup> Despite this change, Llewellyn still saw agreement as a “relation in fact” between two parties.<sup>224</sup> In drafting the UCC, Llewellyn sought to restore agreement as the “proper basis and ground for the relation in law we call contractual obligation.”<sup>225</sup>

In displacing contract-as-promise with contract-as-agreement, the Code effected a significant change.<sup>226</sup> Equally significant, however, is the way in which the definition prominently features contextual evidence among the operative facts of agreement. Section 1-201(3) provides that the parties’ bargain-in-fact can be found “by implication” in the circumstances of their interaction, including course of dealing, usage of trade, and course of performance. Indeed, the official comment which accompanies this section states that the definition was intended to give “full recognition” to these background sources as “effective parts” of the parties’ agreement.<sup>227</sup> Thus, the effect of Llewellyn’s conceptualization of agreement as factual relation is to bring what had been background into relief.

In defining “agreement” as such, some critics charged that Llewellyn “seem[ed] to ignore” the distinction between interpreting contract terms and supplying them, and that this move was “open to

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223. *Id.* at 809. Although Llewellyn understood this tendency, he believed that the focus on promise “obscured” the real basis of contract, namely, active agreement. *See id.* In truth, however, “[w]hen minds have really and unmistakably not only met but joined up, neither a precise process nor a precise instant has importance. But we pick a mile-stone. . . . Upon this plays the fact that, in life, expressed agreement does operate as a commitment. It just does.” *Id.* at 804.

224. *See* Llewellyn, *Offer and Acceptance Part II*, *supra* note 182, at 807; *see also* Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 36 (setting forth his hypothesis that “mutual assent” is “a fact” which commonly leads to contractual obligation).

225. Llewellyn, *Offer and Acceptance Part II*, *supra* note 182, at 807. If Llewellyn’s claim that contract was first based on agreement, not promise, is correct, then the radicality of Llewellyn’s definition of agreement is ironic in that it is a return to the past—back to the future as it were.

226. The parties may, of course, conclude an “agreement” under the Code by an exchange of promises. The definition provides that the parties’ bargain-in-fact can be “found in their language.” U.C.C. § 1-201(3) (1995).

227. *Id.* § 1-201(3) cmt. 3.

question.”<sup>228</sup> The distinction, however, was not lost on Llewellyn. Rather, it was plain to him

that in the matter of reading agreements in the light of trade usage, course of dealing or the circumstances of the case, the problems of formation (i.e., of incorporating terms and conditions into the agreement) and of construction (i.e., determining the meaning of the words used) overlap and even coincide.<sup>229</sup>

Consequently, the inclusion of contextual evidence within the definition of agreement was not due to any confusion on Llewellyn’s part. Instead, it reflected both his understanding of the way in which language operates as well as the manner in which business people conclude deals. Under the Code’s definition of “agreement,” the text of the parties’ bargain is still of great importance, but it must be situated within its proper context. Beyond this, however, Llewellyn’s definition of “agreement” recognizes the background sources which make-up this context as a constituent part of the parties’ agreement.

*b. usage of trade, course of dealing, and course of performance*

The importance Llewellyn attached to the different categories of contextual evidence is readily apparent from a review of the Code text, comments, and earlier drafts. Section 1-205(1) of the UCC defines a “course of dealing” as “a sequence of previous conduct between the parties” which may be “fairly . . . regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.”<sup>230</sup> Similarly, section 1-205(2) defines “usage of trade” as “any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.”<sup>231</sup> Likewise, section 2-208 states that a “course of performance” may be “relevant to determine the meaning of the agreement”

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228. 2 N.Y. REPORT 1955, *supra* note 24, at 210-13 (analysis of section 1-201(3) by Professor Edwin W. Patterson).

229. *Selected Comments*, *supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 21 (emphasis omitted); *see also* Karl N. Llewellyn, *Introductory Comment to Parts II and III Formation and Construction* (1944) [hereinafter *Introductory Comment*], in KLP, *supra* note 29, at J.VI.2.h, at 10.

230. U.C.C. § 1-205(1) (1995).

231. *Id.* § 1-205(2).

where the agreement "involves repeated occasions for performance by either party."<sup>232</sup> Section 2-208(1) provides that a "course of performance" may be shown where either party had the opportunity to object to the performance rendered but "accepted or acquiesced in [it] without objection."<sup>233</sup>

Each of these three terms emphasizes what the parties knew and expected based on their understanding of the trade and their familiarity with one another. It is, after all, "[t]he parties themselves [who] know best what they have meant by their words of agreement."<sup>234</sup> These provisions recognize, however, that the parties' use of language does not occur in a vacuum but takes place within and draws meaning from their particular historical and social context. Accordingly, the Code prescribes that "the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances."<sup>235</sup> The contextual sources which

232. *Id.* § 2-208(1).

233. *Id.* The comment that follows section 2-208 makes clear that a "single occasion of conduct does not fall within the language of this section . . ." *Id.* cmt. 4.

234. *Id.* cmt. 1.

235. *Id.* § 1-205 cmt. 1. An earlier version of this remark can be found at *Selected Comments*, *supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 44. See also *Introductory Comment*, *supra* note 229, in KLP, *supra* note 29, at J.VI.2.h, at 1 ("This Act rests on the principle that commercial agreements are to be given in law the same reasonable and commercial meaning which they have in the circumstances of commercial men, and that action under them which is commercially reasonable is to be given recognition and protection."). Professor Kirst has argued that those portions of the unpublished Karl Llewellyn Papers that demonstrate the importance Llewellyn attached to contextual evidence "may be excellent evidence of Llewellyn's intent" but constitute "weak legislative history because nothing indicates that the sponsors of the Code or legislators . . . read [them]." Kirst, *supra* note 14, at 827. Clearly, however, some individuals other than Llewellyn had access to some version of these materials. A careful reading of Llewellyn's *Selected Comments*, and his *General Comment on Parts II and IV, Formation and Construction* (1948) [hereinafter *General Comment*], in KLP, *supra* note 29, at J.X.2.k, show that these materials were the basis for at least some of the official comments to Article 2. (Note that although the document identified as J.X.2.k. does not appear in the catalogue prepared by Ellingwood and Twining, *supra* note 29, it does appear in the collection identified as such.) The similarity in much of the language is simply too striking to be mere coincidence. Compare KLP, *supra* note 29, at J.X.2.h, at 42-49, and J.X.2.k, at 25-38, with U.C.C. §§ 2-207 cmt.,

comprise these circumstances are of such vital importance in the process of interpretation that they “may explain and supplement even the language of a formal or final writing.”<sup>236</sup> They “furnish the background and give particular meaning to the language used, and are the [parties’] framework of common understanding.”<sup>237</sup> The parties may acknowledge this background “either by explicit provisions of the agreement or by tacit recognition.”<sup>238</sup> In either case, however, they plainly constitute “[p]art of the agreement of the parties.”<sup>239</sup>

It is of course possible that different aspects of this context will, as it were, point in different hermeneutical directions. The applicable course of dealing, usage of trade, and course of performance may suggest different meanings for the same written terms or may imply different terms altogether. To obviate such possible conflict, the Code employs two mediating rules. First, it requires that “[t]he express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other.”<sup>240</sup> When it is

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1-205 cmt., and 2-320 cmt. Much earlier versions of these comments can be found in the 1940 DRAFT, *supra* note 219, the 1941 DRAFT, *supra* note 87, and the 1944 DRAFT, *supra* note 219. See also TWINING, *supra* note 6, at 328.

236. U.C.C. § 1-205 cmt. 1.

237. *Id.* cmt. 4.

238. *Id.* cmt. 3.

239. *Id.* cmt. 4. Trade usage, course of dealing and course of performance were recognized as sources of contractual obligation and aids to interpretation in the earliest drafts of the Code. See, e.g., 1940 DRAFT, *supra* note 219, §§ 12, at 16 (stating that a contract “may be inferred from the conduct of the parties”), 18, at 21 (stating that course of dealing and trade usage may have “the same effect as express agreement”); 1941 DRAFT, *supra* note 87, § 1-D, at 54-55. In this early recognition, however, the Code did not equate these sources with custom and usage as they had developed under English and American common law. See 1941 DRAFT, *supra* note 87, § 1-D cmt., at 55 (remarking that courts have been confused “because the cases have presented in disordered sequence ‘usages’ which seemed to be such and ‘usages’ which looked extremely doubtful or unreasonable”). Section 1-205 requires that a trade usage enjoy a “regularity of observance” and that a course of dealing establishes a “common basis of understanding,” but the accompanying comment makes clear that the common law tests for custom “are abandoned.” See U.C.C. § 1-205 cmt. 5; *Selected Comments*, *supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 47-48; see also 2 N.Y. REPORT 1955, *supra* note 24, at 323 (contending that section 1-205 does not distinguish usage from custom); *supra* Part II.A-B.

240. U.C.C. § 2-208(2) (1995); see also *id.* at § 1-205(4).



not reasonable to construe these various sources as consistent, the Code specifies a hierarchical ordering among them. In this hierarchy, priority is given to what is typically thought to be the most specific evidence of the parties' intent.<sup>241</sup> Accordingly, the Code provides that "express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade"<sup>242</sup> and that "course of dealing controls usage of trade."<sup>243</sup>

The presence of this hierarchy does not mean that express terms will necessarily dominate ostensibly contrary contextual evidence. First, the context of the agreement and its terms must be read together charitably and sympathetically. Where reasonable, the Code requires the reader to interpret contextual evidence and the express terms of the agreement as "consistent with each other."<sup>244</sup> Under this interpretive norm a trade usage or course of dealing which initially appears to be at odds with the written agreement may upon closer examination seem more congenial. In fulfilling this obligation, the reader must ask "What does the explicit language, read commercially, mean?"<sup>245</sup> Where the express terms are read in such a commercially sensible manner, the apparent conflict with contextual sources will often disappear.<sup>246</sup>

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241. See William D. Hawkland, *Sales Contract Terms Under the U.C.C.*, 17 UCC L.J. 195, 197 (1985) (explaining that "[t]hese priorities reflect the relative ability of the various concepts to determine the parties' actual intent"). Comment 2 to section 2-202 explains that the Code allows the use of contextual evidence "in order that the true understanding of the parties as to the agreement may be reached." U.C.C. § 2-202 cmt. 2. *But see* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997) (arguing that there is to some extent a hierarchy among the sources but that the more general sources such as trade usages are of greater importance than the more specific sources).

242. U.C.C. § 2-208(2). Because it is the most specific and the most concrete, "the course of actual performance by the parties is considered the best indication of what they intended the writing to mean." *Id.* § 2-202 cmt. 2; *see also id.* § 2-208 cmt. 1 ("The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was.").

243. *Id.* § 1-205(4).

244. *Id.* §§ 1-205(4), 2-208(2).

245. *Selected Comments, supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 21.

246. *See Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652, 659-60 (6th Cir. 1987); *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772,

Second, where conflict between the written terms of the agreement and the unwritten context cannot be avoided, the written terms may not control. Rather, the Code seeks to enforce the intent of the parties which may or may not be expressed in the formal agreement. Properly understood “the rule of the Code . . . is not that express terms dominate, but that the intent of the parties, however expressed, is to control.”<sup>247</sup> Llewellyn believed that even contract terms which appear “explicit in form” are often “shown by the parties’ conduct not to be meant as written.”<sup>248</sup> Consequently, although a trade usage “may incorporate a meaning seemingly contradictory to the language used,” frequently no genuine contradiction will exist because the parties did not intend the ordinary meaning of the express terms to apply.<sup>249</sup> Thus, section 1-205(3) provides that course of dealing and trade usage may “*supplement or qualify* [the] terms of an agreement.”<sup>250</sup> Likewise, section 2-208(3) provides that evidence of course of performance may be used “to show a waiver or

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790-94 (9th Cir. 1981); *Foxco Indus. v. Fabric World, Inc.*, 595 F.2d 976, 984-85 (5th Cir. 1979); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 8-11 (4th Cir. 1971); *Carter Baron Drilling v. Badger Oil Corp.*, 581 F. Supp. 592, 594-98 (D. Colo. 1984); *Luedtke Eng'g Co. v. Indiana Limestone Co.*, 592 F.Supp. 75, 81-83 (S.D. Ind. 1983), *aff'd* 740 F.2d 598 (7th Cir. 1984); *Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.*, 59 Cal. App. 3d 948, 953-57, 131 Cal. Rptr. 183, 187-89 (1976); *Campbell Farms v. Wald*, 578 N.W.2d 96, 100-01 (N.D. 1998).

247. Kirst, *supra* note 14, at 825; *see also infra* notes 253-302 and accompanying text.

248. *Selected Comments, supra* note 84, in *KLP, supra* note 29, at J.X.2.h, at 15.

249. *Id.* at J.X.2.h, at 16 (citing *Dixon, Irmaos & Cia, Ltd. v. Chase Nat'l Bank*, 144 F.2d 759 (2d Cir. 1944)). The *Dixon* case is significant in that its holding embodied the theory behind the rules in UCC sections 1-205, 2-208. For a more detailed discussion of *Dixon* and its place in the drafting history of the Code, see Kirst, *supra* note 14, at 828-32; Patterson, *supra* note 99, at 196-99; *see also* LLEWELLYN, *THE COMMON LAW TRADITION, supra* note 83, at 328-30, 348.

250. U.C.C. § 1-205(3) (1995) (emphasis added); *see also Selected Comments, supra* note 84, in *KLP, supra* note 29, at J.X.2.h, at 20 (arguing that “[t]he background of circumstances against which the agreement is entered into and performed may supply terms not explicitly agreed upon” and that “[t]he circumstances may qualify the meaning of an explicit term”); FARNSWORTH, *supra* note 27, § 7.13, at 528 (arguing that this provision “makes it clear that conduct may have an effect beyond mere interpretation of the [contract] terms”).

modification of any term inconsistent with such course of performance."<sup>251</sup>

From this it is obvious that under the Code, express contract terms do not enjoy the same primacy given to them at common law. Embracing a naive formalism, the common law often supposed that prior to interpretation express terms possessed a meaning that was plain and clear. Accordingly, the common law did not permit the use of extrinsic evidence to "contradict" or "vary" the express language of an agreement.<sup>252</sup> The Code, by contrast, recognizes that express terms can be "contradicted" or "varied" only when they have already been interpreted and assigned a specific meaning. The process of interpretation necessarily involves the use of context. The Code's use of trade usage, course of dealing, and course of performance does not alter the "innate" meaning of express contract terms because no word or sentence innately means anything. Instead, language has meaning only when it is purposefully used by someone within a given context. In order to grasp the meaning intended by the parties to an agreement, the express terms must be read against the background that the parties had in mind.

Sections 1-205 and 2-208 mandate the use of this background in the interpretive process. In so doing, the Code has effected a remarkable change. Evidence that the common law considered *extrinsic* to the contract, outside the "four corners" of the written document, the Code regards as *intrinsic* to the agreement itself. Under sections 1-205 and 2-208, contextual evidence may limit or otherwise qualify a written term. It may even suspend the effect of a term by waiver. In doing this the written document is truly respected because the genuine intentions of the parties are given force.

*c. the parol evidence rule*

UCC sections 1-201(3), 1-205, and 2-208 powerfully illustrate Llewellyn's whole-hearted embrace of context in the interpretive

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251. U.C.C. § 2-208(3); *see also id.* cmt. 3; *Selected Comments, supra* note 84, *in KLP, supra* note 29, at J.X.2.h, at 14 (remarking that "it is frequently impossible to say whether a course of conduct under a written agreement interprets the parties' original meaning or represents a subsequent standing waiver of some term or terms of the agreement").

252. *See supra* notes 101, 109-111 and accompanying text.

process. To fully appreciate, however, the gravity of the change brought about by the Code, these provisions must be read in conjunction with section 2-202, Article 2's version of the parol evidence rule. This provision allows for the generous use of various sources of meaning not expressly contained within the final written contract itself.

Like its common law predecessors, the UCC's version of the parol evidence rule is not a rule of evidence. It is instead a substantive rule of law that establishes the outer limits of what material constitutes the operative contract between the parties.<sup>253</sup> At common law, the rule served an exclusionary function by "affirm[ing] the primacy of a subsequent agreement over prior negotiations and even prior agreements."<sup>254</sup>

The Code's version of the parol evidence rule is decidedly less exclusionary than its common law cousins. Indeed, the rule's relative openness to sources outside the formal written contract reflects the same broadened understanding of what constitutes the parties' agreement also present in UCC sections 1-205 and 2-208. Section 2-202 provides as follows:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also

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253. See, e.g., 3 CORBIN, *supra* note 100, § 573, at 357-70; FARNSWORTH, *supra* note 27, § 7.2, at 450; 3 WILLISTON, *supra* note 124, § 631, at 1813.

254. FARNSWORTH *supra* note 27, § 7.2, at 451; see also 3 CORBIN, *supra* note 100, § 574 (illustrating the supremacy of subsequent agreements over prior negotiations and prior agreements); cf. 1 N.Y. REPORT 1955, *supra* note 24, at 598 ("The parol evidence 'rule' in its broadest sense is a set of judge-made rules excluding any and all proof of extrinsic aids to vary or contradict or supplement the terms of an apparently complete written contractual document.") (analysis of Professor Edwin Patterson).

as a complete and exclusive statement of the terms of the agreement.<sup>255</sup>

The rule does not presume that the formal written document in question is "integrated," that it is the final expression of the terms it contains. Instead, integration is a contention that must be proved to the court.<sup>256</sup> Under section 2-202, the party making this contention must show that the writing was "intended by the parties as a final expression of their agreement with respect to such terms as are included therein."<sup>257</sup>

Even though a document is the *final* expression of the parties with respect to the items it contains, it may not be the *complete and exclusive* expression of the parties' agreement. Finality is a quality that is distinct from the qualities of completeness and exclusivity.<sup>258</sup>

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255. U.C.C. § 2-202 (1995). The original Uniform Sales Act did not contain any version of the parol evidence rule though clearly Williston supported the rule at common law. At an early stage Llewellyn began to think about the problems raised by formal writings and oral agreements governing the same matter. See Llewellyn, *What Price*, *supra* note 138, at 713, 747-48. The first version of the parol evidence rule to appear in the drafting history of the Code was section 15 of the 1944 Draft. See 1944 DRAFT, *supra* note 219, § 15. Except for a slight change in word order in subsection (6), section 15 of the 1944 Draft is virtually identical to UCC § 2-202.

256. The exact role of the court under section 2-202 is itself a point of contention. Some courts have held that determining whether a writing is the final expression of the parties is a question of fact for the jury. See, e.g., *Campbell v. Regal Typewriter Co.*, 341 So. 2d 120 (Ala. 1976); *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 595 P.2d 709 (Idaho 1979). Others have held that it is a question of law for judges to decide. See, e.g., *Compania Sud-Americana de Vapores v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411 (S.D.N.Y. 1992); *Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng'g Sales, Inc.*, 436 N.W.2d 121 (Minn. App. 1989); see also *WHITE & SUMMERS*, *supra* note 9, § 2-9, at 97 (arguing that because the question of "completeness and exclusivity" is for the judge the question of finality should also be for the judge since "the greater ordinarily includes the lesser").

257. U.C.C. § 2-202.

258. See 2 RONALD A. ANDERSON, *ANDERSON ON THE UNIFORM COMMERCIAL CODE* § 2-202:21, at 146 (1982) ("[F]inality means merely that the writing is final as far as it goes. It cannot be contradicted but there is no bar to the proof of additional consistent terms. Exclusive means that the writing was intended as the memorial of the total agreement. As the writing states 'everything' it necessarily follows that a term not included in the writing cannot be proved by parol evidence, without regard to whether the term could be considered consistent with the writing.") (footnote omitted). Although Anderson correctly describes the distinction between finality and exclusivity, as shall

The comment to section 2-202 states that the section “definitely rejects . . . [a]ny assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon.”<sup>259</sup> Accordingly, even if the court finds that the written agreement is the final expression between the parties with respect to the terms it contains, section 2-202 still allows for proof of “consistent additional terms.”<sup>260</sup> These additional terms may take the form of collateral agreements which relate to the subject matter of the contract<sup>261</sup> or prior drafts of the contract itself which reveal the understanding of the parties.<sup>262</sup> In any case, the statute allows for proof of such terms insofar as they “explain” or “supplement” the final agreement and do not “contradict” it.<sup>263</sup> The court<sup>264</sup> may, however, exclude proof of consistent additional terms if it “finds the writing to have been intended also as a complete and exclusive

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be made clear below, he overstates the effect these qualities have on the admissibility of extrinsic evidence.

259. U.C.C. § 2-202 cmt. 1(a).

260. *Id.* § 2-202 cmt. 3.

261. See *Wilson v. Marquette Electronics, Inc.*, 630 F.2d 575 (8th Cir. 1980); *In re W.T. Grant Co.*, 1 B.R. 516 (S.D.N.Y. 1979); *Rockdale Cable T.V. Co. v. Spadora*, 423 N.E.2d 555 (Ill. App. Ct. 1981); *Security Mut. Fin. Corp. v. Willis*, 439 So. 2d 1278 (Miss. 1983); *Norwest Bank Billings v. Murnion*, 684 P.2d 1067 (Mont. 1984); *Mill Printing & Lithographing Corp. v. Solid Waste Management Sys., Inc.*, 409 N.Y.S.2d 257 (N.Y. App. Div. 1978); *Red River Commodities, Inc. v. Eidsness*, 459 N.W.2d 811 (N.D. 1990); *Sundlun v. Shoemaker*, 617 A.2d 1330 (Pa. Super. Ct. 1992); *In re Estate of Upchurch*, 466 S.W.2d 886 (Tenn. Ct. App. 1970).

262. See *Embryo Progeny Assocs. v. Lovana Farms, Inc.*, 416 S.E.2d 833 (Ga. Ct. App. 1992); *Security Mut. Fin. Corp. v. Willis*, 439 So. 2d 1278 (Miss. 1983).

263. See 1 N.Y. REPORT 1955, *supra* note 24, at 601 (expressing doubt as to the durability of this distinction in practice and fear that the failure will “impair the policy of protecting the effectiveness of a written instrument”) (analysis of Professor Edwin Patterson).

264. The majority of courts and commentators agree that the judge, not the jury, makes the determination regarding completeness and exclusivity. This judgment is based on reference to “the court” in UCC § 2-202(b) and comment 3. See U.C.C. § 2-202 cmt. 3 (“Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds the writing was intended by both parties as a complete and exclusive statement of all the terms.”); see also *Huntsville Hosp. v. Mortara Instrument*, 57 F.3d 1043, 1046 (11th Cir. 1995) (finding that the written agreement was not final and therefore the court could consider consistent additional terms).

statement of the terms of the agreement.”<sup>265</sup> Although exclusion of consistent additional terms is still possible, the effect of section 2-202 is “to ‘loosen up’ the parol evidence rule by abolishing the presumption that a writing (apparently complete) is a total integration.”<sup>266</sup>

Another effect of section 2-202 is to bolster the Code’s already emphatic commitment to the use of contextual evidence in the interpretive process.<sup>267</sup> The introduction of this evidence does not turn on whether or not the contract is fully integrated. That is, even if the court finds that the written contract is “a complete and exclusive statement” of the parties’ agreement, the court may still consider evidence of course of dealing, usage of trade, and course of performance. A seemingly complete contract is in fact incomplete—and will be misconstrued—if divorced from its proper context. Thus, even a fully integrated contract must “be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased.”<sup>268</sup> “Unless carefully negated,” this background has “become an element of the meaning of the words used.”<sup>269</sup>

Further, the use of this background in the interpretive process does not depend upon a finding of ambiguity. Section 2-202 “definitely rejects” the claim that such a finding is “a condition precedent to the admissibility of [contextual evidence].”<sup>270</sup> In so doing, the Code sides with modern literary theory in recognizing that ambiguity is not a property that language possesses.<sup>271</sup> A document “is neither

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265. U.C.C. § 2-202 (b).

266. 1 N.Y. REPORT 1955, *supra* note 24, at 598 (analysis of Professor Edwin Patterson).

267. *See* Kirst, *supra* note 14, at 833 (arguing that section 2-202(a) “is primarily an internal cross-reference to emphasize that section 1-205 provides the rule governing usage of trade and course of dealing”).

268. U.C.C. § 2-202 cmt. 2.

269. *Id.*

270. *Id.* cmt. 1(c); *see also* Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 363 (3d Cir. 1987) (“A finding that the language admits of more than one interpretation is not a prerequisite to the admission of extrinsic evidence relating to usage of trade, course of dealing or course of performance.”); Michigan Bean Co. v. Senn, 287 N.W.2d 257, 260-61 (Mich. Ct. App. 1979); Herman Oil, Inc. v. Peterman, 518 N.W.2d 184, 189-90 (N.D. 1994).

271. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY

ambiguous nor unambiguous in and of itself. The document isn't *anything* in and of itself, but acquires a shape and a significance only within the assumed background circumstances of its possible use . . .<sup>272</sup> Accordingly, "when there is a disagreement about the shape or meaning of a sentence, it is a disagreement between persons who are reading or hearing (and therefore constituting) it according to the assumptions of different circumstances."<sup>273</sup> Making proof of context contingent on a showing of ambiguity as the common law did defies the logic of interpretation because it is the supposition of different contexts that make a text appear clear or ambiguous in the first place. The Code attempts to avert interpretive disputes over business contracts by giving interpretive priority to the background circumstances and beliefs that make up the "commercial context."<sup>274</sup>

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OF INTERPRETIVE COMMUNITIES 281 (1980) ("I am as willing to say that all sentences are straightforward as I am to say that all sentences are ambiguous. What I am not willing to do is to say that any sentence is by right either one or the other. That is, I wish to deny that ambiguity is a property of some sentences and not of others."); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1335 (1984) [hereinafter Fish, *Fish v. Fiss*] (stating that the qualities of ambiguity and straightforwardness "are not linguistic, but contextual or institutional").

272. Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777, 784 (1988) [hereinafter Fish, *Middle Ages*]. Professor Fish elsewhere makes clear that it is neither the language of the text itself nor its specific context which determine textual meaning but "the cultural assumptions within which both texts and contexts take shape for situated agents." *Id.* at 783; see also Corbin, *supra* note 192, at 164 (asserting that "when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience").

273. Fish, *Fish v. Fiss*, *supra* note 271, at 1335; see also FISH, *supra* note 271, at 277 ("If we expect a text to be ambiguous, we will in the act of reading it imagine situations in which it means first one thing and then another . . . and those plural meanings will in the context of that situation, be that text's literal meaning.").

274. Comment 1(b) to § 2-202 clearly expresses the Code's preference for the commercial context over the context provided by abstract legal rules which have no connection to the transaction itself. It provides that § 2-202 "definitely rejects . . . [t]he premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used." U.C.C. § 2-202 cmt. 1(b) (1995).



Furthermore, proof of this context is not subject to the requirement that it explain or supplement and not contradict<sup>275</sup> the written terms of the agreement.<sup>276</sup> A large number of courts misconstrued

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275. Section 2-202 speaks in terms of both consistency and non-contradiction. It provides that a final expression of the parties' agreement "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." *Id.* § 2-202. It also provides that evidence of "consistent additional terms" may be introduced except where the writing is "a complete and exclusive statement of the terms of the agreement." *Id.* Courts have generally found that the concepts of contradiction and inconsistency are closely related and frequently overlap. *See, e.g.,* Mac Gregor v. McReki, Inc., 494 P.2d 1297, 1298 (Colo. Ct. App. 1971); Whirlpool Corp. v. Regis Leasing Corp., 288 N.Y.S.2d 337, 339-40 (N.Y. App. Div. 1968); Hunt Foods & Indus., Inc. v. Doliner, 270 N.Y.S.2d 937, 940 (N.Y. App. Div. 1966). More recently some courts have defined inconsistency as the "absence of reasonable harmony." This definition goes beyond mere contradiction to address those cases in which a parol term is offered that "if agreed upon . . . would certainly have been included in the document." U.C.C. § 2-202 cmt. 3; *see* Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1115-16 (7th Cir. 1983); American Research Bureau Inc. v. E-Systems, Inc., 663 F.2d 189, 199-200 (D.C. Cir. 1980); Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d 33, 40 (Alaska 1983); Snyder v. Herbert Greenbaum & Assoc., Inc., 380 A.2d 618, 623 (Md. Ct. Spec. App. 1977).

276. This essentially is the gist of Professor Kirst's article. *See* Kirst, *supra* note 14, at 832-39. In a criticism that was both ironic and prescient Professor Edwin Patterson, writing in 1955, questioned whether "rules as to interpretation by usage, prior dealings or course of performance should be included in a section on the parol evidence rule." 1 N.Y. REPORT 1955, *supra* note 24, at 601. He concluded that "[i]t would seem less confusing to state clearly the rules as to exclusion or admission of *other utterances of the parties*, and to leave to other sections the rules as to usage and prior dealings (§ 1-205) and course of performance (§ 2-208)." *Id.* Although the New York Law Revision Commission incorporated Patterson's suggestion into its recommendation concerning § 2-202, N.Y. REPORT 1956, *supra* note 24, at 368, the reference to contextual evidence remained in the statute. Patterson's criticism of § 2-202 was prescient because courts have been confused by the language of the provision. His criticism was ironic because, had it been followed, it may have avoided the misinterpretation that followed. Properly understood the statute allows for the introduction of contextual evidence even when that evidence appears to conflict with the express terms of an agreement. Patterson, however, believed in the primacy of written terms. *See, e.g.,* 1 N.Y. REPORT 1955, *supra* note 24, at 601 (referring to "the policy of protecting the effectiveness of a written instrument"); *id.* at 638 (supporting the "plain meaning" test as "workable" in support of "the protection of the reliability of written contracts"); 3 N.Y. REPORT 1955, *supra* note 24, at 325 (referring to "the dominance of express terms" under New York law); *see also* Edwin W. Patterson, *The Inter-*

the statute and held that evidence of course of dealing, course of performance, and usage of trade that contradicts the express terms of the agreement may not be admitted.<sup>277</sup> The language and structure of the Code itself, however, do not support this reading.

First, the definition of agreement under section 1-201(3) makes evidence of usage of trade, course of dealing, and course of performance necessarily relevant and presumptively admissible. Because these sources of contextual evidence are "effective parts" of the agreement itself,<sup>278</sup> they cannot be excluded by other evidence of the same agreement. Instead, if an apparent conflict exists between the contextual evidence presented and the written terms of the agreement, then the question to be resolved is "a question of determining [the parties'] intent from oral and written evidence."<sup>279</sup> Clearly "both the evidence of the writing and the evidence of the usage of trade or course of dealing must be admitted for the factfinder to determine which intent is controlling."<sup>280</sup>

Second, nothing in the provisions which define usage of trade, course of dealing, and course of performance requires that such evidence be consistent with the express terms of the agreement.<sup>281</sup>

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*pretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 851 (1964) ("An alleged usage which contradicts express terms of the contract is to be rejected.").

277. See, e.g., *Trailways Fin. & Acceptance Corp. v. Euro-Flo Tours, Inc.*, 572 F. Supp. 1227, 1231 (D.N.J. 1983); *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 57, 63-64 (S.D.N.Y. 1981); *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375, 387-88 (S.D. Tex. 1974); *Gianelli Distrib. Co. v. Beck & Co.*, 172 Cal. App. 3d 1020, 1040-41, 219 Cal. Rptr. 203, 212-13 (1985); *Santandrea v. Siltec Corp.*, 56 Cal. App. 3d 525, 528, 128 Cal. Rptr. 629, 631 (1976); *BIB Audio-Video Prods. v. Herold Mktg. Assocs.*, 517 N.W.2d 68, 72-73 (Minn. Ct. App. 1994); *SAB Harmon Indus., Inc. v. All State Bldg. Sys., Inc.*, 733 S.W.2d 476, 486 (Mo. Ct. App. 1987); *Division of the Triple T Serv., Inc. v. Mobil Oil Corp.*, 304 N.Y.S.2d 191, 202-03 (N.Y. Sup. Ct. 1969); *North Unit Potato Co. v. Spada Distrib. Co.*, 490 P.2d 995, 998-99 (Or. 1971); *Printing Ctr. of Tex., Inc. v. Supermind Publ'g Co.*, 669 S.W.2d 779, 784 (Tex. App. 1984). Fortunately, some courts have held that contextual evidence need not satisfy the requirement of non-contradiction in order to be admitted. See, e.g., *State ex rel. Nichols v. Safeco Ins. Co. of Amer.*, 671 P.2d 1151, 1155 (N.M. Ct. App. 1983); *Morgan v. Stokely-Van Camp, Inc.*, 663 P.2d 1384, 1389 (Wash. Ct. App. 1983).

278. See U.C.C. § 1-201 cmt. 3.

279. Kirst, *supra* note 14, at 835.

280. *Id.*

281. Professor Kirst adds that while § 1-205 "states a general rule applicable

Sections 1-205(4) and 2-208(2) do state that the interpreter must construe the express terms and other elements of the agreement as "consistent" whenever "reasonable." Clearly, however, these provisions contemplate instances in which a consistent construction of the written terms and the contextual evidence presented will be patently unreasonable. In such an instance the Code does not demand the exclusion of contextual evidence from proof. Instead, sections 1-205(4) and 2-208(2) plainly allow for the introduction of this evidence but also that it will be ranked behind the agreement's express terms in the hierarchy of interpretive sources.

As noted above<sup>282</sup> this hierarchy does not necessarily mean that the express terms control. Section 1-205(3) expressly provides that course of dealing and usage of trade may "qualify" the meaning of the express terms used. Nullification may rightly be described as the most severe form of qualification. That is, the written terms may be qualified in such a way that they no longer have any effect. Further, sections 1-205(4) and 2-208(2) demand that contextual evidence and written terms "be construed wherever reasonable as consistent with each other."<sup>283</sup> It may, however, be reasonable to construe the express terms as having no effect. It may be reasonable to conclude that the parties did not intend for the unnegotiated terms of their written form contract to govern their relationship.<sup>284</sup>

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to the entire Code," § 2-202 "applies only to transactions in goods." *Id.* at 833 (footnote omitted). "Consequently, an interpretation of section 2-202 that differs from the interpretation of section 1-205 would result in one rule for transactions in goods and another rule for all other commercial transactions." *Id.* He rightly concludes that nothing in the Code drafting history suggests that such a dual approach was ever intended. *See id.*

282. *See supra* note 244-252 and accompanying text.

283. Section 1-205(4) says "wherever reasonable" while § 2-208(2) says "whenever reasonable." U.C.C. §§ 1-205(4), 2-208(2).

284. *See* Kirst, *supra* note 14, at 824.

Because the stock printed forms cannot always reflect the changing methods of business, members of the trade may do business with a standard clause in the forms that they ignore in practice. If the trade consistently ignores obsolete clauses at variance with actual trade practices, a litigant can maintain that it is reasonable that the courts also ignore the clauses. . . . [Likewise,] if the trade regards an express term and a trade usage as consistent because the usage is not a complete contradiction but only an occasional but definite exception to a written term, the courts should interpret the contract according to the usage.

While this treatment of express terms may seem unusual, in fact it may more closely approximate the actual intent of the parties. The American model of legal contract is founded on notions of individual autonomy and shared intent.<sup>285</sup> Llewellyn, however, believed that the parties to a contract actually assent to very little. In the case of a standard-form contract, the inquiry for Llewellyn was not whether the parties had given their assent to the boiler-plate language contained within the document. "What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction . . . ."<sup>286</sup> Consequently, other than the few specifically negotiated terms, the express language of a standard-form contract should not be regarded as the primary embodiment of the parties' intent. Instead, Llewellyn believed that the parties' intent is primarily reflected in the background out of which the formal document emerges. Accordingly, to ask, "Does the offered contextual evidence contradict the express language of the contract?" is to frame the issue backwards. For Llewellyn the issue was "[H]ow far does the language, read commercially, even purport to negate or modify an otherwise clear course of dealing or usage of trade?"<sup>287</sup> The parties may vary from the background of past practice and usage by adopting express terms that are at odds with this background. "But when course of dealing, usage, or circumstances are to be negated by language, then the language should go, knowing the background, into *clear*

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*Id.* ("[I]n some cases a usage may exist, the parties may have intended to be bound by it, and the express terms of a writing will not make the evidence irrelevant. In such litigation the court must admit the evidence and allow the factfinder to make the determination required by section 1-205(4).").

285. This admittedly very general description of the basis of contract does nevertheless provide some common ground for those disparate liberal and communitarian theorists who see contract variously as a personal and private basis of obligation and as a product of state action and means of social control. Compare Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986), with Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990).

286. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 370. Llewellyn also believed that the parties assent to the non-dickered terms of the form contract but only insofar as they are not "unreasonable or indecent" and "do not alter or eviscerate the reasonable meaning of the dickered terms." *Id.*

287. *Selected Comments*, *supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 21.

negation.”<sup>288</sup> Requiring the parties to “carefully negate” the commercial context helps to ensure that variation from this presumed background is specifically intended.<sup>289</sup>

#### 6. The parties’ intent: a matter of convention

The purpose of contract interpretation in general is to ascertain the intent of the parties to the agreement.<sup>290</sup> Likewise, the central goal of contract interpretation under Article 2 is to discern the intent of the parties. Indeed, this goal both explains Llewellyn’s sensitivity to context and justifies the clear and direct access to contextual evidence provided by various Code provisions.<sup>291</sup> As comment 2 to section 2-202 explains, the Code makes evidence of trade usage, course of dealing, and course of performance available “in order that the true understanding of the parties as to the agreement may be reached.”<sup>292</sup> It is “[t]he parties themselves [who] know best what they have meant by their words of agreement,”<sup>293</sup> but their use of words takes place within a given context. Evidence of this context is “the best indication of what [the parties] intended the writing to mean.”<sup>294</sup> Unless a contrary intent is clearly manifested,<sup>295</sup> the Code

288. *Id.* (emphasis in original).

289. *See* U.C.C. § 2-202 cmt. 2 (1995) (asserting that “[u]nless carefully negated” trade usage and prior dealings are “an element of the meaning of the words used”).

290. *See* CLARK, *supra* note 105, §§ 173-175, at 448 (“The cardinal or fundamental rule in the construction of contracts is that a contract should receive that construction which will best effectuate the intention of the parties.”) (footnote omitted); *see also* Corbin, *supra* note 192, at 162 (observing that “[t]he cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties” but that the parol evidence rule then in place “if actually applied, excludes proof of their actual intention”). Corbin goes on to argue for expanded use of extrinsic evidence in contract construction. For a recent article critical of Corbin’s view see Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 568-73 (1998).

291. *See, e.g.,* Levie, *supra* note 131, at 1106-07 (“The Code views trade usage as a way of determining the parties’ probable intent.”).

292. U.C.C. § 2-202 cmt. 2.

293. *Id.* § 2-208 cmt. 1.

294. *Id.* § 2-202 cmt. 2. This portion of the comments refers specifically to evidence of “the course of actual performance by the parties.” *Id.*; *see also id.* § 2-208 cmt. 1 (referring to the parties’ “action under that agreement” as “the best indication of what that meaning was”).

assumes that the meanings associated with this context “were taken for granted [by the parties] when the document was phrased.”<sup>296</sup>

Plainly the “intent” which the UCC rules of contract construction seek to ascertain is not the private and unexpressed intent of either party.<sup>297</sup> As Llewellyn once half-jokingly remarked “[n]o man

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295. See *id.* § 2-202 cmt. 2 (stating that the meaning derived from the commercial context must be “carefully negated”). Additional language throughout the Code comments indicate that the purpose behind the Code’s wide use of contextual evidence is to ascertain the parties intent. See, e.g., *id.* § 1-205(1) (describing course of dealing as creating a “common basis of understanding”).

296. *Id.* § 2-202 cmt. 2.

297. Professor Dennis Patterson somewhat overstates the matter in attempting to distance Llewellyn’s position from that of his “father-in-law” Arthur Corbin. However, as Professor Kirst correctly notes, everyone involved in the debate over the proper role of contextual evidence, including both judges and law professors—such as “Williston, Corbin, and Llewellyn—agreed that the object of the search was some notion of the intent of the parties.” Kirst, *supra* note 14, at 823. They did, however, differ “on how to determine intent or whether every intent should be given controlling effect.” *Id.* Of the several methods available for ascertaining intent, Williston and Learned Hand favored an objectivist approach. See, e.g., FARNSWORTH, *supra* note 27, §§ 3.6, 7.9. Under such an approach, the subjective unexpressed intentions of the parties are of little consequence. The words used do not necessarily mean what the parties had in mind, rather they mean what a reasonable person would understand them to mean. This approach has the disadvantage of regarding the actual intentions of the parties as being irrelevant, even if the intention of both parties fully coincides with the standard use of such language. By contrast, under a subjectivist approach to contract, the actual intentions of the parties determines whether or not the parties have actually formed a binding contract through a “meeting of the minds.” No matter how unusual or original their use of words, the terms mean what the parties jointly intended. See also E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939, 942-47 (1967) (detailing the evolution of the requirement that there be a “meeting of the minds”).

Professor Patterson argues that Llewellyn believed that “context was the single most important determinant to the meaning of contract language.” Patterson, *supra* note 99, at 188-89. In so doing, Patterson argues, Llewellyn differed from both Williston and Corbin. According to Patterson, Williston “narrowly focused on and objectified the language of the parties” whereas Corbin “evinced an appreciation for context” but nevertheless believed that “the intentions of the parties provided the fundamental source of meaning.” *Id.* at 189. He concludes that “Llewellyn rejected both intent, as identified by Corbin, and semantic import, as identified by Williston” and instead realized “that the meaning of contract language derived from its commercial context, from the fusion of the intentions of individual actors with the background of evolving commercial practices.” *Id.* at 190.

is safe when language is to be read in the teeth of its intent."<sup>298</sup> To give contract terms the idiosyncratic meanings that one party intended but did not share with his or her counterpart would undermine the goals of certainty and predictability so vital to the law of contracts.<sup>299</sup> It is, however, equally plain that the Code does not champion an objective theory of meaning. The Code does not ignore the actual intent of the parties or employ the proverbial reasonable man and his ordinary dictionary in order to discern the "normal" meanings of the words used.<sup>300</sup>

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This account of Llewellyn's approach is accurate in that it stresses the importance Llewellyn attributed to context. It errs, however, in trying to distance Corbin's views from Llewellyn's. The two are substantially the same. Corbin, like Llewellyn, believed that the meaning of a text derived from the parties' intentions that were operating within a given context. See, e.g., Corbin, *supra* note 192, at 162 (asserting that it is "impossible" for a court to learn the parties' meaning "without being informed by extrinsic evidence of the circumstances surrounding the making of the contract"). A careful reading of the passage from Corbin's treatise quoted by Patterson reveals as much. See 3 CORBIN, *supra* note 100, § 538. Second, contrary to Patterson, Llewellyn did not contend that "the meaning of contract terms was not a function of intent, mercantile or otherwise." Patterson, *supra* note 99, at 189. Nor did Llewellyn "divorce[ ] the meaning of contractual language from the mental states of the parties." *Id.* These strongly worded remarks contradict to some extent Patterson's conclusion that Llewellyn believed that the meaning of contract terms "derived . . . from the fusion of the intentions of individual actors with the background of evolving commercial practices." *Id.* at 190. Further, in making these remarks Patterson does not attempt to account for the manifold references to intent throughout the Code text and comments. Clearly, Llewellyn, like Corbin, believed that the intent of the parties was a critical factor in determining the meaning of the words used. Additionally, in stressing the importance Llewellyn attached to context in the interpretive process, Patterson almost seems to anthropomorphize context. Fundamentally, however, meaning is neither a matter of words nor the background in which those words appear. Instead, meaning is a matter of consciousness. See E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION 4 (1967). Llewellyn understood that context is a factor in that it influences interpreters. It is they who derive meaning from the interaction of text and context as perceived through their own beliefs and experiences. Context in and of itself, absent some active consciousness, has no meaning. See *id.*

298. Llewellyn, *What Price*, *supra* note 138, at 732.

299. See *id.* Ensuring certainty and predictability in the law was one of Llewellyn's greatest concerns in preparing the UCC. See, e.g., U.C.C. § 1-102 (1995); see also *Statement*, *supra* note 116, in 1 N.Y. REPORT 1954, *supra* note 24, at 23-36.

300. See U.C.C. § 1-205 cmt. 1 (stating that the Code "rejects both the 'lay-

Between these two extremes the Code plots a middle course. Unlike the objectivist approach, the Code regards the actual intent of the parties as real and relevant to the meaning of the agreement. Indeed, the "true understanding of the parties" is the stated goal of contract interpretation under Article 2.<sup>301</sup> Nevertheless, these intentions are often difficult to discover and sometimes unfair to apply.<sup>302</sup> Accordingly, the Code regards the parties' intentions as a matter of convention. The rules set forth in UCC sections 1-205 and 2-208 delineate sources of evidence from which the parties' probable intent may be inferred.

The conventional understanding of the parties' intent contained in these rules has both normative and descriptive components. For example, the provisions on course of dealing and course of performance suggest that the parties' intent may be found in their actual conduct. The description of this conduct in sections 1-205(1) and 2-208(1) is not, however, purely factual. These provisions are also surely normative in that they reflect a choice of one kind of conduct over another. The Code drafters, for example, could have decided that only a signature, or payment, or documents delivered under seal, would, as a matter of law, constitute proof of intent. That the drafters allowed for proof of intent by other means reflects a normative judgment. These provisions are also normative in how they define each category of conduct. Comment 4 to section 2-208 expressly states that "a single occasion of conduct does not fall within the language of this section."<sup>303</sup> The drafters could have decided otherwise. They could have decided as a matter of policy that one occasion of

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dictionary' and the 'conveyancer's' reading of a commercial agreement").

301. *See id.* § 2-202 cmt. 2.

302. Professor Farnsworth explains the unfairness of treating the parties' subjective intentions as dispositive as follows: If the parties attach disparate meanings to the same contract language, there has been no "meeting of the minds," only a misunderstanding by one party of what the other actually intended. Accordingly, if the law truly required a "meeting of the minds," then frequently "there would be no contract." FARNSWORTH, *supra* note 27, § 7.9, at 506. Moreover, a finding of no contract would continue to be the result whenever the parties intended different meanings for the same contract terms unless some basis were found "to tip the scales in favor of one meaning or the other." *Id.* The Code regards the parties' intentions as relevant but "tips the scales" in favor of the intention supported by objective criteria, such as the conduct of the parties or the prevailing trade usage.

303. U.C.C. § 2-208 cmt. 4.



such conduct would be satisfactory or that a minimum of three occasions would be required. Clearly the frequency of the conduct described reflects a normative judgment as to what is sufficient to support the inference that such conduct embodies the parties' intent.

In a like manner the provision which defines usage of trade refers to regular practices and methods of dealing in an industry that "justify an expectation" that they will be followed in a given case. Section 1-205(2) leaves no doubt that "[t]he existence and scope of such . . . usage[s] are to be proved as facts."<sup>304</sup> Clearly trade usage under the Code has a descriptive, empirical basis. Nevertheless, the decision to recognize such usages of trade as well as the requirement that they enjoy a "regularity of observance" embodies a set of normative judgments as to what facts are likely to evidence the parties' common intentions. Likewise, the presumption that such usages were "taken for granted when the document was phrased" and so "have become an element of the meaning of the words used" unless "carefully negated"<sup>305</sup> is a normative judgment that such usage is a good "indication of what [the parties] intended the writing to mean."<sup>306</sup>

Again, these rules do not purport to reveal the actual intent of the parties, only a conventional understanding of that intent. Indeed, section 1-205(3) makes clear that a party may be bound by a trade usage or course of performance "of which they are or should be aware."<sup>307</sup> That the parties were aware of the practice does not prove as a factual matter that they intended to be bound by it. Quite the opposite could be true. Moreover, it seems unlikely that the parties intended to be bound by any practice of which they were not aware even if they should have been knowledgeable of it. Even though the facts may suggest otherwise, as a normative matter the Code presumes that such practices best approximate the intent of the parties. To overcome this presumption it must be shown that the parties specifically intended to exclude such practices from the terms of the agreement.<sup>308</sup>

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304. *Id.* § 1-205(2).

305. *Id.* § 2-202 cmt. 2.

306. *Id.*

307. *Id.* § 1-205(3).

308. This also accounts for the priority rules in sections 1-205(4) and 2-

That the Code treats the intent of the parties to a contract as a matter of inference, approximation, and convention, is not to be regretted since it could not be otherwise. One can never know with absolute certainty the author's intent in any written text because the sources of evidence for this intent are themselves often incomplete and are always open to interpretation.<sup>309</sup> Thus, intent is not "a simple fact awaiting discovery" but is instead "an intellectual construct developed through a process of interpretation" that includes both normative and descriptive elements.<sup>310</sup> This point is significant because, as I shall argue in detail below,<sup>311</sup> the same may be said regarding legislative intent. Before turning to these matters, however, we must first examine Llewellyn's strictly textualist approach to statutory meaning in detail.

### III. LLEWELLYN, CONTEXTUAL EVIDENCE, AND THE INTERPRETATION OF STATUTES

Llewellyn was the consummate common lawyer, having learned a deep appreciation for the nuance of fact from his teacher and friend Arthur Corbin.<sup>312</sup> He was enamored with the evolutionary process of reasoned elaboration that defines the case-law method. Thus, in some ways it is odd that Llewellyn is best remembered as the principal draftsman for one of the nation's most important statutes.<sup>313</sup> It was Llewellyn's study of the common law, however, that informed

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208(2), and the remark in comment 2 to section 2-202 about "carefully negat[ing]" contextual evidence. See *supra* notes 267-269, 282-289 and accompanying text.

309. See Gerald Graff, "Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 408 (1982) (noting that "the degree to which we can be confident about our inferences [about the author's intent] depends on the amount of evidence available, evidence which itself is open to criticism and may well be fallible").

310. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1212-13 (1987).

311. See *infra* Part IV.C.2.

312. See TWINING, *supra* note 6, at 96; see also MARY ANN GLENDON, A NATION UNDER LAWYERS 177-98 (1994); Arthur L. Corbin, *A Tribute to Karl Llewellyn*, 71 YALE L.J. 805 (1962).

313. Cf. Gilmore, *supra* note 5, at 814 (noting that there is "an element of paradox" in contending that Llewellyn "dislike[d] system-building" and preferred "the particular over the general" because for many years "his energies were devoted to the drafting of statutes").

his basic thinking about the nature of legal rules and their application.<sup>314</sup> He attempted to put much of this thought into practice in drafting the Uniform Commercial Code. Indeed, most of what we know about Llewellyn's views concerning statutes in general is derived from his work on the UCC. Because Llewellyn did not write extensively about statutory interpretation *per se*, what we understand of his views is an amalgam of his study of common law rules, his work as Chief Reporter of the UCC, and a few miscellaneous writings.

#### A. Purposivism and Formalism in Statutory Construction

In many respects, Llewellyn's views on statutory interpretation are similar to those of his fellow legal realists and to those proponents of dynamic interpretation writing today.<sup>315</sup> Llewellyn believed that the interpretation of legal rules was primarily the search for purpose and the application of that purpose to the facts at hand.<sup>316</sup> He held this view from an early point in his career.<sup>317</sup> For Llewellyn, "[a] piece of legislation, like any other rule of law is . . . meaningless without reason and purpose."<sup>318</sup> Indeed, "[i]f a statute is to make sense it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."<sup>319</sup> Llewellyn insisted that statutory construction and

314. See generally Llewellyn, *Rule of Law*, *supra* note 116.

315. See William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 826-28 (1985); see also *infra* Part IV.C.1-2.

316. See Llewellyn, *Current Recapture*, *supra* note 82, at 217 ("[I]n working with statutes it is the normal business of the court not only to read the statute but also to implement that statute in accordance with purpose and reason.").

317. See Llewellyn, *Realistic*, *supra* note 138, at 451 (noting that a rule is formulated "always with a purpose").

318. Llewellyn, *Current Recapture*, *supra* note 82, at 228.

319. Llewellyn, *Remarks*, *supra* note 86, at 400. Llewellyn also believed that the reading of case-law must likewise look to the purpose or policy behind decisions. See Llewellyn, *Some Realism*, *supra* note 158, at 1253 ("And only policy considerations and the facing of policy considerations can justify 'interpreting' (making, shaping, drawing conclusions from) the relevant body of precedent in one way or in another."). Indeed, Llewellyn was so confident and forthright about the importance he attached to purpose that he began his ground breaking casebook thus: "A casebook is built for a purpose." LLEWELLYN, *CASEBOOK*, *supra* note 183, at ix.

application “are intellectually impossible except with reference to *some* reason and theory of purpose and organization.”<sup>320</sup> For a legal rule to apply in a definitive manner, and “to expand, intelligently and intelligibly, the core of *purpose* must be clear—and must be just to the situation.”<sup>321</sup> That is, a legal rule must be animated by a knowable purpose in order to function as a rule of law.<sup>322</sup>

In Llewellyn’s view, judges often failed to grasp the purpose behind legal rules because of the dominant influence of verbal formalism. Indeed, courts often had “the utmost difficulty in getting beyond words.”<sup>323</sup> As noted above, this encouraged Llewellyn to harbor a great distrust for words alone viewed as a source and depository of law.<sup>324</sup>

Courts, of course, often found creative ways of avoiding the unjust effects of this formalism. Llewellyn was keenly aware of the widespread judicial practice of ritually reciting a rule and purporting to apply it,<sup>325</sup> while in fact discarding the rule and replacing it with

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320. *Plans*, *supra* note 83, in KLP, *supra* note 29, at J.VI.1.e, at 5.

321. Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 31.

322. See Llewellyn, *On the Good*, *supra* note 117, at 248 (asserting that “purpose is yet an inherent part of any functioning structure; and so, that whatever expresses purpose, expresses also an inherent part of function”). In Llewellyn’s aesthetics of law, functionality was the primary test for legal beauty. See *id.* at 229, 247. It is worth noting that there are many similarities between Llewellyn’s purposivism and the legal process approach to statutes championed by Henry Hart and Albert Sacks. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958). For various descriptions of the legal process approach, see Aleinikoff, *supra* note 37, at 34-37; Blatt, *supra* note 315, at 832-33; Eskridge & Frickey, *supra* note 47, at 332-34; Redish & Chung, *supra* note 38, at 815-16. For a comparison of Llewellyn’s work on statutes with that of Hart and Sacks, see Danzig, *supra* note 173.

323. Llewellyn, *Realistic*, *supra* note 138, at 443.

324. See, e.g., Llewellyn, *Some Realism*, *supra* note 158, at 1223 (commenting that legal realists “want law to deal . . . with things, with people, with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles—not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles”); see also *supra* Part II.C.2.

325. Llewellyn expressly employed the imagery of ritual, magic and superstition in order to capture the powerful influence which verbal formulations of legal rules have over courts. See Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 13 (“[A] formula once accepted as ‘the rule’ . . . of our *authoritative law* claims and gets repetition, whether it prove meaningful or

another. Courts would often “seek the wise decision, but hide the seeking under words.”<sup>326</sup> In this effort, courts had a wide range of accepted practices at their disposal for the construction and application of legal rules. Llewellyn observed that the court could narrow or expand the rule in question, mechanically apply it, or pay homage to its authority, but then ignore the rule by distinguishing the operative facts of the case.<sup>327</sup> Llewellyn believed that courts had the

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not in actual use. For there is in law as in magic such a thing as ‘obligatory’ ritual. And in law, as in magic, power is attributed to repetition of proper words, without inquiry into their meaning.” (footnote omitted); Llewellyn, *Realistic*, *supra* note 138, at 445 (referring to the phrase “security of transactions” and “questioning how much is accomplished, for any given specific problem, by resting merely on the magic of those words”); Llewellyn, *Rule of Law*, *supra* note 116, at 1258 (“If the accepted and ‘well-settled’ rule varies from the course of actual decision, i.e., is superstition, then the best the superstition will accomplish in the near future is to unsettle a bit the relatively consistent course of decision, and continue to obscure the picture.”) (footnote omitted); *id.* at 1269 (describing his scholarly agenda in a series of papers as being an effort “to present *rules of law* instead of formulae of *superstition about law*”); *id.* at 1270 (“In [c]ontracts, superstition is rampant. Rampant superstition is unfortunate, because it has results—*sometimes*.”).

326. Llewellyn, *Some Realism*, *supra* note 158, at 1252.

327. See Llewellyn, *Realistic*, *supra* note 138, at 450 (expressing his hope “to determine when [a rule] is stated, but ignored; when it is stated and followed; when and why it is *expressly* narrowed or extended or modified, so that a new paper rule is created” and distinguishing “*silent* application or modification or escape, in the ‘interpretation’ of the facts of a case, in contrast to that other and quite distinct level of express wrestling with the language of the paper rule”); Llewellyn, *Rule of Law*, *supra* note 116, at 1244-46 (describing seven distinct relations between cases and the rule at issue); *id.* at 1246 (noting that in the American case law system “the relation between the rule and the cases may move all the way from copying any words printed by anybody in a ‘law’ book to meticulous re-examination of precise facts, issues and holdings, in total disregard of any prior language whatsoever”) (footnote omitted); *id.* at 1258 (remarking that “we have evolved and established a large number of discrepant relations between a rule and its prior cases, resulting in discrepant techniques in working from the cases to the rule” but that “[a]ll of these techniques and relations are ‘correct,’ because they are all part of the case-law going scheme”); see also Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 8-9 (remarking that American courts have a “notably common aptitude for strongarming a needed result ‘out of’ rules which do not contain it; a veritable gift for pertinent logical fallacy—and a notably common and often baffling failure to make explicit when strongarming or fallacy will be used, and when not”) (footnote omitted); Llewellyn, *Offer & Acceptance, Part II*, *supra* note 182, at 797-98 (recounting how one may alternately twist the facts to fit an agreement within the conceptual framework of contract as “promise” or

capacity to construe written legal rules in a variety of ways, not only in the case of common law rules created by judges, but also in the case of statutes and rules generated by administrative agencies.<sup>328</sup> As Llewellyn wrote in the introduction to his innovative casebook: "The court can always, and it does often, 'save the rule' by 'construing' the facts into a pattern that bears no relation to reality; and the facts brought out in dissenting opinions leave no doubt that this is often and deliberately done in the interest of the court's view of justice in the particular case."<sup>329</sup>

This practice led Llewellyn to conclude that the real work of legal analysis is to understand "what courts do instead of what courts say."<sup>330</sup> Thus, the "first objective" of legal commentary should be "to

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give genuine agreements no legal effect because their verbal expression is not one of "promise"); Llewellyn, *Realistic*, *supra* note 138, at 449 (remarking that in response to authoritative rules officials can "either pay no heed at all . . . or listen with all care"); Llewellyn, *Through Title*, *supra* note 164, at 172 (observing that the rules in sales law regarding the passage of title are either "applied blindly to situations in which a different implication is concerned, with regrettable consequence" or "slight-of-handed into inconsistent use in the new situation, to achieve a consequence deemed desirable") (footnote omitted).

328. See LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 521-35 (containing a list of how courts may construe legal rules); Llewellyn, *My Philosophy*, *supra* note 158, at 189 (remarking that the American legal tradition is "equipped with a whole set of janus-faced techniques for handling rules to keep them out of the way of justice" which include "emasculating a silly statute by treating it as 'derogation,' or of expanding a wise but ill-drawn statute as 'remedial'"); Llewellyn, *Remarks*, *supra* note 86, at 401-06 (detailing by antipodal canons of construction the "technical framework for maneuver" in statutory interpretation).

329. LLEWELLYN, *CASEBOOK*, *supra* note 183, at x.

330. Llewellyn, *Some Realism*, *supra* note 158, at 1249 (remarking that we must also learn "what difference it makes to anybody that they do it"); see also Llewellyn, *Realistic*, *supra* note 138, at 446 (distinguishing "the actual doings of the judges and the actual effects of their doings" from the "judges' sayings"). The distinction between judicial action and the mere recitation of "well-settled" rules was a dominant theme of Llewellyn's thought. In describing the approach to legal analysis taken in his innovative casebook, Llewellyn explained that he sought

to keep a number of lines of inquiry distinct. First, what did the courts say? What rules did they lay down *as ratio decidendi*? What is the doctrine, the accepted formula of words upon the subject? Second, what did the court really do? Exactly what difference did the doctrine or the rule laid down make to the parties in the case? Exactly what difference will it make in other cases? Third, what is the background

state accurately and neatly what the courts have been doing."<sup>331</sup> By contrast, traditional legal analysis, had been conducted "[i]n terms of words, and not in terms of conduct; in terms of what *apparently* is understandable *without* checking up in life."<sup>332</sup> For Llewellyn, judicial conduct provided a certain "check" against which the legal efficacy of stated rules could be measured.<sup>333</sup> He insisted that no matter how clear, well-settled, or emphatically stated a rule is "where doctrine does not square with case-results, that doctrine *is not law*, in a

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of the case in practice, and what is the meaning of the case in practice?

LLEWELLYN, CASEBOOK, *supra* note 183, at xi; *see also* Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 17 (remarking that although courts try to formulate rules of decision, "in the main they *do* more wisely than they rationalize"); Llewellyn, *Rule of Law*, *supra* note 116, at 1258 (distinguishing "judicial practice-in-fact" from "the announced rule 'governing' the cases" and "present day notions of rightness"); *id.* at 1249 n.15 ("Wherever the doing and the saying of our case-law fail to square, each of these modes of saying obscures the problem. I find our doing and our saying in the case-law fields I study to be noticeably and importantly at odds, in places where it matters."); Llewellyn, *Through Title*, *supra* note 164, at 191-95 (emphasizing what "judges typically *do*" in "vault[ing] over" the theoretical difficulties created by Williston's conceptual apparatus based on the passing of title where seller's shipment is nonconforming); Llewellyn, *What Price*, *supra* note 138, at 742 (observing that in a variety of cases "courts strain by one dodge or another toward enforcement" of an agreement that would be void under the doctrine of consideration).

331. Llewellyn, *Rule of Law*, *supra* note 116, at 1269. In his famous response to Roscoe Pound, Llewellyn described two of the "common points of departure" among legal realists as a "[d]istrust of traditional legal rules and concepts insofar as they purport to *describe* what either courts or people are actually doing" and "a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions." Llewellyn, *Some Realism*, *supra* note 158, at 1235, 1237. Later in the same article Llewellyn wrote that, among the lines of inquiry in need of further exploration by legal realists, "[t]here is first the question of what lower courts and especially trial courts are doing, and what relation their doing has to the sayings and doings of upper courts and legislatures." *Id.* at 1247 (emphasis omitted).

332. Llewellyn, *Realistic*, *supra* note 138, at 440.

333. *See id.* at 464 (concluding that the "clearer visualization of the problems involved" in law calls for an "ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior"); *see also id.* at 442-43 (arguing that "rights and rules should be removed from their present position at the *focal point* of legal discussion, in favor of the *area of contact* between judicial (or official) *behavior* and the *behavior* of laymen").

case-law field.”<sup>334</sup> Accordingly, throughout his career Llewellyn sought “an understanding of actual judicial behavior, in that comparison of rule with practice.”<sup>335</sup>

### B. “Paper” Rules and Predictability

The dissonance between the rules publicly announced by courts and the actual practices of judges led Llewellyn to distinguish “real rules” from what he called “pseudo” or “paper rules.”<sup>336</sup> By the latter term Llewellyn referred to those verbal formulations in law that are prescriptive in nature. They are “what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place—what the books there say ‘the law’ is.”<sup>337</sup> Although stated with normative authority, such rules are mere “imposters” in the “masquerade of case-law.”<sup>338</sup> No matter how authoritative a rule may sound, if it does not “get *results*, on cases, in decisions and with some regularity,” it remains only a “pseudo” rule, merely paper, not the genuine article.<sup>339</sup> “Real rules,” by contrast, are not prescriptive in nature but are instead “predictions” and descriptions of the “practices of courts.”<sup>340</sup> They are “statements of likelihood that in a given situation a certain type of court action loom[s] in the offing.”<sup>341</sup>

334. Llewellyn, *Rule of Law*, *supra* note 116, at 1269; *see also id.* at 1260 (commenting that “curiously many of the currently accepted rules of Contract are not, and never have been a reflection of, or a guide to, the case-law of *contractual relations at large*”).

335. Llewellyn, *Realistic*, *supra* note 138, at 450 (emphasis omitted). For Llewellyn, actions always spoke louder than words. Indeed, the Code’s emphasis on conduct in the formation and interpretation of contracts reflects the communicative value Llewellyn saw in conduct. *See supra* Part II.C.

336. Llewellyn, *Realistic*, *supra* note 138, at 448.

337. *Id.*

338. Llewellyn, *Rule of Law*, *supra* note 116, at 1263.

339. *Id.* In a similar vein, in the oft-quoted introduction to his article responding to Dean Pound, Llewellyn writes: “*Beyond rules lie effects—but do they? Are some rules mere paper? And if effects, what effects? Hearsay, unbuttressed guess, assumption or assertion unchecked by test—can such be trusted on this matter of what law is doing?*” Llewellyn, *Some Realism*, *supra* note 158, at 1222.

340. Llewellyn, *Realistic*, *supra* note 138, at 448.

341. *Id.* (describing “real rules” as “convenient short hand symbols, for the remedies, the actions of the courts”). In describing “real rules” in this fashion, Llewellyn acknowledged his debt to Holmes. *See id.*; *see also* Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 13 (stating that “a ‘rule’ . . . as a



The ability to predict the legal consequences of one's actions is of course a primary benefit of the rule of law. Without the greater freedom that predictability brings, citizens cannot plan with confidence for the future. They "may simply be unable to carry out complex social arrangements that are dependent on legal sanctions being predictable in their application."<sup>342</sup> As Llewellyn succinctly stated, "inadequate legal theory makes for *uncertainty* in the results of legal cases. In transaction-law at least, this is a heavy debit item."<sup>343</sup>

The vice of "pseudo rules," then, was both the masquerade of authority and the absence of genuine predictability. Prescriptive formulae offer no guidance where judges "pay no heed at all" or pay only lip-service "while practice runs another course."<sup>344</sup> This leaves the practicing lawyer in a precarious spot. The lawyer must "gamb[e] on what [he or she thinks] will appeal to whatever court may get the case . . . ."<sup>345</sup> A roll of the dice is not the rule of law. Courts' fixation on words—viewed as the authoritative source of law—had led to an intolerable situation.

predictive formula, is under no less pressure to be meaningful as applied to emergent raw fact, or else be useless"). For Holmes' account of the law as a matter of prediction see OLIVER WENDELL HOLMES, JR., *THE PATH OF THE LAW* 167 (1920) ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."). See also *id.* at 173 ("The prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law."). Llewellyn made the distinction between "real" and "paper" rules relatively early in his career. Later he would further refine his notion of "real rule" as something more than the prediction of a legal outcome in a judicial process. See Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 9-14, 28-31 (describing the characteristics of an ideal rule of law); Llewellyn, *Rule of Law*, *supra* note 116, at 1252-59 (describing the characteristics of an ideal rule of law).

342. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 316 (1985) [hereinafter Moore, *Natural Law*]. See generally LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969).

343. Llewellyn, *Through Title*, *supra* note 164, at 201 n.82.

344. Llewellyn, *Realistic*, *supra* note 138, at 449; cf. Llewellyn, *Rule of Law*, *supra* note 116, at 1258 (remarking that "[t]he test of the relative worth of competing rule formulations lies in first instance in their accurate guidance to prediction of the outcome of future cases"). For a further discussion of Llewellyn's views on certainty and unpredictability in case law, see Llewellyn, *Rule of Law*, *supra* note 116, at 1253 n.31, 1270-71 (expressing the opinion that some uncertainty in case-law is inevitable but that rules in a case-law system are not wholly indeterminate).

345. Llewellyn, *Rule of Law*, *supra* note 116, at 1257.

### C. *Judicial Decision-Making in the "Grand Style"*

Llewellyn believed that the cure for verbal formalism, both in the creation of common law rules and in the interpretation of statutes, could be found in the method of decision-making he termed the "Grand Style" or "Manner of Reason." The heart of the Grand Style is a "conscious and overt concern *about* policy."<sup>346</sup> According to this method<sup>347</sup> a judge should not only "read the statute but also . . . implement [it] in accordance with purpose and reason."<sup>348</sup> With respect to case law, the Grand Style calls for the "open, reasoned, extension, restriction or reshaping of the relevant rules, done in terms not of the equities or sense of the particular case or of the particular parties, but instead . . . in terms of the sense and reason of some significantly seen *type* of life-situation."<sup>349</sup> With respect to statutes, courts in the Grand Style do not act like free-wheeling "independent agents" of policy, but must instead cheerfully accept the "policy and basic measure" of the legislature.<sup>350</sup> Then, using their "inherited rule machinery" and sensibly facing the facts of each case, courts must go about the business of implementing the legislature's purpose.<sup>351</sup> That is, in applying the "frozen text" of a statute, the court must attempt to "satisfy the reason *as well as* the language."<sup>352</sup>

346. Llewellyn, *On the Good*, *supra* note 117, at 243.

347. By "style" Llewellyn made clear he was "referring to a way of thought and work, not to a way of writing" let alone a "literary quality or tone." LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 36-37; *see also* Llewellyn, *On the Good*, *supra* note 117, at 230-31 (making clear that "style" does not mean "an individual's manner of handling words or work" but "the period-style of a craft").

348. Llewellyn, *Current Recapture*, *supra* note 82, at 217. For an earlier discussion of the Grand Style, when Llewellyn was first formulating it and before it was so named, see Llewellyn, *Realistic*, *supra* note 138, at 447 n.12, 453-54, and Llewellyn, *Some Realism*, *supra* note 158, at 1251 (describing the realist response to "verbalism and deduction" as the "conscious seeking, within the limits laid down by precedent and statute, for the wise decision") (emphasis omitted).

349. Llewellyn, *Current Recapture*, *supra* note 82, at 219-20.

350. *See id.*

351. *See id.* at 227-28; *see also* Llewellyn, *Remarks*, *supra* note 86, at 400 (stating that "if a statute is to be merged into a going system of law . . . the court must do the merging, and must in doing so take account of the policy of the statute").

352. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 38.

Llewellyn contrasted the Grand Style of decision-making with what he called the "Formal Style."<sup>353</sup> According to Llewellyn, this logical and authoritarian manner of deciding cases dominated the American judicial landscape during the last decades of the nineteenth century.<sup>354</sup> During this Formal Period, courts tended to proclaim their inability to change even common law rules, and "[o]pinions r[a]n in deductive form with an air or expression of single-line inevitability."<sup>355</sup> "Authority was authority; logic was logic; certainty was certainty; heart had no place in legal work; esthetics drove in the direction of cold clarity."<sup>356</sup>

Although they claimed to be largely powerless, courts during this Formal Period exercised power quite broadly. They fiercely resented "the intrusion" of legislatures into the realm of policymaking. According to Llewellyn, they refused to accept the legislature's "essential declarations of policy, and its outlines of measure."<sup>357</sup> Thus, statutes "tended to be limited or even eviscerated by wooden and literal reading"<sup>358</sup> or pared down "via unconstitutionality."<sup>359</sup>

### 1. Predictability and the manner of reason

Above all, Llewellyn believed that the Formal Style of judging lacked predictability and the capacity to adapt legal rules to a

353. See Llewellyn, *Remarks*, *supra* note 86, at 396.

354. See Llewellyn, *On the Good*, *supra* note 117, at 238; Llewellyn, *Remarks*, *supra* note 86, at 396.

355. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 38.

356. Llewellyn, *On the Good*, *supra* note 117, at 239; see also Llewellyn, *Remarks*, *supra* note 86, at 396 (contrasting the Grand Period, during which precedent guided but principle controlled, with the Formal Period, when precedent controlled and principle was tested "by whether it made for order in the law, not by whether it made wisdom-in-result").

357. Llewellyn, *Current Recapture*, *supra* note 82, at 228.

358. Llewellyn, *Remarks*, *supra* note 86, at 400; see also Llewellyn, *Current Recapture*, *supra* note 82, at 218 ("Statutes, moreover, tended to be read unfavorably, and even when seen favorably, they tended to be limited to the letter."); cf. 1941 DRAFT, *supra* note 87, at 25 (remarking that "the one-time hostility of the courts to statutes has all but disappeared").

359. Llewellyn, *Current Recapture*, *supra* note 82, at 227 (stating that courts "walled off" the reach of statutes by "literalistic construction"); see also *id.* at 228 (stating that Formal Style courts would use their self-declared absence of power to enforce the statute in question in order to "whittle it down to frustration").

continuously changing world. To act “as if fixed rules of law’ were all of law, as if all rules were of a single kidney, as if, finally, the *reason*, explicitly and accountably stated for guidance and for explanation, were not the heart of all sound work in things of law” would be disastrous.<sup>360</sup> Any manner of judging that ignores the purpose behind legal rules “is foredoomed, sooner or later, to *become* a bad style, and lawyers will have to groan under fiction, spurious interpretation, and their progeny at once of confusion and of discretion which escapes accountability.”<sup>361</sup> That is, a legal system founded on verbal formalism is by its very nature bound to lead to uncertainty and obsolescence.

