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WHAT DID *THEY* MEAN?: HOW PRINCIPLES OF GROUP COMMUNICATION CAN INFORM ORIGINAL MEANING JURISPRUDENCE AND ADDRESS THE PROBLEM OF COLLECTIVE INTENT

W. Matt Morgan*

[W]e do not throw up our hands when considering a group's communication; rather we attempt to make sense of it using ordinary, original meanings.¹

INTRODUCTION

The judiciary's proper role under Article III of the United States Constitution² has been the subject of debate since the promulgation of the Constitution.³ The conversation continues notwithstanding the expanse of time. This Note focuses on a subset of interpretative methods: originalism and its analogues to statutory interpretation (cumulatively referred to herein as original meaning jurisprudence). Within the realm of original meaning jurisprudence, two divergent trails have been blazed:⁴ give the

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¹ Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 536 (1998).

² U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

³ *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); THE FEDERALIST NO. 78, at 498 (Alexander Hamilton) (Robert Scigliano ed., 2000) ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.").

⁴ Placing advocates of original meaning jurisprudence into two camps is certainly an oversimplification; different theories are inevitably more nuanced. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 557 n.60 (1994) ("[O]riginalists disagree somewhat amongst themselves on this question,

legal text its original *public* meaning,⁵ or look to the text's original *intended* meaning.⁶ While original meaning jurisprudence covers an array of interpretive methods, they can all be distilled down to either a form of textualism or intentionalism.⁷ Professor Walter Sinnott-Armstrong offers a description of the two: "At the most general level, textualists claim that the meanings of the words in the text should guide interpretation, whereas intentionalists claim that an author's intentions should guide interpretation."⁸

The terms *textualism* and *intentionalism* can be somewhat misleading. Intentionalism could be easily misunderstood as an inquiry into the lawgiver's intended goals or purposes for a law—what the lawgiver hoped to accomplish with the legal text.⁹ Furthermore, intentionalism, when juxtaposed to textualism, creates an impression that the intentionalist is not concerned with text. Legal texts are in fact vital to both interpretive methods; the crucial difference between the two concerns whose meaning attaches to the text. Meaning under textualism is derived from the listener (the public),¹⁰ while meaning under intentionalism is derived from the speaker (the lawgiver).¹¹

Textualism has been referred to as the more sophisticated form of interpretation on more than one occasion,¹² and perhaps for good reason. That trail has been trod by

with Raoul Berger advocating a form of extreme intentionalism . . . , while Justice Scalia and Professor Harrison essentially advocate a form of nearly pure textualism. Former Judge Bork and Professor McConnell follow a middle course, in our view, between the intentionalist and textualist extremes." But for the purpose of this Note, it is enough to say that some rely more heavily on public meaning while others focus more on intended meaning.

⁵ See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) ("The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. . . . When lawmakers use words, the law that results is what those words ordinarily mean."); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (1997) ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.").

⁶ See RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 15–16 (1987) (supporting proposition that intentions of lawmaking bodies are in fact law, "rising even above the text").

⁷ See Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 *SAN DIEGO L. REV.* 465, 465 (2005).

⁸ *Id.*

⁹ See Larry Alexander & Saikrishna Prakash, "*Is That English You're Speaking?*" *Why Intention Free Interpretation is an Impossibility*, 41 *SAN DIEGO L. REV.* 967, 994–95 (2004) (discussing difference between intended meanings and intended goals); see also *supra* Part I.D. (discussing the distinction between intentionalism and purposivism).

¹⁰ See *supra* note 5.

¹¹ See *supra* note 6.

¹² See, e.g., Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 *COLUM. L. REV.* 1917, 1917 (2012) ("[O]riginalism has become more sophisticated. It is now understood that original meaning, not original intent, is the most appropriate originalist source of constitutional law."); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 *CONST. COMMENT.* 411, 412 (1998) ("Professor Machen's article demonstrates

the heavyweights of original meaning jurisprudence.¹³ Deriving meaning from the listener, however, may be inconsistent with basic principles of communication¹⁴—and legal texts are undeniably communicative in nature.¹⁵ With so many of original meaning’s intellectual giants treading the path of original public meaning, one might suspect that the footpath to original intended meaning will go the way of all unmaintained trails, yielding to the overgrowth until no man dare traverse it. However, original intended meaning may be seeing a resurgence, with originalist scholar Professor Sai Prakash lending credibility to the intentionalist cause.¹⁶ Prakash’s position is likely attributable to his understanding that legal texts are communicative in nature.¹⁷ And intended meanings are critical (Professor Prakash might even say indispensable¹⁸) to interpreting communications.¹⁹

that he was what modern scholars refer to as a ‘sophisticated’ originalist. He believed the examination of original meaning is not the search for what the Framers specifically had in mind when they drafted the text, but rather for the general and reasonable meaning of the language they used.”); Lawrence B. Solum, *Originalism As Transformative Politics*, 63 TUL. L. REV. 1599, 1609 (1989) (“I do not want to claim that any originalist theory of constitutional interpretation requires contemporary interpreters to recapture the founders’ own understanding of the Constitution in the same way that romantic hermeneutics does. Indeed, it is quite evident that sophisticated originalists make no such pretensions.”).

¹³ Justice Antonin Scalia and Judge Frank Easterbrook, both intellectual juggernauts in the realm of original meaning jurisprudence, are both advocates of textualism. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (describing Justice Scalia and Judge Easterbrook as “[t]he leading exponents of modern textualism”).

¹⁴ See *infra* Part II.B.1.

¹⁵ See Jan Engberg, *Statutory Texts As Instances of Language(s): Consequences and Limitations on Interpretation*, 29 BROOK. J. INT’L L. 1135, 1135 (2004) (“My basic assumption, based on results from modern research in cognitively oriented text linguistics, is that legal texts are perfectly normal texts subject to the characteristics of human communication . . .”).

¹⁶ What is notable about Professor Prakash is not that he is a lone voice in the wilderness heralding a resurgence of intentionalism—there are certainly other highly distinguished legal scholars, past and present, who share his view. What makes Professor Prakash an interesting figure among intentionalists is that he has, at least it seems, arrived at his current position via a tour as a textualist. Compare Calabresi & Prakash, *supra* note 4, at 552 (“The meaning of all such legal writings depends on their texts, as they were objectively understood . . .”), with Alexander & Prakash, *supra* note 9, at 969 (“[Intention free] textualism is a conceptual impossibility.”).

¹⁷ See The Federalist Society, *Originalism: A Rationalization or Principled Theory? Pt. 2*, YOUTUBE (Mar. 14, 2010), <http://www.youtube.com/watch?v=JH5TbEyL3a0> (“If you want to understand what an utterance or document means, you try to understand what the speaker or author was trying to convey. This is what we do in everyday conversations . . . [T]his seems to be a foundation of communication—an attempt to understand what other people are trying to convey to us.”) (statement by Professor Prakash, 1:55 through 2:13) [hereinafter Federalist Society Panel on Originalism].

¹⁸ See Alexander & Prakash, *supra* note 9, at 969 (“[O]ne cannot interpret texts without reference to the intentions of some author.”).

¹⁹ See E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION 5 (1967) (“To banish the original

If legal texts are communications, then they are group communications, and to be sure, group communications pose certain challenges.²⁰ If it is a basic principle of communication that we attach the speaker's intended meaning to a communication,²¹ whose meaning do we attach when it is probable (perhaps even certain) that individual members within the group have subjectively attached different meanings to the same words? This presents a major problem when interpreting not only legal texts but all group communications. On one hand we cannot imagine how a group can attach a single meaning to the words it uses when individuals within that group almost certainly have attached varied meanings to those words,²² and on the other hand we are baffled by the thought that a group cannot attach meanings that are peculiar to some will of the group. The collective intent problem has no absolute solution, but nevertheless, we manage to make sense of group communications every day. Original meaning jurisprudence should embrace principles of group communication when interpreting legal texts.

The overarching purpose of this Note is to argue that principles of group communications can guide the original meaning inquiry. Part I argues two points: (1) law maintains its original meaning, and (2) law has, by nature, a communicative element. Part II examines the underlying principles of group communications²³ that could inform original meaning jurisprudence. This requires not only an inquiry into how other fields approach group communications, but also how groups form their communications, and how listeners interpret group communications. Part III begins with a discussion of how group communications can inform inquiries into a law's original meaning, and ends with an application of those principles to a body of law that is particularly interesting for this inquiry—the Uniform Commercial Code.

author as the determiner of meaning was to reject the only compelling normative principle that could lend validity to an interpretation.”).

²⁰ See *infra* Part II.A (discussing problem of collective intent).

²¹ See BERGER, *supra* note 6, at 17 (“That is the essence of communication; it begins with the speaker who alone is entitled to say what *he* meant. No listener or reader may insist in the teeth of the speaker's own explanation that he meant exactly the opposite.”); Federalist Society Panel on Originalism, *supra* note 17 (“[T]his seems to be a foundation of communication—an attempt to understand what other people are trying to convey to us.”) (statement by Professor Prakash, 1:55 through 2:13).

²² This lack of collective intent among individual lawmakers has been the chief criticism of intentionalism. See *infra* notes 70–72 and accompanying text.

²³ This Note focuses on five principles of communication germane to the original meaning calculus: (1) meaning is set by the speaker, see *supra* Part II.B.1; (2) while groups cannot form intents, attributing a metaphorical intent to groups is useful for determining the meaning of group communications, see *supra* Part II.B.2; (3) we can derive metaphorical intent through simple and complex summative accounts of group communications, see *supra* Part II.B.3; (4) individuals within the group often form their intent by relying on the expertise and intended meanings of others in the group, see *supra* Part II.B.4; and (5) for practical reasons, listeners often do resort to public meaning to make sense of group communications when metaphorical intent is too difficult to ascertain, see *supra* Part II.B.5.

I. DISTINGUISHING AUTHORIAL MEANING FROM THE INTERPRETER'S MEANING

Before proceeding, it may be worthwhile to address why we should treat legal texts as conveying a set meaning. In the field of literary critique, this idea has met a great deal of resistance.²⁴ But in virtually every other aspect of life we understand that communications convey an authorial meaning that exists independent of our interpretation. If a mountaineer misreads his topographic map, a new mountain does not sprout up under his feet to match the location of his faulty interpretation. Maps are communications, communicating an external reality already in existence. Interpretation, of course, has no power to change what already exists; misinterpreting legal texts (innocently or intentionally) can no more change the underlying law than misreading a topographic map can move mountains. This is not to argue that faulty interpretations cannot change our perception of what a law is. Indeed, we may follow faulty legal interpretations just as we may all calibrate our altimeters to match the mountaineer's faulty interpretation of the map. What is argued is that law exists distinct from the interpreter's understanding of it and endures despite interpretive methods that miss their mark.

