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Level Up: Employing the Commerce Clause To Federalize the Sale of Goods

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Level Up: Employing the Commerce Clause To Federalize the Sale of Goods

JENNIFER CAMERO*

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I. INTRODUCTION

Over the last century, Congress has utilized the Commerce Clause to varying degrees of success to enact laws regarding violence against

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women,¹ gun possession in school zones,² a national health care system,³ and discrimination.⁴ Regardless of the merit of each of these laws, review of these statutes demonstrates that Congress is utilizing the expansive power of the Commerce Clause for social policy. In doing so, it has ignored the intended purpose of the Commerce Clause, which is to give Congress the ability to enact national laws concerning interstate commerce. By focusing on these areas outlying commerce to the detriment of the basic purpose of the Commerce Clause, Congress overlooked an area of the law squarely within the Commerce Clause that is ripe for federalization—the sale of goods.

Currently, the sale of moveable goods is governed by Article 2 of the Uniform Commercial Code (UCC). Initially a success over fifty years ago, Article 2 is becoming unpredictable, outdated, and ineffectual, such that its defects are blatant even to the most ardent supporter. Over the past two decades, scholars, practitioners, and judges alike have criticized

1. Violence Against Women Act, 42 U.S.C. § 13981 (1994), *invalidated* by *United States v. Morrison*, 529 U.S. 598 (2000). The Violence Against Women Act stated in part: A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

Id. § 13981(c). The Supreme Court held the Act unconstitutional as beyond congressional power under the Commerce Clause as the activity in question was not economic in nature nor could the government demonstrate an effect on interstate commerce. *Morrison*, 529 U.S. at 610–14.

2. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1994), *invalidated* by *United States v. Lopez*, 514 U.S. 549 (1995). The Gun-Free School Zones Act prohibited “any individual knowingly to possess a firearm at a place that [he or she] knows . . . is a school zone.” *Id.* § 922(q)(2)(A). The Supreme Court invalidated the Act as unconstitutional as it regulated a noneconomic activity. *Lopez*, 514 U.S. at 559–64.

3. Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (Supp. IV 2010). The Patient Protection and Affordable Care Act requires individuals to maintain a certain amount of health care coverage. *Id.* Although the Supreme Court upheld the constitutionality of the Act, it declined to enforce it under the Commerce Clause. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012). For a more detailed discussion as to the Commerce Clause reasoning, see *infra* notes 192–94, 206–08 and accompanying text.

4. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006). Section 2000a(a) provides: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.” *Id.* § 2000a(a). The Supreme Court upheld the constitutionality of Congress’s enactment of the Civil Rights Act in two seminal cases: *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). In these cases, the Court articulated that Congress may regulate activity that, in general, substantially affects interstate commerce, even if the Act touches upon a purely local incident. See *Heart of Atlanta*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 305.

Article 2 for these and a variety of other reasons.⁵ Given the inability to revamp Article 2 under the current uniform code amendment process, the law of sales is ready for a fresh mechanism to maintain the speed, efficiency, and fairness necessary in commercial transactions.

Although sales law is not in imminent danger of collapse, eventually Article 2's cracks will become crevasses as the nature of our commercial environment and technology changes and develops the manner in which parties conduct sales. Rather than wait until the collapse, these defects should be acknowledged and addressed now. Acting before the problem becomes overwhelming allows adequate time to craft a comprehensive and meaningful body of sales law instead of hastening to find a solution after the collapse.

Accordingly, this Article argues that rather than wait until the defects become insurmountable, we should act now to address the defects in the law of sales and enact a federal sales act to supplant Article 2 using congressional power under the Commerce Clause. Part II details the defects of Article 2 that are in need of repair, which include creating inconsistent results across the states, failing to adapt to changing trends in our modern commercial environment, and utilizing a private drafting process that fails to balance the competing interests of businesses and consumers. Part II then demonstrates that the current uniform code model cannot correct those defects due to its biased, cumbersome, and consensus-oriented amendment process.

Next, Part III proposes a federal sales act to replace Article 2 and explains why a federal sales act is a practical solution for the sale of goods. Although the concept of a federal sales act is not novel, the dramatic changes in our commercial environment over the past sixty years coupled with the decline of Article 2 make a federal sales act an appropriate route to achieving a uniform, simple, and predictable body of sales law.