As noted above,<sup>362</sup> Llewellyn concluded that legal uncertainty and lack of predictability were due to the multifarious ways in which courts had come to regard law as mere verbal formula. For example, a court could “blindly apply” a rule “with regrettable consequence” or through legal “sleight-of-hand[]” achieve “a consequence deemed desirable.”<sup>363</sup> Second, Llewellyn saw legal obsolescence as the result of life moving forward and courts clinging to the fixed language of rules.<sup>364</sup> No matter how carefully drafted, as a statute grows old the specific terms it employs may cease to be relevant to the facts at hand.<sup>365</sup> Consequently, obsolescence cannot be avoided by additional or more clever verbiage. As Llewellyn remarked, waxing poetic, “[m]uch doctrine, however sweetly spun, serves chiefly to grow grey with dust against the rafters.”<sup>366</sup> If the law is not adapted to the changing circumstances of life, it suffers a loss of relevance and so forfeits its claim to command assent.

By contrast, and somewhat paradoxically, “Llewellyn believed that judging in the ‘Grand Style’ was the surest route to law that was

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360. Llewellyn, *On the Good*, *supra* note 117, at 260.

361. *Id.* at 247-48.

362. *See supra* Part II.C.1-2.

363. Llewellyn, *Through Title*, *supra* note 164, at 171-73 (lamenting how these disparate approaches to the title concept under the Uniform Sales Act had “throw[n] into confusion any lines of *predictable* presuming about *Title*”).

364. *See* Llewellyn, *Remarks*, *supra* note 86, at 400.

365. *See id.* (remarking that “increasingly as a statute gains in age—its language is called upon to deal with circumstances utterly un contemplated at the time of its passage”).

366. Llewellyn, *What Price*, *supra* note 138, at 751.

certain, predictable, and true to its underlying purposes.<sup>367</sup> He was confident that under the Grand Style “with right Reason plainly dominant, the outcome of a particular case at law [could] be moderately certain in the bulk of instances, and [could] and [would] at the same time give guidance in words, for the future, which [would be] moderately clear.”<sup>368</sup> Likewise, in crafting “the right kind of rule . . . [one that] is clear, and plainly wise, and plainly applicable, a judge can not only follow it, but it can be predicted that he will.”<sup>369</sup> If rules were crafted according to the Manner of Reason so as to encourage decision-making in the Grand Style, courts would neither mechanically apply the written law nor would they feel compelled to twist the facts or legal language in order to reach the right result. Instead, the right result would follow from the reasoned application of the rule.

In drafting the UCC, Llewellyn plainly sought to foster decision-making in the Grand Style.<sup>370</sup> As Chief Reporter for the Code, he tried to draft each provision of the statute so that it would “show its reason on its face”<sup>371</sup> and thereby encourage judges to join in the tradition of the best common law courts. Thus, the technique<sup>372</sup>

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367. Wiseman, *supra* note 10, at 492; see also LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 83, at 37-38 (asserting that “the Grand Style is the best device ever invented by man for drying up that free-flowing spring of uncertainty, conflict between the seeming commands of the authorities and the felt demands of justice”).

368. Llewellyn, *On the Good*, *supra* note 117, at 241.

369. Llewellyn, *My Philosophy*, *supra* note 158, at 191.

370. See Wiseman, *supra* note 10, at 495 (stating that Llewellyn sought “judicial decision-making guided by statements of reason and purpose written into the Code, which would lead courts to explain what they were doing and why, according to the principles of the Code”). *But cf.* Danzig, *supra* note 173, at 632 n.39 (stating that although it might appear that Article 2 should “be analyzed as an attempt to coerce courts into deciding cases in the Grand Style,” in fact the “policies” embodied in the Code do not guide judicial decisions but are a source of judicial law-making).

371. *Plans*, *supra* note 83, in KLP, *supra* note 29, at J.VI.1.e, at 5; see also *infra* notes 392-399 and accompanying text.

372. Llewellyn had great respect for craftsmen and often described the work of lawyers in terms of “craft” and “technique.” See, e.g., LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 83, at 212-35. See generally ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 209-25 (1993). Likewise, Llewellyn steadfastly resisted labeling legal realism as a school of thought or philosophy. He preferred instead to think of it as a method or technique. See TWINING, *supra* note 6, at 96-97,

Llewellyn employed in this regard was both a means of identifying the operative facts at issue as well as a way of encouraging a certain interpretive approach to the statute.

## 2. "Situation sense" and the formulation of legal rules

As noted above,<sup>373</sup> facts were of great importance to Llewellyn in the creation of legal norms. It was critical for him that "judgments of policy come backed by facts."<sup>374</sup> The concept Llewellyn repeatedly used to capture this quality of being grounded in fact was "the sense of the situation" or "situation sense."<sup>375</sup> Llewellyn's use of the term is complex, however, in that it often appears to carry a normative connotation regarding the applicable legal principles or values.<sup>376</sup> Indeed, at times Llewellyn's discussion of situation sense

199-202. This can be seen throughout Llewellyn's writings on the subject. See, e.g., LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 510 ("Realism is not a philosophy, but a technology."); Llewellyn, *On the Good*, *supra* note 117, at 246 n.25 ("The perception is slowly growing more general, as the smoke of the fireworks blows away, that the so-called 'realistic' line of work is in essence a new and sound drive into more effective legal engineering techniques; not in any way a philosophy of law, but useful in the more adequate service of any philosophy of law."); Llewellyn, *Some Realism*, *supra* note 158, at 1256 ("A group philosophy or program, a group credo of social welfare, these realists have not.").

373. See *supra* Part II.C.2-3.

374. Llewellyn, *On Philosophy*, *supra* note 160, at 212.

375. See generally TWINING, *supra* note 6, at 216-27 (discussing Llewellyn's use of the term in *THE COMMON LAW TRADITION*).

376. For example, in an early discussion of situation sense with respect to commercial transactions and the value of security for the parties involved, Llewellyn suggested that "as facts become clear, [they] suggest one line of policy." Llewellyn, *Realistic*, *supra* note 138, at 446. The application of this policy must still "be illumined by the facts relevant to the situation in that instant case. No elimination of the subjective value-judgment, then; but an illumination by objective data of the basis and bearings of a subjective value judgment." *Id.* Likewise, in one of Llewellyn's last published works, he wrote that in Grand Style judging,

*Situation Sense* will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with.

LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 60; see also Llewellyn, *On the Good*, *supra* note 117, at 241 (asserting that in Grand Style judging, "[i]t is the felt reason of the situation which is stated").

indicates an abandonment of the moral skepticism and relativism popular among the legal realists and even suggests some sympathy for natural law theory.<sup>377</sup> The matter is further complicated by the fact that Llewellyn sometimes uses the term to refer to a capacity for empirical or normative comprehension on the part of judges. At other times "'situation sense' seem[s] to be related to the situation rather than the court[s] or the judges."<sup>378</sup> As one might expect,

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377. For hints of Llewellyn's inclination toward natural law, see LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 121-28 (discussing an important passage from German legal scholar Levin Goldschmidt on the "immanent law" dwelling within "the very circumstances of life"). While Professor Danzig believes that this passage strongly supports the view of Llewellyn as a closet natural lawyer, others are less certain. Compare Danzig, *supra* note 173, at 624-26, with Patterson, *supra* note 99, at 195-97 n.176, and TWINING, *supra* note 6, at 185-88, 215-27. Llewellyn's writings contain numerous favorable references to natural law. In addition, many passages in his work are suggestive of natural law though they do not refer to it as such. See, e.g., Llewellyn, *Natural Law*, *supra* note 175, at 8 (arguing that natural law is akin to the evolving common law and concluding that "it is difficult . . . to conceive of the ultimate ideals" of legal realists "in terms which do not resemble amazingly the type and even the content of the principles of a philosopher's Natural Law"); Llewellyn, *Realistic*, *supra* note 138, at 461-62 (denying any "Hegelian mysticism of the State," but asserting that in law, there is "the recurrent emergence of some wholeness, some sense of responsibility which outruns enlightened self-interest, and results in action apparently headed (often purposefully) for the common good"). Thus, it seems fair to conclude that Llewellyn had more than a simple "flirtation" with natural law. Cf. TWINING, *supra* note 6, at 220 (suggesting that Llewellyn's use of language indicates a belief that with a six or seventh sense one can uncover an immanent law). Instead, it makes sense to acknowledge that Llewellyn may well have been a natural lawyer. Unlike many of his fellow natural lawyers, Llewellyn was uncertain as to the ultimate origin of this law. He was, however, confident that the thoughtful, factually intensive method of the common law was the proper means for discovering it. See Llewellyn, *On the Good*, *supra* note 117, at 255-56, 264 (asserting that belief in the Good, of which Justice is an aspect, is a matter of faith such that "you can persuade only another man who shares it" and concluding that the substance of the Good is not clarified by deduction from "broad ultimates" but by "that on-going process of check-up and correction . . . which is the method and very life of case-law" wherein his faith lies). Although this position may strike some as intellectually incoherent it is precisely the same cognitive posture scientists find themselves in when they are investigating natural phenomena. See KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 136-53, 215-48 (1963).

378. TWINING, *supra* note 6, at 220. In this passage and in the accompany-

commentators have interpreted this nebulous concept in a variety of ways.<sup>379</sup>

Although it is probably correct to understand situation sense as a hybrid concept,<sup>380</sup> the term surely has a factual component. This factual component must deal in generalities. A rule cannot be so specific in the facts it describes that it has a single, unique application and no other.<sup>381</sup> Llewellyn observed that “[o]ur fields of law, our patterns of legal thinking, our legal concepts, have grown up each one around some ‘type’ of occurrence or transaction, *felt* as a typical something, *seen* in due course as a legally significant type, and, as a type-picture, made a standard and a norm for judging.”<sup>382</sup> In the process of categorizing facts, in describing a “background picture of transactions ‘of *this* type,’”<sup>383</sup> the primary task “lies in definition of the problem situation itself.”<sup>384</sup> In the process of rule formation, a court acting in the Grand Style is engaged in “the open and conscious quest for the reasonable rule *for the type-situation*”

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ing footnotes, Professor Twining conveniently collects several instances in which Llewellyn uses the term in different ways in *THE COMMON LAW TRADITION*.

379. See, e.g., Harold D. Lasswell, Book Review, 61 *COLUM. L. REV.* 940, 946 (1961); Patrick J. Rohan, *The Common Law Tradition: Situation Sense, Subjectivism or “Just-Result Jurisprudence?”*, 32 *FORDHAM L. REV.* 51 (1963); Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255 (1961). Professor Gedid forthrightly claims that Llewellyn “failed to define ‘situation-sense.’” John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 *WM. & MARY L. REV.* 341, 369 (1988).

380. See *TWINING*, *supra* note 6, at 222-23 (concluding that situation sense involves both “the formulation of principles or policies and the classification of the facts into a general type-fact-situation”).

381. See Llewellyn, *Law Jobs*, *supra* note 138, at 1359 (“To see that something is *right* or that something is *a right*, is to generalize. There is no practical way, in ordinary life, to get at the notion of rightness without having, somewhere in your mind, a *general* picture or pattern which the case in hand fits into and fits under.”).

382. Llewellyn, *First Struggle*, *supra* note 173, at 880.

383. Llewellyn, *On Warranty Part I*, *supra* note 162, at 723; see also *id.* at 720-21 (discussing two polar background pictures of sales).

384. Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 24; see *id.* at 24-26 (stating that the question of whether a bill of lading was “merely equivalent to the goods” or was a “quasi-negotiable document” actually involves two “divergent situations in life”).



involved and not merely for the case at hand.<sup>385</sup> That is, “[t]here is a sense of *the type of situation* to be contrasted with the sense of *a particular controversy between particular litigants*.”<sup>386</sup> The court’s “*method* has to be to *reach, first*, for the significant *type-situation*. Then, to diagnose a problem, and to prescribe an answer accompanied by an explicit life-reason . . . .”<sup>387</sup>

Again, Llewellyn knew that this was not simply a matter of transcribing empirical observations. In the formation of common law rules “the court’s conception of *reasonableness-in-the-circumstances* goes far toward determining its views on proper rules, *and especially toward determining its reading of fact*.”<sup>388</sup> Likewise, in drafting a statute or other legal rule, articulating the facts is a creative act. “To ‘see’ a pattern is to make a pattern, and to make it a ‘right’ pattern is to project it into the on-coming future.”<sup>389</sup> The grouping and categorization of facts is in part a matter of policy “which means the *reason of the situation*.”<sup>390</sup> The court must give “not only a rule but also *a persuasive presentation of good life-reason in the light of the type life situation*.”<sup>391</sup>

385. Llewellyn, *Current Recapture*, *supra* note 82, at 218.

386. Llewellyn, *Remarks*, *supra* note 86, at 398.

387. Llewellyn, *Current Recapture*, *supra* note 82, at 223. Llewellyn believed that the “grouping [of] cases and legal situations into narrower categories than has been the practice in the past” was one of the defining characteristics of legal realism. Llewellyn, *Some Realism*, *supra* note 158, at 1237; *see also* Llewellyn, *Realistic*, *supra* note 138, at 438 (noting that the realists “moved . . . toward sizing up the law by situations, instead of under the categories of historically conditioned, often archaic remedy-law”). Llewellyn followed this approach of narrow categorization in his own work. *See* LLEWELLYN, *CASEBOOK*, *supra* note 183, at 1033-77 (providing an index of the sales cases covered in the book, organized around the specific commodities involved); Llewellyn, *Through Title*, *supra* note 164, at 169-70 (“[T]oday I find too many kinds of seller in contact with too many kinds of buyer in too many kinds of transaction. But what I am clear on is that we *can* isolate *types*, either of transaction, or of party, or of issue, and get light on how better to deal with those *types*.”); *see also* Wiseman, *supra* note 10, at 470, 538 (discussing Llewellyn’s goal of narrow categorization).

388. Llewellyn, *On Warranty Part I*, *supra* note 162, at 722.

389. Llewellyn, *Law Jobs*, *supra* note 138, at 1359; *see also id.* at 1361 (stating that a rule “in its selection of life-stuff to work with and from, it is creative in what it does with the selection”).

390. Llewellyn, *Current Recapture*, *supra* note 82, at 217-18.

391. *Id.* at 220.

### 3. The theory of "patent reason"

Because the clear articulation of policy lies at the very heart of judging in the Manner of Reason, a statute designed to inspire decision-making in this style must also make its reason and purpose clear.<sup>392</sup> Thus, in drafting the UCC Llewellyn sought to craft provisions "which make sense on their face, and which can be understood and reasonably well applied even by mediocre men."<sup>393</sup> In the Code he sought to draft "that rightest and most beautiful type of legal rule, the singing rule with purpose and with reason clear."<sup>394</sup> Llewellyn called this approach to statutory drafting the "principle of patent reason."<sup>395</sup> In drafting a statute according to this principle, "[e]very provision should show its reason on its face. Every body of provisions should display on their face their organizing principle."<sup>396</sup>

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392. Even at an early stage in his career Llewellyn believed that statutory language should not, once drafted, "merely bask in the sun upon the books." Instead the drafter "must so shape [the statute] as to induce its application . . . or else . . . his bow is spent in air." Llewellyn, *Realistic*, *supra* note 138, at 452 (footnote omitted).

393. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 38 (describing the Grand Style of judging in the common law); *cf.* Llewellyn, *First Struggle*, *supra* note 173, at 876 (remarking that "if the stock intellectual equipment is apt, it takes extra ineptitude to get sad results"); *Plans*, *supra* note 83, in KLP, *supra* note 29, at J.VI.1.e, at 5 ("Reasonably uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application of the same language is the *same* reason in all cases."). For an elaborate exposition of Llewellyn's use of the phrase "stock equipment," see Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777 (1986).

394. Llewellyn, *On the Good*, *supra* note 117, at 250; *see also* LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 183 (referring to "the rule with a singing reason"); *id.* at 513 (suggesting that a "singing reason" can resolve a particular problem "each time into a new, usefully guiding, forward-looking felt standard-for-action or even rule-of-law").

395. *See generally* TWINING, *supra* note 6, at 321-26 (discussing statutory drafting).

396. *Plans*, *supra* note 83, in KLP, *supra* note 29, at J.VI.1.e, at 5. In the same December 1944 memorandum, Llewellyn acknowledged that this approach had "met with serious opposition" from "an old-fashioned craftsman" who believed that "relying on anything but clear and adequate dispositive words" was "inappropriate to statutes." *Id.* at 6. As a consequence, Llewellyn had then eliminated "most open statements of reason or policy" from the Revised Sales Act. He indicated that the objective of drafting with conspicuous

More than a simple rule of composition,<sup>397</sup> however, Llewellyn saw the principal of patent reason as a hermeneutic directive. The "basic policy" behind statutes like the UCC drafted according to this principle is that "known purpose and reason should govern interpretation."<sup>398</sup> Statutory language drafted in such a manner would not

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reference to the purpose of a provision could still be accomplished by "the authorizing reference to the Comments, the demand for construction to promote underlying reasons, purposes and policies, and the authorization, where the circumstances and underlying reason so require, to disregard language of limitation." *Id.* Further, for those Code articles other than the Sales Act, Llewellyn believed that he could still make "the purpose of a provision appear on its face by the choice of language and by the organization of the thought in the light of the situation." *Id.*; see also *Selected Comments, supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 2 (noting that "sustained effort has been made to make the reasons and purposes of the Act apparent on the face of the text whenever possible").

397. Cf. LLEWELLYN, *THE COMMON LAW TRADITION, supra* note 83, at 182 (remarking that "no explicit purpose clause or preamble is requisite [in a statute]—though one can be useful; it is enough that the phrasing of the rule reveals the reason").

398. U.C.C. § 2-401 cmt. 1 (1995). Although not as prominent as Llewellyn might have preferred, the final version of the UCC clearly embodies at least the interpretive component of the principle of patent reason. The comment that accompanies section 1-102 provides that "the proper construction of the Act requires that its interpretation and application be limited to its reason." *Id.* § 1-102 cmt. 1. The same comment makes clear that the UCC "should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question as also of the Act as a whole." *Id.*

The UCC drafting history also clearly demonstrates that Llewellyn intended to create a statute according to the theory of patent reason. For example, Llewellyn described one of the "main features" of the 1941 Draft as follows: "Principles are made explicit, wherever they underlie a series of provisions, in order to guide application of the detail, or the handling of uncovered cases." 1941 DRAFT, *supra* note 87, at 21. Likewise, the comment to section 1 of the 1944 Draft provides that the statute's

proper construction requires that the text be read in light of the reason and purpose of each rule or principle and of the Act entire. Sustained effort has been made to make the reason and purpose apparent either on the face of the text or in the Comments, and the court is expressly authorized to consult the Comments.

1944 DRAFT, *supra* note 219, at 72. As this remark suggests, Llewellyn had intended the comments to play a major role in courts' interpretation of the Code. Paradoxically, the use of the comments both undermined the theory of patent reason and advanced the cause of purposive interpretation. See *infra* Part IV.B.

dictate specific results in specific cases. Instead, Llewellyn believed that such language would “elicit” both “the court’s best judgment, in applying or in developing the principles stated” as well as the court’s reasons for reaching the particular case-holding.<sup>399</sup>

*a. a creative role for courts*

The principle of patent reason plainly envisions a creative role for courts in statutory construction. Such a judicial role is clearly at odds with the Formal Style of judging that Llewellyn came to loathe. Llewellyn recognized that judges who must conjoin the infinite variety and specificity of facts in the world and the blunt imperative of general verbal directives must be free to exercise creative flexibility. Llewellyn believed that “the rule and its application [should] shift . . . with any shift in reason.”<sup>400</sup> Thus, the official comments to the UCC provide that “the application of the [statutory] language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.”<sup>401</sup> For Llewellyn, it was “not where the *words* leave off, but where the *reason* leaves off, that the provision is to find its limit.”<sup>402</sup> He summarized his ideas concerning the purposive application of legislative texts in two adages: “[W]here the reason stops, there stops even the enacted rule” and “Whither the reason leads, thither goeth the rule, as well.”<sup>403</sup>

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399. Llewellyn, *Federal Sales Act*, *supra* note 85, at 563-64.

400. Llewellyn, *On the Good*, *supra* note 117, at 241.

401. U.C.C. § 1-102 cmt. 1.

402. 1941 DRAFT, *supra* note 87, at 26.

403. Llewellyn, *Current Recapture*, *supra* note 82, at 229; *see also* 1941 DRAFT, *supra* note 87, § 1-A cmt., at 47; 1944 DRAFT, *supra* note 219, at 72. The earlier drafts of the Code especially emphasized the creative role of courts in statutory interpretation. Through a series of five “illustrations,” the Comment on section 1 of the 1944 Draft encourages the creative application of the statute. For example, the Comment urges courts to “fill a gap in the language of the statute” with a “clear, though unexpressed, underlying principle.” *Id.* at 73 (emphasis omitted). Restrictive statutory language “should be . . . expanded to fit the reason and principle of the situation” where “commercial sense” so dictates. *Id.* at 74 (emphasis omitted). Although a principle can be “extended where its reason and policy apply to a situation outside the explicit scope of the [statute],” nevertheless, “[a]n express provision should be . . . limited where its reason does not apply.” *Id.* at 75 (emphasis omitted). An express provision may justify the inference of negative implication “but only when the reason of the situation requires such inference.” *Id.* at 76 (emphasis omitted).

#### D. Semi-Permanent Legislation and the Fear of Obsolescence

For Llewellyn, the creative application of legislative purpose offered more than simple aesthetic appeal. In his view it was necessary to avoid the onset of statutory obsolescence. Like today's supporters of dynamic interpretation he was fearful that the fixed text of a statute would quickly become antiquated in a rapidly changing world.<sup>404</sup> He had, after all, seen how obsolescence had overtaken the Uniform Sales Act in a relatively short period of time.<sup>405</sup> He observed that rules "cast into . . . authoritative verbal form" possessed "a tremendous power" for "rigidification over time."<sup>406</sup> A statute could

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Over the course of the drafting process, the "principle of implementation by purpose," Llewellyn, *Current Recapture*, *supra* note 82, at 229, was somewhat curtailed by the elimination of specific provisions. See, e.g., Wiseman, *supra* note 10, at 508, 520-22 (discussing the ill-fated merchant expansion provision under which the court was permitted to apply merchant rules to non-merchants if the reason "justified so doing"). In addition, changes in the tone and context of the comments also diminished the role of creativity in Code interpretation. For example, in the comments to the 1949 Draft the drafters expressly "adopt[ed] the trend of those cases which extend the principle of a statute either to fill a gap in the language or to apply to a situation outside of the statute's explicit scope where reason and policy justify such extension." UNIFORM COMMERCIAL CODE (ARTICLE 1: GENERAL PROVISIONS; ARTICLE 2: SALES; ARTICLE 3: COMMERCIAL PAPER) (1949) [hereinafter 1949 DRAFT] § 1-102 cmt. 2, reprinted in 6 U.C.C. DRAFTS, *supra* note 21, at 22. The drafters then cited *Commercial National Bank of New Orleans v. Canal-Louisiana Bank and Trust Co.*, 239 U.S. 520 (1916), as an example of precisely the style of interpretation they had in mind. *Id.* By 1952 the citation to the *Canal-Louisiana Bank* case remained, but the Code no longer expressly adopted this interpretive approach. Instead the comment provided in understated fashion that "[n]othing in this Act stands in the way of the continuance of such action by the courts." 1952 OFFICIAL DRAFT, *supra* note 22, § 1-102 cmt. 1. This bland endorsement of creativity in statutory construction remains in the current version of the Code. See U.C.C. § 1-102 cmt. 1.

404. See Llewellyn, *On Warranty Part II*, *supra* note 146, at 409 ("Today's policy or principle will be outdated, doubtless, within a generation.").

405. See Llewellyn, *Federal Sales Act*, *supra* note 85, at 560 ("But an Act drawn in 1906 is an Act whose drafting rested on experience now thirty-four years old, an Act which did not contemplate any of such conditions as have arisen or taken new shape in what make out almost two full generations since, spanning a great war and a great depression."); *Statement*, *supra* note 116, in 1 N.Y. REPORT 1954, *supra* note 24, at 29 ("Much of the law, whether embodied in the original Uniform Commercial Acts or not, has become outmoded as the nature of business, of technology, and of financing has changed. Such law needs to be brought up to date.").

406. Llewellyn, *My Philosophy*, *supra* note 158, at 188.

“becom[e] rapidly ‘dated’ by reason of reliance on ‘practical’ ‘modern’ patterns of thought and action which may then prove to be passing ones.”<sup>407</sup> Moreover, Llewellyn knew that “increasingly as a statute gains in age—its language is called upon to deal with circumstances utterly un contemplated at the time of its passage.”<sup>408</sup>

Plainly, he did not want the UCC to suffer the same fate as the Uniform Sales Act.<sup>409</sup> Instead, Llewellyn “intended to make it possible for the law embodied in [the Code] to be developed by the courts in the light of unforeseen and new circumstances and practices.”<sup>410</sup> This was an ambitious goal, especially given the fluid

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407. 1941 DRAFT, *supra* note 87, at 28; *see also id.* at 30 (explaining that in drafting the statute he sought “to avoid the trammels of mercantile practice already outdated” and “to avoid any equivalent freezing of the Sales law of the future upon the immediate past or the immediate present”).

408. Llewellyn, *Remarks*, *supra* note 86, at 400.

409. It may be fair to ask whether statutory obsolescence is something that can truly be avoided, or only postponed. Writing in 1967, Professor Grant Gilmore, one of the principal drafters of Article 9 of the UCC, was less than sanguine about the possibility of avoiding obsolescence in legislation. To do so, a statute would have to focus on the future, on what is to come. This, however, is never accomplished. “[T]he Code, as all statutes must, devotes most of its wordage to a recreation of the past.” Grant Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 473 (1967). For Gilmore, “[t]he true function of a codifying statute is to reduce the past to order and certainty—and, thus, to abolish it.” *Id.* at 476. In spite of the simplification and certainty that a new statute provides, “[t]he law will continue to evolve” such that “[t]he time will . . . come for another round of codification, in the course of which the recodifiers will point out that the old statutes were obsolescent, if not obsolete, when they were drafted. As indeed they were.” *Id.* at 476-77. Such obsolescence is inevitable, because the forward-looking dynamic of life always outstrips the backward-looking reflection of law. *Cf.* Moore, *Natural Law*, *supra* note 342, at 293, 357 (noting that obsolescence is as inevitable as death). A healthy constitution may help to postpone it, but cannot avoid it entirely.

410. U.C.C. § 1-102 cmt. 1 (1995). One may well ask whether history has shown that Llewellyn’s ambitions in this regard were in fact unrealistic. That is, since New York adopted the UCC in 1962, the Official Text has been substantially revised by the sponsoring bodies in several important respects. These “updates” of the statute were not and could not have been undertaken by courts. For example, the American Law Institute and the National Conference of Commissioners on Uniform State Laws promulgated revised versions of Articles 3 and 4 in 1990. Likewise, Article 8 was updated in 1978. Article 9 was fully revised in 1972 and is currently under revision again as are Articles 2, 5 and 7. *See* WHITE & SUMMERS, *supra* note 9, § 1, at 5; *see also* Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the U.C.C.*, 39 TEX. L. REV. 707, 712-716 (1998) (discussing the process of revising the

nature of commerce in a modern, industrialized economy. It was even more ambitious in that Llewellyn expressly intended the Code to become a more-or-less permanent fixture in the American legal landscape. He repeatedly referred to the proposed UCC as a "permanent"<sup>411</sup> or "semi-permanent piece of legislation."<sup>412</sup> Thus, for the Code to maintain its currency over time, Llewellyn believed that courts would have to implement the Code's purposes with creativity and flexibility.

### E. A Common Law Code

The kind of creativity Llewellyn had in mind was exemplified by the common law tradition. Llewellyn believed that a common law rule, properly understood, was more a matter of policy and purpose than of words.<sup>413</sup> Not confined by "fixed language,"<sup>414</sup> a common law rule could "expand[] or shift[] direction according to the reason which is its life."<sup>415</sup> Thus, bearing in mind the sense of the

UCC).

411. See Llewellyn, *Federal Sales Act*, *supra* note 85, at 561 (arguing that a national codification of sales law is not "ordinary legislation" but "is in a peculiar sense *permanent* legislation" in that "it enters into the commercial structure of the country").

412. See, e.g., U.C.C. § 1-102 cmt. 1 (stating that the Code "is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices"); 1949 DRAFT, *supra* note 403, § 1-102 cmt. 1 (providing the same as the current version but adding that the statute's machinery allows not only for "expansion" but also for "gradual alteration"); 1941 DRAFT, *supra* note 87, at 22-30 (containing an extensive discussion of the Code as semi-permanent legislation and the problem of obsolescence); *Selected Comments*, *supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 2 (containing an early version of comment 1 to U.C.C. § 1-102, referring to the Code as "a semi-permanent piece of legislation"); Karl N. Llewellyn, *Memorandum to Executive Committee Re: Possible Uniform Commercial Code* (Aug. 1940) [hereinafter *Possible Code*], in KLP, *supra* note 29, at J.II.1.b, at 1 (asserting that commercial law could "be put into shape to be flexibly permanent").

413. See, e.g., Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 31 ("But for a rule or concept to take more definite shape, or to expand, intelligently and intelligibly, the core of *purpose* must be clear—and must be just to the situation."); see also *supra* Parts II.C.3, III.A.

414. See LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 38 (referring to the "frozen text" of a law); see also Llewellyn, *Remarks*, *supra* note 86, at 400 (referring to the "fixed language" of statutes).

415. 1941 DRAFT, *supra* note 87, § 1-A cmt., at 47.

situation, courts could adapt common law rules to meet the needs of changed circumstances.

By contrast, Llewellyn observed that statutory rules were often rigid and so lacked the capacity for ready adaptation. This rigidity was due in part to the once prevalent Formal Style of statutory construction. It was also due to the specificity of the rules themselves, “the heaping up of technical language and of qualifications.”<sup>416</sup> Llewellyn believed that the added certainty obtained by restricting the role of courts through detailed rulemaking would always prove to be short-lived.<sup>417</sup> “Certainty [would] not [be] furthered by the manner of decision, still less by the manner of drafting, which ignores the fundamental role of the purpose and reason of a provision.”<sup>418</sup> Detailed legislation might provide some guidance today, but “[o]nly the rule which shows its reason on its face has ground to claim maximum chance of *continuing* effectiveness.”<sup>419</sup> By combining “an unmistakable indication of the sense and purpose of the provisions” together with “accurate statutory language” he believed that “uncertainty and doubt [would be] materially decreased.”<sup>420</sup> Although he knew that in a modern commercial code “[t]echnical language and complex statement [could not] be wholly avoided,” Llewellyn believed that it could “be reduced to a minimum.”<sup>421</sup> Thus, he argued that “[t]he task of law writing or legislation is to

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416. *Possible Code*, *supra* note 412, in KLP, *supra* note 29, at J.II.1.b, at 3 (lamenting this approach even in his own work on the Uniform Trust Receipts Act).

417. See LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 183 (“In a statutory rule intended as most statutes are—and as all rules of case law are—for lasting service, such insurance comes cheap at the price of using a zone rather than a surveyor’s line to border the rule.”); see also *Possible Code*, *supra* note 412, in KLP, *supra* note 29, at J.II.1.b, at 4 (“Language drawn in distrust or anxiety about courts’ understanding may accomplish its immediate purpose, but it paves the way with stumbling blocks within a decade.”); Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 31 (“[W]e shall do well to recall that much useful charting of travel can be done by way of indicating merely direction, across a country whose boundaries and even detailed landscape may still be blind to us.”).

418. 1941 DRAFT, *supra* note 87, at 27.

419. Llewellyn, *On the Good*, *supra* note 117, at 250.

420. 1944 DRAFT, *supra* note 219, at 70.

421. *Id.*



produce broad generalizations *which work out to satisfaction*.<sup>422</sup> With statutory purpose clearly stated, courts could be trusted "to give reasonable effect to reasonable intention of the language."<sup>423</sup> They would, he hoped "work out the effect of the statute quite as much in terms of its sense and purpose as in terms of its meticulously examined wording."<sup>424</sup>

The method whereby courts "work out" the broadly stated principles of rules over time is of course the method of the common law. In preparing the UCC Llewellyn attempted to draft a "common law code" that would in turn introduce common law creativity to statutory construction.<sup>425</sup> Although some might regard the notion of a "common law code" as self-contradictory or nonsensical,<sup>426</sup> Llewellyn believed that the common law manner of decision-making was "utterly necessary to the on-going rejuvenation of a semi-permanent body of written law, amid the inevitable changes of modern conditions."<sup>427</sup> Accordingly, the 1941 Draft prepared by Llewellyn provided that the statute

shall be deemed to state the common law principles of sales and of contracts to sell; and its provisions may be applied,

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422. Llewellyn, *Through Title*, *supra* note 164, at 190; *see also* Llewellyn, *On Warranty Part II*, *supra* note 146, at 381 (arguing that any uniform code of a whole field "makes judicial *development* (not mere 'interpretation') a necessity").

423. *Possible Code*, *supra* note 412, in KLP, *supra* note 29, at J.II.1.b, at 3.

424. 1941 DRAFT, *supra* note 87, at 25.

425. *See* Danzig, *supra* note 173, at 632 (remarking "that the provisions of Article II often take the form, not so much of legislation . . . as of a common law decision"); Wiseman, *supra* note 10, at 488 (arguing that Llewellyn wanted legislation to resemble common law rules); *cf.* Mooney, *supra* note 10, at 222 n.14 (referring to the UCC as a "common law code" because of its derivation from Llewellyn's close factual reading of case law and his emphasis on the actual conduct of courts).

426. *See, e.g.*, National Conference of Commissioners on Uniform State Laws, *Consideration in Committee of the Whole of the Revised Uniform Sales Act* (Sept. 1941) [hereinafter *1941 Transcript*], in KLP, *supra* note 29, at J.III.2.c, at 21 ("Now with regard to the common law, of course, the courts can develop that, but if we take the common law and put it into a statute, . . . and it seems to me it has got to be construed like a statute from that time on and cease to be construed like common law.") (comments of Mr. Bogert).

427. 1941 DRAFT, *supra* note 87, at 25.

developed or limited as in the application, development or limitation of common law principles by judicial decisions . . . .<sup>428</sup>

It was “in essence a fresh statement of common law principle, intended not to cripple, but to fertilize decision.”<sup>429</sup> As such, if life were to “unmistakably and persistently show the obsolescence of a policy declared in the Act,” then courts would be “free to move in the common-law manner toward cure.”<sup>430</sup> Although this explicit invitation to vary from the statutory text<sup>431</sup> did not survive the drafting process,<sup>432</sup> it nevertheless manifests Llewellyn’s hope that the Code would emulate the common law and in so doing change with the changing times. By “the laying down of rules *to be developed by the courts* as common law rules are themselves developed by the courts, and molded to the succession of unforeseen circumstances,”<sup>433</sup>

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428. *Id.* § 1-A. Section 2 of the 1940 Draft contained a nearly identical provision. It stated that the statute “shall be construed as stating true common law principles of sales and of contracts to sell” and that its provisions “may be applied or developed by analogy where such procedure would be judicially appropriate in the application of common law principles stated in judicial decisions in equivalent terms.” 1940 DRAFT, *supra* note 219, § 2. Professor Wiseman explains that the word “true,” modifying the phrase “common law principles,” was deleted from the statute at the suggestion of Professor Max Radin, who could not conceive of a “false” common law principle. *See* Wiseman, *supra* note 10, at 498 n.150.

429. 1941 DRAFT, *supra* note 87, § 1-A cmt., at 48; *see also* Llewellyn, *Federal Sales Act*, *supra* note 85, at 563 (describing the Code as “a freshly stated take-off from explicit, true common-law principle into the common-law type of development of true common-law principle”).

430. 1941 DRAFT, *supra* note 87, at 29.

431. William Schnader, president of the National Conference of Commissioners on Uniform State Laws, described section 1-A of the 1941 Draft as a “deliberate invitation to the courts . . . to treat the rules of the Act in the same manner as they treat common law statements of principle.” 1941 DRAFT, *supra* note 87, Foreword, at v.

432. This provision was succeeded by the much less radical section 1-102 which states that the Code “shall be liberally construed and applied to promote its underlying purposes and policies.” U.C.C. § 1-102(1) (1995). Although the Official Comment to this section clearly encourages statutory interpretation in the Grand Style, nothing in the current text of the UCC suggests that courts may treat the statute like a malleable common-law principle. An early version of the present section 1-102 can be found in the 1944 DRAFT, *supra* note 219, § 1.