Law in its broadest sense can perhaps be seen as consisting of two elements: a sort of existential element (what comes into existence by virtue of the lawmaking process), and a communicative element (the text that communicates to us what the existential element is). Because the communicative element only serves to tell us the location of the existential element, the basis for interpretation should be to use the communicative element to reveal the station of the existential element.

A. The Existential Element

When laws are ratified, something comes into existence, albeit not in a physical form. Law is perhaps metaphysical: a series of invisible lines that once crossed create liability. If this existential element is brought into existence by virtue of the lawmaking process, then the goal of judicial interpretation should be to determine where the lines have been drawn.²⁵ True interpretation can consist of nothing else,²⁶ and faulty

²⁴ E.D. Hirsch details some of the popular objections to interpretations that rely on authorial intent: "The meaning of a text changes—even for the author ;" "It does not matter what an author means—only what his text says ;" "The author's meaning is inaccessible ;" "The author often does not know what he means." HIRSCH, *supra* note 19, at 6–23.

²⁵ Or at least arrive at conclusions that are as close to the lines as possible. In many circumstances it is impossible to *perfectly* discern original meanings, but that should not discourage judges from getting as close as possible. See BORK, *supra* note 5, at 163 ("We must not expect too much of the search for original understanding in any legal context. The result of the search is never perfection; it is simply the best we can do; and the best we can do must be regarded as good enough—or we must abandon the enterprise of law and, most especially, that of judicial review."); Prakash, *supra* note 1, at 535 ("Originalism simply does not rest on a theory of definite meanings; it only requires an ability to determine which of several possible meanings better reflects the most natural reading of the word or phrase when the text was ratified.").

²⁶ If judges have the power to move the lines by virtue of nothing more than their own

interpretations have no power to move lines drawn by a process completely independent to the interpretative process.

B. The Communicative Element

Lewis Carroll offered an illustration that goes to the heart of the meaning of words:

“I don’t know what you mean by ‘glory,’” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

“When *I* use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”²⁷

Communications carry the baggage of the speaker’s intended meaning.²⁸ A listener misconstruing the speaker’s words has no power to change what the speaker in fact intended the words to mean.²⁹

interpretation of legal texts, then the lawmaking process is for naught. *Cf.* Prakash, *supra* note 1, at 530–31 (“[A]bsent originalism we must question why we would bother to recognize an institution as a lawmaker and its words as law if we simultaneously reserve the right to construe the law’s words without regard to their original meanings. Put simply, without originalism we have to believe that lawmakers codify words but not meaning *and* we have to suppose that we sensibly can recognize some set of words as law, but supply our own meaning.”).

²⁷ LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 81 (1871).

²⁸ *See* HIRSCH, *supra* note 19, at 5 (“To banish the original author as the determiner of meaning was to reject the only compelling normative principle that could lend validity to an interpretation.”). Justice Scalia and Bryan Garner, however, would take issue:

To say that words have no meaning, indeed no existence, apart from the intention of their author is a ludicrous extension of the thesis that a tree falling in a deserted forest makes no noise. *King Lear* would still be *King Lear* if it were produced by the random typing of a thousand monkeys over a thousand years.

ANTONIN SCALIA & BRYAN A. GARNER, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* 25 (2012). This Note does not take the position that every word or phrase should be approached as a blank slate that can only be filled in by the communicator’s intended meaning. The information costs involved would be insurmountable. It is worth noting, however, that if the Court of King’s Bench had relied on a typing ape to provide a rule for policing unfair contracts, and by some miracle the monkey managed to hammer out the words “the unconscionability

Law does not reside in legal texts; words themselves are not the source of legal liability. Legal texts do, however, communicate to us what the existential element is—the metaphysical lines drawn by the lawmaking process that are the source of legal liability. If it is controversial to say that law does not reside in legal texts, it is certainly more agreeable to say that legal texts are communications.³⁰ However, if legal texts are communications, then they are group communications, which certainly pose problems for listeners who must look to several individuals within the group to determine an authorial intent.³¹

C. *The Lines Are Drawn by Intended Meaning*

It is of course one thing to say that law's existential element consists of metaphysical lines that once crossed create liability, and another to say that the location of the lines are delineated by a legislature's *intended* meaning. There may in fact be good reason to believe that the original *public* meaning of the text sets the lines,³² but as will be discussed throughout this Note, principles of communication suggest that words (including legal texts) carry the baggage of the speaker's intended meaning.³³ And if law is in fact communicative in nature, intended meanings are indispensable.³⁴

Professor Raoul Berger, an early proponent of modern original meaning jurisprudence, supported the proposition that the intentions of lawmaking bodies are in fact the

doctrine," years before the phrase was ever conceived, the words would be random symbols, and a judge would be hard-pressed to find a way to use those symbols in any useful way. See Alexander & Prakash, *supra* note 9, at 976.

²⁹ See *supra* note 6, at 17.

³⁰ See Engberg, *supra* note 15, at 1135 ("My basic assumption, based on results from modern research in cognitively oriented text linguistics, is that legal texts are perfectly normal texts subject to the characteristics of human communication . . ."); see also The Federalist Society, *Judicial Philosophy/Originalism—The Tempting of America: The Political Seduction of the Law*, YOUTUBE (Apr. 21, 2011), <http://www.youtube.com/watch?v=SwhpfjVqXXs> ("I think one of the reasons why originalism has such staying power . . . is [] because it just coheres to people's common sense understanding of interpretation . . . If they have . . . a diary from their grandmother, they are not going to be applying some highfalutin theory about interpretation, they are going to try to figure out what their grandmother was trying to convey in the diary . . .") (statement by Professor Saikrishna Prakash, 1:03:33 through 1:04:20) [hereinafter Federalist Society Panel on Robert Bork].

³¹ See *infra* Part II.A.

³² This Note is sympathetic to this position. There may just be something different about law that lends itself to original *public* meaning. Perhaps people should not be bound by an authorial intent that is not readily discernable in the legal text. See BORK, *supra* note 5, at 144 ("Law is a public act. Secret reservations or intentions count for nothing."); SCALIA, *supra* note 5, at 17 ("[T]he reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.")

³³ See *infra* Part II.B.1.

³⁴ See generally Alexander & Prakash, *supra* note 9 (arguing that intention-free textualism is impossible).

law, “rising even above the text.”³⁵ In expounding his position, Professor Berger cites James Madison,³⁶ Justice Story,³⁷ Justice Holmes,³⁸ Justice Wilson,³⁹ and *Hawaii v. Mankichi*.⁴⁰ Professor Berger’s position is driven by principles of communication: “That is the essence of communication; it begins with the speaker who alone is entitled to say what *he* meant. No listener or reader may insist in the teeth of the speaker’s own explanation that he meant exactly the opposite.”⁴¹

Principles of communication are not the sole reason to believe that the existential element of law is formed by the lawmaking body’s intended meaning. Intended meanings are manifestations of the law making body’s judgment—and the precise reason for selecting individuals to comprise a lawmaking body is because we believe that they will exercise their judgment in addressing very specific issues. To deprive a law-making body of its intended meaning frustrates the very purpose of electing particular individuals to serve in the lawmaking body.⁴²

More often than not, a lawmaking body’s intended meaning will be coincident with public meaning.⁴³ Even textualists who focus exclusively on public meaning

³⁵ BERGER, *supra* note 6, at 15–16.

³⁶ James Madison wrote in a letter to Andrew Stevenson:

I cannot but highly approve the industry with which you have searched for a key to the sense of the Constitution, where alone the true one can be found; in the proceedings of the Convention, the contemporary expositions, and above all in the ratifying Conventions of the States. If the instrument be interpreted by criticisms which lose sight of *the intention of the parties to it*, in the fascinating pursuit of objects of public advantage or conveniency, the purest motives can be no security against innovations materially changing the features of the Government.

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 474 (Max Farrand ed., 1911) (emphasis added).

³⁷ See JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 400 at 283 (1851) (“The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and *the intention of the parties.*”) (emphasis added).

³⁸ See OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 206 (1920) (“Of course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual . . .”).

³⁹ 1 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 14 (1804), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 438 (Kermit L. Hall & Mark David Hall eds., 2007) (“The first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it.”).

⁴⁰ 190 U.S. 197, 212 (1903) (“The intention of the lawmaker is the law” (quoting *Smythe v. Fiske*, 90 U.S. 374, 380 (1874))).

⁴¹ BERGER, *supra* note 6, at 17.

⁴² See *supra* note 26 and accompanying text.

⁴³ Speakers tend to communicate in a way that is understandable to their target audiences. See Robert M. Krauss & Susan R. Fussell, *Perspective-Taking in Communication: Representations of Others’ Knowledge in Reference*, 9 SOC. COGNITION 2, 3 (1991) (“Messages are

will look to statements of individuals within the lawmaking body as a representation of the public meaning.⁴⁴ When the intended meaning differs from the public meaning, it is likely the result of poor draftsmanship,⁴⁵ and it would be a dubious proposition that any lawmaker has ever been elected to office on a campaign of “I write with clarity.” Voters certainly care about lawmakers’ substance more than their writing style.

Reliance on public meaning unquestionably has its benefits, ensuring that the meaning of the text is available to those who must follow the law.⁴⁶ After all, “[l]aw is a public act.”⁴⁷ However, to allow public meaning to win out over a clearly contradictory intended meaning is inconsistent with the purpose of setting up lawmaking bodies, and inconsistent with basic principles of communication.

D. A Word About Purposivism

Intentionalism and purposivism are often lumped together in criticisms of legislative intent, but the interpretive methods are distinguishable: intentionalism looks to a lawmaking body’s intended meaning of a text,⁴⁸ while purposivism looks to a lawmaking body’s intended purposes or goals—what the lawgiver wants to accomplish

formulated to be understood by a specific audience, and in order to be comprehensible they must take into account what that audience does and does not know.”). Professor Prakash discusses the practical similarities between intended meaning and public meaning:

It seems to me that the disagreements between original intent folks and original meaning folks is more theoretical than practical Practically speaking, it’s not a meaningful distinction An original intent person is likely to think that the original public meaning is what they intended.

Federalist Society Panel on Robert Bork, *supra* note 30 (statement by Professor Saikrishna Prakash, 1:22:40 through 1:22:50).

⁴⁴ See, e.g., Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 n.37 (1995) (“Although I attach no weight to secret legislative histories or to post-enactment legislative histories of the word ‘Officer’ as it is used in the Presidential Succession Clause, the fact that [James Madison] thought that the word had the original meaning the Amars attribute to it helps to bolster the plausibility of their argument that most legally trained readers in 1787 would agree with the Amars’ construction, if asked.”). If the search is for public meaning, it is curious that a textualist would ever focus on a Framer’s intended meaning. It seems to skew the survey. Were there not hundreds (thousands?) of “legally trained readers” in 1787 that could proffer a meaning for the word “Officer,” or was James Madison simply stumbled upon during a vast survey of the entire public? Roll the dice again and you might land on an obscure barrister from Liverpool.

⁴⁵ Professors Alexander and Prakash note that even textualists take “scrivener’s error” into account when interpreting texts. See Alexander & Prakash, *supra* note 9, at 979–80.

⁴⁶ One of Justice Scalia’s criticisms of intentionalism is that the lawgiver’s subjective meaning may be unavailable to those who must follow the law. See SCALIA, *supra* note 5, at 17 (“That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read.”).

⁴⁷ BORK, *supra* note 5, at 144.

⁴⁸ See Sinnott-Armstrong, *supra* note 7 and accompanying text.

with the law.⁴⁹ Purposivism is particularly susceptible to judicial activism. Justice Scalia and Bryan Garner explain:

The most destructive (and most alluring) feature of purposivism is its manipulability. Any provision of law . . . can be said to have a number of purposes, which can be placed on a ladder of abstraction. A law against pickpocketing, for example, has as its narrowest purpose the prevention of theft from the person; and then in ascending order of generality, the protection of private property; the preservation of a system of private ownership; the encouragement of productive activity by enabling producers to enjoy the fruits of their labor; and, finally, the furtherance of the common good.⁵⁰

By ascending “the ladder of abstraction,” the interpreter can essentially rewrite legal texts by making them conform to a general goal of the lawgiver. The higher the interpreter climbs up “the ladder of abstraction,” the more freedom she has to rewrite the text.⁵¹ intentionalism on the other hand is not concerned with what the ultimate goal of a law against pickpocketing is, only what the lawmaking body intended the legal text to mean.⁵² For example, what did the lawgiver intend the word “pickpocketing” to mean? Did the lawgiver intend “pickpocketing” to encompass the thief’s act of keeping a wallet that has fallen out of a pocket by its own devices? The intentionalist does not rely on something as abstract and malleable as the “spirit” of the law.⁵³ Like textualism, intentionalism relies on the letter of the law, the only departure regards whose meaning attaches to the letter—the speaker’s (the lawgiver) or the listener’s

⁴⁹ See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70 (2006) (“Purposivists traditionally argued that because Congress passes statutes to achieve some aim, federal judges should enforce the spirit rather than the letter of the law when the two conflict.”).

⁵⁰ See SCALIA & GARNER, *supra* note 28, at 18–19; see also JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 2 (2005) (“Any interpretation conceived as the application of a specific philosophical or moral theory is typically rejected.”).

⁵¹ SCALIA & GARNER, *supra* note 28, at 18–19.

⁵² Alexander & Prakash, *supra* note 9, at 995 (“The intentionalist does not advocate ascending up the ladder of generality of intention, at the pinnacle of which all laws turn out to be the Spike Lee law: do the right thing. He only advocates honoring the intent of the lawmaker at the specific level of generality that the lawmaker meant to convey, even if at that level it thwarts the lawmaker’s more general intentions.”).

⁵³ Professor John Manning disagrees, contending that intentionalists do in fact rely on the “spirit” of the law. See Manning, *supra* note 13, at 429 (“[I]ntentionalists insist that judges enforce the spirit rather than the letter of the law . . .”). Perhaps some intentionalists do appeal to the law’s spirit. Conjuring spirits, however, seems more the work of purposivists than intentionalists.

(the public). In this sense, intentionalism is much more consistent with textualism than purposivism.

The distinction between intentionalism and purposivism is important because if we say that a lawmaking body's intended meanings form law's existential element, why not say that their intended desires and goals form the same? The reason is that intended desires and goals are not law;⁵⁴ they are simply what a lawmaking body *hopes* to accomplish with a law. A law's purpose or goal may in fact be frustrated by its own meaning. Consider Professor Thomas Sowell's example:

Ironically, cities with strong rent control laws, such as New York and San Francisco, tend to end up with higher average rents than cities without rent control. Where such laws apply only to rents below some specified level, presumably to protect the poor, builders then have incentives to build only apartments luxurious enough to be above the rent-control level. Rich and poor alike who move into the city after rent control has created a housing shortage typically cannot find a rent-controlled apartment, and so have available only housing that costs more than it would in a free market, because of the housing shortage.⁵⁵

The purposivist climbing “the ladder of abstraction” might invalidate the price ceilings if it would ultimately effectuate the goal or desire of the legislator to “protect the poor” or “make available affordable housing.” But the intentionalist would only be concerned with the meaning that the lawmaking body attached to the text—there would be no route to invalidation of the price ceiling.

E. The Existential Element, The Communicative Element, and Group Communications

When Humpty Dumpty said “glory,” the word meant “there’s a nice knock-down argument for you.”⁵⁶ It did not matter that Alice perceived the word “glory” to mean something different, because the speaker did not intend the word to mean anything but “there’s a nice knock-down argument for you.” When a lawmaking body promulgates a legal text, however, it is not merely a conversation between two people, it is a group communication—several individuals using one set of words to convey one meaning. Individuals within the group likely will subjectively attach different

⁵⁴ See BLACK'S LAW DICTIONARY 962 (Bryan A. Garner ed., 2009) (“The set of rules or principles dealing with a specific area of a legal system . . .”) (definition of “law”); see also Alexander & Prakash, *supra* note 9, at 994 (“[T]he goals [legal texts] are meant to achieve are not the same thing as the meanings they are intended to convey.”).

⁵⁵ THOMAS SOWELL, BASIC ECONOMICS 30 (2004).

⁵⁶ CARROLL, *supra* note 27, at 81.

meanings to the same set of words. This is of course problematic when arguing that law's existential element is formed by the lawmaking body's intended meaning. In an ideal world, the judge would have universal access to the intended meanings of each and every member within the lawmaking body, and could analyze them to determine whether a threshold⁵⁷ of mutual assent was reached to transform a particular word or phrase of legal text into law. However, it is unquestionable that the information costs involved in such an inquiry would be insurmountable. Therefore, any interpretive enterprise must acknowledge that the goal is not perfection—it is only to interpret law's communicative element to get as close to law's existential element as possible.⁵⁸ As will be discussed in the following Part, principles of group communications suggest that we should look to the intended meaning of legal texts only under specific scenarios where intent is more readily discernable, and defer to public meaning in all other circumstances.⁵⁹

II. GROUP COMMUNICATIONS

The purpose of this Note is to show how principles of group communication can inform original meaning jurisprudence. But as mentioned before, group communications pose certain challenges. When group communications occur, a group of individuals convey one set of words that have, presumably, one meaning.⁶⁰ However, it is likely (perhaps certain, even) that individuals within the group will each subjectively attach different meanings to the same set of words—there is no collective intent that can be attributed to the group.⁶¹

This Part will first discuss the problems associated with group communications and how those problems have been used to undermine intentionalism.⁶² Next, this Part will detail five principles of group communications that could influence the original meaning calculus:⁶³ (1) meaning is set by the speaker;⁶⁴ (2) while groups cannot form intents, attributing a metaphorical intent to groups is useful for determining the meaning of

⁵⁷ The judge might conclude that if a majority of the voting senators attached *meaning X* to the word or phrase, then *meaning X* is the intended meaning of the Senate. Such an inquiry, however, would be futile because the information needed to answer that question is unattainable. See *infra* Part II.B.4 (arguing that because of the futility of determining the intended meanings of each individual member, the interpreter should focus only on certain key figures within the group).

⁵⁸ See *supra* note 25.

⁵⁹ See *infra* Part II.C.

⁶⁰ That one meaning is the product of communications may be especially true with legal texts where we ask the Supreme Court to ultimately resolve contradictory interpretations amongst lower courts.

⁶¹ See *infra* Part II.A.

⁶² *Infra* Part II.A.

⁶³ *Infra* Part II.B.

⁶⁴ *Infra* Part II.B.1.

group communications;⁶⁵ (3) we can derive metaphorical intent through simple and complex summative accounts of group speech;⁶⁶ (4) individuals within the group often form their intent by relying on the expertise and intended meanings of others in the group;⁶⁷ and (5) for practical reasons, listeners often do resort to public meaning to make sense of group communications when metaphorical intent is too difficult to ascertain.⁶⁸ Finally, this Part will offer a way that group communications can inform original meaning jurisprudence by relying on both public and intended meaning.⁶⁹

A. The Problem of Collective Intent

Group communications can be somewhat baffling. One of the biggest criticisms of intentionalism is that no collective intent can be attributed to groups made up of individuals who likely all subjectively attached different meanings to the same set of words.⁷⁰ Judge Frank Easterbrook (Professor Easterbrook at the time) summed up the problem of collective intent as follows: “Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.”⁷¹ Justice Scalia and Bryan Garner add:

[C]ollective intent is pure fiction because dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting on—or perhaps no views at all because they are wholly unaware of the minutiae. The Whigs disagree with the Tories on how a court will someday apply a given provision—or they *would* disagree if they took the time to consider it. . . . Each member voting for the bill has a slightly different reason for doing so. There is no single set of intentions shared by all. The state of the assembly’s collective psychology is a hopeless stew of intentions⁷²

The only thing more baffling than group communications themselves, is the notion that a group cannot attach meanings to its words that depart from the public’s understanding.

⁶⁵ *Infra* Part II.B.2.

⁶⁶ *Infra* Part II.B.3.

⁶⁷ *Infra* Part II.B.4.

⁶⁸ *Infra* Part II.B.5.

⁶⁹ *Infra* Part II.C.

⁷⁰ See, e.g., SCALIA & GARNER, *supra* note 28, at 392; Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998).

⁷¹ Easterbrook, *supra* note 70, at 547.

⁷² SCALIA & GARNER, *supra* note 28, at 392.

Textualists make much of the intentionalist's problem of collective intent, but the textualist faces a nearly identical problem. In relying on the public understanding of a word or phrase, they fail to acknowledge that there can be no collective *understanding*. Members of the public certainly disagree about the meaning of legal texts. The textualist tries to overcome this problem by resorting to a reasonableness standard,⁷³ but the problem persists where either equally reasonable members of the public disagree over an ambiguous word or phrase, or an idealized member of the public would conclude that the text has equally plausible alternative meanings.⁷⁴ If the textualist is undeterred by the problem of collective understanding—as well he should be—then the intentionalist should not throw his hands in the air over the problem of collective intent.