433. Llewellyn, *Federal Sales Act*, *supra* note 85, at 562.

Llewellyn sought to forestall as much as possible the gradual process of obsolescence.<sup>434</sup> By drafting "legislation in terms of lasting principle, akin to case-law rules," he hoped to incorporate creative flexibility into the statute itself.<sup>435</sup>

#### F. *The Role of the Official Comments in UCC Interpretation*

Creating a commercial statute according to the theory of patent reason would require the drafters "to work the principles involved into simple, clear statement."<sup>436</sup> To further this goal, Llewellyn sought from the beginning of the Code project to "buttress" the UCC text with an authoritative interpretative aid, much as Samuel Williston had given an elaborate exposition of the Uniform Sales Act in his treatise on the law of sales.<sup>437</sup> Indeed, because he believed that an official commentary was "an integral part of any thought about a Code,"<sup>438</sup> he predicted that the Code project "[would] stand or fall on what it [got] in the way of buttressing from such an authoritative textbook."<sup>439</sup>

Llewellyn believed that such a commentary would assist Code construction in several important respects. First, the comments would help lawyers and others<sup>440</sup> to construe this lengthy and

434. See 1940 DRAFT, *supra* note 219, at 9 (asserting that a statute of "freshly stated principle" must "be developed by the courts as common law principles are developed, the lines of growth and the base lines being given, but not of necessity the detail, nor the necessary extensions").

435. Llewellyn, *Federal Sales Act*, *supra* note 85, at 562.

436. Karl N. Llewellyn, *Suggested Statement for a Foundation Project for a Uniform Commercial Code and Commentary* (Aug. 30, 1940) [hereinafter *Suggested Statement*], in KLP, *supra* note 29, at J.II.1.c, at 1.

437. See *Memo No. 1*, *supra* note 29, in KLP, *supra* note 29, at J.II.1.a, at 3 (remarking that the Code could not "hope for adoption or hope for use, if adopted, without the kind of buttressing by a book which Williston gave his Sales Act, and the Negotiable Instruments Law failed to get"); see also *Possible Code*, *supra* note 412, in KLP, *supra* note 29, at J.II.1.b, at 4 (remarking that "[t]he Sales Act has been tremendously helped by having [an adequate commentary]"); 1941 DRAFT, *supra* note 87, § 1-A cmt., at 49 (discussing the Sales Act and Williston's treatise); TWINING, *supra* note 6, at 327; Braucher, *supra* note 27, at 808-09.

438. *Possible Code*, *supra* note 412, in KLP, *supra* note 29, at J.II.1.b, at 4.

439. *Memo No. 1*, *supra* note 29, in KLP, *supra* note 29, at J.II.1.a, at 3.

440. See *Possible Code*, *supra* note 412, in KLP, *supra* note 29, at J.II.1.b, at 2 ("Commercial law requires to be for consumption by commercial men, as well as lawyers.").

complex legislation as a single, coherent statute.<sup>441</sup> As Llewellyn saw it, the comments would make “the bearing of all other relevant parts clear as to each particular part, so that lawyers and judges [would] have [a]ccess to the whole, whatever the matter before them.”<sup>442</sup> Indeed, he believed that “it [was] only in the Comments that the bearing of one section on other sections [could] be consistently explored, and the Act integrated, for use, into a working whole.”<sup>443</sup> Each comment would help facilitate this process of integration by providing cross-references to related Code sections.<sup>444</sup>

Second, Llewellyn hoped that an official commentary on the Code would further the cause of uniform construction. As the General Comment to the present UCC stresses, “[u]niformity throughout American jurisdictions is one of the main objectives of th[e] Code”

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441. See *id.* at 4 (arguing that a condition for “sound development” of the Code by the courts “is an *adequate* commentary which guides to the legal material concerned *as a whole*”). Indeed, the General Comment introducing the UCC today states that “this Comment and those which follow the text of each section” are set forth “to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.” U.C.C. 17 (1995) (General Comment of the National Conference of Commissioners on Uniform State Laws and the American Law Institute).

442. *Suggested Statement*, *supra* note 436, in KLP, *supra* note 29, at J.II.1.c, at 2.

443. 1941 DRAFT, *supra* note 87, § 1-A cmt. 3, at 50.

444. See *Statement*, *supra* note 116, in 1 N.Y. REPORT 1954, *supra* note 24, at 35 (asserting that the comments “cross-refer to almost everything else in the Code which bears upon the section in hand; they give clear cross-reference to the definition of any word of art whatever which the section may contain”); Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 782 (1953) (“By adding to the text of the statute a reasonably complete body of comment indicating its purpose, with cross-references to other related sections of the Code, the text and comment provide the material with which a man who has never seen the Code before can work his way with effectiveness.”); see also TWINING, *supra* note 6, at 330 (remarking that the comments “help to integrate the Code” and that “the cross-references make for speedy and efficient use”). But see WHITE & SUMMERS, *supra* note 9, § 4, at 13 (remarking that the cross-references are sometimes “not exhaustive”); Robert Skilton, *Some Comments on the Comments to the U.C.C.*, 1966 WIS. L. REV. 597, 606 (1966) (contending that the cross-references in the comments will “improve the chances that a Code section will be considered in context with due regard to its proper place in the whole” but that the references “may be concerned only with certain points” and so should not be viewed as exhaustive).

and the comments are provided “[t]o aid in uniform construction.”<sup>445</sup> Indeed, uniformity was thought so important that Llewellyn prominently featured it among the Code’s “[u]nderlying purposes and policies” set forth in UCC section 1-102.<sup>446</sup>

1. The comments as an official statement of legislative intent

Llewellyn knew, however, that “substantial uniformity of construction . . . depends in turn on uniformity of intent, which depends again in turn on an adequate record of the reason for and purpose of the language chosen.”<sup>447</sup> Thus, the goal of uniform interpretation could not be achieved unless the courts understood the same Code sections to mean the same thing. To that end, Llewellyn conceived of the comments as a sort of standardized legislative history that would help ensure application consistent with the distinct purposes behind the various Code provisions.<sup>448</sup>

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445. U.C.C. 17 (1995) (General Comment of National Conference of Commissioners on Uniform State Laws and American Law Institute). Earlier versions of these statements can be found elsewhere in the Code drafting history. *See, e.g.*, 1949 DRAFT, *supra* note 403, § 1-102 cmt. 3; *Selected Comments*, *supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 6.

446. U.C.C. § 1-102(2)(c) (1995). The goal of achieving uniform construction clearly appeared in the earliest Code drafts. *See, e.g.*, 1940 DRAFT, *supra* note 219, § 2 (stating that “the dominant purpose of the Act [is] to make uniform the law of those jurisdictions which enact it”); 1941 DRAFT, *supra* note 87, § 1-A (same); 1944 DRAFT, *supra* note 219, § 1 (describing uniformity as “[o]ne of the main purposes”). Recently, some commentators have questioned whether uniformity is a goal that can be advanced by the use of comments. *See* Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993, 1027-28 (1995).

447. 1941 DRAFT, *supra* note 87, § 1-A cmt., at 49. A similar remark can be found in *Selected Comments*, *supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 6 (adding also that the comments would “safeguard against misconstruction by mistake of intention”). Likewise, in 1941 Llewellyn argued in committee that “the only way to get a uniformity of construction is to have a uniformity of lines of construction, and the only way to have uniformity of lines of construction is to have an official comment that says what the lines of construction are intended to be.” 1941 *Transcript*, *supra* note 426, in KLP, *supra* note 29, at J.III.2.c, at 25.

448. *See* TWINING, *supra* note 6, at 326 (“The very full commentary which accompanies the official text is the main device for articulating and explaining the policies of the Code provisions.”); Danzig, *supra* note 173, at 623 (re-marking that the Code drafters sought to restrain state legislatures “from generating a unique legislative history by the prepackaged gloss provided in the

Initially, Llewellyn sought to accomplish this by formally acknowledging the authority of the comments in the statutory text. He knew that it was at the very least “anomalous” to search for legislative intent “in the acts or declarations of persons who have no official connection with the actual passage of the legislation.”<sup>449</sup> Although courts deciding cases under the Uniform Sales Act routinely cited to Williston’s treatise on sales as a primary source of authority, Llewellyn believed that “our doctrinal scheme of statutory construction” did not allow for “the delegation to private persons of essentially legislative power—e.g. the effective declaration of why legislative language means what it does not say, or does not mean what it does say.”<sup>450</sup> In section 1-A(2) of the 1941 Draft, Llewellyn sought to avoid these problems of delegation and authority. It provided that “the Legislature declares that the Act is adopted for the purposes and with the intent set forth in the Official Comments of the Conference of Commissioners on Uniform State Laws, and that those comments are to be used as a guide in the construction and application of this Act.”<sup>451</sup> Had it survived the drafting process, this section would have permitted Llewellyn and his fellow drafters to state the reason and purpose behind each Code section with undeniable authority.

This approach to the comments, however, failed to garner the necessary support in the sponsoring body.<sup>452</sup> Accordingly, the reference to the comments in the 1944 Draft was changed from being “mandatory and official” to being merely “permissive but

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form of official commentary”); Skilton, *supra* note 444, at 602 (“A particular reason for making use of the comments is that they may be viewed as part of the legislative history of the Code.”); Wiseman, *supra* note 10, at 499-500 (“Llewellyn’s Comments represented his effort not only to provide a substitute for the Williston treatise, to which the courts had regularly resorted in construing the 1906 Act, but also to provide an authoritative explanation of the ‘purposes and reasons’ that were essential to judicial application of the Code’s provisions in the Grand Style.”) (footnotes omitted).

449. 1941 DRAFT, *supra* note 87, § 1-A cmt., at 49.

450. *Id.*

451. *Id.* § 1-A(2). This draft attributes the comments to the National Conference of Commissioners on Uniform State Laws and not the American Law Institute because it was prepared in 1941. The Institute did not agree to participate in the revision of the Uniform Sales Act until 1942. See Braucher, *supra* note 27, at 800.

452. See 1941 Transcript, *supra* note 426, in KLP, *supra* note 29, at J.III.2.c, at 21-29.

suggested.” Section 1(2) of the 1944 Draft provided that the comments “may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and application.”<sup>453</sup> Although it lacked the express delegation found in the 1941 Draft, Llewellyn still saw this provision as “explicitly authoriz[ing] reference to [the] Comments to determine the reasons, purposes and policies which should govern judicial decisions.”<sup>454</sup> Indeed, because the statute invited courts to consult the comments, Llewellyn believed that the comments enjoyed “a status more than equivalent to that of a Committee Report on the basis of which a proposed bill has been enacted by a legislature.”<sup>455</sup>

In the 1949 Draft, the numeration of all the Code sections was changed so that what had been section 1(2) of the 1944 Draft became section 1-102(2). Although the operative language of this provision remained exactly as before,<sup>456</sup> a new comment was added. Like its predecessor, the comment to section 1-102 suggested that the comments as a whole would “aid in uniform construction” of the Code.<sup>457</sup> It added, however, that because the comments “will have been before the Congress or Legislature at the time of adoption” they would in fact “disclos[e] the uniform intent of the lawmaking bodies in enacting the Code.”<sup>458</sup>

Llewellyn’s prediction that legislatures would somehow approve of the comments in the process of enacting the Code itself did not come true. “In some states the comments were not placed before the enacting body prior to adoption of the Code. Indeed, some of the present comments were not even in existence at the time the section to which they are now appended was adopted.”<sup>459</sup> Thus, the use of

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453. 1944 DRAFT, *supra* note 219, § 1(2).

454. *Id.* at 70.

455. *Id.* at 72; *see also Selected Comments, supra* note 84, in KLP, *supra* note 29, at J.X.2.h, at 2.

456. The only change that took place between the two drafts of this provision was the deletion of the word “joint” modifying the word “comments,” and removal of the brackets around “The National Conference of Commissioners on Uniform State Laws.” *Compare* 1944 DRAFT, *supra* note 219, § 1(2), *with* 1949 DRAFT, *supra* note 403, § 1-102(2).

457. 1949 DRAFT, *supra* note 403, § 1-102 cmt. 3.

458. *Id.*

459. WHITE & SUMMERS, *supra* note 9, § 4, at 13-14 (footnote omitted); *see*

the comments cannot be justified, as Llewellyn had hoped, in terms of an express political endorsement.<sup>460</sup> Still, the changes Llewellyn made in the 1944 and 1949 Drafts demonstrate the advantages of a well-executed strategic retreat. By removing the language of express delegation from the statutory text, Llewellyn was able to satisfy his critics. He then used the language in one particular comment to declare the authority of the comments as a whole.<sup>461</sup>

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*also* TWINING, *supra* note 6, at 326 (“The term ‘Official Comments’ is sometimes used, but this may be misleading in that they have been formally adopted neither by the floors of the sponsoring bodies nor by legislatures which have enacted the Code and in some cases were not even made available to legislators.”); Peter A. Alces & David Frisch, *Commenting on “Purpose” in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 450 (1997) (remarking that the reporter who drafts the comments “though anointed by the ALI and NCCUSL, has not been *elected* to write the law and has no legislative authority beyond the states’ enactment of the black letter that has been the subject of careful deliberations”); Skilton, *supra* note 444, at 604 (“Embarrassing questions multiply if one subjects the Comments to the standards often imposed for recourse to legislative history. In some states the revised Comments had not yet been drafted at the time of the Code’s adoption. In others it is highly doubtful that the Comments were laid before the legislators in the form of a committee report explaining the legislation which the legislators were asked to adopt.”) (quoting JOHN HONNOLD, SALES AND SALES FINANCING 19 (2d ed. 1962)); Walker, *supra* note 446, at 1021 (paraphrasing Easterbrook and arguing that “marginal writing,” like the Official Comments, “is even more difficult to legitimize [than typical legislative history] because the authors lack authority to enact legislation and ordinarily, there is no formal relationship between authorship and enacting power”); Sean Michael Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 962 (1990) (remarking that the comments “cannot accurately be described as legislative history in the traditional sense, as there is little evidence that the state legislatures gave any extensive consideration to them when adopting the Code”) (likewise citing JOHN HONNOLD, SALES AND SALES FINANCING, *supra*, at 19).

460. See Walker, *supra* note 446, at 1033 (concluding that “marginal writing,” such as the Code comments, “cannot be placed within any category of authority approved heretofore by the process of democratic government, and therefore, should not be given weight”). *But see* TWINING, *supra* note 6, at 329-30 (commenting on the utility of comments); Skilton, *supra* note 444, at 602-03; Hannaway, *supra* note 459, at 985 (The author argues for a “continuum” theory of legal authority and concludes that “[t]he truth of the matter is that the Comments *are* authoritative. To say that legislatures did not enact them says nothing more than that their authority is not the same as a statute’s.”); *infra* notes 634-644 and accompanying text.

461. While this “bootstrapping” has not escaped the eyes of some critics, see JOHN HONNOLD, SALES AND SALES FINANCING, *supra* note 459, at 18, it has



a. *the ABA and the comments*

Despite this clever drafting, the quasi-legislative status conferred upon the comments remained a concern among some participants in the Code project. Beginning in 1947, the American Bar Association's Section for Corporation, Banking and Business Law began to study successive Code drafts as they became available.<sup>462</sup> In May 1950, the governing Council for this ABA section adopted a series of resolutions asking the sponsoring bodies to delay final approval of the Code in order to allow for further study.<sup>463</sup> In adopting these resolutions the Council observed that many had objected "to the conferring upon the Comments any form of official legislative status, as is apparently accomplished by Section 1-102(2)."<sup>464</sup> In September 1950, the Section's Committee on the Proposed Commercial Code<sup>465</sup> issued a report that was favorably disposed toward the statute but which again urged further study.<sup>466</sup> The Committee spoke enthusiastically in support of the Code comments.<sup>467</sup> Indeed, given their apparent importance, the Committee urged the drafters to

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not prevented widespread use of the comments among courts and practitioners. See Skilton, *supra* note 444, at 601.

462. See Walter D. Malcolm, *The Proposed Commercial Code, A Report on Developments During the Period from May 1950 Through February 1951 Particularly With Reference to Activities of the Section on Corporation, Banking and Business Law of the American Bar Association*, 7 BUS. LAW. 113, 114 (1951) [hereinafter Malcolm, *Developments*].

463. See *id.* at 113-17. A copy of the Council's resolutions can also be found in KLP, *supra* note 29, at J.XII.1.1. Other bar and trade associations also urged the Institute and National Conference to delay final action on the Code. See, e.g., Whitney North Seymour, *Annual Report of the President*, 5 THE RECORD OF THE BAR OF THE CITY OF NEW YORK 268, 295 (1950).

464. Malcolm, *Developments*, *supra* note 462, at 115.

465. This committee was created by, and served within, the ABA's Section on Corporation, Banking and Business Law for the special purpose of studying the proposed UCC. See *Report of the Committee on the Proposed Commercial Code*, 5 BUS. LAW. 142 (1949-1950).

466. Malcolm, *Developments*, *supra* note 462, at 120.

467. See *id.* at 129 ("To us it is elementary that in the best drawn, as well as in poorly drawn statutes, it is always helpful if some statement or comment is available to give background, history, reference, examples or explanation serving the simple purpose of throwing more light on the problem than the bare words of the statute can give itself."). By way of contrast, the Association of the Bar of the City of New York thought that the statutory text "should be made 'clear without the crutch of official comments.'" *Id.* at 128.

devote “almost as much care” to the preparation of the comments as to the statutory text itself.<sup>468</sup> Still, the Committee asserted that the comments “should not be part of the statute itself,—enacted as law by legislatures.”<sup>469</sup> Moreover, it recommended that the language in

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468. *Id.* at 129. The need for the comments to be drafted with great care was also expressed by a group of Harvard Law School faculty chaired by Robert Braucher, *see id.* at 151-53, and later by Walter Malcolm, chair of the ABA Committee, at a meeting of the Enlarged Editorial Board to which he was invited to attend in January 1951. *See Proceedings of Larger Editorial Board of the American Law Institute* (Jan. 1951) [hereinafter *1951 Proceedings*], in KLP, *supra* note 29, at J.XIII.1.e, at 171. The faculty of the Harvard Law School also expressed concern that in some instances the comments appeared to “go beyond the terms of the statute, adding provisions which should be enacted as part of the statute” and that they sometimes “attempt[ed] to modify the plain meaning of the statutory language.” Malcolm, *Developments*, *supra* note 462, at 152. This overreaching on the part of the comments continued to be a source of concern during the New York Law Revision Commission’s study of the Code. *See* N.Y. REPORT 1956, *supra* note 24, at 26-27, 357-58. Indeed, it remains a problematic feature of the statute even today. *See, e.g.*, Skilton, *supra* note 444, at 628 (“Some comments obviously, some comments subtly, add to or take away from the text. It is often hard to determine the point at which ‘explanation’ begins to take over the work that should be done by the text.”); Hannaway, *supra* note 459, at 975 (“In a few instances, the Comments prescribe requirements that are so specific that they overstep their proper role as interpretive guides.”). Llewellyn believed that, initially, in order to garner support for the Code, the comments would have to both explain the various Code provisions and justify the policy choices contained therein. He hoped, however, that in their final version the comments would be purely expository in nature. *See* 1941 DRAFT, *supra* note 87, at 3, 30; 1941 Transcript, *supra* note 426, in KLP, *supra* note 29, at J.III.2.c, at 21 (“Next year, when the draft comes back to you, the comments will have a very different form. They will be expository and nothing more. They will not argue, they will not defend, they will simply state what is being done.”). This original vision for the comments was never fully realized. Some of the present comments are plainly expository while others are clearly argumentative and promotional. *See* Hannaway, *supra* note 459, at 974; Skilton, *supra* note 444, at 608. This in part accounts for the fact that at times the comments appear to go beyond the statutory text. *See also* WHITE & SUMMERS, *supra* note 9, § 4, at 13.

469. Malcolm, *Developments*, *supra* note 462, at 129. In an apparent reversal from the position taken in the resolutions adopted by the Section in May 1950, the Committee concluded that section 1-102(2) as then drafted did not codify the comments or confer any form of legislative status upon them. *See id.* This change may have been in response to Llewellyn’s sustained argument that section 1-102(2) simply offered the comments “as a possible guide and a permissive guide to the reasons and policies of the statute.” *Transcript of Discussion on the Uniform Commercial Code Joint Meeting, The American Law*

section 1-102(2) referring to the "underlying reasons, purposes and policies of the Act" be dropped and that the words "may be consulted" be substituted for the phrase "may be used as a guide."<sup>470</sup> As the Committee's chairman, Walter Malcolm, later explained, this change was suggested in order "to minimize the quasi-legislative standing of the comments, if they have any such standing."<sup>471</sup>

In response to some of the ABA's concerns that "the Reporters circulated in late December 1950, a proposed amendment of Section 1-102 embodying a number of suggestions made by [ABA] Section representatives."<sup>472</sup> Representatives from the ABA including Walter Malcolm discussed this proposal at a meeting of the UCC's Enlarged Editorial Board held in January 1951.<sup>473</sup> During this meeting, Malcolm proposed that a provision be added to section 1-102 "to the effect that in the event of any conflict between the statutory language and the comments, the statutory language would control."<sup>474</sup> Taking the ABA's suggestions into account, section 1-102 was revised and approved by the Enlarged Editorial Board in March 1951.<sup>475</sup> Accordingly, section 1-102(3)(f) of the Spring 1951 Draft provided:

The Official Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted in the construction and application of this Act but where text and comment conflict, text controls.<sup>476</sup>

Oddly enough, no comments accompanied this draft of the Code.

In May and September 1951, the Institute and the National Conference gave final approval to the text of the Uniform Commercial

*Institute and the National Conference of Commissioners on Uniform State Laws* (May 1950) [hereinafter *1950 Transcript*], in KLP, *supra* note 29, at J.XII.1.i, at 7.

470. Malcolm, *Developments*, *supra* note 462, at 129-30.

471. *1951 Proceedings*, *supra* note 468, in KLP, *supra* note 29, at J.XIII.1.e, at 165.

472. Malcolm, *Developments*, *supra* note 462, at 179.

473. See *1951 Proceedings*, *supra* note 468, in KLP, *supra* note 29, at J.XIII.1.e, at 81-171. For the text of the proposal see *id.* at 84-85. For a list of meeting participants, see *id.* at 2-3.

474. *Id.* at 170.

475. See *Section 1-102 Purposes; Rules of Construction* (March 1951 Draft), in KLP, *supra* note 29, at J.XIII.1.c; Schnader, *supra* note 27, at 6-7.

476. SPRING 1951 DRAFT, *supra* note 21, § 1-102(3)(f).

Code.<sup>477</sup> Additional editorial work and preparation of the comments delayed publication of a Text and Comments Edition of the UCC until 1952.<sup>478</sup> In spite of the changes made to the text of section 1-102(3)(f) that followed from the ABA's involvement, the comment explaining this provision remained exactly as it had in the 1949 Draft discussed above.<sup>479</sup> Just as before, the comment assumes that all of the comments "will have been before the Legislature at the time of the adoption" of the Code.<sup>480</sup> Moreover, like its predecessor from 1949, the 1952 comment explains that the purpose of section 1-102(3)(f) is to recommend the comments "to the consideration of the courts to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction by mistake of legislative intention."<sup>481</sup>

Remarkably, through more than ten years of drafts and revisions, Llewellyn's original plan for the comments as an interpretive aid remained largely intact. By embracing the modest changes suggested by the ABA and others, Llewellyn was able to gain support for the permissive use of the comments. Although section 1-102(3)(f) did not require courts to refer to the comments, the statutory text still acknowledged their authority. Even with this diminished status Llewellyn expected that judges and lawyers would rely on the comments and interpret the Code "according to its reason" in the Grand Style.

*b. the New York Law Revision Commission and the comments*

Despite this apparent triumph for Llewellyn's approach to statutes, the language in section 1-102 expressly authorizing use of the comments did not survive the drafting process. In 1953 the New York Law Revision Commission began a long and intensive review of the Code that included public hearings and consultations with numerous bankers, lawyers, manufacturers, and other interested

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477. See Herbert F. Goodrich, FOREWORD, UNIFORM COMMERCIAL CODE: FINAL TEXT EDITION v (Nov. 1951), reprinted in 12 U.C.C. DRAFTS, *supra* note 21, at 379; see also Schnader, *supra* note 27, at 7.

478. See Braucher, *supra* note 27, at 800; see also Herbert F. Goodrich, FOREWORD, 1952 OFFICIAL DRAFT, *supra* note 22, at v.

479. See *supra* notes 456-61 and accompanying text.

480. 1952 OFFICIAL DRAFT, *supra* note 22, § 1-102 cmt. 2.

481. *Id.*

parties.<sup>482</sup> The Commission laid aside its other work and employed eighteen special consultants in addition to its regular staff in order to study each UCC provision in detail.<sup>483</sup>

During the Commission's work on the Code, the sponsoring bodies did not sit by as idle or indifferent observers. Instead, the Code drafters sought to respond to many of the Commission's criticisms and concerns before it issued its final report.<sup>484</sup> As a result of this work, the Editorial Board proposed a number of amendments which the sponsoring bodies approved and published in January 1955 as Supplement No. 1 to the 1952 Official Draft of Text and Comments of the Uniform Commercial Code.<sup>485</sup> In Supplement No. 1, what had been section 1-102(3)(f) of the 1952 Official Draft became section 1-102(5), however, the language of the provision remained exactly as before.<sup>486</sup>

By cooperating with the New York Law Revision Commission during its period of study, the Code drafters were able to resolve a number of problems raised concerning the statute, but not all of them. In February 1956, the Commission published its final report in which it endorsed the goal of a single code bringing together different aspects of commercial law. The Commission concluded, however, that the UCC was "not satisfactory in its present form and [could not] be made satisfactory without comprehensive re-examination and revision in the light of all critical comment obtainable."<sup>487</sup> In the body of its final report, the Commission criticized the Code's "extensive use of 'Comments' to fill out the skeleton of the statute itself."<sup>488</sup> The Commission also noted "a number of

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482. For a collection of letters and memoranda received by the Commission and stenographic reports of the public hearings see 1-2 N.Y. REPORT 1954, *supra* note 24.

483. See 1 N.Y. REPORT 1954, *supra* note 24, at 7-9.

484. For a summary of the interaction between the reactivated Editorial Board and the Commission during this time see John M. Breen, *The Lost Volume Seller and Lost Profits Under U.C.C. § 2-708(2): A Conceptual and Linguistic Critique*, 50 U. MIAMI L. REV. 779, 877-78 (1996).

485. See SUPPLEMENT NO. 1 to the 1952 OFFICIAL DRAFT OF TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE (1955) [hereinafter SUPPLEMENT NO. 1], *reprinted in* 17 U.C.C. DRAFTS, *supra* note 21, at 307.

486. See *id.* at 3.

487. N.Y. REPORT 1956, *supra* note 24, at 68.

488. *Id.* at 25-26.

instances of apparent conflict between text and Comments” as well as “instances in which the Comments appear to qualify the text or to add further rules not supported by the text.”<sup>489</sup> In so doing, the Commission simply reiterated a concern that had been raised by the ABA and others involved in the drafting process,<sup>490</sup> as well as by the Commission’s own expert consultants.<sup>491</sup> More importantly, the Commission found that “the direct invitation to consult the Comments” contained in section 1-102(5) was “unnecessary” in that “[e]xisting principles of statutory construction would . . . permit recourse to the Comments to resolve ambiguities.”<sup>492</sup> Further, the Commission feared that, by expressly encouraging courts to refer to the official comments, section 1-102(5) “could lead to unprecedented

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489. *Id.* at 26.

490. *See supra* notes 462-476 and accompanying text.

491. Professors Carl Fulda of Rutgers University and Edwin Patterson, one of Llewellyn’s colleagues at Columbia University, were two of the special consultants hired by the Commission to study the Code. Although each reviewed section 1-102(f) of the 1952 Official Draft, *see* 1 N.Y. REPORT 1955, *supra* note 24, at 57-64 (analysis of Patterson), 156-63 (analysis of Fulda), neither objected to use of the comments. Indeed, Professor Fulda observed that even if the comments were not brought before the legislature they could still be construed “broadly speaking, as part of the ‘legislative history’” behind the Code. *Id.* at 160. He noted that similar extrinsic aids had been used “where courts considered the history of the times, the circumstances surrounding the passage of the statute and the evils to be cured thereby.” *Id.* (footnote omitted). Accordingly, Fulda concluded that use of the comments would be permitted under New York law, “it being, of course, necessary to guard against inconsistencies between the Comments and the texts.” *Id.* at 163. Professor Patterson likewise asserted that the Code would be “seriously impaired” if “accompanied by ‘official’ comments which add to the rule of the text, or subtract from it.” *Id.* at 58. Moreover, Patterson preferred that the reason for each Code provision “should be indicated in the text” rather than in a separate comment. *Id.* at 64. Still, although Patterson did not object to the comments as a means of expressing legislative purpose, he did object to the comments as “an ‘official’ or mandatory source of interpretation.” *Id.* Citing his own experience in statutory drafting, Patterson added that to submit the comments for legislative approval might “arouse more controversy and take longer to get agreement on, than would the text itself.” *Id.* (footnote omitted). Patterson’s support for the comments, or rather his lack of objection to them, appears to be based on the belief that, even with the comments, courts would still have to find or invent the reasons for the provisions “in about the same way that they now are, for case law.” *Id.*

492. N.Y. REPORT 1956, *supra* note 24, at 27.

use of the Comments to expand and qualify the text."<sup>493</sup> As such, it could not approve of section 1-102(5).

## 2. The comments as an unofficial interpretive aid

Rejection of the statute by the New York legislature would have been fatal to the success of the Code project.<sup>494</sup> Accordingly, in order to gain New York's support, the Code drafters were highly receptive to many of the criticisms and suggestions offered by the New York Law Revision Commission.<sup>495</sup> Although the exact degree to which the work of the Commission influenced subsequent drafts of the Code may never be known,<sup>496</sup> the Editorial Board clearly accepted the majority of the Commission's recommendations.<sup>497</sup> In the

493. *Id.* In the Excerpts from the Proceedings of the Commission published in the same volume, *see id.* at 355-485, the Commission likewise noted its disapproval of section 1-102(5) "as inviting to an unprecedented extent reliance on 'Comments' which have not been considered by Legislatures." *Id.* at 357-58. The Commission further remarked that the provision did "not deal adequately with the question of Comments that add to the text of the Code." *Id.* at 358.

These criticisms were not new. Other critics had expressed similar concerns about the role of the comments long before the Commission had begun to study the Code. *See supra* notes 447-481 and accompanying text. Moreover, the Commission had made its own views known a year before it issued its final report. In its Interim Report on the Uniform Commercial Code dated February 1, 1955, *see* 1 N.Y. REPORT 1955, *supra* note 24, at 3-30, the Commission strongly criticized section 1-102(3)(f) of the 1952 Official Draft. It found that the comments were "unprecedented both in their detail and in the quantity of elaboration" given to the statutory text. *Id.* at 22. The Commission likewise remarked that "[a] great deal of the content of the Comments appears to add to the text" and that some passages "completely alter the purport of the text." *Id.* Thus, given the reliance invited by the comments, the Commission questioned "the propriety of tendering dissertations of this kind to the courts and to lawyers as official explanation for legislative intent, confirmed as such by explicit provision even though it be stated only as permission to consult the Comments." *Id.* A year later section 1-102 still expressly authorized the use of the comments, but the Commission's views had not changed. The comments may well have enjoyed the status of a committee report (as Llewellyn had wanted) but the Commission was still uncomfortable with such a status.

494. *See supra* notes 23-27 and accompanying text.

495. *See* TWINING, *supra* note 6, at 295; WHITE & SUMMERS, *supra* note 9, § 4, at 11.

496. Twining suggests that such an evaluation would involve "some intractable methodological problems." TWINING, *supra* note 6, at 296.

497. *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS

fall of 1956, the Editorial Board completed its "thorough-going re-examination of the Code" in light of the Commission's work<sup>498</sup> and published the 1956 Recommendations of the Editorial Board for the Uniform Commercial Code.

The 1956 Recommendations contained the entire text of the 1952 Official Draft but did not include a set of the official comments. Instead, an Explanatory Reason or Reason for Recommendation followed each section where some revision was suggested. Many Code sections were unchanged from the 1952 Official Draft. In those sections that were revised, however, the language deleted from the 1952 Official Draft appeared in brackets while newly added language appeared in italics. Although the 1956 Recommendations included the substantive changes already adopted in Supplement No. 1, the numbering of Code sections was now based on the 1952 Official Draft. Thus, what had become section 1-102(5) in Supplement No. 1 appeared once again as section 1-102(3)(f).

In the 1956 Recommendations, the Editorial Board deleted section 1-102(3)(f) from the UCC text. As a result, use of the comments was no longer expressly permitted by the Code text itself. In the explanatory Reason for Recommendation that followed, the drafters noted that the New York Law Revision Commission had recommended the deletion of section 1-102(3)(f). The drafters asserted, however, that the section had been deleted "because the old comments were clearly out of date and it was not known when new ones could be prepared."<sup>499</sup> This explanation may account for the deletion of section 1-102(3)(f) in the 1956 Recommendations.<sup>500</sup> It cannot,

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ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-SIXTH YEAR 100-01 (1957) [hereinafter 1957 HANDBOOK] (denoting William Schnader's estimation that the drafters "adopted fully ninety per cent [sic] of the recommendations of the New York Law Revision Commission in one form or another"); Malcolm, *Panel Discussion*, *supra* note 27, at 78.

498. See Herbert F. Goodrich, FOREWORD, 1956 RECOMMENDATIONS, *supra* note 23, at IV; see also Braucher, *supra* note 27, at 804; Schnader, *supra* note 27, at 9.

499. 1956 RECOMMENDATIONS, *supra* note 23, § 1-102, Reason for Recommendation.

500. There is some reason to doubt this claim. If Walter Malcolm was correct in his assertion that the vast majority of changes recommended by the New York Law Revision Commission were not substantive in nature, but only minor points of drafting, see Malcolm, *Panel Discussion*, *supra* note 27, at 78,



however, account for the absence of this provision from any subsequent version of the UCC to which revised comments were appended. For example, in 1958 the sponsoring bodies published a new edition of the statute, the Uniform Commercial Code: 1957 Official Text with Comments. The comments published with this version of the statute were "a revision of the original comments" accompanying the 1952 Official Draft.<sup>501</sup> As such, the comments were plainly not out of date, yet nothing in the UCC text authorized their use.

Since the publication of the 1957 Official Text, the sponsoring bodies have published numerous revisions of the UCC. Neither section 1-102(3)(f) nor its functional equivalent has appeared in any subsequent version of the statute.<sup>502</sup> Accordingly, although the

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then the comments to the 1952 Official Draft may have been somewhat out of date relative to the text of the 1956 Recommendations, but not necessarily. *But see* TWINING, *supra* note 6, at 463 n.84 (noting that "it was in the interests of [the drafters] . . . to play down the extent of disagreement [with the Commission]"). Thus, it is reasonable to conclude that section 1-102(3)(f) was deleted not because the comments were archaic, but because the Commission objected to the clear authority given to the comments in the statutory text.

501. *See* UNIFORM COMMERCIAL CODE: 1957 OFFICIAL TEXT WITH COMMENTS 1 (1958) [hereinafter 1957 OFFICIAL TEXT], *reprinted in* 19 U.C.C. DRAFTS, *supra* note 21, at 33.

502. In 1963, the sponsoring bodies published the Uniform Commercial Code: 1962 Official Text with Comments. *See* UNIFORM COMMERCIAL CODE 1962 OFFICIAL TEXT WITH COMMENTS (1963), *reprinted in* 22 U.C.C. DRAFTS, *supra* note 21, at 285. Unlike its predecessors, the 1962 Official Text was introduced by a General Comment that summarized the UCC drafting history, and acknowledged the work of many of the individuals involved in the Code project. Although this General Comment as a whole was new, the first paragraph was not. It provides as follows:

This comment and those which follow are the Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction these Comments set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.

*Id.* at 1. In only slightly varied form, this language appeared in comment 3 to section 1-102 of the 1949 Draft. Of course, unlike the 1962 Official Text, section 1-102(2) of the 1949 Draft expressly authorized use of the comments "as a guide" to "construction and application" of the Code. *See* 1949 DRAFT, *supra*

comments continue to enjoy wide use among lawyers and judges,<sup>503</sup> the status of the comments remains in doubt. Unlike the statutory text itself, the comments have not received the approval of any legislature. Still, the comments are more than the idle gossip of strangers who like to talk about things to which they have no connection. Clearly, they enjoy some measure of authority beyond the commentary of those who did not participate in the Code project. Absent, however, some express authorization to use the comments, like that found in the text of the earlier drafts, the textualist approach to statutory interpretation cannot account for this practice.