B. Principles of Group Communications

Surveying the literature regarding group communications, and relying on everyday experiences, it becomes clear that groups can communicate an intended meaning effectively despite the textualist's insistence that collective intention poses an insurmountable hurdle. If we manage to make sense of group communications in our everyday lives, it stands to reason that the judge need not throw his hands in the air when interpreting what is just another form of group communication—legal texts. If the basis for judicial interpretation is to reveal law's existential element—the metaphysical lines that are drawn by virtue of the lawmaking process⁷⁵—original meaning jurists should embrace principles of communication when those principles will allow the judge to better home in on law's existential element. Admittedly, the search for intended meaning often will be a quixotic venture, and in those cases textualists will be vindicated in their reliance on public meaning. However, when we *can* make the calculus work, when we *can* attribute an intended meaning to a lawmaking body, then we will have come closest to discovering the existential element of law.

1. Meaning is Set by the Speaker

“Bypassing occurs when people miss each other with their meanings. They use the same words but attribute different meanings to them.”⁷⁶ The article *Bypassing in Managerial Communications* gives an example of the problems that can arise as

⁷³ See, e.g., SCALIA, *supra* note 5, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”).

⁷⁴ See Alexander & Prakash, *supra* note 9, at 988 (“[T]he idealized reader whom the textualist stipulates . . . may conclude that a text has two or more meanings that are equally supported by the evidence to which he is restricted.”).

⁷⁵ See *supra* Part I.A–C.

⁷⁶ Jerry Sullivan et al., *Bypassing in Managerial Communication*, 34 BUS. HORIZONS 71, 72 (1991).

a result of bypassing.⁷⁷ A Japanese parent company sends a telex to its subsidiary in America: “SHIP ANY JOB LOTS OF MORE THAN 25 UNITS TO US AT ONCE.”⁷⁸ An employee with the American subsidiary interprets the words “more than 25 units” as most Americans would, twenty-six or more, and promptly ships the three lots that meet that requirement.⁷⁹ Six weeks later the American subsidiary receives a follow-up telex from Japan: “WHY DIDN’T YOU DO WHAT WE TOLD YOU? YOUR QUARTERLY INVENTORY REPORT INDICATES YOU ARE CARRYING 40 LOTS WHICH YOU WERE SUPPOSED TO SHIP TO JAPAN.”⁸⁰ The author explains the apparent discrepancy between the parent company’s communication and the employee’s interpretation: “[I]n Japan ‘more than X’ very often includes X.”⁸¹ The parent company intended “more than twenty-five” to mean twenty-five or more.

This scenario is perhaps what George Bernard Shaw was referencing when he said, “[t]he single biggest problem in communication is the illusion that it has taken place.”⁸² What is clear from the above example is that the parties have each subjectively attached different meanings to the same set of words. But whose meaning is the actual meaning? Principles of communication resolve the question: meaning is determined by the speaker, not the listener.⁸³

To say that meaning is determined by the speaker is not to argue that in ordinary conversations we do not occasionally approach the interpretive calculus from an egocentric perspective. One study, detailed in *Taking Perspective in Conversation: The Role of Mutual Knowledge in Comprehension*, clearly demonstrates that we have a natural tendency to do so.⁸⁴ Test subjects assumed the roles of “director” and “addressee.”⁸⁵

⁷⁷ *Id.* at 71–72.

⁷⁸ *Id.* at 71.

⁷⁹ *Id.* at 71–72.

⁸⁰ *Id.* at 71.

⁸¹ *Id.* at 72.

⁸² See KEY ISSUES IN ORGANIZATIONAL COMMUNICATION 235 (Dennis Tourish & Owen Hargie eds., 2004) (quoting George Bernard Shaw).

⁸³ See BERGER, *supra* note 6, at 17 (“That is the essence of communication; it begins with the speaker who alone is entitled to say what *he* meant. No listener or reader may insist in the teeth of the speaker’s own explanation that he meant exactly the opposite.”); HIRSCH, *supra* note 19, at 5 (“[W]hen critics deliberately banished the original author, they themselves usurped his place, and this led unerringly to some of our present-day theoretical confusions. Where before there had been but one author, there now arose a multiplicity of them, each carrying as much authority as the next. To banish the original author as the determiner of meaning was to reject the only compelling normative principle that could lend validity to an interpretation.”); Federalist Society Panel on Originalism, *supra* note 17 (“[T]his seems to be a foundation of communication—an attempt to understand what other people are trying to convey to us.”) (statement by Professor Prakash, 1:55 through 2:13).

⁸⁴ Boaz Keysar et al., *Taking Perspective in Conversation: The Role of Mutual Knowledge in Comprehension*, 11 PSYCHOL. SCI. 32, 32 (2000) (noting that listeners occasionally use an egocentric strategy—considering information that is available to them, but not to the speaker).

⁸⁵ *Id.* at 32–33.

Director and addressee sat on opposite sides of slotted shelves with various items placed in the slots.⁸⁶ From addressee's perspective, every item in the shelf could be seen; however, from the director's perspective certain slots were covered, blocking the contained item from director's view.⁸⁷ The addressee could see which items were blocked from the director's view.⁸⁸ Among various items on the shelf were three candles (large, medium, and small).⁸⁹ All three candles were visible to the addressee, however the smallest candle was blocked from the director's perspective.⁹⁰

During the study, the director was told to instruct the addressee to move "the small candle" to a different shelf.⁹¹ Recall, because the small candle was blocked from director's perspective, the medium candle *was* the small candle as far as the director was concerned. Despite the addressee's knowledge that the director was not even aware of the smallest candle on the shelf, the addressee still considered moving it.⁹² In six percent of cases, the addressee reached for the occluded candle but corrected the faulty interpretation.⁹³ However, in seventeen percent of cases, the addressee moved the smallest candle despite knowing that the candle was hidden from director's perspective.⁹⁴ While a notable percentage actually moved objects that the director could not have possibly intended, the overwhelming majority of addressees⁹⁵ were seeking the director's intended meaning, even if it meant overcoming a tendency to approach the interpretative calculus from an egocentric perspective.⁹⁶

2. Attributing a Metaphorical Intent to Groups Is Useful for Determining the Meaning of Group Communications

It is a common theme among textualists to claim that the intentionalist—seeking the intent of the legislature—is bestowing anthropomorphic characteristics upon the lawmaking body.⁹⁷ While this Note frequently uses the word "intent" in the context

⁸⁶ *Id.* at 33.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 34.

⁹² The study examined recorded eye movement and fixation to determine whether addressee considered moving the occluded candle. *Id.* at 33–34.

⁹³ *Id.* at 35.

⁹⁴ *Id.*

⁹⁵ Only seventeen percent ultimately move the hidden candle. The rest either corrected their initial interpretive mistake or followed the director's intended meaning without reaching for the hidden candle. *Id.* at 35.

⁹⁶ The authors suggest that the tendency to make egocentric interpretations may be the result of a cost-benefit analysis. *See id.* at 37 ("[T]here is reason to believe that the likelihood of an error due to egocentric interpretation is not very high.").

⁹⁷ *See* Kozinski, *supra* note 70, at 813 ("[T]o look for congressional intent is to engage in anthropomorphism—to search for something that cannot be found because it does not exist.");

of group communications, it is unquestionable that groups do not have the capacity to form intents.⁹⁸ Intent can only exist within the individual human mind, and there is no collective group mind.⁹⁹ What is meant in this Note by “intent” (and hopefully what is meant by other intentionalists) is a sort of metaphorical intent. To say that a group intends something, is not to anthropomorphize the group, but rather to acknowledge that groups can, and do, form something that sure looks a lot like intent, even if intent itself is an impossibility.¹⁰⁰

Attributing a metaphorical intent to groups is commonplace,¹⁰¹ and for good reason. It allows us to make sense of group actions.¹⁰² Judges need not look far for examples of metaphorical intent—it is routinely the subject of contract law. The common law of contract requires “mutual assent” for contract formation.¹⁰³ The Uniform Commercial Code allows contract formation when “the parties have *intended* to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”¹⁰⁴ If the textualist’s position is taken to its extreme, groups would never be able to enter contracts under the common law unless a single-actor-agent entered into the contract on behalf of the group. And their ability to do so under the Uniform Commercial Code

Manning, *supra* note 13, at 423 (“What characterizes classical intentionalism is its tendency to anthropomorphize the legislature.”).

⁹⁸ See Deborah Tollefsen, *Collective Intentionality*, INTERNET ENCYCLOPEDIA OF PHIL., available at <http://www.iep.utm.edu/coll-int/> (“A common response to the questions that arise concerning our practice of ascribing intentional states to groups is to say that these ascriptions are mere fictions.”) (last visited May 1, 2015).

⁹⁹ See *id.* (“The dominant picture in [Anglo-American and European philosophical] circles is that intentionality is a feature of individual minds/brains.”).

¹⁰⁰ And at any rate, even if it is anthropomorphism to ascribe intents to a lawmaking body, then the anthropomorphic leap is more of a hop. After all, legislatures do happen to be comprised entirely of “anthropos.”

¹⁰¹ Even textualists take part. See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 110 (1996) (“[T]he Supreme Court demonstrated . . . the direction in which they *intend* to drive the country . . .” (emphasis added)); *id.* at 116 (“The framers almost certainly did not *intend* that the exceptions power be used to control the Supreme Court.” (emphasis added)); *id.* at 197 (“[T]o make the roles of men and women identical are what the feminists *intend*.” (emphasis added)).

¹⁰² See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 65–66 (2006) (“The only real solution . . . to the problem of collective intentions is to take the metaphor seriously as a metaphor. The metaphor works by positing the collective as a fictitious individual. . . . Anthropomorphism of this kind is especially plausible, and especially necessary, with respect to legal documents, which only function well when they speak with one voice, even if the process which generated that voice was messy and divisive.”); see also Tollefsen, *supra* note 98 (“[O]ur ascriptions of intentional states to groups have a surprising explanatory power. They allow us to predict and explain the actions of groups.”).

¹⁰³ RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”).

¹⁰⁴ U.C.C. § 2-204(3) (2013) (emphasis added).

would be limited.¹⁰⁵ Partnership agreements would also be problematic. Consider a partnership contract signed by thirty partners. If the textualist approached partnership agreements as just a “hopeless stew of intentions,” every partnership contract would become nothing more than thirty ships passing each other in the night. The problem persists with contract interpretation, where the goal is to determine the intent of the parties.¹⁰⁶ If we could not attribute a metaphorical intent to groups, contract doctrine would wilt in the presence of corporate contracts.

3. We Can Derive Metaphorical Intent Through Simple and Complex Summative Accounts of Group Communications

Summative accounts of collective intentionality are majoritarian in the sense that a majority of mutual intent is necessary in order to ascribe a collective intent to the group.¹⁰⁷ There are two versions of the summative account, both helpful for informing the intentionalist. The simple summative account holds that if a majority of individuals within the group intends something, then the group intends the same. In other words, *Group A intends X if and only if most of Group A’s members intends X*.¹⁰⁸ The complex summative account adds a caveat to the simple summative account: it must be common knowledge within the group that most of its members mean X.¹⁰⁹ To summarize, *Group A intends X if and only if most of Group A’s members intend X, and it is common knowledge that most of the members intend X*.¹¹⁰

As will be discussed in the following Parts, the simple and complex summative accounts, on their own, are not useful for the interpretive calculus. While they explain how we can attribute metaphorical intents to groups, the information costs of discerning the intended meanings of each group member is impossibly high. For purposes of this Part, it is enough to say that either the simple or complex summative account is a plausible explanation of group intention, and the following Part will discuss the shortcuts we take to estimate the summative account without an intensive inquiry into the mind of each group member. Relating the summative accounts to legal texts, the simple summative account would factor in privately-held intended meanings of legislators—for example, a letter written to a colleague about the intended meaning

¹⁰⁵ Under the U.C.C., groups could still enter a contract by exhibiting “conduct . . . which recognizes the existence” of a contract. See U.C.C. § 2-204(1) (2013). Even still, if you believe that it is anthropomorphism to say that a group can intend something, it is likely anthropomorphism to say that a group can “recognize the existence” of something.

¹⁰⁶ See *In re Binghamton Bridge*, 70 U.S. 51, 74 (1865) (“All contracts are to be construed to accomplish the intention of the parties . . .”).

¹⁰⁷ Tollefsen, *supra* note 98.

¹⁰⁸ See *id.* (Tollefsen presents the formula in a slightly different manner: “Group G believes that p if and only if all or most of the members believe that p.”).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (Tollefsen’s formulation: “A group G believes that p if and only if (1) most of the members of G believe that p, and (2) it is common knowledge in G that (1).”).

of what the text meant.¹¹¹ For the complex summative account, the intended meaning would have to be available to the entire lawmaking body—for example, an official comments section that explains the intended meaning of the text.¹¹²

4. Individuals Within the Group Often Form Their Intent by Deferring to the Intended Meanings of Key Figures in the Group

Justice Scalia and Bryan Garner contend that “collective intent is pure fiction The state of the assembly’s collective psychology is a hopeless stew of intentions”¹¹³ If lack of collective intent is a pitfall embedded in group communications, it is no less true that we manage to traverse around it every day unscathed.¹¹⁴ We interpret group communications constantly without wringing our hands over a “stew of intentions.” If the Campbell’s Soup Company instructs customers to “[h]eat gently over medium heat in saucepan, stirring occasionally,”¹¹⁵ most customers manage to make sense of the group communication without a deeper inquiry into the “collective psychology” of the corporation. However, if questions did arise over the meaning of “gently,” “medium heat,” or “occasionally,” both public meaning and intended meaning likely would resolve the issue to an extent. But is there any question that the meaning intended¹¹⁶ by Campbell’s would get us closer to the *actual* meaning? Nor would we be concerned whether each member of the group—from CEO to delivery driver—had subjectively attached the same meaning to the words “medium heat.” This is because we understand that individuals within the group defer to the expertise and intended meanings of certain key figures within the group when forming their communications—the CEO and delivery drivers likely have deferred to the expertise of company chefs. If the company chef was the key figure in forming the communication and others within the company had deferred to the chef’s intended meaning, the company chef’s intended meaning would get us closest to the actual meaning of the text.

Throughout this discussion the key figure in forming the group communication—to whose intended meanings other group members would be likely to defer—will be referred to in shorthand as Σ . Σ represents one key figure within the group. Multiple Σ s, however, can exist simultaneously within the group, and each possesses different

¹¹¹ The simple summative account would allow for evidence of privately held intents because the simple account does not require that the majority’s intent be *common knowledge* to group members. *See id.*

¹¹² The complex summative account requires that the intended meaning of the majority be common knowledge to the group. Privately held intents, unknown to the rest of the group, would not be useful for the complex account.

¹¹³ SCALIA & GARNER, *supra* note 28, at 392.

¹¹⁴ *See* Prakash, *supra* note 1, at 536.

¹¹⁵ *Campbell’s® Slow Kettle® Heating Instructions*, CAMPBELLSOUP.COM, <http://www.campbellsoup.com/Products/Slow-Kettle/Heating-Instructions> (last visited May 1, 2015).

¹¹⁶ At least *metaphorically* intended.

intents. A company chef ($\Sigma 1$) may intend “medium heat” to mean 325°F (the temperature needed to produce optimal quality soup), but Campbell’s head of marketing ($\Sigma 2$) may intend “medium heat” to mean 374°F (the temperature needed to cook the soup fast enough to compete with other quick-prep meals on the market).

The idea that individuals within the group defer to the expertise and intended meanings of Σ can supplement both the simple and complex summative accounts of collective intentionality. If Σ intends X, and a majority of group members defers to the intended meaning of Σ , then a majority of group members intends X. This is enough to satisfy the simple summative account.¹¹⁷ The only caveats that the complex summative account adds is (1) Σ ’s intended meaning must be common knowledge to the group, and (2) it must be common knowledge in the group that a majority of individuals deferred to Σ ’s intended meaning.¹¹⁸ That judges look to Σ ’s intended meaning as evidence of a group’s intended meaning may already be prevalent in legal interpretation. Judges are often called to discern the intent of corporate parties to contracts.¹¹⁹

5. Listeners Often Resort to Public Meaning to Make Sense of Group Communications When Metaphorical Intent Is Difficult to Ascertain

We likely rely on public meaning more often than intended meaning in the context of group communications because of the high information costs involved. When bypassing¹²⁰ occurs between two individuals, the listener can often resolve ambiguities in the speaker’s words by asking, “What do you mean?”¹²¹ In the context of group communications, however, the listener cannot simply consult *any* member of the group for an accurate representation of the group’s meaning. The Campbell’s delivery driver may be available for comment on the meaning of “medium heat,” but her idea of the intended meaning may be no more reliable of the company’s intended meaning than any off-the-shelf cookbook. The same would apply to Campbell’s customer service representative (unless she has a specific answer at the ready from

¹¹⁷ Group A intends X, if and only if most of Group A’s members intend X. *See* Tollefsen, *supra* note 98 (Tollefsen presents the formula in a slightly different manner: “Group G believes that p if and only if all or most of the members believe that p.”).

¹¹⁸ Group A intends X, if and only if most of Group A’s members intend X, and it is common knowledge that most of the members intend X. *See id.* (Tollefsen’s formulation: “A group G believes that p if and only if (1) most of the members of G believe that p, and (2) it is common knowledge in G that (1).”).

¹¹⁹ *See, e.g., In re Binghamton Bridge*, 70 U.S. 51, 74 (1865) (discussing contract between government and corporation: “All contracts are to be construed to accomplish the intention of the parties . . .”). Indeed, unless a single-actor-agent (recall, intent can only exist at the *individual* level) bound a corporation to the terms of an agreement, corporations could never form the intent necessary to achieve mutual assent under the common law of contracting.

¹²⁰ For an explanation of “bypassing,” *see supra* notes 76–81 and accompanying text.

¹²¹ Due to the “collaborative nature of conversation,” speakers can also detect and correct errors made by their conversational counterparts. *See* Keysar et al., *supra* note 84, at 37.

a Company Chef). So instead of going through the process of trying to get at the heart of what the company meant by a certain word or phrase, we simply rely on either our own understanding of the words or we consult a cookbook, which is likely to be indicative of the public understanding of the words.¹²² We are able to take these shortcuts because we go about our daily lives with the understanding that in most settings communications are made deliberately—they are designed to be understood without a complex inquiry into the speaker's intent.¹²³ That we sometimes approach the interpretative exercise from an egocentric perspective is demonstrated in the abovementioned candle test.¹²⁴ Indeed the study's authors suggest that we employ an egocentric strategy because we are making a cost benefit analysis.¹²⁵ And with group communications, the cost of uncovering intent is particularly high.

C. How Principles of Communication Should Inform Original Meaning Jurisprudence

Intent only exists within individual minds; groups cannot form intents.¹²⁶ The simple summative account of group communications says that if a majority of individuals within the group intends to mean X, then the group (metaphorically speaking) intends to mean X;¹²⁷ the complex summative account further requires that the majority's intended meaning be common knowledge among the members of the group.¹²⁸ However, the information costs involved with accurately obtaining the intents of each member of the group are insurmountable. So we, as listeners, approach the interpretive calculus heuristically in at least two ways: we rely on the ordinary public

¹²² That we occasionally rely on our own understanding rather than searching for the speaker's intent is demonstrated in *Taking Perspective in Conversation: The Role of Mutual Knowledge in Comprehension*. See *supra* notes 84–96 and accompanying text. Even when we know that the author is communicating from a different perspective, we occasionally still adhere to egocentric methods of interpretations, perhaps heuristically because we assume that the author has communicated in a way that is understandable without an inquiry into authorial intent. See *infra* note 125 and accompanying text; see also *supra* note 43.

¹²³ See Krauss & Fussell, *supra* note 43, at 3 (“Messages are formulated to be understood by a specific audience, and in order to be comprehensible they must take into account what that audience does and does not know.”); see also Federalist Society Panel on Robert Bork, *supra* note 30 (“[P]eople use words to convey meaning and they know that other people are likely to take the ordinary meaning as the meaning that they intended.”) (statement by Professor Saikrishna Prakash, 1:20:05 through 1:22:11).

¹²⁴ See *supra* notes 84–96 and accompanying text.

¹²⁵ See Keysar et al., *supra* note 84, at 37 (“[An egocentric strategy] might require minimal cognitive effort because it uses accessible information and does not take into account alternative perspectives, which might involve further mental computation.”).

¹²⁶ See Tollefsen, *supra* note 98 (“The dominant picture in [Anglo-American and European philosophical circles] is that intentionality is a feature of individual minds/brains.”).

¹²⁷ See *supra* note 108 and accompanying text (simple summative formula).