*G. The Attempt to Prohibit the Use of Legislative History in UCC Interpretation*

We have seen that in order to foster interpretation of the UCC in the Grand Style of common law courts, Llewellyn sought to provide judges with a clear statement of statutory purpose. Paradoxically, Llewellyn believed that such purposive interpretation would both promote uniform construction and avoid statutory obsolescence. We have also seen that a primary means he employed for encouraging this approach was the use of an official, authoritative commentary. The historical record plainly shows that up until the time of the New

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note 403, § 1-102(2). Comment 3 to this section provided:

Uniformity throughout American jurisdictions is the objective of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction, these Comments (which will have been before [the Congress] [the Legislature] at the time of the adoption of this Act) set forth the purpose of various provisions of this Act, thus disclosing the uniform intent of the law-making bodies in enacting the Code. Therefore, subsection (2) of the present section recommends these Comments to the consideration of the courts to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction by mistake of legislative intention.

*Id.* § 1-102 cmt. 3. The present UCC also contains an introductory General Comment, a slightly altered version of the Comment to the 1962 Official Text. See U.C.C. 17 (1995) (General Comment of the National Conference of Commissioners on Uniform State Laws and the American Law Institute).

503. See, e.g., *WHITE & SUMMERS*, *supra* note 9; *Amwest Sur. Ins. Co. v. Republic Nat'l Bank*, 977 F.2d 122, 128 (4th Cir. 1992); *Daitcom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578 (10th Cir. 1984); *Weathersby v. Gore*, 556 F.2d 1247, 1256 (5th Cir. 1977).

York Law Revision Commission's Report, Llewellyn studiously worked to secure some form of quasi-legislative standing for the comments.

### 1. Llewellyn's skeptical view of legislative intent

Obtaining such an official endorsement for the comments was important to Llewellyn in part because he rejected the frequent appeals made to legislative intent popular in his day.<sup>504</sup> Indeed, Llewellyn shared with the legal realists of his generation the same deep-seated skepticism concerning the existence of legislative intent that the proponents of new textualism now assert in our own day.

To be sure, Llewellyn did not regard the idea of legislative intent as wholly unintelligible. For Llewellyn "talk of 'intent' [was] reasonably realistic" where there were "ideas consciously before the draftsmen," such as "a known evil to be cured, a known goal to be attained, a deliberate choice of one line of approach rather than another."<sup>505</sup> Llewellyn conceded that legislative history containing this sort of information could "have significance" in the interpretive process.<sup>506</sup> Beyond this level of generality, however, he believed that legislative intent was "frequently non-existent."<sup>507</sup> "Few are the legislatures," he asserted, "who, in passing any bill, pass it with any real 'intention,' as to the question which is now before the court."<sup>508</sup> Legislative history that lacked this sort of particularity could not realistically qualify as legislative intent nor could it function as such. Thus, Llewellyn concluded that, in the vast majority of cases, talk of legislative intent was illusory. It amounted to nothing more than a "pure will-o'-the-wisp."<sup>509</sup>

Furthermore, in those few cases in which legislative intent was real and could be comprehended, Llewellyn feared that it would act as "a false guide as a statute ages."<sup>510</sup> Avoiding statutory obsolescence in the face of changed and changing circumstances was, of

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504. See LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 528-29.

505. Llewellyn, *Remarks*, *supra* note 86, at 400.

506. *Id.*

507. Llewellyn, *Current Recapture*, *supra* note 82, at 227.

508. *Id.* at 228.

509. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 529.

510. *Id.*

course, one of Llewellyn's primary concerns in drafting the UCC.<sup>511</sup> He knew that over time a statute must "deal with circumstances utterly un contemplated at the time of its passage."<sup>512</sup> An interpretive approach that "run[s] primarily in terms of historical intent" cannot "mak[e] sense" of the statute "in the light of the unforeseen."<sup>513</sup> Contrary to Llewellyn's ambition to create a "semi-permanent" piece of legislation,<sup>514</sup> reliance on the statute's original meaning reflected in the drafting history might hasten the process of obsolescence. Accordingly, Llewellyn believed that, as a statute ages, "the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation."<sup>515</sup>

## 2. Legislative history and verbal formalism

This suggests that Llewellyn may also have feared that recourse to historical sources would degenerate into a kind of rigid formalism in which words would matter more than policy. As noted above, Llewellyn envisioned a creative role for courts in statutory construction.<sup>516</sup> Like the dynamic theorists of today, Llewellyn thought that courts should further the underlying purposes of statutes rather than mechanically apply legal formulae. Nevertheless, he recognized that legal rules had to be expressed through the medium of language. "The effectuation of [legal] purpose[s] . . . *must be sought by means of verbal formulation.*"<sup>517</sup> However, focusing on the "fixed

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511. See *supra* Part III.D.

512. Llewellyn, *Remarks*, *supra* note 86, at 400.

513. *Id.* at 401.

514. See *supra* Part III.D.

515. Llewellyn, *Remarks*, *supra* note 86, at 400; see also LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 83, at 528-29 (arguing that instead of fixating on legislative history as evidencing some compelling legislative intent, the court should "settle down" to its "own real and responsible business of trying to make sense out of the legislation, so far as text and context may allow"). Clearly, this passage demonstrates that Llewellyn believed that an understanding of context was important to statutory interpretation in the Grand Style. For the reasons explained above, however, in preparing the UCC, Llewellyn unfortunately chose to exclude the context of legislative history from the interpretive process.

516. See *supra* Part III.C.3.a.

517. Llewellyn, *Realistic*, *supra* note 138, at 451; see also Llewellyn, *What Price*, *supra* note 138, at 713 (observing in his "pseudo-history" of contract

language” of legislative history in addition to that of the statutory text could impair the purposive imagination of courts and lead to a barren sort of legal calcification.<sup>518</sup> It was, in short, “bad engineering to force all [interpretive] matters into the framework of a supposedly fixed and absolute legislative intent . . . .”<sup>519</sup> Instead, courts should look “to the essential reason of the rules laid down, as in the case of common law principles.”<sup>520</sup>

### 3. The authority of history at common law and in the interpretation of statutes

In preparing the UCC, Llewellyn tried to create a statute that reconciled his high regard for statutory purpose with his dislike of statutory history and legislative intent. History, of course, lay at the heart of the common law method in that it required courts to look back to past decisions as a source of law for the present day. Some courts simply retrieved the rules of earlier cases and mechanically applied them to the problems at hand, often “with regrettable consequence.”<sup>521</sup> At its best, however, the common law was not a prisoner

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law that there is a “process of legal rigidification and divergence of legal from non-legal” and that “[l]aw *must* grow fixed, in most of its parts”). As Llewellyn remarked in the comments that accompanied his 1941 Draft of the Revised Uniform Sales Act: “The policies of our law require that official reasons be fixed officially in fixed words. . . .” 1941 DRAFT, *supra* note 87, § 1-A cmt., at 50.

518. Cf. Llewellyn, *What Price*, *supra* note 138, at 705 (referring to the “rigidification of rule and of imagination—which is part of the price men commonly pay for a new systematization”).

519. 1941 DRAFT, *supra* note 87, § 1-A cmt., at 47.

520. *Id.*; see also Llewellyn, *Federal Sales Act*, *supra* note 85, at 561-62 (describing his revision of the Uniform Sales Act at the time as “legislation which is *declaratory of principle*, which is in essence and intent the laying down of rules *to be developed by the courts* as common law rules are themselves developed by the courts, and molded to the succession of unforeseen circumstances”).

521. Llewellyn, *Through Title*, *supra* note 164, at 172 (discussing how under the Uniform Sales Act the rule regarding passage of title is often “applied blindly to situations in which a different implication is concerned, with regrettable consequence”) (footnote omitted); see also Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 23 & n.50 (referring to the “wooden, persistent grinding out of injustice” and citing to Roscoe Pound’s famous law review article in which he coined the phrase “mechanical jurisprudence”); LLEWELLYN, *CASEBOOK*, *supra* note 183, at x (referring to “the triumph of mechanical, deductive reasoning from formulae which crush to death some needed, budding,

to the past, nor was it a captive of verbal formalism. Instead, it both “look[ed] back upon the heritage of doctrine and . . . forward into prospective consequences and prospective further problems . . . .”<sup>522</sup> Common law courts in the Grand Style engaged in “that on-going process of check-up and correction, and further check-up and correction, which is the method and the very life of case-law.”<sup>523</sup> While they “carefully regarded” precedent,<sup>524</sup> courts in the Grand Style were engaged in a “future-directed quest,” namely, “the on-going production and improvement of rules which make sense on their face . . . .”<sup>525</sup> Plainly, they could not accomplish this “on-going renovation of doctrine”<sup>526</sup> if they regarded prior decisions as “[expressions] of single-line inevitability,”<sup>527</sup> or as artifacts to be drawn from history and brought forward without change.

At common law, a prior decision was authoritative for Llewellyn not because it recited a “well-settled” rule,<sup>528</sup> but because the reason behind the rule fit the case at hand. If experience showed that the rule was no longer congruent with the facts that life presented, then a new rule could be fashioned.<sup>529</sup> Thus, to provide genuine authority, Llewellyn believed that a prior case should “give not only a rule but also a persuasive presentation of good life-reason in the

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economic institution”).

522. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 44.

523. Llewellyn, *On the Good*, *supra* note 117, at 264.

524. *See* Llewellyn, *Current Recapture*, *supra* note 82, at 217; Llewellyn, *Some Realism*, *supra* note 158, at 1251 (urging courts to adopt an approach of “conscious seeking, within the limits laid down by precedent and statute, for the wise decision”).

525. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 38; *see also* Llewellyn, *Current Recapture*, *supra* note 82, at 218 (referring to courts in the mid-19th century as being engaged in the “ongoing constant and overt re-examination, redirection, rephrasing and general refreshment of the rules, in the light of sense not for the case alone but for the type of situation”).

526. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 36.

527. *Id.* at 38.

528. *Cf.* Llewellyn, *Rule of Law*, *supra* note 116, at 1249.

529. *See* Llewellyn, *On the Good*, *supra* note 117, at 264 (describing “the common law at its high best” as “[r]eason, reexamining in the light of reasonableness, on further experience, any and every prior ruling or prior reason given, and then reshaping, reformulating, redirecting, each time need may appear in further reason”).

light of the type life situation."<sup>530</sup> If it failed in this regard, a prior case could quickly cease to be authoritative.

The authority of legislation and legislative history are, by contrast, wholly different in nature. A statute is authoritative because it has been duly enacted into law by the legislature. "Legal obligations arise because we recognize law-making authority vested in certain human beings."<sup>531</sup> The obligations created by a statute may not be wise, or just, or even reasonable. The statute is nevertheless authoritative in some sense<sup>532</sup> because it has "gone through the constitutionally specified procedures for the enactment of law."<sup>533</sup> Similarly, the authority of legislative history is not contingent upon its merits in explaining the statute in question. Indeed, it may fail to make a convincing case for the statute. The legislative history behind a statute may not, in Llewellyn's words, give "a persuasive presentation of good life-reason" with respect to the statute in question.<sup>534</sup> Instead, the authority of legislative history derives simply from its historicity.<sup>535</sup> Unlike the statute itself, the legislative history

530. Llewellyn, *Current Recapture*, *supra* note 82, at 220 (emphasis omitted). For a discussion of Llewellyn's use of the term "situation sense" see *supra* Part III.C.2.

531. Kay, *supra* note 38, at 232.

532. Surely the authority of a statute would be enhanced if it imparted wisdom, advanced the cause of justice, or embodied the soul of reason. Still, even in the absence of these qualities a duly enacted statute carries some authority simply because it is the law. This authority may, however, be insufficient to command the assent and compliance of those governed. I have in mind here the difficult questions raised by conscientious objection and civil disobedience in the face of unjust laws. See generally POLITICAL AND LEGAL OBLIGATION (J. Roland Pennock & John W. Chapman eds., 1970) (containing contributions from James Luther Adams, at 293; Kent Greenawalt, at 332; and Gerald C. MacCallum, Jr., at 370, concerning civil disobedience). This complex subject is well beyond the scope of this article. Likewise, I also leave aside here the authority of statutes that are unconstitutional despite having been duly enacted.

533. Sunstein, *supra* note 52, at 416; see also *infra* notes 679-683 and accompanying text.

534. Llewellyn, *Current Recapture*, *supra* note 82, at 220.

535. Again, as in the case of the statute itself, whatever wisdom, justice or reason is present in the legislative history is relevant to the authority that the historical record will enjoy. For example, a committee report which makes a compelling case for the legislation in question or which explains the objectives sought by the statute's drafters with great clarity would surely enhance its own authority. As I argue in detail below, however, such qualities go to the weight to be accorded such sources in the interpretive process. They do not go to the

behind a statute is not enacted into law.<sup>536</sup> It is nevertheless authoritative in that it constitutes the historical context out of which the statute emerges.

History, as is often said, cannot be changed. Although it is surely subject to reinterpretation, once history occurs it cannot be undone. Likewise, the authority of legislative history *as history* cannot be undone. Even if a statute were to be repealed, the legislative history behind it would still be an authoritative source with respect to the meaning of the statute.

This then was the problem that legislative history posed for Llewellyn in drafting the UCC. Whereas common law precedent could be revised and even abandoned where reason so indicated, the authority of statutory history was far less mutable. Whereas experience and changed circumstances could undermine the authority of a common law rule, legislative history retained its authority as history even where it failed to address the sense of the situation. Llewellyn believed that a statute "with no purpose or objective" was simply "nonsense."<sup>537</sup> Although legislative history could be a useful vehicle for communicating statutory purpose, it could also stifle a law's development by focusing courts on a past that was no longer relevant.

Put another way, Llewellyn believed that "a realistic approach" to any received body of law required one to examine it with a "fresh" eye.<sup>538</sup> Taking a fresh look at the rules of the UCC would be all the more difficult if courts were to dwell upon and be misled by the drafting history behind the statute. Indeed, such a practice would seriously weaken Llewellyn's plan for a genuine "common law code" that would avoid statutory obsolescence by directing judges to decide cases in the Grand Style. Without the distractions of an equivocal legislative history, courts could focus on the problem at hand and the purpose behind the applicable rule while keeping an eye towards the future.

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issue of relevance, that is, authority, as an initial matter. *See infra* notes 672-78 and accompanying text.

536. *See infra* notes 629-630, 679-683, 719-722 and accompanying text.

537. Llewellyn, *Remarks*, *supra* note 86, at 400.

538. *See* Llewellyn, *Realistic*, *supra* note 138, at 453; *see also* Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 1 (arguing that the received categories of offer and acceptance required a "fresh start").



#### 4. Restricting the use of prior code drafts

In April 1950, the sponsoring bodies published a revised text of the Code<sup>539</sup> which was followed shortly in May by a complete Text and Comments Edition.<sup>540</sup> This was the first draft to address the issue of the use of prior Code drafts in the interpretive process. Although the statutory text was silent on the issue, comment 3 to section 1-102 made the drafters' intentions clear. Like its counterpart in the 1949 Draft discussed above,<sup>541</sup> section 1-102(2) of the May 1950 Draft recommended that courts use the official comments "as a guide" in the construction and application of the UCC in order "to determine [the statute's] underlying reasons, purposes and policies."<sup>542</sup> Comment 3 to this section explained that this invitation to use the comments was intended "to promote uniformity" and "to safeguard against misconstruction by mistake of legislative intention."<sup>543</sup> Although this positive rationale for the comments had been asserted many times in the past,<sup>544</sup> comment 3 now suggested for the first time that reference to the comments also carried a negative implication. It provided:

It is also intended by express reference to the comments to preclude resort to prior drafts to ascertain intent. Frequently matters have been omitted as being implicit without statement and language has been changed or added solely for clarity. The only safe guide to intent lies in the final text and comments.<sup>545</sup>

This brief passage represents the first attempt on the part of the drafters to make the interpretive authority of the comments exclusive of traditional appeals made to statutory history.

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539. See UNIFORM COMMERCIAL CODE: PROPOSED FINAL DRAFT, TEXT EDITION (Spring 1950), reprinted in 9 U.C.C. DRAFTS, *supra* note 21, at 185; Malcolm, *Developments*, *supra* note 462, at 119.

540. See MAY 1950 DRAFT, *supra* note 29, reprinted in 10-11 U.C.C. DRAFTS, *supra* note 21.

541. See *supra* notes 452-461 and accompanying text.

542. MAY 1950 DRAFT, *supra* note 29, § 1-102(2).

543. *Id.* § 1-102 cmt. 3.

544. See *supra* notes 436-446 and accompanying text.

545. MAY 1950 DRAFT, *supra* note 29, § 1-102 cmt. 3.

The sponsoring bodies considered the May 1950 Draft at a joint meeting held that month in Washington D.C.<sup>546</sup> During the debate, Llewellyn again argued that section 1-102(2) did not mandate the use of the comments but only recommended them as “a permissive guide to the reasons and policies of the statute.”<sup>547</sup> In addition to this oft-repeated argument, however, Llewellyn informed the sponsoring bodies that the Editorial Board wished to amend section 1-102(2) by adding the language “. . . but prior drafts may not be used to establish legislative intent.”<sup>548</sup> He explained that he and his fellow drafters had “been worried to the bottom of [their] souls by the conception of the use of the successive drafts of this Code as a guide to legislative intent.”<sup>549</sup> He explained that the reason for this fear was the “tremendous advantage” that wealthy litigants would have over less-affluent parties in paying for lawyers to locate and review these somewhat obscure materials.<sup>550</sup> More importantly, Llewellyn argued that use of the Code’s drafting history would be “extremely misleading” because of the wide variety of reasons employed for making specific changes in the statutory text.<sup>551</sup> Some changes were “made merely for purposes of style . . . though there was no change intended at all in the meaning,” while other changes were truly “a matter of substance . . . a change in policy produced . . . by votes on the floor.”<sup>552</sup> Still other changes were made to eliminate redundancy and to conform different sections “in an effort to unify the entire material of the Code.”<sup>553</sup> Llewellyn stressed, however, that there was “no guide anywhere” to indicate what kind of change had been effected

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546. See Schnader, *supra* note 27, at 6.

547. 1950 *Transcript*, *supra* note 469, in KLP, *supra* note 29, at J.XII.1.i, at 7.

548. *Id.* at 8. A friendly amendment was later added which expanded the prohibition to include prior drafts of both the statute and the comments. See *id.* at 12.

549. *Id.* at 8.

550. See *id.* For a response to the argument that limited access to legislative materials justifies prohibiting the use of such materials, see *infra* notes 657-666 and accompanying text.

551. 1950 *Transcript*, *supra* note 469, in KLP, *supra* note 29, at J.XII.1.i, at 8.

552. *Id.*

553. *Id.*

in each instance.<sup>554</sup> As such, inferences concerning the purpose and intent behind textual changes based on the drafting history would likely be "misleading, troublesome and dangerous."<sup>555</sup> As an alternative, Llewellyn argued that lawyers and judges should rely on the official comments in order to understand the statute.<sup>556</sup> Although some questioned the constitutionality of "tell[ing] the judiciary what they may or may not consider in arriving at the interpretation of a piece of legislation,"<sup>557</sup> the majority recommitted section 1-102 to the Editorial Board for further work consistent with the proposed amendment.<sup>558</sup>

*a. the ABA and the use of prior drafts*

As noted above, by this point in time the American Bar Association's Section for Corporation, Banking, and Business Law was deeply involved in reviewing successive drafts of the proposed UCC.<sup>559</sup> In order to allay some of the ABA's concerns with respect to section 1-102, the drafters circulated an amended version of this section in late December 1950.<sup>560</sup> Section 1-102(3)(g) of the proposed amendment provided that "[i]n construing and applying [the UCC] to effect its purposes . . . [p]rior drafts of text and comments may not be used to ascertain legislative intent."<sup>561</sup> The Enlarged

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554. *Id.* at 8-9.

555. *Id.* at 9.

556. *See id.* at 10.

557. *Id.* at 19-21 (remarks of Judge Thompson); *see also id.* at 12-13 (remarks of Mr. Hardin). For a more recent reflection on the constitutionality of such "interpretive directives," see Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211 (1994).

558. *See 1950 Transcript, supra* note 469, in KLP, *supra* note 29, at J.XII.1.i, at 21-22.

559. *See supra* note 462 and accompanying text.

560. *See Malcolm, Developments, supra* note 462, at 179.

561. *Id.* at 179-80. In fact, the language quoted above from Walter Malcolm's article differs from the proposed amendment circulated by the Code drafters in two respects. First, in Malcolm's article the language above is designated section 1-102(3)(f), whereas it appears as section 1-102(3)(g) in the proposed amendment. Second, the proposed amendment prohibited the use of "[p]rior drafts," whereas Malcolm's version prohibited the use of "[p]rior drafts of text and comments." Compare Malcolm, *Developments, supra* note 462, at 179-80, with *1951 Proceedings, supra* note 468, in KLP, *supra* note 29, at J.XIII.1.e, at 84-86. These discrepancies are due to Malcolm's editorial

Editorial Board for the UCC and representatives from the ABA discussed this proposal at a meeting held in January 1951.<sup>562</sup> During the meeting, the ABA's Walter Malcolm reported that the governing Council for the ABA Section reviewing the Code was "very much pleased" with the substance of section 1-102(3)(g).<sup>563</sup> Again, however, objection was raised as to the constitutionality of instructing a court as to "what it may or may not do in the construction of a statute."<sup>564</sup> In response, Soia Mentschikoff argued that a legislature may inform the court of its intent "and the intent [here] is that nothing that happened in the past shall in any way reflect" how to construct the statute.<sup>565</sup> Quickly following up, Llewellyn noted that "parol evidence is close to defined in the statute."<sup>566</sup> The purpose of this remark was likely to show that legislative bodies do indeed have the power to limit the materials courts may consider in the process of interpretation, and that section 2-202 of the UCC was another example of the exercise of this power. It also suggests, however, that the connection between contract interpretation and statutory interpretation was not lost on Llewellyn.

Following the meeting, the Enlarged Editorial Board prepared and approved an amended version of section 1-102 in March 1951.<sup>567</sup> This version of the statute was published as part of the Spring 1951 Draft of the Code. Section 1-102(3)(g) of this draft provided that "[p]rior drafts of text and comments may not be used to ascertain legislative intent."<sup>568</sup> Although this was the first Code draft to

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work in preparing his article. The proposed amendment circulated in December 1950 contained a subsection (3)(e) that expanded the application of the term "between merchants." This provision was subsequently deleted by the Enlarged Editorial Board during the January 1951 meeting. Likewise, the Enlarged Editorial Board amended the language of the prohibition to include prior drafts of the text and comments. See Malcolm, *Developments*, *supra* note 462, at 181; *1951 Proceedings*, *supra* note 468, in KLP, *supra* note 29, at J.XIII.1.e, at 170.

562. See *1951 Proceedings*, *supra* note 468, in KLP, *supra* note 29, at J.XIII.1.e, at 81-171.

563. *Id.* at 166.

564. *Id.* (remarks of Mr. Jenner).

565. *Id.*

566. *Id.*

567. See *Section 1-102 Purposes; Rules of Construction* (March 1951 Draft), in KLP, *supra* note 29, at J.XIII.1.c; Schnader, *supra* note 27, at 6-7.

568. SPRING 1951 DRAFT, *supra* note 21, § 1-102(3)(g).

contain such a prohibition in the statutory text, the Spring 1951 Draft did not include explanatory comments.

The sponsoring bodies gave final approval to the text of the UCC at meetings held in May and September 1951.<sup>569</sup> Following additional editorial work on the text and comments overseen by Professor Charles Bunn of Wisconsin, a definitive Text and Comments Edition of the UCC was published in the fall of 1952.<sup>570</sup> In the comment explaining section 1-102(3)(g), the drafters used precisely the same language found in comment 3 to section 1-102 of the May 1950 Draft. That is, the comment asserts that "resort to prior drafts" would not be a "safe guide" to legislative intent because "[f]requently matters have been omitted as being implicit without statement and language has been changed or added solely for clarity."<sup>571</sup> Instead, the comment urges those who use the Code to rely on "the final text and comments" in interpreting the statute.<sup>572</sup>

*b. the New York Law Revision Commission and section 1-102(3)(g)*

In April 1953, Pennsylvania became the first state to enact the UCC, including the prohibition contained in section 1-102(3)(g).<sup>573</sup> This legislative success did not, however, bring an end to the drafting process. Instead, "various groups which had not actively studied the Code's provisions came forward with strong recommendations for certain changes."<sup>574</sup> Moreover, as noted above, at this time the New York Law Revision Commission began an intensive study and critique of the Code.<sup>575</sup> In response to these developments, the UCC's Editorial Board sprang to life again. The reactivated Editorial Board appointed nine new subcommittees to assist it, one for each of the

569. *See supra* note 477.

570. *See* 1952 OFFICIAL DRAFT, *supra* note 22, at v; Braucher, *supra* note 27, at 800.

571. 1952 OFFICIAL DRAFT, *supra* note 22, § 1-102 cmt. 2.

572. *Id.*

573. The Code did not take effect in Pennsylvania until July 1954. *See* PA. STAT. ANN. tit. 12A (1954) (amended 1959) (current version at PA. STAT. ANN. tit. 13 (1984)).

574. FURTHER RECOMMENDATIONS OF THE ENLARGED EDITORIAL BOARD FOR AMENDMENTS OF TEXT AND ANSWERS TO CERTAIN CRITICISMS iii (1954) [hereinafter 1954 RECOMMENDATIONS]. Unfortunately this document is not reprinted in U.C.C. DRAFTS, *supra* note 21.

575. *See supra* notes 482483 and accompanying text.

Code's several articles. The subcommittee members were instructed to review the comments and criticism then being generated and, where appropriate, to recommend changes to the statute.<sup>576</sup> During the course of this renewed study, the sponsoring bodies published Supplement No. 1 to the 1952 Official Draft. Although a number of Code sections were amended in this draft, the language in section 1-102(3)(g) prohibiting the use of prior drafts to ascertain legislative intent remained exactly as it had before. The section was renumbered, however, as section 1-102(6).<sup>577</sup>

The analysis of this provision conducted on behalf of the New York Law Revision Commission was not nearly as favorable as the Editorial Board's own review. Professor Carl Fulda of Rutgers, the special consultant to the Commission responsible for this section,<sup>578</sup> was highly critical of the Code drafters for "attempt[ing] to establish a proper boundary between what shall be considered as relevant 'legislative history' and what shall not be so considered."<sup>579</sup> To begin with, Fulda noted that traditionally "the question of admissibility of extrinsic aids ha[d] been a matter for the court's decision" and that courts had "generally been liberal in examining 'the events leading up to the introduction of the bill out of which the statute under consideration developed.'"<sup>580</sup> Consequently, the legislative command in section 1-102(3)(g) prohibiting courts from looking at legislative history "may possibly be held unconstitutional as an interference with the judicial function."<sup>581</sup>

Moreover, Fulda found that "[a]s a categorical prohibition, Section 1-102(3)(g) 'fails to distinguish between legal admissibility and

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576. See 1954 RECOMMENDATIONS, *supra* note 574, at V-X; Braucher, *supra* note 27, at 803; Schnader, *supra* note 27, at 9.

577. See SUPPLEMENT NO. 1, *supra* note 485, § 1-102(6).

578. Although Supplement No. 1 had renumbered the section prohibiting the use of prior drafts as section 1-102(6), because the New York Law Revision Commission began its work on the UCC in 1953, the Commission focused on the 1952 Official Draft which designated this same language as section 1-102(3)(g). See 1 N.Y. REPORT 1955, *supra* note 24, at 129. For the language attributing this analysis to Professor Fulda, see *id.* at 133.

579. 1 N.Y. REPORT 1955, *supra* note 24, at 164.

580. *Id.* (quoting 2 FRANK E. HORACK, JR., SUTHERLAND ON STATUTORY CONSTRUCTION § 5001 (3d ed. 1943)).

581. *Id.* at 165.

weight.”<sup>582</sup> That is, even though a judge may wish to review the drafting history behind a statute, she need not find that history dispositive. Indeed, it may prove to be decidedly unhelpful to her in the interpretive process. The judge should, in any event, be allowed to consider this material and assign to it the weight she deems appropriate. Thus, Fulda objected to section 1-102(3)(g), because it flatly “tells the judges not to do what they might want to do.”<sup>583</sup>

As part of its annual report to the New York legislature, the Law Revision Commission issued an Interim Report on the Uniform Commercial Code in February 1955.<sup>584</sup> In commenting on sections 1-102(3)(f) and (g), the Commission noted that the legislature had frequently considered proposed statutes in the past that were accompanied by explanatory notes and that it was “well established that when a problem [arose] in interpreting a statute, such notes [could] be consulted as an aid in determining the intent of the Legislature.”<sup>585</sup> It further noted that the comments explaining a statute “prepared by its draftsman” had been consulted even where “they were not before the legislature when it acted.”<sup>586</sup> Although the reliance to be accorded such materials was “a matter of degree,” the Commission clearly favored giving courts access to this sort of contextual evidence.<sup>587</sup>

A year later the Commission issued its final report on the Uniform Commercial Code to the New York legislature. Although the language of the provision prohibiting the use of prior drafts remained exactly as before, what had been section 1-102(3)(g) of the 1952 Official Draft was now designated section 1-102(6) of Supplement No. 1. In its final report the Commission recommended that section 1-102(6) be eliminated. In a passage strongly reminiscent of

582. *Id.* (quoting Board of Nat. Missions v. Neeld, 9 N.J. 349, 361 (1952)) (Jacobs, J., concurring).

583. *Id.* Fulda also noted that this prohibition was in stark contrast to the permissive language contained in section 1-102(3)(f) concerning the use of the comments. The operative language in section 1-102(3)(f) stated that the comments “may be consulted” in the process of interpreting the Code. *Id.* In his analysis, Fulda quoted Llewellyn quoting Learned Hand as saying: “Well, what this comes to is to say that we may do what we shall do anyway.” *Id.*

584. *See id.* at 3-30.

585. *Id.* at 21-22.

586. *Id.*

587. *Id.* For a further discussion of the Commission’s Interim Report with respect to the UCC’s comments, see *supra* note 493.

Llewellyn's purposive approach to statutes and his otherwise deep appreciation for context, the Commission concluded: "Underlying policies should of course be considered in construing a commercial code. It is inadvisable to limit by statute the sources from which the reason for the text—and in this way the meaning of the text—may be found."<sup>588</sup> The Commission made plain that it did "not object" to the other interpretive rules contained in section 1-102 that were "supplementary to the rules ordinarily applied to all statutes."<sup>589</sup> Nevertheless, it rejected the notion "that courts and lawyers should be prevented or discouraged from using the many rules of interpretation ordinarily employed to determine [the] meaning of [a] text."<sup>590</sup> With respect to the UCC, the traditional "extrinsic aids to interpretation of a statute" would "go far beyond" the official comments offered by the Code sponsors.<sup>591</sup> These would include "[t]he more immediate background and legislative history" generated by the several states in the course of enactment.<sup>592</sup> Because of their potential to explain the statute in question, the Commission concluded that the use of these materials should not be curtailed.<sup>593</sup>

#### 5. Removing the restriction on the use of prior drafts

The Code drafters took these criticisms to heart in preparing the 1956 Recommendations of the Editorial Board for the Uniform Commercial Code. As noted above, the statutory text for this draft was based on the 1952 Official Draft as well as the changes adopted

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588. N.Y. REPORT 1956, *supra* note 24, at 26.

589. *Id.* By this the Commission was presumably referring to the language in section 1-102 providing that the UCC was to be "liberally construed and applied to promote its underlying purposes and policies" and identifying those purposes and policies to include simplification and modernization of commercial law and uniformity "among the various jurisdictions." 1952 OFFICIAL DRAFT, *supra* note 22, § 1-102(1) and (2).

590. N.Y. REPORT 1956, *supra* note 24, at 26.

591. *Id.*

592. *Id.*

593. *See id.* The Commission also summarized its work on Supplement No. 1 in its Excerpts from the Proceedings of the Commission, a work published in the same volume as the Commission's final report. *See id.* at 355-485. In these excerpts the Commission noted that section 1-102(6) had been "disapproved, as attempting to limit the judicial doctrine of resort to extrinsic aids in determining legislative intent, and as inappropriate in view of revisions of the Code subsequent to the 1952 Official Text and Comments edition." *Id.* at 358.



in Supplement No. 1. Because the Code section numbers were based on the 1952 Official Draft, however, what had been section 1-102(6) in Supplement No. 1 appeared once again as section 1-102(3)(g) in the 1956 Recommendations.

In this important revision, the Editorial Board recommended that section 1-102(3)(g) be deleted from the Code. This was clearly done in order to appease the concerns of New York lawmakers. In the explanatory Reason for Recommendation that followed section 1-102, the drafters acknowledged that “[t]he New York Commission recommended that paragraphs (a), (b), (f) and (g) of subsection (3) be deleted.”<sup>594</sup> In what must be regarded as a plainly specious attempt to gloss over their clear capitulation, however, the drafters stated that section 1-102(3)(g) “was deleted because the changes from the text enacted in Pennsylvania in 1953 are clearly legitimate legislative history.”<sup>595</sup>

To be sure, this capitulation was for the better in that it permitted lawyers and judges to examine the thought and purpose behind the various Code provisions and the articulation of that purpose as it developed over the years. The reason for the change in section 1-102 was not, however, the sudden realization that legislative history was indeed relevant to the interpretive process. The drafters believed that recourse to the drafting history, wherein “matters ha[d] been omitted as being implicit without statement and language ha[d] been changed or added solely for clarity,” would lead to “misconstruction by mistake of legislative intention.”<sup>596</sup> Moreover, although they ostensibly recognized the changes enacted by Pennsylvania as “legitimate legislative history,” the Code drafters did not suggest that the danger of misconstruing legislative intent was no longer present. Instead, the drafters’ reversal on this issue should be attributed both to the importance of New York as a commercial law state<sup>597</sup> and to the importance that the New York Law Revision Commission attached to context in statutory construction.

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594. 1956 RECOMMENDATIONS, *supra* note 23, § 1-102, Reason for Recommendation.

595. *Id.*

596. 1952 OFFICIAL DRAFT, *supra* note 22, § 1-102 cmt. 2.

597. *See supra* note 27 and accompanying text.

The sponsoring bodies approved the revised statutory text which appeared in the 1956 Recommendations<sup>598</sup> and published it in 1957 as the Uniform Commercial Code: 1957 Official Edition.<sup>599</sup> A set of revised comments was added to the statutory text which the sponsoring bodies published in 1958 as the Uniform Commercial Code: 1957 Official Text with Comments.<sup>600</sup> Neither version contained any trace of what had been section 1-102(3)(g). Indeed, since the deletion of this provision in the 1956 Recommendations, nothing in either the text or the comments of any subsequent version of the UCC has prohibited or in any way restricted the use of prior Code drafts in the interpretive process. Today, it is common-place for judges and advocates to refer to Code drafting history as they attempt to discern the meaning of the statutory text.<sup>601</sup> Thus, although many courts and commentators have warmly embraced Llewellyn's purposive approach to Code interpretation,<sup>602</sup> at the same time, most have been unwilling to forsake the historical sources available to help them in this endeavor.<sup>603</sup>

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598. See 1957 HANDBOOK, *supra* note 497, at 101; 34th Annual Meeting, A.L.I. PROC. 53-54 (1957).

599. See UNIFORM COMMERCIAL CODE: 1957 OFFICIAL EDITION (1957), reprinted in 18 U.C.C. DRAFTS, *supra* note 21, at 341.

600. See 1957 OFFICIAL TEXT, *supra* note 501.

601. See *supra* note 28 (citing relevant case law).

602. See, e.g., Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978) (setting forth a theory of "purposive construction" and relating it to Llewellyn's theory of "patent reason"); WHITE & SUMMERS, *supra* note 9, § 4, at 18 (citing McDonnell); *In Re Copeland*, 391 F. Supp. 134 (D. Del. 1975), *aff'd in part and vacated in part*, 531 F.2d 1195 (3d Cir. 1976); *Barclays Bank D.C.O. v. Mercantile Nat'l Bank*, 481 F.2d 1224 (5th Cir. 1973); *Columbian Rope Co. v. Rinek Cordage Co.*, 461 A.2d 312 (Pa. Super. Ct. 1983).