¹²⁸ See *supra* note 110 and accompanying text (complex summative formula).

meaning of the communication,¹²⁹ or we look to the intent of Σ ¹³⁰ (or multiple Σ s) within the group as evidence of the intent of others.¹³¹

In the judicial setting, either approach likely will get us close to the actual meaning of the legal text, but relying on the intent of Σ respects the notion that it is within the providence of the legislature to make law, and that the intended meanings of legislators matter. Relying on these principles, original meaning judges should look for evidence of an Σ (or multiple Σ s) within the group that formed the legal text. Recall, Σ would be a key figure involved in forming the legal text to whose meaning others either actually deferred or to which they were likely¹³² to defer. If one accepts the simple summative account, then any evidence of Σ 's intended meaning could be utilized, even if that intent was evidenced by information that was unknown to other members of the legislature.¹³³ If one subscribes to the complex summative account, then Σ 's intended meanings could only be used by a judge if Σ 's intended meaning was common knowledge to the legislators.¹³⁴ If Σ is not discernible, or if there are multiple Σ s that have disparate intended meanings for the same text, then the judge should resort to the original public meaning, much the same way that we as listeners resort to public meaning when the information cost of determining a group's metaphorical intent is too high.¹³⁵

III. THEORY IN PRACTICE

The U.C.C. is an interesting subject for group-communication-based analysis. The Code was not crafted by state legislatures, but is rather the product of a committee sponsored by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI).¹³⁶ By October 1952, the 1952 Official Text and Comments Editions¹³⁷ was published.¹³⁸ Pennsylvania adopted the

¹²⁹ This is the textualist's approach.

¹³⁰ Because intent can only exist at the level of the individual mind, intentionalism should only search for intent at the individual level. Rather than consider the intended meaning of just anyone in the group, we rely on the intent of Σ , which is more likely to be representative of the metaphorically intended meaning. By excluding evidence of non- Σ s, we reduce the interpretative gamble of relying on a single legislator, whose meaning may be idiosyncratic and foreign to most legislators. Σ , however, is, by its nature, likely to be representative of other legislators.

¹³¹ See *supra* Part II.B.4.

¹³² Evidence of actual reliance on Σ within the group may be impossible to find, and the goal is not perfection. See *supra* note 25 and accompanying text.

¹³³ For instance, a private letter written by Σ .

¹³⁴ In this scenario, a judge would likely need an official comments section (or something analogous) that Σ was instrumental in forming.

¹³⁵ See *supra* Part II.B.5.

¹³⁶ For a thorough retelling of the history of the Code, see generally Walter D. Malcolm, *The Uniform Commercial Code in the United States*, 12 INTER. & COMP. L.Q. 226 (1963).

¹³⁷ UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (1952).

¹³⁸ See Malcolm, *supra* note 136, at 230.

Code the following year;¹³⁹ however, the New York Legislature was hesitant to adopt the 1952 version and formed the Law Revision Commission to study whether a revision would be necessary.¹⁴⁰ New York's Law Revision Commission worked with the NCCUSL and the ALI,¹⁴¹ culminating in a revised version in 1958.¹⁴² By 1967, all states (with the exception of Louisiana¹⁴³) had adopted the Code.¹⁴⁴

The question that arises for the intentionalist is which group's intended meaning is more dispositive of the actual meaning of a given Code provision? State legislatures (at least some) did not merely accept the text as promulgated by the sponsoring organizations—as evidenced by New York's careful examination and rejection of the 1952 version of the Code.¹⁴⁵ In that sense, the intended meanings of legislatures may be relevant to the inquiry. But there may be good reason to look to the meanings of the sponsoring organizations rather than each legislature that ratified the Code. William Twining offers three justifications for consulting the Official Comments promulgated by the sponsoring organizations:

[T]hey bear the imprimatur of those responsible for the Code and so they have strong claims to be authoritative; they were prepared concurrently with the drafting of the Code, and so are not vulnerable to any suggestion of hindsight or second thoughts; they are, above all, accessible and easy to use.¹⁴⁶

In addition to the reasons offered by Twining, the purpose of a *uniform* code is to have *uniform* law throughout the states.¹⁴⁷ State legislatures have adopted the text with the knowledge that they are ratifying the same law (with the same meaning) as sister states.

¹³⁹ See *id.* at 230; see also MARION W. BENFIELD, JR. & MICHAEL W. GREENFIELD, SALES: CASES AND MATERIALS 5 (6th ed. 2011); WILLIAM TWINING, THE KARL LLEWELLYN PAPERS 38 (1968).

¹⁴⁰ See Malcolm, *supra* note 136, at 230–31.

¹⁴¹ *Id.* at 230–33.

¹⁴² UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS (1958).

¹⁴³ Louisiana ultimately “adopted all Articles of the Code except Articles 2 and 2A.” BENFIELD & GREENFIELD, *supra* note 139, at 5.

¹⁴⁴ See *id.*

¹⁴⁵ See *supra* notes 140–42 and accompanying text.

¹⁴⁶ WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 329 (2012).

¹⁴⁷ There is a sense among judges that they should defer to the interpretation of a majority of jurisdictions, even when they believe that a better interpretation is available. See BENFIELD & GREENFIELD, *supra* note 139, at 9 (noting that judges should “rely . . . on the decisions of other code states” and “give their own decisions somewhat less permanent precedential value”). This Note does not adopt the above position, because the focus of original meaning jurisprudence should be to ascertain the correct meaning, not the popular one. But insofar as this trend of judges deferring to the decisions of other legislatures is an acknowledgment that the law that has come into existence has uniform meaning throughout the states, this Note is somewhat sympathetic to their actions.

In seeking the intended meaning of the sponsoring organizations' committee (hereinafter, the Committee), the intentionalist must first acknowledge that individual members of the Committee certainly intended different meanings for the same text. However, because the information costs of obtaining the intended meanings of each member of the group is insurmountable, and because we are looking only for a metaphorical intent, we look for the intended meaning of Σ within the group as evidence of the metaphorical intent. If Σ was among the drafters of the Code, it was likely Karl Llewellyn. Commentators go so far as to call the Code "Llewellyn's Code,"¹⁴⁸ "Lex Llewellyn,"¹⁴⁹ and "Llewellyn's Llaw."¹⁵⁰ William Twining describes Llewellyn's involvement in drafting the Code: "[T]he general style of drafting and the central concepts of the code, as well as many of the particular solutions of problems of substance, style, and wording, are Llewellyn's."¹⁵¹ Twining goes on to discuss the close-knit nature of the drafting process:

Each article was originally given to one or two draftsmen, who were usually professors of law, and an advisory group of six, most of whom were practitioners or judges. The draftsmen prepared the initial drafts; these were revised in consultation with Llewellyn and the Assistant Chief Reporter, Soia Mentschikoff, and then reviewed and corrected in detail by the advisers.¹⁵²

In addition, Professor Llewellyn was involved heavily in drafting the early Official Comments for Article 2.¹⁵³ In short, Llewellyn is a key figure in the group, and others within the group likely would have deferred to his expertise. Llewellyn's intended meaning is perhaps the sort of evidence on which an intentionalist would rely. Recall, that the goal of judicial interpretation is not perfection,¹⁵⁴ but rather to get as close as possible. Reliance on one member of the group will not always be indicative of law's

¹⁴⁸ Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962).

¹⁴⁹ Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 330 (1951).

¹⁵⁰ Peter A. Alces, *Symposium: The Revision of Article 2 of the Uniform Commercial Code: Introduction*, 35 WM. & MARY L. REV. 1299, 1299 (1994).

¹⁵¹ TWINING, *supra* note 146, at 36; *see also* Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1146–47 n.25 (1985) (noting Llewellyn's involvement in Article 2).

¹⁵² TWINING, *supra* note 146, at 37.

¹⁵³ *Id.* at 328 ("Llewellyn and Mentschikoff expended an enormous amount of time on the first drafts of the Sales Comments during the period 1943–5.").

¹⁵⁴ *See* BORK, *supra* note 5, at 163 ("We must not expect too much of the search for original understanding in any legal context. The result of the search is never perfection; it is simply the best we can do; and the best we can do must be regarded as good enough—or we must abandon the enterprise of law and, most especially, that of judicial review.").

existential element, just as reliance on an objectified public meaning will not always be indicative of law's existential element. However, by relying on Σ (Llewellyn) we reduce this risk by focusing on a key figure within the group whose intended meaning others were likely to defer to.

A. Interpreting Article 2 of the U.C.C.

Before discussing any interpretive approach related to the U.C.C., it is important to note that the Code seems to thrust upon judges its own Code-mandated interpretive methods.¹⁵⁵ One provision of the Code seems to impose a form of purposivism.¹⁵⁶ Another provision, removed in 1956,¹⁵⁷ seemed to be more (at least a *little* more) sympathetic to the textualist cause.¹⁵⁸ Whether a legislature can impose such a mandate on the judiciary is a question that far exceeds the bounds of this paper. Although it is an interesting question, the proposition seems at least questionable.¹⁵⁹ This Note will approach the interpretive calculus using the methods discussed herein, and not rely on any interpretive method espoused by the Code itself.

The first thing that should be noted about the Official Comments is that they are not contained in the legal text adopted by the states.¹⁶⁰ The Official Comments are not even “official” insofar as “they have been formally adopted neither by the floors of the sponsoring bodies nor by legislatures which have enacted the Code.”¹⁶¹ Indeed, in some circumstances the Comments were not provided to legislators considering the Code for adoption,¹⁶² although presumably there were at least some legislators who

¹⁵⁵ See U.C.C. § 1-103(a) (2013).

¹⁵⁶ See *id.* (“[The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies . . .”). Before the revision of Article 1, this provision was found, in slightly different language, in U.C.C. § 1-102(1) (1958) (“This Act shall be liberally construed and applied to promote its underlying purposes and policies.”).

¹⁵⁷ See TWINING, *supra* note 146, at 327–28. Interestingly, while the provision specifically required that text win out over comment when the two conflict, New York’s Law Revision Commission objected because “the provision allowing the reference to the Comments gave them undue weight.” *Id.* at 328.

¹⁵⁸ See U.C.C. § 1-102(3)(f) (1952) (“The 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 *if text and comment conflict, text controls . . .*” (emphasis added)).

¹⁵⁹ The power to interpret law is held by the Judiciary branch. See U.S. CONST. art. III § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

¹⁶⁰ See *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.*, 837 N.W.2d 244, 254 (Mich. 2013) (“The official comments to the UCC do not have the force of law.” (citation omitted)).

¹⁶¹ TWINING, *supra* note 146, at 326.

¹⁶² *Id.*

had access to the Comments.¹⁶³ Employing principles of group communication, the intentionalist would not rely on the Comments as legal text—the legal text is limited to the language adopted by the state legislatures. The Comments are, however, perhaps a window into the intended meanings of Karl Llewellyn, an Σ within the group that formed the communication.