603. For example, although Professors White and Summers urge that "judges and lawyers should interpret and construe Code words, phrases, and sections in light of their rationales," WHITE & SUMMERS, *supra* note 9, § 4, at 18, they also gladly avail themselves of prior Code drafts and other legislative and historical sources. See, e.g., *id.*, § 4, at 9-14 (in general) and §§ 7-10 to 7-13, at 316-329 (citing prior Code drafts and the New York Law Revision Commission reports with respect to UCC § 2-708(2)). These two approaches are not inconsistent. Indeed, recourse to the drafting history may be the surest way of learning the rationale behind the Code section in question.

#### IV. THE RELEVANCE OF LEGISLATIVE HISTORY IN STATUTORY CONSTRUCTION

The removal of section 1-102(3)(g), first championed by the New York Law Revision Commission and ultimately accepted by the sponsoring bodies, marks the end of restrictions on the use of prior Code drafts. Although Llewellyn wanted courts to construe the rules contained in the UCC as if they were common law rules, in many respects, interpretation of the Code itself now more closely resembles the interpretation of sales contracts under the Code. In each case the nature of language itself informs the interpretive approach taken. In each case the purpose behind the text in question can best be understood if it is situated within the social and historical context out of which it emerged. With respect to sales agreements under the Code, this context includes whatever evidence can "explain or supplement" the meaning of the contract terms without contradicting them.<sup>604</sup> Indeed, the Code expressly provides that such evidence includes proof of "consistent additional terms" as well as proof of trade usage, course of dealing, and course of performance.<sup>605</sup> With respect to the Code itself, this context includes the history of the statute's preparation and enactment.

This then is the lesson to be learned from Llewellyn's successful attempt to integrate context into contract interpretation, and his failed attempt to exclude legislative history from statutory construction. Legislative history is always relevant because language is always language, even when it is used in a statutory text. The nature of language itself is not altered by the use of language in different genres or for different purposes. Whether it appears in a business contract, a statute, a novel, a poem, or a post-card, language is always used by someone with a purpose in mind. "Words are only meaningless marks on paper or random sounds in the air until we posit an intelligence which selected and arranged them."<sup>606</sup> Language is not a naturally occurring phenomenon like the weather, but is instead the most basic of human artifacts, a product of human thought. Furthermore, the use of language always occurs within a particular historical and

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604. See U.C.C. § 2-202 (1995).

605. *Id.*

606. Kay, *supra* note 38, at 230 (footnote omitted).

social context. Legislative history is relevant because the meaning of words is in part a function of the context in which they are used and the purposes for which they are employed. Because language is always the product of consciousness, "meaning is an affair of consciousness not of words."<sup>607</sup> Because one always uses language with a purpose in mind, the thinking behind the use of language is always relevant to the question of meaning.

#### A. *Meaning and the Purposeful Use of Language*

The use of language, however, is not simply a function of the particular words chosen and the order in which they appear.<sup>608</sup> The use of language always occurs within some set of social and historical circumstances, that is, within a given context. This context may be quite ordinary in nature and may even go unnoticed, but it is always present.<sup>609</sup> Accordingly, to understand *any* particular use of

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607. HIRSCH, *supra* note 297, at 4.

608. The study of language by linguists is typically divided into two categories, semantics and pragmatics. Semantics is the study of language in terms of the rules of grammar, word order (or syntax) and word choice (or diction). Pragmatics, by contrast, is the study of language in terms of its usage in a particular context. While the former is concerned with "sentence meaning," that is, the meaning of words and phrases "abstracted from any particular occasion of utterance," the latter deals with "utterance meaning," that is, the meaning that a sentence has "when uttered by someone in some particular situation." Moore, *Natural Law*, *supra* note 342, at 289-90; *see also* FISH, *supra* note 271, at 284-91; Graff, *supra* note 309, at 407. Both Graff and Fish acknowledge that philosopher John Searle is one author responsible for this distinction. *See* JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 117-36 (1979); John R. Searle, *Indirect Speech Acts*, in *SYNTAX AND SEMANTICS 3: SPEECH ACTS* 60 (Peter Cole & Jerry Morgan eds., 1975); *see also* Paul Grice, *Logic and Conversation*, in *SYNTAX AND SEMANTICS 3: SPEECH ACTS* 41 (Peter Cole & Jerry Morgan eds., 1975); Paul Grice, *Utterer's Meaning and Intentions*, 78 *PHIL. REV.* 147 (1969); Paul Grice, *Meaning*, 66 *PHIL. REV.* 377 (1957).

609. In contrast to this contextual view of language, the redoubtable Professor Michael Moore argues that words possess "ordinary meanings" which "exist antecedently of any interpretive enterprise in law [such that] a theory of interpretation in law is free to incorporate such ordinary meanings or not." Moore, *Natural Law*, *supra* note 342, at 288; *see also supra* note 608 (discussing the related concept of "sentence meaning"). Moore claims "that in legal interpretation there must be a place for ordinary meaning, no matter what one's theory might be as to what such meanings are." Moore, *Natural Law*, *supra* note 342, at 313. This claim is in turn based on a normative argument

language, one must understand the context in which that use occurs.<sup>610</sup>

Again, the use of language is not accidental. It is not a naturally occurring phenomenon or a random event, but a personal and intentional act designed to impart some meaning to an audience whose

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that ordinary meanings support the rule of law better than do competing theories of meaning such as functionalism and contextualism. *See id.* at 313-21. Hedging his bets a bit, Moore asserts that ordinary meanings are only a starting place which can be “modified or supplanted entirely by the technical meanings given the words by prior case law, by the purpose a statute serves, or by an all-things-considered moral judgment about the injustice of the rule under an ordinary language interpretation.” *Id.* at 320.

Moore’s theory has much to recommend it, but Moore is mistaken in at least one important respect. He argues that if the meaning of language was simply a matter of contextual use then “we would not know how to put sentences together to express our thoughts on particular occasions.” *Id.* at 304. Indeed, “[i]f words were such chameleons,” radically changing their meaning with each change in context, “we would not be able to use them to communicate.” *Id.* But communication does take place because the users of language employ the “ordinary meanings” of words, the meanings they possess in “the null context” or in a “contextless situation.” *Id.* at 304, 290.

Although words can communicate ordinary meanings and sentence types can express sentence meaning, these meanings are not divorced from any context. They are instead dependent upon some context which is assumed because it is the most common or frequently used within a given social group. Indeed, as Professor Fish has stated, words and sentences can have a normal context and, hence, a normal meaning, “[b]ut what is normal (like what is ordinary, literal, everyday) is a *function* of circumstances in that it depends on the expectations and assumptions that happen to be in force.” FISH, *supra* note 271, at 287. Put another way, words and sentences may possess ordinary meanings, but “that meaning doesn’t reside *in* the expression,” rather the expression “has acquired certain standard meanings only because of a history of use that has established those meanings as normal and conventional.” Graff, *supra* note 309, at 408. Thus, even though words may possess “ordinary” meanings, these meanings are not wholly divorced from context. Rather, the context which brings these meanings to mind are assumed.

610. Since Wittgenstein, modern language theory has tended to view the meaning of words primarily as a function of their use. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (G.E.M. Anscombe trans., 3d ed. 1958) (“For a *large* class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined as thus: the meaning of a word is its use in the language.”); *see also* Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485 (1996) (arguing that Wittgenstein’s theory does not support the radical theory of linguistic indeterminacy championed by some critical scholars).

identity may or may not be known. If the speaker in a conversation or the author of a text wishes to be understood,<sup>611</sup> he will utilize those background assumptions and beliefs which he believes the audience will bring to the interpretive process. Indeed, “[t]he words would be useless to him if he could not anticipate how they would be understood by these other persons.”<sup>612</sup> Accordingly, “[t]he legislator will be interested primarily in the conventions of statutory interpretation—that is, in the current conventional approaches by judges, administrators, lawyers and citizens to the understanding of statutes.”<sup>613</sup> Put another way, the legislator has “the intention to say what one would be normally understood as saying, given the circumstances in which one said it.”<sup>614</sup> But the circumstances surrounding

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611. The assumption that the author or speaker wishes to be understood may appear uncontroversial, but it is in fact a conclusion drawn by the reader or listener that may be mistaken. Every expression need not be communicative. Because law is an inherently social endeavor and because democratic government is at least presumably rational if not always deliberative, we “should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.” HART & SACKS, *supra* note 322, at 1415. Thus, more often than not the debate is not over whether the legislature wanted to be understood, but how it wanted to be understood. The same cannot be said for all other kinds of authors and speakers.

612. GERALD C. MACCALLUM, JR., *Legislative Intent*, in LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY 3, 8 (Marcus G. Singer & Rex Martin, eds., 1993). This essay was originally published as Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L. J. 754 (1966).

613. See MACCALLUM, *supra* note 612, at 8.

614. Joseph Raz, *Intention in Interpretation*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 268 (Robert P. George ed., 1996). Although both MacCallum and Raz contend that the legislature intends to be understood “given the circumstances of the promulgation of the legislation, and the conventions of interpretation prevailing at the time,” *id.* at 271, Raz only briefly considers the use of legislative history as an important convention of interpretation that the legislature bears in mind in the process of generating statutes. This point is instead more prominent in MacCallum’s work. See MACCALLUM, *supra* note 612, at 33 (noting that “one should consider whether the established use of *references* to legislative intent does not itself produce conditions under which the references become more reasonable as the practice of making them becomes entrenched,” indeed even forming “part of the institutional background against which legislators recognize themselves to be acting when proposing, investigating, discussing, and voting for bills”); cf. Anthony D’Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561, 592-93 (1989) (arguing that although radical

the creation of a statutory text are reflected in its legislative history. Indeed, this history of drafting, deliberation, and negotiation is relevant to statutory interpretation because it provides, at least in part, the context out of which the law emerged.<sup>615</sup>

Although Llewellyn was an acknowledged leader among the legal realists of his generation, in urging courts to ignore legislative history, he engaged in the most unrealistic conceit of all. To ignore the context in which a statute is generated and out of which it emerges is to pretend that language is not the product of human consciousness. To ignore the drafting history of a particular text is to pretend that the language used is not used by someone situated in history and with a purpose in mind. Under this conceit, the work of legislators has no meaningful relationship to the statute that is eventually enacted. For example, by prohibiting the use of prior Code drafts, section 1-102(3)(g) would have required courts to construe the statute independent of the thoughtful work that created it.

#### 1. The minimalist view of legislative intent

Without specifically relying on Llewellyn, some commentators today have repeated this same conceit. They contend that in the case of statutes, the legislature's only purpose or intent is to enact into law the specific language that is now at issue. The legislature has no further intentions with respect to the content of what it enacted.<sup>616</sup>

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reinterpretation of a text is always possible "if the audience already has a certain mind-set, the meaning of the message is less susceptible to radical reinterpretation" and that the legislature may "precondition the audience so that statutes will fall on friendly ears"); Richard H. Weisberg, *Text into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939, 979-80 (1986) (arguing that although the author's pure meaning, unaffected by the reader's own background and beliefs is unattainable, there may be "clues" that may "lead to an ideal manner of interpretation" because "many texts display a discernable desire to be understood a certain way").

615. *But see* REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 137-97 (1975) (arguing that legislative history is not part of a statute's context and should not be considered in the interpretive process). For other arguments that the context provided by legislative history is irrelevant because statutory language is not a "communicative act," that is, the use of language between a speaker or author and her audience within a specific context, see Heidi Hurd, *Sovereignty in Silence*, 99 YALE L. J. 945 (1990); Moore, *Natural Law*, *supra* note 342, at 288-91, 304-07.

616. *See* Raz, *supra* note 614, at 266-67 (arguing that "it must be the case

Its only purpose is to execute the formal procedures of law-making with respect to the text before it.

Such a minimalist view of legislative intent, while “intelligible,” is hardly satisfying.<sup>617</sup> It appears to render the bulk of legislative activity a meaningless side-show. Under this view, the work of legislators in proposing legislation, holding investigative hearings, and discussing and debating matters is without any meaning or significance. The statute might just as well have emerged as the result of some random act of nature or as the product of a mechanical device that produces statutes instead of widgets.<sup>618</sup> Indeed, if the process whereby language becomes law is irrelevant to its meaning, then the

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that whenever one legislates one intends, under some description to make the law one is enacting”). Raz says that this fundamental law-making intention need not be accompanied by some “comprehensive statement of [the law’s] content,” *id.* at 266, only by an intention that it will be construed according to “the conventions of interpretation prevailing at the time.” *Id.* at 271; *see also* Moore, *Natural Law*, *supra* note 342, at 339 (noting that the passage and wording of a law are intentional acts, and “no accident”).

617. *See* Raz, *supra* note 614, at 266-67 (demonstrating the “intelligibility” of the view that “legislators make the law that they intend to make, and that they make that law by expressing the intention to do so” and that this intention need “not include any understanding of the content of the legislation”).

618. *Cf.* Raz, *supra* note 614, at 258-59 (discussing an “invisible hand mechanism” that produces laws). While Raz’s thesis, that a legislature need have no intention as to the content of the law it enacts, may be intelligible in certain respects, in other respects it “makes no sense.” As Raz himself says, “[i]t makes no sense to give the lawmaking power to any person or body unless it is assumed that the law they make is the law they intended to make.” *Id.* at 258. He assures us that

the notion of legislation imports the idea of entrusting power over the law into the hands of a person or an institution, and this imports entrusting voluntary control over the development of the law, or an aspect of it, into the hands of the legislator. This is inconsistent with the idea of unintentional legislation.

*Id.* at 265-66 (footnote omitted). The minimalist intention to make a law which this argument establishes is, however, inadequate even on its own terms if the reason for giving the law-making function to a body of individuals is so that *they* may exercise *their* thought and deliberation, that *they* will exercise *their* judgment in deciding what the law ought to be. Perhaps Raz has in mind a legislature that does not itself make the law but only appoints those who do. If this is not the case, however, then some understanding of the content of the substantive law under consideration must be part of the legislative process. In sum, one cannot exercise deliberation and judgment in the absence of such an understanding of content.



identity of legislators and the judgment they exercise is wholly inconsequential. Instead of elected representatives who deliberate proposals, under this view "legislators are similar to the typing monkeys, who, if given enough time, will eventually type every word of *Hamlet*."<sup>619</sup> The idea, however, "that a legislative body aimlessly chooses words for a statute by a mental process equivalent to randomly selecting words from a hat is simply preposterous."<sup>620</sup>

Further, the minimalist account of intention cannot explain the role that intention is widely thought to play with respect to other texts. The author of a letter, for example,<sup>621</sup> does not intend simply to generate a document which he then wishes to be construed as a "letter" under the conventions of the day. Instead, by writing the letter and sharing it with the recipient, the author hopes to communicate some meaning. Surely the conventions prevalent in the culture that pertain to the interpretation of letters aids the reader in

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619. Redish & Chung, *supra* note 38, at 826; see also DICKERSON, *supra* note 615, at 75 (comparing the finger paintings of the chimpanzee at the Baltimore Zoo in the 1950s to statutes so conceived and concluding: "What devastating discouragement it would heap on the legislative draftsman, who works under the illusion that he is somehow helping the legislature to communicate to the public!").

620. Redish & Chung, *supra* note 38, at 819; see also *id.* at 875 (remarking that "[t]he crudity of the new textualist perspective is even more apparent when one considers the logical implications of its assumption that a legislative body exhausting enormous resources would exist merely to pass purposeless statutes. If this were true, statutory language could be deemed a function of some random process, as if the words had been simply drawn from a hat.") (footnotes omitted).

621. For other works comparing the interpretation of statutes to that of personal correspondence, see, for example, DICKERSON, *supra* note 615, at 112-13; William N. Eskridge, Jr., *Fetch Some Soupmeat*, 16 CARDOZO L. REV. 2209 (1995) (discussing a famous example provided by 19th century legal scholar Francis Lieber); Graff, *supra* note 309, at 409 (discussing the receipt of an unsigned note). Closely related to this comparison is the analogy between legislative commands and the garbled or incomplete commands of a military officer to his men in battle. First articulated by Judge Posner, this analogy has gained the attention of many commentators. See, e.g., Farber, *supra* note 32, at 285-92; Farber & Frickey, *supra* note 57, at 461-65; Maltz, *supra* note 52, at 20-22; Posner, *supra* note 61, at 189-90, 199-201; see also D'Amato, *supra* note 614, at 565-70 (discussing communications with military personnel, extra-terrestrials, and domestic servants); Sunstein, *supra* note 52, at 424 (arguing that "legislative instructions are often unclear and the claim of a command is a myth").

ascertaining this meaning. The goal, however, of this interaction is communication. Thus, as a fundamental matter, the letter-writer wants to be understood, not to have the standard conventions of letter-interpretation followed. The latter are only a means of attaining the former. If the standard conventions fail to accomplish this goal, other means may be employed.<sup>622</sup> An approach to interpretation that “requires that we intentionally ignore exactly the kind of additional contextual information that we use routinely and unselfconsciously in everyday life to understand communications” is mistaken and should not be followed.<sup>623</sup>

## 2. Legislative intent and legitimacy—political and linguistic

The claim that the a-historical, a-contextual approach to statutory interpretation reflected in section 1-102(3)(g) is unrealistic does not mean that such an approach is unworkable. Clearly the practice

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622. There are, of course, means of clarifying the meaning of a letter which are not available to the judge or lawyer struggling with the meaning of a statute. A letter recipient who is puzzled by a particular passage in a letter can normally speak with the author to ask for an explanation. A judge, on the other hand, cannot telephone Congress to inquire into the meaning of a particular statute. Legislatures, unlike juries, cannot be polled after they render a decision. It is significant to note in this regard that recourse to the intentions of legislators has been and continues to be a widely accepted convention for the interpretation of statutes. See *supra* notes 28 & 614 and accompanying text.

623. Solan, *supra* note 37, at 252. There are of course many differences between statutes and personal correspondence. Nevertheless, because the way in which the language operates remains relatively constant, the similarities between letters and statutes are profound. For example, the background of prior correspondence and conversations between friends might provide the context necessary to understand their idiosyncratic use of language in a letter (e.g., a woman referring to her boyfriend as “the Big Creep”). Likewise, this same background might help explain why a particular letter was sent and what the writer hoped to accomplish in sending it. Although Judge Easterbrook is certainly correct in maintaining that “[s]tatutes are not exercises in private language,” Easterbrook, *Role*, *supra* note 34, at 60, the use of a particular word or phrase may be peculiar to the field of regulation. The words used are not a private code between friends. They have a public meaning but one which is specialized, perhaps even unique to the area. Legislative history may help remind the reader of this specialized usage even where the statutory text fails to do so. In the same way, legislative history may set forth a common basis for understanding the purpose behind legislation. Cf. DICKERSON, *supra* note 615, at 142-47 (distinguishing between “expounding texts,” which explain specific meanings, and “motivating texts,” which set forth purpose).

of ignoring legislative history does not render statutes meaningless. The practice has long been a part of English jurisprudence.<sup>624</sup> Likewise, neither Justice Scalia nor Judge Easterbrook has been rendered mute by the explicit disavowal of legislative history. They are still quite able to attribute some purpose to the statutes that come before them.

The issue, however, is not whether one can read a text so as to reflect some purpose. All interpretation is intentional and purposive because all language must possess a purpose, must reflect an intention, in order to be language, and in order to be meaningful.<sup>625</sup> Because the meaning of language is always a matter of consciousness, the issue is not whether a given statute must be purposive in order to be meaningful. Instead, the issue is whose purpose should control.<sup>626</sup> One may, of course, "assign a meaning different from the one intended by the original authors, but this merely substitutes some other hypothetical author for the historical ones."<sup>627</sup> If, however, the goal of statutory interpretation is to understand what the legislature understood and intended by its words, then one ought to regard the statute's legislative history as at least relevant to the interpretive process.

Indeed, the legitimacy of the interpretive process is in some way tied to the relevance of the intentions of the lawmakers. Although

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624. See, e.g., *Beswick v. Beswick*, 2 All E.R. 1197, 1202 (H.L. 1967); *Davis v. Johnson*, 1 All E.R. 1132 (H.L. 1978); *Hadmor Prods. v. Hamilton*, 1 All E.R. 1042 (H.L. 1982); *The Queen v. Hertford College*, 3 Q.B.D. 693, 707 (C.A. 1878); *Totherglee v. Monorch Aulinis, Ltd.*, 1981 App. Cas. 251, 279-80; DICKERSON, *supra* note 615, at 170-74 (commenting on the absence of legislative history in English statutory interpretation); TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS* 255-62 (6th ed. 1996); William S. Jordan, *Legislative History and Statutory Interpretation: Relevance of English Practice*, 29 U. FLA. L. REV. 1 (1994).

625. See RONALD DWORKIN, *LAW'S EMPIRE* 50-51 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*] (arguing that all interpretation of language is purposive in nature).

626. See HIRSCH, *supra* note 297, at 3 ("What had not been noticed in the earliest enthusiasm for going back to 'what the text says' was that the text had to represent *somebody's* meaning - if not the author's then the critic's."); see also Paul Campos, *Three Mistakes About Interpretation*, 92 MICH. L. REV. 388, 389 n.3 (1993) ("Supplying old texts with new authors is becoming a common methodological recommendation in contemporary legal theory.") (citing Aleinikoff, *supra* note 37).

627. Kay, *supra* note 38, at 231.

this legitimacy is political in nature, it is not political in the sense that is frequently asserted. Many contend that recourse to legislative history helps to ensure the exercise of popular sovereignty by democratically elected legislatures. This, so the argument goes, helps to hold the policy-making power of courts in check thereby fostering the principle of separation of powers.<sup>628</sup>

Clearly the status of a text as law depends upon the intent of those who enacted it. The language of a statute is not "the law" because of some innate quality it possesses. Instead, the legitimacy of the text as law is derived from the authority of the lawmaking body.<sup>629</sup> It is the will of that body formally expressed through the

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628. See Eskridge & Frickey, *supra* note 47, at 356 ("To the extent that the Court can recover [the] original meaning [of the statute] it subserves democratic values by enforcing the law as the legislature understood it, thus limiting judicial discretion and power."); *see id.* at 326 ("If the legislature is the primary lawmaker and the courts are its agents, then requiring the courts to follow the legislature's intentions disciplines judges by inhibiting judicial lawmaking, and in so doing seems to further democracy by affirming the will of elected representatives."); Farber, *supra* note 32, at 288 (arguing that "a statute's language and legislative history together preclude at least some interpretations"); *see id.* at 293 (arguing that by failing to implement the clear statutory language and intent courts "impair the basic social norm of democratic self-government" by arrogating to themselves "the ultimate power to make public policy"); Merrill, *supra* note 38, at 24 (concluding that "the separation of powers principle . . . supports an 'originalist' mode of textual interpretation, but not necessarily a 'nonoriginalist' mode"); Redish & Chung, *supra* note 38, at 871 (arguing that their theory of "textual originalism," which includes the use of historical materials, "would lead to a better-functioning, more responsive democratic government"); *see id.* at 861 (arguing that "absent a finding of unconstitutionality, it is an illegitimate usurpation of legislative authority for an unrepresentative judiciary to circumvent policy choices made by democratically elected branches of government"); Sunstein, *supra* note 52, at 430 (observing that "[w]ithout reference to the history, interpretation sometimes becomes far less bounded"); *see id.* at 437 (agreeing with the view that "it would be improper for judges to construe statutes to mean whatever the judges think best" because of "the lawmaking primacy of the legislature, with its superior democratic pedigree"). *But see* Eskridge, *Dynamic*, *supra* note 42, at 1498-1503 (arguing for a lawmaking role for courts and against Merrill's view of separation of powers which he describes as "formalist"); Eskridge, *New Textualism*, *supra* note 37, at 667-68 ("Once the statutory text is unencumbered by evidence of original legislative expectations, it is free to evolve dynamically, especially where the statute is open-textured.").

629. See Kay, *supra* note 38, at 232 ("Legal obligations arise because we recognize law-making authority vested in certain human beings.") (footnote

process of enactment which tells us "which statements, of all the statements there are in any natural language such as English, are authoritative and should be taken as part of the law."<sup>630</sup> Accordingly, "to construe the text squarely contrary to the collective understanding of the legislature weakens its claim to legitimacy."<sup>631</sup> Although recourse to legislative history *may* further the democratic values of popular sovereignty and separation of powers, the principal reason for consulting the context out of which a statute emerges is linguistic not political.

First, consulting the drafting history of a statute would not serve democratic values if the process whereby the statute became law was not itself democratic. Suppose for example, that the nation was governed by an unelected monarch who alone possessed the power to make, enforce, and adjudicate the law. Under such a regime, no amount of research into the monarch's thinking as reflected in prior drafts of royal edicts, conversations, and correspondence with palace advisors would advance the causes of popular sovereignty or separation of powers. It is, however, entirely possible—even likely—that the citizens of such a country would want to have access to this sort of contextual evidence in order to discern the monarch's meaning.<sup>632</sup>

Second, the political rationale for the use of legislative history may be overstated. In many ways, the view that supports the use of legislative history in statutory interpretation contemplates a firm separation of powers among the three branches of government. Many believe that, as a constitutional matter, the lines that demarcate the authority of the distinct branches of government are largely blurred or porous. As such, they contend that courts may legitimately assume a generous policy-making role in the course of adjudication.<sup>633</sup> Even if this is correct, however, a court may still want to

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omitted).

630. Moore, *Natural Law*, *supra* note 342, at 282.

631. Farber, *supra* note 32, at 291; *see also* Farber & Frickey, *supra* note 57, at 460 (arguing that "when a court ignores congressional intent in implementing a statute, it weakens the legitimacy of the statute by detaching the implementation from the actual purposes of the electorate's representatives").

632. *Cf.* Raz, *supra* note 614, at 257-58 (noting that the "law exists in many non-democratic countries" such that any theory which justifies reference to the intentions of lawmakers must apply to these regimes as well).

633. *See generally* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2-2, at 18-19 (2d ed.1988) (disagreeing with the notion that each branch of

know the legislature's view of a statute's meaning if only as a counterpoint to its own. Even a court operating under such a lax understanding of separation of powers would recognize the statutory text as something not of its own making.

Third, and most importantly, the vast majority of drafting history behind any statute is not generated by those who possess the law-making faculty.<sup>634</sup> Indeed, "much legislation is [itself] actually drafted by people outside the [legislature] which is then persuaded to enact it, often without much discussion or alteration."<sup>635</sup> The meaning attributed to these statutes by such non-legislative drafters "is often of interest" to interpreters and is usually "preserved in hearings and letters where the drafters explain the statute to the legislators."<sup>636</sup> The opinions of non-legislative drafters and sponsors may coincide with popular views regarding the meaning of legislation. Likewise, the lawmakers who actually vote may agree with the interpretations of proposed legislation proffered by such drafters and sponsors.

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the government legitimately should exercise only the powers appropriate to its function and endorsing the notion that the Supreme Court makes law under its Article III judicial power).

634. See Redish & Chung, *supra* note 38, at 823 (noting that "the creation of legislative history is often left to unelected committee staff members"); Zeppos, *Fact-Finding*, *supra* note 37, at 1303 ("The image of the unelected, unsupervised staff person making law in a committee report is obviously at odds with the textualist's vision of representative democracy. Legislative history not only bypasses article I procedures, it is not even produced by the elected members of the legislature.") (footnote omitted).

635. Eskridge, *New Textualism*, *supra* note 37, at 632. Many important acts of legislation fit this description, including the Uniform Commercial Code. As discussed at length above, the UCC was drafted by Karl Llewellyn, Soia Mentschikoff, and their colleagues under the auspices of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. See *supra* notes 5-10, 66 and accompanying text. Although each is a prominent legal organization, neither the Institute nor the National Conference is an authoritative legislative body. Each may function like a law-making body and may even be subject to political influence like a legislature. See Alces & Frisch, *supra* note 459, at 441-58; A. Brooke Overby, *Modeling U.C.C. Drafting*, 29 LOY. L.A. L. REV. 645 (1996) (citing authorities); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995). Despite these apparent similarities, however, the Institute and the National Conference are merely private organizations. They do not make laws, they only make proposals which they hope will become law.

636. Eskridge, *New Textualism*, *supra* note 37, at 632.

This may make the use of the statutory history generated by non-legislators appear to support democratic values. If this is true, however, it is true only by accident. Because non-legislators do not hold office, because they do not possess any law-making authority within the political process, reference to their opinions cannot with any certainty be said to advance popular sovereignty.<sup>637</sup> Thus, the connection between the use of drafting history generated by non-legislators and democratic theory is at least somewhat attenuated.<sup>638</sup>

The drafting history behind a statute may still be authoritative, however, even though its authority is not necessarily political in nature. The drafting history generated by non-legislators may be regarded as "authoritative" because (as the word suggests) it is derived from the author herself. This authority is linguistic in nature. Because the non-legislative drafter lacks the requisite political authority to enact a statute she is not the author of the law. She is, however, the author of the text upon which the law is based.

*a. Llewellyn in the role of Shakespeare*

In this way, the non-legislative drafter is similar to the playwright whose work is produced and acted by a group of people over whom she exercises no control. The play's director may choose to have the play performed in a way that closely tracks what the playwright intended it to mean. Nothing, however, compels the director to follow this approach. Indeed, the director may well feel at liberty to change the language of the script in one way or another. Even if

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637. It is, of course, also possible for elected representatives to vote in a way that is contrary to the popular views of their constituencies. Elected officials are not obliged to vote as the majority of people would have them. Indeed, to do so automatically would actually be contrary to the view that "popular sovereignty" involves not only popular opinion but also reasoned deliberation. See Edmund Burke, *Speech to the Electors of Bristol*, in EDMUND BURKE ON GOVERNMENT, POLITICS AND SOCIETY 156, 157 (B.W. Hill ed., 1976) ("Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.").

638. The political justification for the use of legislative history generated by non-legislators is stronger where, for example, the opinions of an outside drafter or sponsor are later expressly endorsed by a legislator or where the legislator directs his or her staff in the preparation of a committee report or other interpretive aid. See Note, *Nonlegislative Intent as an Aid to Statutory Interpretation*, 49 COLUM. L. REV. 676 (1949).

the text of the play remains exactly as it was written, however, the play that is performed is a different text from what the playwright wrote. Each is a distinct use of language.<sup>639</sup> Even though the actors do not compose any part of the script, in reciting and acting it out, the actors in effect make the text their own. They imbue it with their own meaning, a meaning which may or may not coincide with what the playwright intended to communicate.<sup>640</sup>

Still, it would be strange to suggest that in trying to understand the meaning of a contemporary production of *Hamlet*, thoughtful members of the audience could not refer to the Bard's original work and the circumstances surrounding its creation.<sup>641</sup> It would be foolish to assume, as an initial matter, that the performance and the written play carry different meanings. Although they are distinct, they are not unrelated or wholly independent of one another.

In the same way, a legislature may enact the text of a statute prepared by a non-legislative drafter. The legislature may change the text in some way or enact it into law without alteration. In either case, the statute that is enacted is a distinct text from the proposed statute composed by the non-legislative drafter. The meaning intended by the authors of these two distinct texts may or may not coincide. Nevertheless, the lawyer or court who must interpret the statute should be free to consult the work of the non-legislative drafter.

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639. Paul Campos provides a useful example of this phenomenon using two notes which are textually identical but which have different authors and different recipients. He employs this example against the claim that the meaning of the constitutional text changes over time. He concludes, in both cases, that "even if the interpreter is willing to jettison original authors and replace them with someone else, the new author(s) would, from an intentionalist perspective, generate a new text, even if *that* text should remain verbally identical with the text it replaces." Campos, *supra* note 626, at 390.

640. For a wonderfully humorous example of how a bad play can be transformed into an amusing one, see *THE PRODUCERS* (Embassy Pictures 1968).

641. Again, although a text can be made to mean something radically different from what the author intended, such a possibility does not demonstrate the irrelevance of historical materials that relate to the author's intended meaning. See Stanley Fish, *Wrong Again*, 62 *TEX. L. REV.* 299, 303, 313-15 (1983) [hereinafter Fish, *Wrong Again*] (suggesting new interpretations of *Hamlet*); D'Amato, *supra* note 614, at 589-93 (also proposing novel interpretations of *Hamlet*).



In this fashion, the linguistic rationale can account for how it is that courts frequently look to interpretive aids that were neither drafted by legislators nor approved by any legislative body. Without a doubt, the most striking example of this sort of interpretive aid is the official comments to the UCC. Although the comments are frequently cited by courts and are widely regarded as authoritative,<sup>642</sup> reference to the comments cannot be justified in terms of political values. The comments, after all, are not the statutory text itself. They are not the law and have not been adopted by any legislature.<sup>643</sup> Thus, use of the comments cannot be justified in terms of bolstering either popular sovereignty or the principle of separation of powers. Accordingly, if use of the comments is to be justified at all, it must be justified on linguistic, not political grounds.<sup>644</sup>

*B. The Official Comments and the Failure of Llewellyn's Theory of Patent Reason*

Llewellyn knew that it was preposterous, that it was fundamentally unrealistic, to read business agreements in the abstract. He clearly believed that courts ought to consider the context of sales

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642. See Skilton, *supra* note 444; WHITE & SUMMERS, *supra* note 9, § 4, at 12 (describing the comments as "by far the most useful aids to interpretation and construction" and observing that "courts take to the comments like ducks to water even though the legislatures did not enact the comments"); Hannaway, *supra* note 459, at 985 (concluding that the comments "derive their authority not only from their character as largely contemporaneous notations of the drafters of the Code itself, but more importantly from their role in the jurisprudence of the Code"); McDonnell, *supra* note 602, at 806 ("The Code was formulated with the assumption that text and Comments would be considered as a unit.") (citation omitted). With respect to Hannaway's conclusion, it is worth pointing out that the Code's jurisprudence is itself a product of the work of the drafters, especially Llewellyn. Thus, to the extent that the jurisprudence behind the Code legitimizes the use of the comments, it does so only because this jurisprudence and the comments themselves derive from the same source.

643. See *supra* notes 53-54, and *infra* notes 679-683 and accompanying text.

644. See Skilton, *supra* note 444, at 602-03 (arguing that the comments may be regarded as authoritative because "they express opinions on meaning and purpose of text and were written by men who supposedly either participated in the drafting of the sections involved or were close to those who did") (footnote omitted). *But see* Walker, *supra* note 446, at 1033 (concluding that "marginal writing cannot be placed within any category of authority approved heretofore by the process of democratic government, and therefore, this material should not be given weight").

contracts in order to ascertain the intent of the parties involved. For Llewellyn, this context included not only the background of beliefs and assumptions gathered from the commercial context, but also the parties' attempts to define the agreement in writing.<sup>645</sup> Llewellyn also clearly believed that statutory texts should be "read in the light of some assumed purpose."<sup>646</sup> If, however, the goal of statutory interpretation is the explication of statutory purpose, this goal will best be served by allowing judges and lawyers to study the historical record behind the legislation in question. "We should not insulate ourselves from the context in which legally significant words were uttered if we care about ascertaining what the speaker intended to convey."<sup>647</sup>

The presence of the comments demonstrates that Llewellyn appreciated the importance of contextual evidence even in the case of statutes. As noted above, Llewellyn conceived of the official comments as a sort of standardized legislative history that would buttress the Code's policies and encourage uniform application of the statute across jurisdictions.<sup>648</sup> As such, however, the comments themselves seriously undermine Llewellyn's theory of "patent reason." A statutory text that "shows its reason on its face"<sup>649</sup> should not be in need of a voluminous interpretive aid like the comments.<sup>650</sup> A statute made up of "rules which make sense on their face, and which can be understood and reasonably well applied even by mediocre men"<sup>651</sup> should not require such a thorough explication. Indeed, the confidence evident in Llewellyn's description of the theory of patent reason is belied by the lengthy exposition of statutory purposes found in the official comments.<sup>652</sup>

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645. See Part II.C.5.

646. Llewellyn, *Remarks*, *supra* note 86, at 400.

647. Solan, *supra* note 37, at 256.

648. See *supra* Part III.F.

649. See *supra* Part III.C.3.

650. See Skilton, *supra* note 444, at 597 ("In quantity of words, these comments are a great deal more than the text. That says a lot, for the text itself is of no small length.").

651. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 38.

652. In his defense, Llewellyn's own notes indicate that at a fairly early stage he failed to convince some of his fellow drafters of the merits of including express statements of purpose in the statutory text. This led Llewellyn to attempt to make "the purpose of [each] provision appear on its face by the

choice of language and by the organization of the thought in the light of the situation" and to rely even more on the comments "to promote underlying reasons, purposes and policies." *Plans*, *supra* note 83, in *KLP*, *supra* note 29, at J.VI.1.e, at 6. Even if Llewellyn had convinced his fellow Code-drafters of the need for express statements of purpose in the statutory text, interpretive questions would still arise. Indeed, no text, no matter how cleverly drafted could ever achieve that degree of clarity because clarity and ambiguity are not qualities that inhere in texts. As Professor Stanley Fish notes, these qualities "are not linguistic, but contextual or institutional." Fish, *Fish v. Fiss*, *supra* note 271, at 1335. A given document "is neither ambiguous nor unambiguous in and of itself. The document isn't *anything* in and of itself, but acquires a shape and significance only within the assumed background circumstances of its possible use . . ." Fish, *Middle Ages*, *supra* note 272, at 784. Accordingly, "when there is a disagreement about the shape or meaning of a sentence, it is a disagreement between persons who are reading or hearing (and therefore constituting) it according to the assumptions of different circumstances." Fish, *Fish v. Fiss*, *supra* note 271, at 1335; *see also* FISH, *supra* note 271, at 284 ("In order for the sentence to be perceived as ambiguous (or to be perceived at all) it must already be in a context, and the context, rather than any natural property, will be responsible for any ambiguity the sentence will then (in a limited sense) have.").

The legislative history behind a statute constitutes part of the "background circumstances" of its actual use by the legislature. Accordingly, this history is relevant to interpretation of the statute. Even so, the meaning of the statute does not inhere "in the language of the text . . . or in the context . . . in which it is embedded, but in the cultural assumptions within which both texts and contexts take shape for situated agents." Fish, *Middle Ages*, *supra* note 272, at 783. Indeed, the context in which the text is embedded is itself subject to interpretation. Put another way, every context is itself a text. *See* Fish, *Wrong Again*, *supra* note 641, at 304-05 (arguing that "while it is certainly true that context constrains interpretation, it is also true . . . that context is a product of interpretation and as such is itself variable as a constraint"). Thus, the legislative history behind a statute, no matter how complete, cannot yield a "literal" or "uninterpreted" meaning which can then be used to construe the statute. *See* FISH, *supra* note 271, at 277-81 (discussing the construction of the testamentary law at issue in *Riggs v. Palmer*, 22 N.E. 188 (1889)).

This might strike some as quite unsettling. If the context of each text is itself a text, then an infinite regress follows. *Cf.* D'Amato, *supra* note 614, at 563 (observing that if one articulated a meta-theory of interpretation it "would constitute a text, and thus itself be in need of interpretation. It would require a meta-meta-theory of interpretation in order to be interpreted. We thus process into infinite regress"). From this, some have concluded that because each text possesses an infinite number of meanings (and so on a practical level is meaningless) we cannot know whether genuine communication between individuals ever actually occurs. *See* RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989) (discussing the numerous meanings of text).

What saves us from this infinite regress, what pulls us back from this abyss of indefiniteness, is the fact that we share certain background assump-

That Llewellyn saw the relevance of context even in the case of statutory construction probably relieves him of the charge of hubris, if not over-confidence. The wisdom of limiting courts to an

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tions and beliefs. Surely the same text can mean different things "in the light of different assumptions," Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 554 (1982) [hereinafter Fish, *Chain Gang*], and within different "interpretive conditions." Fish, *Wrong Again*, *supra* note 641, at 303. It is only by sharing certain beliefs and assumptions about reality that makes communication possible. In order to communicate, individuals

must understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other's claims, to treat these *as* claims rather than just noises. That means not just using the same dictionary, but sharing what Wittgenstein called a form of life sufficiently concrete so that one can recognize sense and purpose in what the other says and does, see what sort of beliefs and motives would make sense of his diction, gesture, tone and so forth. They must "speak the same language" in both senses of that phrase.

DWORKIN, LAW'S EMPIRE, *supra* note 625, at 63-64; *see also id.* at 50-68, 219-38 (describing these shared understandings as beliefs and assumptions about identity, integrity, coherence and value); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 530-35, 540 (1982); Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Anymore*, in THE POLITICS OF INTERPRETATION 292-97 (W.J. Thomas Mitchell ed., 1983).

Some measure of proof that we do in fact share some of the same assumptions and beliefs about the world can be found in the work of D'Amato, Fish, Graff, and others. In their respective writings, each presents a single sentence and then demonstrates the use of that sentence in radically different contexts. The radically different meanings which then appear to the reader demonstrate the power of context and how it can alter the meaning of a text for an interpreter. *See, e.g.*, D'Amato, *supra* note 614, at 568-70 ("Drop everything and come running."); Fish, *Fish v. Fiss*, *supra* note 271, at 1335 ("I like her cooking."); Graff, *supra* note 309, at 407-08 ("Keep off the grass."). These demonstrations would not work, however, if the reader did not understand each context and the difference between the two. To take but one example, in order to see that the text "keep off the grass" can be either an instruction not to walk on a well-kept lawn or a warning not to smoke marijuana, the reader must be able to appreciate the difference between "the cry of a gardener" and "the expression uttered by a narcotics-counselor." Graff, *supra* note 309, at 407. Thus, in their examples, D'Amato, Fish, and Graff assume that the reader already understands each context and its significance. Moreover, D'Amato, Fish, and Graff likewise expect that by specifying or limiting the context at work in each instance, the meaning of the text will correspondingly be specified or limited in the reader's mind.

abbreviated and purified form of legislative history is, however, still very much in doubt. He imposed no similar limitation with respect to parol evidence in the interpretation of contracts.<sup>653</sup> On the contrary, the rules concerning contract interpretation manifest an openness to various sources of meaning, an openness which narrows only where reasonable construction cannot avoid a contradiction between the evidence offered and the express terms of the agreement.<sup>654</sup>

### C. *Llewellyn and the Same Old New Textualism*

As noted above, the contextual approach to contract interpretation emphatically restated by Llewellyn in the UCC has greatly influenced the interpretation of contracts in general. Evidence that common law courts once considered extrinsic to the agreement is now properly viewed as central to the meaning of the agreement.<sup>655</sup> With respect to statutes, however, it may be fair to say that, despite Llewellyn's efforts to restrict access to legislative history, courts have continued to regularly consult sources outside the "four corners" of the statutory text.

Nevertheless, in recent years the proponents of new textualism have attempted to resurrect the long-dead spirit of section 1-102(3)(g). So far they have not attempted to apply this a-contextual, a-historical approach to the UCC itself.<sup>656</sup> Like Llewellyn and his fellow legal realists, however, these modern-day opponents of

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653. Some might contend that in the case of sales contracts there is no analogue to the pre-packaged interpretative aid found in the Official Comments. Typically, the parties to sales agreements do not sit down and formally identify those extrinsic materials which indicate the parties' meaning or which may be used to interpret the terms of the agreement. On the contrary, it is far more likely that the parties will have employed a merger clause which attempts to exclude the use of contextual materials in the interpretive process. See WHITE & SUMMERS, *supra* note 9, § 2-12, at 111. The point, however, is that the rules concerning the use of contextual evidence under the UCC are all quite liberal, though they could have been far more restrictive. For example, Llewellyn could have provided that extrinsic evidence would not be omitted unless it was written, or signed by one or both parties, etc. That Llewellyn was relatively open with respect to contextual evidence in the case of contracts only goes to show that he could have been similarly open in the case of the Code itself.

654. See *supra* Part II.C.5.

655. See *supra* Part II.C.5.

656. *But see* DICKERSON, *supra* note 615, at 146-47, 159-60, 165, 176-77 (arguing against the use of the comments and prior Code drafts).

legislative history have employed a variety of practical and theoretical arguments.

### 1. Practical arguments against the use of legislative history

For example, as a practical matter many have argued that even if legislative materials are relevant to statutory construction, the limited availability of these sources renders their use manifestly unfair.<sup>657</sup> Either litigants will be unable to obtain access to the materials or, once obtained, will be unable to pay their counsel for the time that must be invested to study them.<sup>658</sup> Llewellyn himself employed just such an argument in defending the restriction contained in section 1-102(3)(g),<sup>659</sup> and many Code commentators have expressed concern over the limited availability of Code drafting-history.<sup>660</sup> Today, however, even those who oppose the use of legislative history concede that “[t]he communications revolution has made legislative materials more accessible than they were a few decades ago.”<sup>661</sup> Indeed, with the exponential growth of legal resources on the Internet, the argument based on the unavailability of legislative history will continue to wane.<sup>662</sup>

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657. See, e.g., DICKERSON, *supra* note 615, at 147-54.

658. A frequently-cited articulation of this argument can be found in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396-97 (1951) (Jackson, J., concurring).

659. See *supra* notes 546-550 and accompanying text.

660. See WHITE & SUMMERS, *supra* note 9, § 4, at 11 (asserting that “[t]hese materials are not as accessible to lawyers as are the usual aids to interpretation and construction” and decrying the loss of section 1-102(3)(g)); Skilton, *supra* note 444, at 602 n.13 (referring to several special library collections of Code materials and concluding that “[i]tems of this kind have such a restricted availability that most practitioners would be greatly disadvantaged by emphasis upon them to shed light on ‘intent’”); RICHARD E. SPEIDEL ET AL., COMMERCIAL AND CONSUMER LAW 44 (2d ed. 1974).

661. Movsesian, *supra* note 89, at 1187; see also Wald, *supra* note 97, at 200 (asserting, perhaps somewhat prematurely that “[t]echnology has made an anachronism” of arguments against legislative history based on unavailability).

662. Even before the advent of the Internet, materials concerning the drafting history behind the UCC had become more widely available. These resources included Elizabeth Kelly’s compilation of Official Code drafts, U.C.C. DRAFTS, *supra* note 21, as well as her more recent compilation with Ann Puckett of confidential Code drafts. See UNIFORM COMMERCIAL CODE CONFIDENTIAL DRAFTS (Elizabeth Slusser Kelly & Ann Puckett eds., 1995) (10 vols.). Further, the Karl Llewellyn Papers, KLP *supra* note 29, have been

The argument that appropriate review of legislative materials will be prohibitively expensive for most litigants<sup>663</sup> is, by contrast, not so much an argument against the use of legislative history as it is a complaint concerning the allocation of legal services within our system of justice. It has always been the case in the United States that the wealthy receive better legal representation than the poor.<sup>664</sup> That a rich person can afford to pay counsel for the time necessary to review the often voluminous legislative record behind a statute while a poor client cannot is to be expected. This does not differ in principle from the fact that the lawyer for the rich client can afford to spend additional time researching case law and conducting discovery. Perhaps this state of affairs is unjust,<sup>665</sup> but the right solution hardly seems to be to limit the use of legislative history any more than it would be to restrict discovery in litigation.<sup>666</sup>

A second but related practical argument focuses on the work of courts. In short, some who oppose the use of legislative history contend that judges are simply not up to the task of construing statutes in the light of these materials.<sup>667</sup> Legislative history is often complex and is always subject to manipulation by legislators and

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available on microfilm for a number of years. See Patterson, *supra* note 99, at 194 n.169 (remarking that the Karl Llewellyn Papers "are available on microfilm from William Hein & Co.").

663. See Movsesian, *supra* note 89, at 1187-88; see also W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 408 (1992).

664. See NORMAN LEFSTIEN, CRIMINAL DEFENSE SERVICES FOR THE POOR, METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 2 (1982). For an overview of case law regarding the representation of the poor in the United States see ELI JARMEL, LEGAL REPRESENTATION OF THE POOR: CASES AND MATERIALS (2d ed. 1975). See also Richard J. Medalie & Ralph Nader, *Justice for All—Who Have Money*, WASH. POST., Sept. 25, 1995, at A2.

665. See Medalie & Nader, *supra* note 664, at A2.

666. But see Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1871 (1998) (arguing that an open approach to legislative history will "skew judicial evaluation in favor of claims about legislative history advanced by affluent parties").

667. See Easterbrook, *Statutes*, *supra* note 34, at 550-51 (noting that statutory construction "is an art" that "requires the rarest of skills" and concluding that the "number of judges living at any time" who can do it well "may be counted on one hand").

clever advocates.<sup>668</sup> Thus, “the effort required” to understand the statute against this background “would be enormous.”<sup>669</sup> Moreover, even in those few instances where the legislative history is straightforward, the sheer volume of materials can easily consume the work of a judge and her clerks whose time is better spent on other matters.<sup>670</sup>

Perhaps it should come as no surprise that the proponents of this argument based on “efficiency” have advocated a similarly economic approach to other legal problems.<sup>671</sup> Efficiency, however, is not the only or even the primary value at stake in adjudication. Moreover, what a judge may see as a pointless, time-consuming exercise will be viewed by others as due process and the search for truth and meaning.

To say that legislative history is relevant to statutory interpretation is not to suggest that it will always be dispositive or that it is not subject to manipulation by lawyers and law-makers. Indeed, the use of contextual materials is no panacea for the problems of statutory construction that confront courts today. Rather, it will frequently be the case that the legislative history behind a statute will not answer the issue at hand.<sup>672</sup> Moreover, the sources that make up this history

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668. See *supra* notes 63-73 and accompanying text.

669. Movsesian, *supra* note 89, at 1186 (footnote omitted); see also Slawson, *supra* note 663, at 408 (“Legislative history requires extraordinary amounts of research.”).

670. See SCALIA, *supra* note 35, at 36-37:

The most immediate and tangible change the abandonment of legislative history would affect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense. When I was head of the Office of Legal Counsel in the Justice Department, I estimated that 60 percent of the time of the lawyers on my staff was expended finding, and poring over, the incunabula of legislative history. What a waste. We did not use to do it, and we should do it no more.

*Id.*

671. See generally Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986); Frank H. Easterbrook & Danial R. Fischel, *Optimal Damages in Security Cases*, 52 U. CHI. L. REV. 611 (1985).

672. See DICKERSON, *supra* note 615, at 73 (“The errors [sic] seems to be in assuming that, if there is an ascertainable legislative intent, it necessarily resolves the question at hand, and conversely that, if it does not resolve the question at hand, it must not have existed.”); *id.* at 79-80 (“That there is some actual and reasonably inferable legislative intent behind every statute does not mean that there is always, or even often, a specific legislative intent with re-



may be incomplete or may contain statements inserted by duplicitous legislators that do not accurately reflect the views of most members. Further, the legislative history behind a statute is always susceptible to manipulation by advocates and by judges already inclined to reach a certain result.

*a. judicial resistance to the judicial role*

It would be wrong to suggest that the review of a statute's drafting history and legislative background will be easy or that statutory analysis in light of this context will be simplified.<sup>673</sup> On the contrary, the review of legislative history will often "require [a] complex and tedious investigation."<sup>674</sup> Moreover, the judge must avoid being misled both by the actions of legislators who behave in a strategic fashion<sup>675</sup> and by the distorted presentations of legislative history made by interested advocates. Instead, judges must overcome these pitfalls in order to determine the proper significance to be given to various portions of the legislative record.<sup>676</sup>

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spect to the particular issue in question or, if there is only a general relevant intent, that it resolves the issue.") (footnote omitted).

673. *But see* Farber & Frickey, *supra* note 57, at 452 n.105 (citing sources that contend that the use of legislative history falsely simplifies the interpretive process).

674. MACCALLUM, *supra* note 612, at 12 (footnote omitted).

675. *See supra* notes 57-62 and accompanying text.

676. It is beyond the scope of this article to argue how courts should go about making this judgment of relative significance. Still, judgments of this sort must be made and not only in the case of statutes. Indeed, as discussed in detail above, the UCC contains rules that establish the relative priority of different kinds of contextual evidence employed in the interpretation of contracts. *See* U.C.C. §§ 1-205(4), 2-208(2) (1995); *supra* notes 240-252, 279-284 and accompanying text. A number of commentators on statutory interpretation have likewise discussed or proposed hierarchical rankings or priority rules that address the relative worth of different sources of legislative history. *See* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39; Eskridge, *New Textualism*, *supra* note 37, at 636-40; Eskridge & Frickey, *supra* note 47, at 353-62; Maltz, *supra* note 52, at 24-28; Redish & Chung, *supra* note 38, at 830-31, 870. For an alternative view, see Vermeule, *supra* note 666, at 1879-80 (arguing that such hierarchies are "poorly theorized and practically unstable").

Although the basic problem of giving priority to different sources of contextual evidence is similar in the case of contracts and statutes, there are also clearly some important differences. For example, the principle of hierar-

Those who oppose the use of legislative history rightly contend that this is a demanding challenge, but it is also a task that falls squarely within the judicial role. In the adjudicative process, judges must frequently decide the weight to be assigned facts that are presented to them. This task is not easy. It requires an open mind and fair disposition, as well as acute study, careful balance, and thoughtful deliberation. In short, it calls for the exercise of sound judgment. Although it may not be easy to attain, *that* is the judge's art. Indeed, it might well be easier or more "efficient" to refuse to engage in this inquiry by simply ignoring legislative history altogether. In the interpretation of contracts and other texts, however, a judge may not ignore what is relevant simply because it is tedious or because its significance is not readily apparent.

Accordingly, the practical objections raised against the use of legislative history are valid, but only to a point. They go to the *weight* to be accorded contextual sources, not to their *relevance*.<sup>677</sup>

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chy at work in sections 1-205(4) and 2-208(2) is one of specificity, i.e., the more specific the source of contextual evidence the more likely it is to manifest the parties' true understanding of their agreement. See U.C.C. §§ 1-205(4), 2-208(2) (1995). Accordingly, where they cannot be reconciled, express terms have priority over course of performance, which has priority over course of dealing, which has priority over usage of trade. Although specific manifestations of the legislature's intent should carry more weight than evidence of general design, the mere specificity of the evidence presented is not sufficient. Whereas the UCC rules presume that the more specific the source the more representative of the parties' intent, the same cannot be said of legislative history. See DICKERSON, *supra* note 615, at 155. A legislator's statement made during a floor debate may be quite specific regarding the aim of a particular provision, but it may also fail to represent the views of most legislators. See *id.* ("Materials in hearings and floor debates are so heterogeneous and fragmentary and so influenced by the tactics of promoting enactment that they have almost no credibility for the purposes of later interpretation.") (footnotes omitted).

677. See Henry M. Hart, Jr., *Note*, in FRANK C. NEWMAN & STANLEY S. SURREY, *LEGISLATION: CASES AND MATERIALS* 668-71 (1955). Hart is correct in concluding that legislative history constitutes a relevant part of the context within which the statute is to be construed. He is also correct in asserting that the real inquiry should be the weight to be accorded different parts of this history. Hart is wrong, however, to limit this history to what was "officially before the legislature at the time of its enactment." *Id.* at 670. As discussed above, a linguistic rationale may justify review of materials beyond those brought before the law-making body. See *supra* notes 639-44 and accompanying text.

“[T]hey suggest only the need for care in the consideration of legislative history, not total abandonment of the use of such materials.”<sup>678</sup>

## 2. Conceptual arguments against the use of legislative history

Although the types of argument employed frequently overlap, the more serious challenges to the use of legislative history tend to be more conceptual in nature. The most prominent of these arguments is the “often overlooked truth”<sup>679</sup> that “[t]he text of the statute—and not the intent of those who voted for or signed it—is the law.”<sup>680</sup> Only the statutory text, and not the legislature’s intent, however so conceived, survives the formal constitutional requirements of enactment that warrant recognition as law.<sup>681</sup> “Men may intend

678. Maltz, *supra* note 52, at 24; *see also* Eskridge, *New Textualism*, *supra* note 37, at 689 (“At the very least, the new textualists urge a more critical use of legislative history, and I join their call, based upon the realist problems with legislative history in many cases.”); Karkkainen, *supra* note 37, at 420 (“Even if we accept Justice Scalia’s criticisms of legislative history at face value, however, they are at best arguments for not treating legislative history as law and for discounting its evidentiary value; they are not convincing reasons to exclude legislative history altogether.”) (citation omitted); Redish & Chung, *supra* note 38, at 830 (“Rather than completely jettisoning legislative history, a more sensible approach would set conditions or guidelines for its use.”); *id.* at 864 n.259 (arguing that the reservations new textualists have for the use of legislative history “recommend a cautious and guarded use of legislative history under circumstances in which the text does not itself provide a definitive answer”); Sunstein, *supra* note 52, at 431 (“In short, courts should approach legislative history cautiously.”) (citation omitted).

679. Sunstein, *supra* note 52, at 416.

680. Easterbrook, *What Does*, *supra* note 89, at 444.

681. In the case of federal legislation, proponents of new textualism emphasize the formal requirements of bicameralism and presentment set forth in *INS v. Chadha*, 462 U.S. 919 (1983). *See* DICKERSON, *supra* note 615, at 9-10 (noting that before *Chadha* was decided, by “negative implication” Article I appeared to set forth the “exclusive means by which [Congress could] create a new law” and that most state constitutions had similar requirements); Eskridge, *New Textualism*, *supra* note 37, at 654 (“The only legitimate statutory law is that which has been approved by both chambers of Congress and by the President (or passed over a veto).”); Easterbrook, *Role*, *supra* note 34, 64-65 (arguing that the rigorous process of law-making adopted by the Framers “was the most important achievement of the Constitution”); Eskridge & Frickey, *supra* note 47, at 327 (arguing that “any theory of interpretation that formally gives conclusive weight to the views of a legislative subgroup is in tension with the bicameralism and presentment requirements of Article I”); Farber, *supra* note 32, at 288 (“The Constitution contains procedural barriers intended to hinder

what they will; but it is only the laws that they enact which bind us."<sup>682</sup>

Although the gist of this argument is vital and bears repeating, its practical import is quite limited. The argument serves chiefly to remind us of the unrivaled primacy of the statutory text. Once this is acknowledged, however, the statutory text must still be interpreted.<sup>683</sup> It is, after all, the meaning of the statute in light of the controversy at hand that the court must determine in the process of adjudication. "Statutory terms are not self-defining, and words have no meaning before or without interpretation."<sup>684</sup> The opponents of legislative history are plainly right to insist that historical materials not be allowed to undermine, let alone replace, the central importance of the statutory text.<sup>685</sup> Clearly, it would not be legitimate for a court to subvert or ignore the meaning of a statute. In order to know

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the transformation of legislators' preferences into law. Hence, to give legal effect to legislative intentions in the absence of any relevant statutory text would undermine the constitutional scheme."); Sunstein, *supra* note 52, at 416 ("Statutory terms—not legislative history, not legislative purpose, not legislative 'intent'—have gone through the constitutionally specified procedures for the enactment of law."); *id.* at 430 (noting that "the words rather than the intent survived the procedures of article I").

682. SCALIA, *supra* note 35, at 17; *see also* Eskridge, *New Textualism*, *supra* note 37, at 671 (describing Scalia's position as resting on the belief that "the only thing that actually becomes law is the statutory text; any unwritten intentions of one House, or of one committee or of one Member, in Congress are not law unless it can be shown that they were understood and accepted by both Houses and by the President"); Eskridge & Frickey, *supra* note 47, at 354 ("Formally, all that is enacted into law is the statutory text, and at the very least legislative supremacy means that an interpreter must be attentive to the text."); Redish & Chung, *supra* note 38, at 822 ("In fact, as new textualists correctly point out, the only thing that has satisfied the Constitution's procedural requirements for passage of law is the text itself."); Sunstein, *supra* note 52, at 427 (noting that "purposes are expressed through and have no life independent of statutory words. The words represent the law."); *id.* at 431 ("Congress enacts statutes rather than its own views about what those statutes mean . . . . The words, not the 'intent,' represent the law.").

683. *See* Posner, *supra* note 61, at 187 ("No matter how clear the text seems, it must be interpreted . . . like any other communication . . .").

684. Sunstein, *supra* note 52, at 416.

685. *See* SCALIA, *supra* note 35, at 31 (recalling the lawyer's joke that the statutory text should be consulted only when the legislative history is unclear); Easterbrook, *Statutes*, *supra* note 34, at 539 (remarking that delving into legislative history "is to engage in a sort of creation" whereby the court fills in the blanks of the legislative text).

what that meaning is, however, the court must first engage in the interpretive process. The formalist critique of legislative history has nothing positive to recommend in this regard.<sup>686</sup>

The most powerful argument against the use of legislative history directly challenges the problematic concept of "legislative intent." Traditionally, those lawyers and judges who have consulted legislative history have justified their actions as a means of discerning the intent of the legislature.<sup>687</sup> The legislature, however, is a corporate body "comprise[d of] many members" with numerous distinct intentions.<sup>688</sup> As such, it does not possess a single, coherent intent "hidden yet discoverable."<sup>689</sup> Although such a shared intent is not a logical or ontological impossibility, "with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent."<sup>690</sup> Consequently, references to the legislative record are "much more likely to produce a false or contrived legislative intent than a genuine one."<sup>691</sup> In the main, the proponents of new textualism contend that "shared meaning in the legislative process is limited to the rules to be established" and does not extend to "what the drafters intended these rules to achieve."<sup>692</sup>

Although this argument against the use of legislative history enjoys considerable currency today,<sup>693</sup> it is by no means new. The first commentator to articulate this critique was Professor Max Radin of Berkley, Llewellyn's contemporary and fellow legal realist.<sup>694</sup>

686. See Eskridge, *New Textualism*, *supra* note 37, at 646-50 (referring to the line of argument that legislative history is not law as "formalist").

687. See Easterbrook, *Role*, *supra* note 34, at 60-61 (noting that the "common uses of legislative history assume that intent matters" because it is thought to be the "real law" embedded in "the minds of the legislators").

688. Easterbrook, *Statutes*, *supra* note 34, at 547.

689. *Id.*

690. SCALIA, *supra* note 35, at 32.

691. *Id.*

692. Easterbrook, *What Does*, *supra* note 89, at 445.

693. See, e.g., Kenneth A. Shepsle, *Congress Is a "They" Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

694. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) [hereinafter Radin, *Statutory*]. Llewellyn clearly considered Radin to be a fellow legal realist. See Llewellyn, *Some Realism*, *supra* note 158, at 1227 n.18, 1234 n.35, 1259. See generally LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986) (discussing Radin's place within legal realism). For other sources attributing this argument against legislative intent to Radin see Blatt,

Nearly seventy years ago he confidently argued that “[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.”<sup>695</sup> As such, Radin estimated that the chances of hundreds of legislators sharing a determinate intent were “infinitesimally small.”<sup>696</sup> Moreover, “[e]ven if the contents of the minds of the legislature were uniform,” it would likely remain “undiscoverable in any real sense.”<sup>697</sup> Indeed, the practical problems involved in computing such a legislative intent would discourage “even venturesome mathematicians.”<sup>698</sup> Accordingly, Radin urged courts and lawyers to

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*supra* note 315, at 827; Eskridge, *Dynamic*, *supra* note 42, at 1507; Manning, *supra* note 58, at 684-85; Movsesian, *supra* note 89, at 1181, 1186; Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 599-600 (1995). Contemporary academics not associated with new textualism have also found the substance of Radin’s critique of legislative intent to be appealing. See RONALD DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE]; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

695. Radin, *Statutory*, *supra* note 694, at 870.

696. *Id.*

697. *Id.*

698. *Id.* at 871. Contemporary critics have further developed Radin’s argument concerning the computation of legislative intent. Constructing a coherent aggregate legislative intent would require much more than a simple mathematical tabulation. For example, as an initial matter one must decide whose intentions will be counted in this calculation. Should it be limited to those who voted for the measure? What about those who voted against it? What if those who voted against the measure did so because they misunderstood it? How should one count the legislators who voted for the statute but who never expressed an opinion about the meaning of the statute? Should the executive who signed or unsuccessfully vetoed the statute count? See, e.g., Easterbrook, *Role*, *supra* note 34, at 63 (noting that “the court has endless flexibility in selecting *who* is asked the question” of what they understood the legislation to mean); Eskridge, *New Textualism*, *supra* note 37, at 632-34, 639 (noting that courts in the past have not taken into account the views of those who did not support the legislation); Maltz, *supra* note 52, at 13 (remarking that “the key issue” is “which legislators’ intent should matter for purposes of judicial interpretation”); Slawson, *supra* note 663, at 404 (discussing the plethora of sources to draw upon in construing intent and recounting the advent of presidential sign-up ceremonies as part of legislative history); *id.* at 395 (referring to Justice Scalia’s statement in *United States v. Stuart*, 489 U.S. 353, 371-77 (1989)

study the rules that have been enacted by legislatures rather than the drafting histories which have not.<sup>699</sup>

*a. the problematic concept of legislative intent*

By almost all accounts, this critique renders the idea of legislative intent problematic.<sup>700</sup> An individual may intend some meaning by his or her use of language, but the individuals who make up the legislature can exercise their law-making authority only in a collective fashion. Difficult to grasp in the case of a natural person, "[i]ntent is . . . fictive for a collective body."<sup>701</sup> Moreover, even if some corporate intent is assumed to exist, the conceptual and practical problems of aggregating multiple individual intents seem insurmountable. Thus, many have concluded with Llewellyn that

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(Scalia, J., concurring), that the treaty in question also "manifests the intent of the President"). Provided these questions are answered one must then deal with the vexing problem of somehow combining multiple inconsistent intentions of varying degrees of specificity and intensity. That is, the intent of each person whose intent would be included would have to be assigned a value in terms commensurable with the value assigned to the intent of everyone else. After completing this process of valuation the resultant intention values would then have to be tabulated together in some fashion that addressed the specific interpretive question at hand. This tabulation would, of course, have to account for those legislators who voted for the statute but for whom no evidence of intent is available, aside from the vote itself. See DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 694, at 34-57; Brest, *supra* note 694, at 209-22; Sunstein, *supra* note 52, at 427.

699. See Radin, *Statutory*, *supra* note 694, at 871-73. Twelve years later Radin modified his position concerning the use of legislative history, declaring that his earlier "statements were undoubtedly somewhat too sweeping." Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 410 (1942). In retrospect, Radin asserted that he had intended to argue that legislative materials were "neither irrelevant nor incompetent, but that they [were] in no sense controlling." *Id.* at 410-11. Although he maintained that the meaning of a statute did not "depend on discovery of the 'intention' or the 'will' of the legislature, or of the legislator," *id.* at 406, Radin found that sponsor statements and committee reports could be considered and might "greatly aid in making the [statute's] purpose apparent." *Id.* at 411.

700. For a careful point-by-point response to Radin's argument, however, see DICKERSON, *supra* note 615, at 67-86.

701. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) (citation omitted).

legislative intent is a "pure will-o'-the-wisp,"<sup>702</sup> and that references to it are either hopelessly contrived or fatuous.

Although the concept of legislative intent is problematic, it is not wholly incoherent. Rather, the realist critique advanced by Radin, Llewellyn, and others makes plain that certain accounts of legislative intent are either incoherent or impracticable. If legislative intent is taken to be the product of a sort of intention calculus, then it is truly an illusory concept. The myriad problems involved in tabulating an aggregate legislative intent are both vexing and intractable.<sup>703</sup> Thus, even if such an intent exists as an ontological matter, as a practical and cognitive matter we are incapable of comprehending it.<sup>704</sup> Consequently, if legislative intent is to be part of the process of statutory interpretation, then it must be conceived of as something other than the sum of multiple individual intents.<sup>705</sup>

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702. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 83, at 529; *see also supra* notes 55-62, 504-509 and accompanying text; Llewellyn, *Offer and Acceptance Part I*, *supra* note 165, at 6 n.13 (crediting Radin and Dean James Landis with encouraging "common law attitudes" in the interpretation of statutes which are necessary for "statutory drafting in simpler, broader terms" to become more wide-spread).

703. *See supra* note 698 and authorities cited therein.

704. Radin grasped this point from the beginning. *See Radin, Statutory*, *supra* note 694, at 870-71 ("Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply."); *see also* Easterbrook, *Statutes*, *supra* note 34, at 547 ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.") (citation omitted).

705. That is to say, we are not limited to conceiving of "legislative intent" as the aggregate sum of multiple individual intentions. Instead, using Professor Dworkin's terminology, this view is but one of several competing "conceptions" all of which attempt to define the "concept" of legislative intent. For Dworkin, a concept is a general idea, a plateau of thought, in relation to which a conception is a particular and detailed articulation of what that idea is. *See DWORKIN, LAW'S EMPIRE*, *supra* note 625, at 70-71; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-37 (1978). Regardless of the subject matter of the concept, each conception has a distinct set of criteria that distinguish it from others. Although Dworkin does not say so expressly, we may regard these criteria as conventions, that is, as some agreed upon means for identify-



*b. intent as a matter of convention*

Our frequent references to the intentions and intentional acts of collective bodies suggests that some alternative conception is already well-established. For example, "[w]e find no problem in attributing intentions to corporations, groups, and institutions in ordinary life, and the law assumes that corporations and some other legal subjects who are not human beings can act intentionally."<sup>706</sup> Even more to the point, we "speak quite freely and precisely about legislatures deliberating, and this, aside from our talk about their debating, investigating, etc., implies a capacity for purposive behavior."<sup>707</sup> Surely, an entity like a corporation, which is admittedly an imaginary person, a "legal fiction,"<sup>708</sup> cannot have a real intention in the same way that we believe that real human persons have intentions.<sup>709</sup> Nonetheless, as a matter of *convention* we regard such entities as having not merely intentions, but intentions to which legal consequences attach.<sup>710</sup>

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ing the thing in question. See Moore, *Natural Law*, *supra* note 342, at 298-99 (describing Dworkin as a "deep conventionalist," who "can distinguish the conventions that define deep concepts from those that define more specific (and often competing) conceptions of those concepts") (footnotes omitted); see also Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 941-57 (1989) (critiquing Dworkin's conventionalism); Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453 (1987) (book review) (same).

706. Raz, *supra* note 614, at 263; see also Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 865 (1992) ("In practice, we ascribe purposes to group activities all the time without many practical difficulties."); Posner, *supra* note 61, at 196 ("Institutions act purposively, therefore they have purposes.").

707. MACCALLUM, *supra* note 612, at 14.

708. For the classic discussion of this concept see L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363 (1930); L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 513 (1931). These essays were later published together as a book. See L.L. FULLER, *LEGAL FICTIONS* (1967). For a more recent treatment of the subject see Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871 (1986).

709. See MACCALLUM, *supra* note 612, at 15 (summarizing the skeptic's response to the attribution of intentional acts to legislatures as being that "[l]egislatures are not men, and if only men clearly have intentions, then one's arguments must cultivate analogies between legislatures and men—the point being to argue that legislatures are enough like men in important respects to be counted as having intentions").

710. See ROBERT CLARK, *CORPORATE LAW* 17 (1986) (stating that the law views corporations as if they were natural persons) (citing authority); Zeppos,

Legislative intent is also a matter of convention.<sup>711</sup> A proposed statutory interpretation may be supported by voluminous and precise citations to the legislative record. Still, what we describe as the “legislative intent” or “legislative purpose”<sup>712</sup> of a specific statute or provision will always be an “intellectual construct.”<sup>713</sup> At best it will be a reasonable approximation of what the legislature had in mind, an accurate reflection but not the thing itself.<sup>714</sup>

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*Fact-Finding, supra* note 37, at 1341 (“As with a legislature, the hundreds of individuals that form a corporation cannot be said to have a single intent. Still, corporations are routinely convicted of crimes which include intent as an element of the offense.”) (citation omitted).

711. See Aleinikoff, *supra* note 37, at 25 (observing that because “recovery of specific intent is quite unlikely,” those who believe legislative intent is relevant “must satisfy themselves . . . [with] something they are willing to call intent derived from the materials deemed appropriate to consult in the search for intent”); Redish & Chung, *supra* note 38, at 865 (explaining that under their theory of “textualist originalism” even though “unanimity was never reached” among legislators that does not mean that “no ascertainable intent exists” since their theory requires “merely a good-faith effort designed to determine if the balance [of evidence regarding intent] can be tipped in favor of any one interpretation within the universe of possible interpretations”) (citations omitted). *But see* Moore, *Natural Law, supra* note 342, at 348-58 (arguing that in varying degrees one can be either a realist or conventionalist concerning the existence of legislative intent and that while the former is non-existent the latter is objectionable on moral grounds); Raz, *supra* note 614, at 263 (rejecting the claim that the search for statutory intent at most “establishes a fictitious author’s intent” and asserting that his own thesis will only be helpful “if it refers to real intentions”).

712. Many commentators distinguish between legislative intent and legislative purpose. See, e.g., DICKERSON, *supra* note 615, at 88 (suggesting that “the word ‘intent’ coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word ‘purpose’ refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish”); Eskridge, *Dynamic, supra* note 42, at 1479-80 (distinguishing between “original intent” and the more general “original purpose”); Redish & Chung, *supra* note 38, at 812-17 (distinguishing between “intentionalism” and “purposivism”). *But see* MACCALLUM, *supra* note 612, at 27-29 (questioning the validity of the distinction).