B. The Meaning of “Merchant” Under a Textualist and Intentionalist Analysis

A party’s status as “merchant” is of paramount importance when applying Article 2 of the U.C.C. Among other things, merchant status is critical for determining whether a firm offer has been made,¹⁶⁴ whether a written confirmation satisfies the statute of frauds,¹⁶⁵ whether additional terms in a written confirmation become part of the contract,¹⁶⁶ whether the contract includes implied warranties,¹⁶⁷ and whether a party has reasonable grounds for requesting adequate assurance.¹⁶⁸

In determining what is meant by the term “merchant,” the first step is to proceed to Article 2’s definitions section. Section 2-104(1) is the apposite legal text:

“Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary

¹⁶³ The Official Comments are included with the text in the literature promulgated by the ALI and NCCUSL. *See* UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS (1959) (each Code provision is immediately followed by the Official Comments for that section).

¹⁶⁴ *See* U.C.C. § 2-205 (2012) (“An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration . . .”). Presumably, a firm offer by a non-merchant must be supported by consideration.

¹⁶⁵ *See* U.C.C. § 2-201(2) (2012) (“Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the [statute of frauds] against such party unless written notice of objection to its contents is given within 10 days after it is received.”).

¹⁶⁶ *See* U.C.C. § 2-207(2) (2012) (“The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.”).

¹⁶⁷ *See* U.C.C. § 2-314 (2012) (“[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”).

¹⁶⁸ *See* U.C.C. § 2-609(2) (2012) (“Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.”).

who by his occupation holds himself out as having such knowledge or skill.¹⁶⁹

There then seem to be at least five separate paths to the status of merchant: (1) a person who deals in goods of the kind; (2) a person who by his occupation holds himself out as having knowledge or skill peculiar to the *business practices*; (3) a person who by his occupation holds himself out as having knowledge or skill peculiar to the *goods*; (4) a person who employs an agent or broker or other intermediary who by his occupation holds himself out as having knowledge or skill peculiar to the *business practices*; (5) a person who employs an agent or broker or other intermediary who by his occupation holds himself out as having knowledge or skill peculiar to the *goods*.

Relying on the text of Section 2-104(1) alone, it appears that “merchant” should have a universal meaning throughout Article 2 because it is centrally defined in the legal text. But was “merchant” intended to mean the same thing across Code provisions? Both textualist and intentionalist analyses would conclude that “merchant” in fact means different things in different provisions, but intentionalism will reveal some subtleties that will be lost in the textualist analysis.

Relying on Section 2-104(1) in a vacuum, one would anticipate that there would be no distinction between the merchant who has knowledge and skill in *business practices* and the merchant who has knowledge and skill in *goods*. Both merchants would fall under the central definition of the term.¹⁷⁰ However, some Code provisions qualify the term.¹⁷¹ For example, Section 2-314 only applies “if the seller is a merchant with respect to goods of [the] kind,”¹⁷² and Section 2-403(2) applies to “a merchant who deals in goods of [the] kind.”¹⁷³ Clearly then, “a person who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices,”¹⁷⁴ would not be a merchant under Sections 2-314 and 2-403(2), unless that person also “deals in goods of [the] kind”¹⁷⁵ or “is a merchant with respect to goods of [the] kind.”¹⁷⁶

Most Article 2 provisions containing “merchant,” however, do not further qualify the term.¹⁷⁷ In those provisions, would there be any distinction between merchants

¹⁶⁹ UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS § 2-104(1) (1959).

¹⁷⁰ See U.C.C. § 2-104(1) (2012).

¹⁷¹ See, e.g., U.C.C. § 2-314 (2012); U.C.C. § 2-403 (2012).

¹⁷² U.C.C. § 2-314(1) (2012) (implied warranty of merchantability).

¹⁷³ U.C.C. § 2-403(2) (2012) (entrusting).

¹⁷⁴ UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS § 2-104(1) (1959).

¹⁷⁵ U.C.C. § 2-403(2) (2012).

¹⁷⁶ U.C.C. § 2-314(1) (2012).

¹⁷⁷ See, e.g., U.C.C. § 2-201(2) (2012) (statute of frauds); U.C.C. § 2-205 (2012) (firm offers); U.C.C. § 2-207(2) (2012) (battle of the forms); U.C.C. § 2-209(2) (2012) (modification, rescission); U.C.C. § 2-509(3) (2012) (risk of loss); U.C.C. § 2-609(2) (2012) (right to adequate assurance); U.C.C. § 2-605(1)(b) (2012) (waiver of buyer’s objections by failure to particularize).

skilled in *business practices* and merchants skilled in *goods*? Under a textualist analysis, it does not appear so. Either type of merchant falls under the umbrella of the central definition of the term¹⁷⁸ and would be implicated wherever the term is used without further qualification. The problem with the textualist analysis, in this particular case, is that the Official Comments contradict the seemingly clear conclusion that merchants who have specialized knowledge or skill in *business practices* are meant to be treated identically to merchants who have specialized knowledge or skill in the *goods*.¹⁷⁹ Because this Note endorses an intention-based analysis when the intended meaning of Σ is available, and because Llewellyn's intended meanings are represented in the Official Comments, the Note will proceed with an examination of the Comments.

Because intentionalism is concerned with *original* intended meaning (what Llewellyn as Σ originally intended a provision to mean), an examination of any changes to the legal text or Comments over the years is first needed. If the Comments have changed after state legislatures adopted the Code, we would need to resort to historical versions. The sponsoring organizations published several drafts of the Code before it was adopted.¹⁸⁰ A 1949 draft of the Code¹⁸¹ contained a slightly different version of our modern Section 2-104(1).¹⁸² In addition, the 1949 Comments for that provision were considerably different than later drafts.¹⁸³ Interestingly, in the UNIFORM COMMERCIAL CODE: 1952 OFFICIAL TEXT WITH COMMENTS¹⁸⁴ the legal text of § 2-104(1) was changed into its current iteration, but the Comments for Section 2-104 were unchanged from the 1949 draft.¹⁸⁵ Essentially, the old 1949 Comments were

¹⁷⁸ UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS § 2-104(1) (1959).

¹⁷⁹ See U.C.C. § 2-104 cmt. 2 (2012) (distinguishing between “goods” and “practices” merchants).

¹⁸⁰ See, e.g., UNIFORM COMMERCIAL CODE: MAY 1949 DRAFT (1949); UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (1952); UNIFORM COMMERCIAL CODE: 1952 OFFICIAL TEXT WITH COMMENTS: WITH CHANGES AND MODIFICATIONS APPROVED BY THE ENLARGED EDITORIAL BOARD AT MEETINGS HELD ON DECEMBER 29, 1952, FEBRUARY 16, 1953, MAY 21, 1953, AND DECEMBER 11, 1953 (1953), reprinted in UNIFORM COMMERCIAL CODE: DRAFTS, vol. XVI (Elizabeth Slusser Kelly ed., 1984); UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS (1959).

¹⁸¹ UNIFORM COMMERCIAL CODE: MAY 1949 DRAFT (1949).

¹⁸² See Hillinger, *supra* note 151, at 1143 (1985) (“When enacted, Article 2 contained . . . a merchant definition very similar to the one proposed by Llewellyn in 1949.”). Compare UNIFORM COMMERCIAL CODE: MAY 1949 DRAFT § 2-104(1) (1949), with U.C.C. § 2-104(1) (2012).

¹⁸³ Compare UNIFORM COMMERCIAL CODE: MAY 1949 DRAFT § 2-104 cmt. 1, 2, 3 (1949), with UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS § 2-104 cmt. 1, 2, 3 (1959).

¹⁸⁴ UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (1952).

¹⁸⁵ See UNIFORM COMMERCIAL CODE: MAY 1949 DRAFT § 2-104(1) (1949); *id.* at cmt. 1, 2, 3; UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (1952) § 2-104(1); *id.* at cmt. 1, 2, 3.

supplementing the new 1952 legal text. This hiccup was quickly remedied when an alternate 1952 version¹⁸⁶ modified the Comments section to reflect the changes to § 2-104(1).

The fact that the legal text of § 2-104 has been supplemented by two different Comment sections would be cause for concern for the intentionalist who may conclude that no reliable evidence of intended meaning can be found in disparate explanations for the same text. If so, the intentionalist would resort to a textualist analysis as a second-best solution.¹⁸⁷ One explanation for the varied Comment sections, however, is that the Section was rewritten piecemeal: the sponsoring organizations redrafted the legal text in the initial 1952 version¹⁸⁸ and updated the Comment section in the revised 1952 draft.¹⁸⁹ This explanation would perhaps be plausible enough for the intentionalist to rely on the later 1952 Comments as evidence of the intended meaning.¹⁹⁰

The changes reflected in the later 1952 version¹⁹¹ are identical to § 2-104 of the 1958 version adopted by the states.¹⁹² Section 2-104 Comment 2 states:

The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both *and*

¹⁸⁶ UNIFORM COMMERCIAL CODE: 1952 OFFICIAL TEXT WITH COMMENTS: WITH CHANGES AND MODIFICATIONS APPROVED BY THE ENLARGED EDITORIAL BOARD AT MEETINGS HELD ON DECEMBER 29, 1952, FEBRUARY 16, 1953, MAY 21, 1953, AND DECEMBER 11, 1953 § 2-104 (1953), *reprinted in* UNIFORM COMMERCIAL CODE: DRAFTS, vol. XVI (Elizabeth Slusser Kelly ed., 1984).

¹⁸⁷ *See supra* Part II.C.

¹⁸⁸ UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT, TEXT AND COMMENTS EDITION § 2-104 (1952).

¹⁸⁹ UNIFORM COMMERCIAL CODE: 1952 OFFICIAL TEXT WITH COMMENTS: WITH CHANGES AND MODIFICATIONS APPROVED BY THE ENLARGED EDITORIAL BOARD AT MEETINGS HELD ON DECEMBER 29, 1952, FEBRUARY 16, 1953, MAY 21, 1953, AND DECEMBER 11, 1953 (1953), *reprinted in* UNIFORM COMMERCIAL CODE: DRAFTS, vol. XVI (Elizabeth Slusser Kelly ed., 1984).

¹⁹⁰ Another problem presents itself here for the intentionalist. It is not clear whether, or to what extent, Llewellyn was involved in the redrafted Comment to § 2-104. It is certain that Llewellyn was heavily involved in drafting the 1949 legal text, which is very similar to modern § 2-104. *See* Hillinger, *supra* note 151, at 1143 (“When enacted, Article 2 contained . . . a merchant definition very similar to the one proposed by Llewellyn in 1949.”). As discussed above, the Comment accompanying Llewellyn’s 1949 version is significantly different than the Comment accompanying subsequent versions of § 2-104. It is possible that the Comment accompanying modern § 2-104 is not Llewellyn’s work at all—problematic for an intentionalist relying on Llewellyn as Σ .

¹⁹¹ UNIFORM COMMERCIAL CODE: 1952 OFFICIAL TEXT WITH COMMENTS: WITH CHANGES AND MODIFICATIONS APPROVED BY THE ENLARGED EDITORIAL BOARD AT MEETINGS HELD ON DECEMBER 29, 1952, FEBRUARY 16, 1953, MAY 21, 1953, AND DECEMBER 11, 1953 (1953), *reprinted in* UNIFORM COMMERCIAL CODE: DRAFTS, vol. XVI (Elizabeth Slusser Kelly ed., 1984).

¹⁹² *Compare id.* at § 2-104 cmt. 1, 2, 3, *with* UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS, § 2-104 cmt. 1, 2, 3 (1959).

*which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.*¹⁹³

The Comment makes it clear that some Article 2 provisions were intended to apply only to goods merchants, only to practices merchants, or to all of the above.¹⁹⁴ Which type of merchant is intended by the given provision “is indicated by the nature of the provisions.”¹⁹⁵ The distinction between goods and practices merchants has led to confusion in the courts.¹⁹⁶ A more detailed definition of goods and practices merchants is necessary before proceeding.

“Practices merchants” is a broad category encompassing *nearly* every person in the business world. Comment 2 provides that “[f]or purposes of [the sections covering practices merchants] almost every person in business would . . . be deemed to be a ‘merchant’ . . . since the practices involved in the transaction are non-specialized business practices such as answering mail.”¹⁹⁷ In contrast, “goods merchants” is “a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods.”¹⁹⁸ The Comments go on to specify which provisions are intended to apply to “goods merchants” (§§ 2-314, 2-402(2), and 2-403(2)), “practices merchants” (§§ 2-201(2), 2-205, 2-207 and 2-209), and either practices *or* goods merchants (§§ 2-327(1)(c), 2-603, 2-605, 2-509, and 2-609).¹⁹⁹

As discussed above, some Code provisions explicitly require some familiarity in the transacted goods.²⁰⁰ In those cases, textualism and intentionalism will carry one to the same conclusion: a goods merchant is required for these provisions. No Code provision, however, explicitly qualifies the term merchant to mean only a practices merchant. Here is where the intentionalist and textualist analyses part ways. The textualist would conclude—in interpreting § 2-201(2), for example—that “merchant” encompasses all practices merchants, and all goods merchants. However, the intentionalist, in consulting Llewellyn’s intended meaning, would conclude that “merchant” in Section 2-201(2) means only “practices merchant.”²⁰¹ A seller familiar with goods, but not versed in business practices, would not fall under the scope of the provision.²⁰²

¹⁹³ U.C.C. § 2-104, cmt. 2 (2012) (emphasis added).

¹⁹⁴ Recall that “merchant” would have a universal meaning throughout the Code under a textualist analysis.

¹⁹⁵ U.C.C. § 2-104, cmt. 2 (2012).

¹⁹⁶ Hillinger, *supra* note 151, at 1146 n.22.

¹⁹⁷ U.C.C. § 2-104, cmt. 2 (2012).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See, e.g.*, U.C.C. § 2-314(1) (2012); U.C.C. § 2-403(2) (2012).

²⁰¹ To illustrate, Professor Ingrid Hillinger notes that although a small “apple farmer who marketed three to six hundred bushels a year” would qualify as a goods merchant, he would not be a practices merchant. *See* Hillinger, *supra* note 151, at 1177. As a result, he would not be considered a merchant for purposes of the statute of frauds. *See id.* (“The evidence indicates Llewellyn did not consider most farmers to be merchants for purposes of the statute of frauds.”).

²⁰² *See id.*

C. When the Interpretive Calculus Will Not Work

The advantage of applying one's own methodology is the ability to be selective in your application of it. However, Judge J. Harvie Wilkinson has suggested that the true test of an interpretive method's viability is not the easy cases, but the hard ones.²⁰³ In that respect, I am afraid, the preceding application may be lacking. This Note deliberately examines a source of law where the described methodology is more likely to work—Article 2 of the Uniform Commercial Code. In demonstrating the application of the methodology, the purpose is not to show that intentionalism—informed by principles of group communications—will work in every scenario. It most certainly will not. However, because the normative goal of judicial interpretation is to discover law's existential element, the interpretative method that gets us closest to that underlying source of legal liability should be employed. In certain cases, intentionalism is that method.

While the preceding Part consults the Code's Official Comments, it is clear that comments, no matter how official, will not necessarily be indicative of the legislature's intended meaning. Article 2's Official Comments were useful not because they were published by the sponsoring organizations alongside the text, but because they conveyed an intended meaning of an Σ within the group. This Note is sympathetic to Justice Scalia's criticism of reliance on committee hearings.²⁰⁴ Justice Scalia and Bryan Garner write of whole industries created for the sole purpose of creating legislative history: "Anyone familiar with the congressional scene knows that one of the regular jobs of Washington law firms is to *draft* legislative history—to be read on the floor or inserted into committee reports."²⁰⁵ It seems that legislative history, strategically created to achieve a desired result, would not be indicative of an intended meaning. However, committees heavily involved in crafting a bill will perhaps contain Σ s whose intended meanings are indicative of a metaphorical intent. The difficulty is in separating the wheat from the chaff—and this is, to be sure, problematic for the interpreter. When the evidence is not likely to reveal a metaphorical intent, we resort to textualism—which may be what we do anyway when interpreting group communications.²⁰⁶

Of course, a host of questions arise concerning the applicability of the methodology discussed herein. At the margins, how do we determine who is Σ ? How can we know whether members of the legislature were likely to rely on Σ 's intended meanings?

²⁰³ See J. HARVIE WILKINSON, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF GOVERNMENT* 72–73 (2012) (“[E]asy cases have a tremendous ability to deceive. When confronted with more complicated cases, process theory begins to crumble.”).

²⁰⁴ SCALIA & GARNER, *supra* note 28, at 376–77.

²⁰⁵ *Id.* at 377; *see also id.* (“Legislators engage in floor colloquies (again, typically before an empty house) precisely to induce courts to accept their views about how a statute works.”).

²⁰⁶ *See supra* Part II.B.5.

What sort of relationship must Σ have with the relied upon evidence? Must Σ be the author of the evidence? Or is Σ 's endorsement of the evidence enough? Should we rely on the simple or rather the complex summative account of group communications? The answers are that there are no answers, yet. Perhaps the solution is that it must be left up to the judge's judgment to answer these questions, but this lacks the sort of rigorousness needed to achieve unbiased decisionmaking. If a judge is bent on biased decision-making, there is a bevy of interpretive methods more conducive to judicial bias than a form of intentionalism that relies on the same methods we use to interpret group communications everyday.

CONCLUSION

Treating legal texts as communications poses certain challenges, principally the lack of collective intent—individuals within a legislature almost certainly intend different meanings for the same legal texts.²⁰⁷ However, legal texts may be no different than any other group communication, and we manage to make sense of group communications in a variety of ways, despite the problem of collective intentionality.

Principles of group communication help us overcome this problem of collective intentionality by providing that (1) meaning is set by the group communicating the message;²⁰⁸ (2) while groups cannot form intents, attributing a metaphorical intent to groups is useful for determining the meaning of group communications;²⁰⁹ (3) we can derive metaphorical intent through simple and complex summative accounts of group speech;²¹⁰ (4) individuals within the group often form their intent by relying on the expertise and intended meanings of others in the group;²¹¹ and (5) for practical reasons, listeners often do resort to public meaning to make sense of group communications when metaphorical intent is too difficult to ascertain.²¹²

Intent only exists within individual minds; groups cannot form intents.²¹³ The simple summative account of group communications says that if a majority of individuals within the group intends to mean X, then the group (metaphorically speaking) intends to mean X;²¹⁴ the complex summative account further requires that the majority's intended meaning be common knowledge among the members of the group.²¹⁵ However, the information costs involved with accurately obtaining the intents of each

²⁰⁷ See *supra* Part II.A.

²⁰⁸ See *supra* Part II.B.1.

²⁰⁹ See *supra* Part II.B.2.

²¹⁰ See *supra* Part II.B.3.

²¹¹ See *supra* Part II.B.4.

²¹² See *supra* Part II.B.5.

²¹³ See Tollefsen, *supra* note 98 (“The dominant picture in [Anglo-American and European philosophical] circles is that intentionality is a feature of individual minds/brains.”).

²¹⁴ See *supra* note 108 and accompanying text (simple summative formula).

²¹⁵ See *supra* note 110 and accompanying text (complex summative formula).

member of the group are insurmountable. As listeners, we approach the interpretive calculus heuristically in at least two ways: we rely on the ordinary public meaning of the communication, or we look to the intent of Σ^{216} (or multiple Σ s) within the group as evidence of the intent of others.²¹⁷

In the judicial setting, either approach likely will get us close to the actual meaning of the legal text, but relying on the intent of Σ respects the notion that it is within the providence of the legislature to make law, and the intended meanings of legislators matter. Relying on these principles, original meaning judges should look for evidence of an Σ (or multiple Σ s) within the group that formed the legal text. Recall, Σ would be a key figure involved in forming the legal text whose meaning others either actually deferred to, or were likely²¹⁸ to defer to. If one accepts the simple summative account, then any evidence of Σ 's intended meaning could be utilized, even if that intent was evidenced by information that was unknown to other members of the legislature. If one subscribes to the complex summative account, then Σ 's intended meanings could only be used by a judge if Σ 's intended meaning was common knowledge to the legislators. If Σ is not discernible, or if there are multiple Σ s that have disparate intended meanings for the same text, then the judge should resort to the original public meaning, much the same way that we as listeners resort to public meaning when the information cost of determining a group's metaphorical intent is too high.²¹⁹

To be certain, the intentionalist calculus will not always work, and in those cases textualism should supplant intentionalism. When we *can* make the calculus work, when we *can* discern a metaphorical intent in the same way that we find a metaphorical intent in all other group communications, original meaning jurisprudence should embrace principles of group communication. Let us not throw our hands in the air.

²¹⁶ Because intent can only exist at the level of the individual mind, intentionalism should only search for intent at the individual level. Rather than consider the intended meaning of just anyone in the group, we rely on the intent of Σ , which is more likely to be representative of the actual meaning. By excluding evidence of non- Σ s, we reduce the interpretive gamble of relying on a single legislator, whose meaning may be idiosyncratic and foreign to most legislators. However, Σ is likely to be representative of other legislators.

²¹⁷ See *supra* Part II.B.4.

²¹⁸ Evidence of actual reliance on Σ within the group may be impossible to find.

²¹⁹ See *supra* Part II.B.5.