713. Cf. Fallon, *supra* note 310, at 1212, 1254 (describing the ubiquitous “framer’s intent” of constitutional law as an “intellectual construct” or a “theoretical construct”).

714. See HIRSCH, *supra* note 297, at 17 (“Since genuine certainty in interpretation is impossible, the aim of the discipline must be to reach a consensus, on the basis of what is known, that correct understanding has *probably* been achieved.”); Gerald L. Bruns, *Law as Hermeneutics: A Response to Ronald Dworkin*, in *THE POLITICS OF INTERPRETATION* 315-16 (W.J. Thomas Mitchell

In hoping to yield some conventional understanding of the legislature's intent, the lawyer or judge who reviews the historical record is not thereby settling for "second best." To suggest that courts should resolve difficult questions of statutory interpretation by recourse to the "true" or "actual" intentions of the legislature rather than some conventional "imitation" or "imposter" is to misunderstand both the subject matter of the inquiry and the role that convention plays in our understanding of reality.

i. conventions and instrumental values

A "convention" may, of course, refer to a social practice that has no truth value but is followed simply as a matter of convenience within a given culture. The choice of such a convention does not purport to describe reality in any way, rather its value is purely instrumental. A convention of this sort may be a matter of explicit agreement (such as driving on the right hand side of the road) or it may be an unspoken custom (such as addressing a person by his or her individual name followed by his or her family name). For virtually every convention of this sort in one culture its opposite may be found in another. Which convention is followed is entirely contingent upon the history and culture in which one is situated.

Both language itself and law are conventions of this kind. With respect to language, it is entirely arbitrary, a matter of *mere* convention, that the English word "dog" refers to a class of carnivorous, quadruped mammals rather than the word "fish." The convention could have been otherwise. It could have been the case that the word "Hunt" or "poisson" or "elephant" referred to these animals. That these words are not typically used in this fashion reflects the dominant social practice, the conventions of the English language.<sup>715</sup>

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ed., 1983) (noting that interpretation aspires to be "what interpretation never quite manages to be, namely, the objectification of a hidden or authorial intention"); D'Amato, *supra* note 614, at 576 (remarking that "[n]o one can ever know with certainty what any author's intention or strategy was" but that we can "invok[e] probabilities") (footnotes omitted); Graff, *supra* note 309, at 408 (noting that "the degree to which we can be confident about our inferences [concerning an author's intent] depends on the amount of evidence available, evidence which itself is open to criticism and may well be fallible").

715. See Moore, *Natural Law*, *supra* note 342, at 291-93 & n.26; see also Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 427 n.72 (1985) ("I can imagine worlds in which the noises or marks 'square' represent a figure

Indeed, we could not recognize something *as* a word, rather than as merely a contour (or range of contours) of sounds or a certain form (or range of forms) of scribblings if we were not aware that sounds and scribblings with such contours and forms have a significance, function, or value resulting from the growth or stipulation of such conventions.<sup>716</sup>

Communication occurs, or rather we believe it occurs, because of convention, that is, “because of agreement over the governing rules; [which] enable people to understand each other, and [which] sharply limit the number of possible interpretations.”<sup>717</sup>

Law, like language, is a vast system of conventional practices and understandings. For example, the process whereby a proposed bill becomes a legally binding statute in this country is wholly contingent upon the law-making practices we have chosen to embrace. It is entirely a matter of convention that we regard the language passed by a majority of both houses of Congress and signed by the President (or passed over his veto) to be the law of the United States. These conventions are neither natural nor necessary. Indeed, there was a time when a quite different set of conventions determined the law of the land.<sup>718</sup> Citizens surely need some “rule of recognition” in order to distinguish legal from non-legal texts. They need some means of identifying those specific pieces of language (of all the languages in the world) that constitute “the law.”<sup>719</sup> The precise content

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with five sides. I also can imagine that some people in this world might use the noises or marks ‘square’ to denote a figure with five sides. But squares still have four and not five sides, which I can say because I understand the conventions of *this* language as used in *this* context, the context in which *this* culture developed and uses *this* language.”).

716. MACCALLUM, *supra* note 612, at 11.

717. Sunstein, *supra* note 52, at 441-42 (footnote omitted); *see also* DICKERSON, *supra* note 615, at 37-38 (“Although all language is conventional in the sense that words have no inherent meanings, its effectiveness in communicating meaning depends on the establishment of its conventions as observable usage.”).

718. For a basic exposition of the law-making procedures under the Articles of Confederation, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 356-57 (1969). For a survey of the British parliamentary and English common law that governed colonial America, see *PAMPHLETS OF THE AMERICAN REVOLUTION: 1750-1776*, at 115-30 (Bernard Bailyn ed., 1965).

719. The term “rule of recognition” was coined by Professor H.L.A. Hart to

of such a rule or set of rules is, however, purely a matter of convention.<sup>720</sup> Although “[l]egal obligations arise because we recognize [that] law-making authority [is] vested in certain human beings,”<sup>721</sup> the identity of the people who possess this authority and how we go about recognizing them is, likewise, entirely a matter of convention.<sup>722</sup>

The law is a matter of convention not only with respect to the procedures that create legal obligations, but also with respect to the content of law. For example, it is a matter of convention that we regard certain results as constituting “injury” and certain actions as constituting “negligent conduct” to which liability attaches and for which the responsible parties must pay damages. It is a matter of convention that we regard some actions as constituting an “offer” and others an “acceptance” whereby the individuals involved form a binding contract. These conventions could be different than they are

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refer to those conventions which enable the members of a given society to identify the specific texts which constitute the authoritative norms of social obligation, i.e., the law. See H.L.A. HART, *THE CONCEPT OF LAW* 97-107 (1961).

720. By this I do not mean to suggest that there are no sound normative reasons for choosing one set of law-making procedures over another. As a general matter, law-making procedures that are democratic in nature are superior to conventions that are not because democratic procedures more directly embody the notions of popular sovereignty and human dignity. The laws that result from democratic law-making conventions may, nonetheless, be morally objectionable in content if not in pedigree.

721. Kay, *supra* note 38, at 232.

722. Joseph Raz obliquely and perhaps unintentionally makes a similar point. Raz asks us to imagine the “ridiculous example” in which “the legislature has passed a law decreeing that, if John Doe eats a melon before Christmas, then strikes will be banned.” Raz, *supra* note 614, at 265. This example demonstrates Raz’s point that legislation is always made with reference to legislative intent, even if the sole content of that intent is merely the intention to legislate. If “John Doe is unaware of the legal power that his culinary habits have acquired,” then his consumption of a melon is not a legislative act because “[o]nly acts undertaken with the intention to legislate can be legislative acts.” *Id.* Although we may find its actions perplexing, even irrational, the legislature has in fact legislated, even though the effect of its legislation turns on some other contingency. Although it may sound bizarre and ridiculous to our ears, other cultures and societies could require the consumption of food or the performance of other acts as conventions in the law-making process. On the other hand, our conventions may strike others as equally strange. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (exemplifying an unusual, and unconstitutional, legislative procedure used in an attempt to deport an alien).

at the present time. For example, it used to be the case that an employer was not considered "negligent" under the law, even though his or her employee was careless and caused injury to a fellow worker.<sup>723</sup> It also used to be the case that one could not sue another person for the psychological injury he or she may have caused.<sup>724</sup> Likewise, it used to be the case that the terms of an "acceptance" had to exactly correspond to the terms of the "offer" made. If the offeree's response was not the "mirror image" of the offer taken, it was not an "acceptance," but a "rejection" and a "counteroffer."<sup>725</sup> There may well be good reasons to opt for one set of conventions over another, but the choice between them will not be a matter of fidelity to some empirical truth. Instead, the content of legal conventions changes over time to reflect changing normative beliefs concerning the value to be accorded certain forms of conduct.<sup>726</sup>

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723. See, e.g., *Boley v. Larson*, 419 P.2d 579, 581-82 (Wash. 1966) (citing RESTATEMENT (SECOND) OF AGENCY § 474 (1958)).

724. See, e.g., *Carter v. Lake Wales Hosp. Ass'n.*, 213 So. 2d 898 (Fla. Dist. Ct. App. 1968).

725. See, e.g., 1 WILLISTON, *supra* note 124, § 73, at 209-10. The demise of the mirror-image rule in sales contracts was yet another innovation brought about by Llewellyn in preparing Article 2 of the UCC. See U.C.C. § 2-207 (1995).

726. For a general discussion of the law as an elaborate system of conventions, see Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987) (citing authority). Law is the expression of a normative order. It establishes the fundamental ways in which the state must relate to individuals, as well as the ways in which individuals must relate to the state, and to one another. We often describe this normative order as being moral or immoral, just or unjust. Accordingly, law may not be wholly conventional either with respect to the procedures of its creation or with respect to its content. It is possible to believe that morality and justice are not simply a matter of convenience or fiat but instead have some truth value and that their existence is independent of our beliefs or assertions about them. If this were the case, then law would still be a matter of convention, but it would not be purely a matter of convention. For an interesting collection of essays concerning the status of moral claims, see *ESSAYS ON MORAL REALISM* (Geoffrey Sayre-McCord ed., 1988). See also Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (claiming the existence of a moral reality which judges should keep in mind as they interpret and apply the law). Moore's views were severely criticized in Brian Bix, *Michael Moore's Realist Approach to Law*, 140 U. PA. L. REV. 1293 (1992). For Moore's response, see Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992).

## ii. conventions and truth values

In contrast to conventions of this sort are those conventions that are not merely a matter of convenience but instead reflect some aspect of reality not of our own making. Because we are unable to fully define or recognize the presence of some things or qualities that exist, we do so by means of convention. Conventions of this kind involve not only approximation with respect to the existence, quality, or quantity of the thing in question, they also necessarily involve normative judgments.

For example, most teachers<sup>727</sup> believe that their students either do or do not have some command of the subject matter which they have been taught. The quality of possessing a certain knowledge is real. It exists, but it is difficult to determine whether and to what extent someone has attained it. We make this determination as a matter of convention. We evaluate students by requiring them to take an examination, write a paper, or perform some other sort of exercise. Each of these tasks is thought to measure, in some real sense, the underlying reality that the student either knows, or does not know, the material that has been assigned.

No matter what means the teacher selects to determine the student's competence, it will be a matter of convention in at least three senses. First, the means of evaluation will be conventional in the sense that the teacher could have selected some other means. Just as we here in the United States could have decided to drive on the left-hand side of the road instead of the right, a teacher may choose to administer an essay exam instead of a multiple choice exam, or a research paper in lieu of any examination altogether. The choice of one method over another is, in this respect, simply a matter of convenience.

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727. For a discussion of how student evaluation is conventional but nevertheless attempts to gauge a real quality that students may or may not possess, see ROBERT M. THORNDIKE ET AL., *MEASUREMENT AND EVALUATION IN PSYCHOLOGY AND EDUCATION* 9-16, 23-25, 49-56, 140-43, 176-80 (5th ed. 1991). There are some educators who believe that all evaluation of student learning is hopelessly arbitrary and a mere convention (like driving on the right-hand side of the road), which does not correspond with the underlying reality it purportedly measures, or that it merely reflects the normative bias of the person conducting the evaluation. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 600-01 (1982).

Second, the means of evaluation chosen is also a matter of convention in the sense that it measures only in an approximate fashion what the student knows. There must, however, be some connection, some correspondence between what was taught and what the student has learned. Thus, although the method selected to measure the student's competence is a matter of convenience, it is not purely so.<sup>728</sup> Further, no matter which method is employed, the correspondence between what the student actually knows about the subject and what the method measures will be only approximate. Teachers know when they give a test that some students actually know more about the subject than they are able to demonstrate within the parameters of the examination. Indeed, no matter how thorough the test may be, the teacher is incapable of learning all that the student knows because she will obtain this knowledge through the medium of the exam.<sup>729</sup> Instead, the chosen means of evaluation will produce a conventional measure of the student's knowledge, an estimate, but not the thing itself.

Third, because the method of evaluation used is devised by the teacher, the measure of student competence obtained will always reflect a normative judgment. That is, in deciding what material to test

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728. For example, it might be more convenient for the teacher to administer an already-prepared examination he has borrowed from a colleague and has readily at hand. If, however, the exam given were to test the student's knowledge of material not assigned for the course, then this basic correspondence would be lacking. An even more egregious case would be where the exam tested the student's knowledge of a subject matter altogether different from the subject matter of the course (e.g., questions about the Turks' sack of Byzantium in 1453 in a course on organic chemistry, or questions about the law of sexual harassment in a course on securities regulation). Such an exam would not measure the student's knowledge of the subject matter of the course approximately because it would not measure that knowledge at all. I am not suggesting that some connection between two ostensibly different subject matters could not be drawn, even in an exam setting. What I am suggesting is that it is possible for an examination to fail to measure the student's competence in a given field. No one would feel safe riding in an airplane where the pilot's only qualification as a pilot was that he or she had graduated from medical school.

729. This will be the case even where the test asks the student to recite everything he or she knows about a given subject matter, for example, "Tell me everything you know about . . . the Allies' D-Day landings in Normandy, William Shakespeare's *A Mid-Summer Night's Dream*, or the Latham Act, etc." Such an open-ended question might not stimulate a thorough response even from a student who knows a great deal about the subject.



and how much weight is to be given to each portion, the teacher is deciding what the student ought to know about a given subject matter if he or she wishes to be judged competent. In this, the teacher is defining what it is that constitutes "command of the subject matter." The teacher is identifying what it is that the teacher is attempting to measure. Further, in requiring the student to show his or her knowledge in a given conventional format, the teacher is making an implicit moral judgment. That is, even if the student knows more than can be conveyed in the exam given or in the paper assigned, the student still ought to be able to demonstrate his or her competence under the conventions chosen.

Conventions of this sort can be found not only in teaching but in virtually every walk of life.<sup>730</sup> All of them possess the same

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730. Although the example I have used here is "knowledge" and the subject we are concerned with is "intention," conventions of this sort are not limited to entities or qualities that are cognitive in nature. For example, each fall, newspaper sportswriters rank college football teams for the Associated Press and other news services. The writers who participate in these polls have in mind what they believe is a very real quality, namely, that of being the best college football team in the country. This overall quality is a combination of a team's many characteristics including its defense and offense, its speed, strength, maturity, and desire to win. The writers gauge this quality of being "the best" based upon their judgment of these characteristics as well as the team's win-loss record, the strength of its schedule, and its ability to win on the road as well as at home. Clearly, the ranking of any given team by any given writer involves the exercise of normative judgment. One writer will think a team's running game is the most important factor while another believes that pass defense is critical. Further, even if two different writers agree upon the weight to be given a certain category (or the polling group predetermines this matter) the writers must still determine how well a team has performed within each category. The ranking is clearly a matter of convenience, a substitute for having every team play every other team every week throughout the season. (Even if this were possible, it would not fully capture the quality of being "the best" team because teams change over time and a game only measures in an approximate fashion the relative quality of two teams under certain conditions (e.g., weather, location) at a given point in time. Indeed, this explains why we determine which team is the best within a given period of time, i.e., a season. The duration of this period of time, when it begins and when it ends, are established as a matter of convention.) Although it often functions only as a crude estimate, both writers and players firmly believe that the poll measures a real quality that a team does or does not possess. See generally *College Football Preview*, SPORTS ILLUSTRATED, Aug. 31, 1998 (describing the pre-season "top-25" college football rankings); Ed Sherman, *The Best? No Way to Know, But No Way to Stop Debate*, CHI. TRIB., Mar. 30, 1999, at C3.

characteristics. Because they seek to describe reality in some fashion, these conventions are not purely instrumental, a mere matter of convenience. Although this reality exists independent of our beliefs about it, the conventions we use to measure it also identify it, or rather, they define our understanding of it. Further, our choices as to how to measure and thus define this aspect of reality involve the exercise of normative judgment.

*c. legislative intent as a matter of convention*

What lawyers and judges mean when they refer to “legislative intent” is conventional in this sense. It is a matter of probability, inference, and approximation. As such, judgments of legislative intent necessarily involve judgments that are instrumental, descriptive, and normative in nature. First, determinations of legislative intent are instrumental in that the sources used to understand this intent are restricted as a matter of convenience or practical necessity. A complete account of the legislative history behind even the most basic form of legislation “is a practical and philosophical impossibility.”<sup>731</sup> The historical record to which judges and lawyers refer in arguing about the content of legislative intent does not include “a transcript of every telephone call, every lunch-table conversation with a lobbyist, and every arm-twisting message from the White House or the Democratic National Committee chairman . . . .”<sup>732</sup> Although the intended meaning of statutory language may have been discussed at length in the course of these events, we make no attempt to include every discussion of the proposed statute in the legislative record. As

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Likewise, use of the number  $\Pi$  is also conventional in this sense. The number  $\Pi$  denotes the ratio of the circumference of a circle to its diameter. See MATHEMATICS DICTIONARY 272 (James & James eds., 3d ed. 1968). Because  $\Pi$  is a transcendental number, it cannot be calculated to the last decimal point. Accordingly, when mathematicians and engineers use  $\Pi$  in their calculations by convention they use only so many decimal places. Although the use of an approximate value for  $\Pi$  is clearly a matter of convenience that involves the exercise of normative judgment, the number  $\Pi$  also has an actual value that is not subject to change by human fiat. It has a value of 3.14159265 (base ten, Arabic numerals, to the eighth decimal place) not 5.62951413 or 3.56295141 or 31.4159265.

731. Moglen & Pierce, *supra* note 64, at 1215; see also *id.* at 1205 (stating that “[t]he real legislative history of any statutory enactment is not retrievable”).

732. *Id.* at 1216.

the UCC itself shows, the materials that make up the available record can be quite broad and include many sources generated by non-legislative drafters. As a matter of practical convenience, however, the search for legislative intent must be limited in some fashion.

Second, although it is instrumental, legislative intent is not purely instrumental like the grammar of a language or the rules of a game. As a general matter, the law regards questions of intent as questions of fact.<sup>733</sup> Thus, judgments concerning legislative intent are thought to describe some aspect of reality, namely, what the legislature as a whole intended by the language it used in enacting the law in question.<sup>734</sup> Conclusions regarding legislative intent are factual in that they are "dependent upon and constrained by historical materials," but they also "embody implicit or explicit normative judgments."<sup>735</sup> As such, legislative intent is not purely descriptive. It is not "a simple fact awaiting discovery by the industrious researcher" but is instead an "intellectual construct" that combines both normative and descriptive elements.<sup>736</sup> It exists, not because we believe it exists, though our beliefs surely shape the contours of what we take it to be.

Third, although the conventions of legislative intent are surely normative in character, they are not purely normative. These conventions are normative in that they value legislative history as one of the best sources of evidence of what the legislature intended to say. Thus, the judge or lawyer who hopes to understand the intent of the legislature ought to examine these sources rather than some other

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733. See, e.g., *Morissette v. United States*, 342 U.S. 246, 274 (1952) (holding that intent is a question of fact and not a matter of law where intent "is an ingredient of the crime charged").

734. See DICKERSON, *supra* note 615, at 72-73 (suggesting that it is "not entirely fatuous" to speak of a "general consensus" among legislators and that the possibility such a consensus "suggests the further possibility of a real (not fictitious) corporate legislative intent, consisting, not of the shared intent of a group of improbably like-minded legislators, but of the composite thrust of many individual intents, no one of which need wholly coincide with the composite") (footnotes omitted).

735. Fallon, *supra* note 310, at 1213 (discussing the use of the Framers' intent in constitutional law).

736. *Id.* at 1212; see also Redish & Chung, *supra* note 38, at 866 (describing legislative purpose as "an inference drawn from an evaluation of the available evidence").

materials. Crudely put, committee reports are a better indication of what the legislature thought than are stock reports or weather reports.

The conventions of legislative intent are not normative in the sense of being simply a matter of political choice. The content of legislative intent is not whatever one thinks it ought to be. If that were the case, then the sources of evidence and means of inquiry for deriving legislative intent would not be limited to those currently employed. If legislative intent were simply a matter of political choice, it would not matter whether a court referred to committee reports or weather reports in determining the meaning of a statutory text. Although legislative intent is a matter of convention, it is not a matter of fiat. That sponsor statements are more highly valued in statutory interpretation than tarot card readings surely reflects a normative judgment. It is also clear that this judgment is guided and tempered by the factual orientation of the inquiry. There must be sufficient evidence to justify the inferences made, bearing in mind that what is sufficient is in part a normative judgment.<sup>737</sup>

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737. It is of course still possible to argue that legislative intent understood as a matter of convention is a purely political construct. Under this view courts make frequent reference to materials generated in the legislative process rather than to other kinds of texts, not because the materials evidence legislative intent, but in order to legitimize what courts declare that intent to be. In other words, reference to the conventional sources of legislative intent actually frees courts to make policy under the guise of implementing the policy of the legislature. *See supra* notes 49-52 and accompanying text. It is of course possible for anyone engaged in any human activity to act in bad faith. For example, it is possible for a teacher in writing his or her exam to test the students on material that was not assigned or to give each student a grade without reading the exam or paper that the student submitted. The teacher who acts in this way does not seek to determine whether or not the students learned what they were taught. That someone may act in bad faith is always possible, but this possibility by itself cannot undermine the convention in question. If it could then no human activity would be deserving of our confidence. *See Breen, supra* note 484, at 854 n.304 (discussing how a bad-faith actor in a given activity is not truly engaged in the enterprise); DICKERSON, *supra* note 615, at 77 ("That the concept [of legislative intent] has been abused does not, however, deny its importance as a fundamental presupposition of the legislative process."). Furthermore, it is at least as reasonable to conclude that the discipline imposed by the conventions of legislative intent has a substantive effect on the interpretation of statutes than to conclude that these conventions affect only the appearance and rhetoric of statutory argument.

*d. intent as a matter of convention elsewhere in the law*

The question of intent under the law is, and in all likelihood will always be, a matter of convention. This is true not only for legislative intent, but also for intent in the law of contracts,<sup>738</sup> civil rights, and the criminal law, to name only the most obvious examples that leap to mind. So long as the human race is not a race of telepaths,<sup>739</sup> there is no alternative to regarding intent as a matter of convention. Depending on the circumstances, the conventions we adopt may be blunt and inaccurate or detailed and precise, stylized and structured or loose and informal. For example, generally we regard the taking of a public oath of office or the exchange of wedding vows as demonstrating the participant's intention to be bound by certain commitments. Unfortunately, these conventions have often proved to be a poor indication of the parties' actual intentions. By contrast, *mens rea*, the intent to commit some criminal act, must be culled from the details of the defendant's conduct. We place a great deal of confidence in these conventions in that we use them to determine matters of public safety, freedom and incarceration, life and death. In each case, however, ascertaining intent is a matter of probability, inference, and convention.

It cannot be denied that the use of legislative intent presents a number of daunting practical and theoretical problems, but these problems do not render the concept wholly unintelligible or unworkable. Properly understood, legislative intent is a matter of convention that involves a number of complex judgments. Indeed, under the law, ascertaining intent is always a matter of convention and could not be otherwise. Thus, if one wishes to question the legitimacy of legislative intent because it is conventional, then in some respects one must also question the use of intent in other areas of the law, including contract interpretation under the UCC.<sup>740</sup>

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738. See *supra* Part II.C.6.

739. Cf. HIRSCH, *supra* note 297, at 17 ("I can never know another person's intended meaning with certainty because I cannot get inside his head to compare the meaning he intends with the meaning I understand, and only by such direct comparison could I be certain that his meaning and my own are identical.").

740. See *supra* Part II.C.

*D. Understanding Statutory Purpose and the Use of Prior UCC Drafts*

Nearly fifty years after it was first enacted, the Uniform Commercial Code remains a remarkable work of legislation that reflects the brilliance of its principal draftsman, Karl Llewellyn. Since the time of its creation, the Code has provided an eminently reasonable, workable and predictable legal framework for those who engage in commercial transactions. The fact that Article 2 is only now undergoing some substantial revision demonstrates the durability of a well-crafted statute.

Notwithstanding this great success, Llewellyn was wrong to try to prohibit courts from consulting prior drafts of the Code in an effort to discern the meaning of the statute. Although the UCC manifests a deeply felt appreciation for the nature of language and the significance of context in contract construction, Llewellyn abandoned this approach with respect to interpretation of the UCC itself. In preparing the Code, Llewellyn sought to draft "that rightest and most beautiful type of legal rule, the singing rule with purpose and with reason clear."<sup>741</sup> He believed that "[o]nly the rule which shows its reason on its face" can hope to avoid obsolescence and "claim maximum chance of *continuing* effectiveness."<sup>742</sup> By drafting the UCC in this fashion, Llewellyn hoped to encourage statutory construction in the Grand Style, in which courts would either expand or curtail the rule in question according to its purpose and the sense of the situation.<sup>743</sup>

Despite his considerable talents as a drafter and legal thinker, Llewellyn was unable to realize these ambitions. Although he aspired to write a statute that "showed its reason on its face," even the most carefully worded text may fail to convey the meaning intended by its author. Indeed, the lengthy comments which accompany the UCC show that Llewellyn felt compelled to provide an elaborate interpretive aid to explain the statute and its application.<sup>744</sup>

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741. Llewellyn, *On the Good*, *supra* note 117, at 250; *see also* U.C.C. § 2-401 cmt. 1 (1995) (stating that the "basic policy" behind Article 2 is that "known reason and purpose should govern interpretation").

742. Llewellyn, *On the Good*, *supra* note 117, at 250.

743. *See supra* Part III.C.

744. *See supra* Parts III.F, IV.B.

Llewellyn insisted that for a statute "to make sense, it must be read in the light of some assumed purpose."<sup>745</sup> Even if a statute is exceedingly well-drafted, however, the purpose behind the statute cannot declare itself. Statutory purpose is not a self-evident fact or a pre-interpretive conclusion.<sup>746</sup> Instead, discerning statutory purpose is itself a principal goal of the interpretive process.<sup>747</sup>

Recourse to the particular historical and social context out of which a statute emerges may help a court to understand the law's purpose.<sup>748</sup> Even if a judge is sincerely committed to implementing

745. Llewellyn, *Remarks*, *supra* note 86, at 400. Many commentators today would describe Llewellyn's basic approach to statutory construction as one of "purposivism." See McDonnell, *supra* note 602, at 797-801; Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-51 (1986) (describing purposivism as the dominant method of statutory interpretation today).

746. Cf. Fish, *Chain Gang*, *supra* note 652, at 554, 559 (asserting that the meaning of a text "does not announce itself" and so does not enjoy "the status of a brute fact" that is simply "found"); Fish, *Wrong Again*, *supra* note 641, at 301 (disputing the claim that meaning is "available in an uninterpreted shape"); *supra* notes 271273, 639-654 and accompanying text.

747. Accordingly, although Llewellyn was right to encourage thoroughly reasoned, carefully worded legislation, the theory of "patent reason" will always fail because it is contrary to the nature of language. As Professor Twining has correctly observed: "Statements of purpose are at least as susceptible as are statements of 'substantive' rules to vagueness, ambiguity, obscurity, difficulty of reconciliation with other statements, and so on. The task of the interpreter is first and foremost to interpret the instrument of the policy rather than the policy itself." TWINING, *supra* note 6, at 324. One might add that in construing what Twining calls "the instrument of the policy" the interpreter will necessarily discover what he or she believes is the policy behind it. As an epistemological matter there is, after all, no alternative to purposive interpretation. See *supra* notes 606-623 and accompanying text.

748. Some readers will surely note that the drafting and legislative history behind a statute is also composed of many texts. The texts that make up these contextual sources cannot declare their own meanings anymore than the statute can. Instead, each source must be interpreted in its own right. Thus, every source, as a text, must be situated in its proper context, which is also composed of texts subject to interpretation, etc., etc., etc. An infinite regress would result and even the most rudimentary form of communication could not occur but for the fact that the author and the reader (or in the case of a statute, the legislature and the court) share certain background assumptions and beliefs. This is another way of saying that meaning is a matter of consciousness and not of words. The act of communication, that is, the sharing of consciousness, is contingent upon the participants already sharing in some level of consciousness, of them already being of "one mind" on a certain level. See *supra* notes

the reason behind a statute, she cannot be certain she is advancing that reason unless she understands it in the first instance. Thus, even if one agrees with Llewellyn that statutory interpretation is principally the determination of purpose and the application of that purpose to the facts of the case, it would still be “inadvisable to limit . . . the sources from which the reason for the text—and in this way the meaning of the text—may be found.”<sup>749</sup> The UCC freely permits the use of contextual evidence in contract construction so that courts and lawyers may obtain a “true understanding” of what the parties intended by their use of language.<sup>750</sup> This evidence includes prior drafts of the agreement in question and the circumstances surrounding its formation.<sup>751</sup> Likewise, in the case of statutes, the goal of implementing the legislature’s purpose will be better served by allowing judges and lawyers to consult legislative history and to incorporate historical sources into their advocacy and opinions.

In the absence of restrictions on the use of Code drafting history like those found in section 1-102(3)(g), courts and commentators have freely employed the rich historical sources surrounding the creation of the UCC. The use of these materials has not been so frequent as to call into question the central importance of the UCC text. Still, the cases and academic literature concerning Code interpretation contain a number of examples that ably demonstrate the use of historical sources in ascertaining statutory purpose.<sup>752</sup> Prior drafts of the text and comments have been used to help resolve a broad range of interpretive questions including the notice requirements of a charge-back statute, the “honesty in fact” component of “good faith,”

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606-23 and accompanying text.

749. N.Y. REPORT 1956, *supra* note 24, at 26.

750. *See* U.C.C. § 2-202 cmt. 2 (1995).

751. *See, e.g.*, ITT Corp. v. LTX Corp., 732 F. Supp. 1225, 1236-37 (D. Mass. 1990) (determining that it is proper under UCC § 2-202 to look to prior contracts of the same type between parties to interpret the contract at issue); Cibro Petroleum Prods., Inc. v. Sohio Alaska Petroleum Co., 602 F. Supp. 1520, 1551-52 (N.D.N.Y. 1985) (determining that it was proper under UCC § 2-202 to look to similar contracts with third parties to interpret the contract in dispute).

752. *See* McDonnell, *supra* note 602, at 807 (arguing that the “purposive interpreter” of the UCC should not only read the statutory text and comments but should also “take the additional step of examining the history of the text or the problem before him”).



the meaning of unconscionability, the proper construction of the parol evidence rule, the obligation of "good faith" in presenting demand notes for payment, and the award of profit damages to aggrieved sellers who successfully resell the contract goods at the original contract price.<sup>753</sup> Unfortunately, some courts and commentators have reviewed the historical record in a cursory fashion or have employed it selectively in support of conclusions already held.<sup>754</sup> That this has occurred is not surprising. It simply

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753. For cases that employ Code drafting history in resolving interpretive problems, see *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1069-70 (7th Cir. 1992) (the parol evidence rule); *Julien Co. v. Rollins Cotton Co.* (*In re Julien Co.*), 168 B.R. 647, 665-66 (Bankr. W.D. Tenn. 1994) (attachment of security interest by possession); *Northpark Nat'l Bank v. Bankers Trust Co.*, 572 F. Supp. 524, 530 (S.D.N.Y. 1983) (notice requirements of charge-back statutes); *Southwestern Resolution Corp. v. Watson*, 964 S.W.2d 262, 263-64 (Tex. 1998) (promissory note indorsement by attachment); *Getty Petroleum Corp. v. American Express Travel Related Services Co.*, 683 N.E.2d 311, 316-17 (N.Y. 1997) ("good faith" and "honesty in fact" standard); *United States Nat'l Bank of Or. v. Boge*, 814 P.2d 1082, 1089 (Or. 1991) (same). For commentators who rely on Code history, see Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (unconscionability); Kirst, *supra* note 14 (parol evidence rule); Patterson, *supra* note 99 (good faith and demand notes); Breen, *supra* note 484 (profit damages for sellers). Perhaps the best example of this kind of academic writing is Professor Wiseman's masterful article. See Wiseman, *supra* note 10.

754. A splendid example of how the poor use of Code drafting history can lead to flawed interpretations of the Code text involves the award of profit damages under UCC § 2-708(2) to aggrieved sellers who successfully resell the contract goods at the original contract price. For commentators who have written in support of so-called "lost volume sellers" by relying upon a history of the profit remedy that is both erroneous and incomplete, see 1 ROBERT L. DUNN, *RECOVERY OF DAMAGES FOR LOST PROFITS* §§ 2.8-2.9 (4th ed. 1992); ROBERT J. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 177 (1970); WHITE & SUMMERS, *supra* note 9, §§ 7-8 to 7-14; Roy Ryden Anderson, *Damages for Sellers Under the Code's Profit Formula*, 40 SW. L.J. 1021 (1986); Robert J. Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66 (1965); William L. Schlosser, *Construing U.C.C. Section 2-708(2) to Apply to the Lost-Volume Seller*, 24 CASE W. RES. L. REV. 686 (1973); Seburt, *supra* note 173, at 393-96; Note, *Seller's Recovery of Lost Profits for Breach of a Sales Contract: Uniform Commercial Code Section 2-708(2)*, 11 WM. MITCHELL L. REV. 227 (1985). For cases that have used this same faulty history in awarding damages to such sellers see, for example, *R.E. Davis Chem. Corp. v. Diasonics, Inc.*, 826 F.2d 678, 684-85 (7th Cir. 1987); *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865, 868 (1st Cir. 1982); *Famous Knitwear*

underscores the fact that the proper use of statutory history requires thoroughness, balance, a lack of interest, and careful deliberation, indeed, the very habits of mind that we should demand and come to expect from our judiciary.

It is often said that if something is worth doing, it is worth doing well. The truth, however, is that “if a thing is worth doing, it is worth doing badly.”<sup>755</sup> An approach to statutes that allows for the use of legislative history reflects the way in which language operates better than an approach which precludes the use of historical materials. It recognizes that meaning is not simply a function of words, that no text ever “speaks for itself.” Instead, it recognizes that meaning is a function of the use of language within a particular time and place. Such an approach to statutory interpretation should be done well. Because it is really worth doing, however, we should not abandon this approach to statutory interpretation out of frustration when it is done poorly.

## V. CONCLUSION

In place of the linear, geometric cleanliness<sup>756</sup> of classical contract theory, Llewellyn gave us something messy,<sup>757</sup> an approach to contract interpretation that more closely resembles biology than geometry. Order is present, but it must be sorted out. Legislative

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Corp. v. Drug Fair, Inc., 493 F.2d 251, 254 (4th Cir. 1974); *Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846, 853-54 (E.D.N.Y.), *aff'd mem.* 614 F.2d 1289 (2d Cir. 1979); *National Controls, Inc. v. Commodore Bus. Mach., Inc.*, 163 Cal. App. 3d 694, 696-99, 209 Cal. Rptr. 636, 641-43 (1985); *Neri v. Retail Marine Corp.*, 285 N.E.2d 311, 314 n.2 (N.Y. 1972); *Snyder v. Herbert Greenbaum & Assocs. Inc.*, 380 A.2d 618, 624-25 (Md. Ct. Spec. App. 1977). For a more thorough review of the relevant history, see Breen, *supra* note 484.

755. G.K. CHESTERTON, *WHAT'S WRONG WITH THE WORLD* 367 (1910).

756. Cf. Llewellyn, *On the Good*, *supra* note 117, at 228 (describing Langdell's legal “aesthetics” as “the one most clean of line” and his approach to acceptance and consideration as “coincid[ing] the equal triangles”); see also Thomas C. Grey, *Langdell's Orthodoxy*, U. PITT. L. REV. 1, 16 (arguing that “[t]he aspiration of classical orthodoxy [in Langdell's theory of contract] toward a conceptually ordered and universally formal legal system readily suggests a structural analogy with Euclidean geometry”).

757. See Graff, *supra* note 309, at 410 (remarking that interpretation is “essentially a messy business of guesswork predicated on practical knowledge of language, conventions, and the situations in which they operate”).

history, like much of life, is also messy business, but this lack of tidiness should not dissuade us from making the effort to understand it. We are of course free to refrain from this exercise, to ignore the complexities of life in favor of what we hope will be simple and certain. If, however, we acknowledge that context is always a part of the function of language, then the simplicity we desire is revealed to be artificial and the certainty we seek is exposed as an illusion. Fidelity to the nature of language and the political process requires us to take up the task of interpreting each statute with reference to its historical and social context. Llewellyn's mistake of ignoring context in the case of statutes while embracing it in the case of contracts was overcome in the UCC drafting process. Courts today can avoid Llewellyn's error by acknowledging the relevance of legislative history to statutory interpretation.