Finally, Part IV establishes the viability of a federal sales act under the Commerce Clause, demonstrating that such an act is precisely the type

5. E.g., Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725, 739 (1993) (describing how Article 2 limits its scope to the sale of goods despite the increasing number of transactions involving the sale of services); Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1099–1102, 1106 (2002) (noting the private drafting process of Article 2 that involves the biases of the drafters, the inability to balance consumer interests and merchant interests, and Article 2's failure to keep pace with technology).

of legislation intended by the clause despite recent Supreme Court rulings. Moreover, a federal sales act is consistent with the principles of federalism under which the Framers founded the United States of America.

II. THE NEED FOR FEDERALIZATION

As Article 2 reaches its senior years, its age is beginning to show. A once shining success has become outdated and increasingly ineffective. Recent attempts to modernize and clarify Article 2 have failed due to the uniform laws amendment process and the importance of consensus in that process.⁶ Also, the UCC's private lawmaking process permits certain interest groups to dominate as the National Conference of Commissioners on Uniform State Laws (NCCUSL or the Commissioners) is ill-suited for handling competing interests and have no constituency to hold them accountable for the laws they draft.⁷

A. A Not-So-Uniform Commercial Code

The Industrial Revolution in the nineteenth century and the ease of moving goods across state lines on the newly established railway system created the need for a uniform and predictable body of commercial law throughout the United States.⁸ At that time, both practitioners and legal scholars began to recognize the importance of uniformity in commercial transactions.⁹ Because of this recognized need for uniformity, the NCCUSL formed to provide a recommended body of sales law for each of the states to enact.¹⁰

In 1906, the Commissioners completed the Uniform Sales Act and officially recommended it for enactment by the states.¹¹ Unfortunately,

6. See Caroline Edwards, *Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal To Experiment*, 78 ST. JOHN'S L. REV. 663, 712 (2004); *infra* notes 129–46.

7. See Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 617–18 (2001); *infra* Part II.B.;

8. Donald J. Smythe, *Commercial Law in the Cracks of Judicial Federalism*, 56 CATH. U. L. REV. 451, 464–65 (2007).

9. Robert Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100, 101–02 (1951); William E. McCurdy, *Uniformity and a Proposed Federal Sales Act*, 26 VA. L. REV. 572, 573 (1939–1940); Smythe, *supra* note 8, at 465.

10. Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 12–13 (1992); E. Hunter Taylor, Jr., *Foreword: Federalism or Uniformity of Commercial Law*, 11 RUTGERS L.J. 527, 529 (1980). The original name was the Conference of the State Boards of Commissioners on Promoting Uniformity of Law in the United States, but fortunately it was shortened in 1915. Bugge, *supra*, at 14.

11. McCurdy, *supra* note 9, at 577.

the Uniform Sales Act had limited progress toward its goal of uniformity.¹² Only thirty-four states adopted it over a three-decade time span, and the states that did adopt it enacted it with many of their own amendments.¹³ This failure likely was due to the formalistic and outdated rules provided in the Uniform Sales Act, which were a result of modeling it after the antiquated English Sale of Goods Act of 1893.¹⁴

The Commissioners recognized that the Uniform Sales Act failed in achieving uniformity because it was outdated, inefficient, and too narrow in scope.¹⁵ They set their sights on something bigger—a comprehensive commercial code.¹⁶ Knowing they could not tackle such an undertaking without assistance, the Commissioners entered into discussions with the American Law Institute—the drafters of the Restatements of the Law—to collectively draft this uniform commercial code.¹⁷ Three years later, they reached an agreement on the collaboration process and began drafting the code.¹⁸ The result of this partnership is today’s UCC.¹⁹

Given that its creation was based upon the need for a uniform body of sales law, the UCC expressly sets forth its purpose of uniformity quite clearly in section 1-103(a): “[I]ts underlying purposes and policies . . . are: (1) to simplify, clarify, and modernize the law governing commercial

12. Taylor, *supra* note 10, at 530.

13. *Id.* at 529–30; see also Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799 (1958).

14. 1 WILLIAM D. HAWKLAND & FREDERICK H. MILLER, UNIFORM COMMERCIAL CODE SERIES § 1-102:3 n.1 (2012); McCurdy, *supra* note 9, at 578. Mackenzie Chalmers, the drafter of the English Sale of Goods Act of 1893, relied on rules developed in the late seventeenth and early eighteenth centuries such that the English Sale of Goods Act was outdated from its inception. 1 HAWKLAND & MILLER, *supra*, § 1-102:3 n.1 (quoting William D. Hawkland, *Article 2: Sales*, in STATE OF NEW JERSEY STUDY OF THE UNIFORM COMMERCIAL CODE 19, 19 (1960)).

15. See NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT 5 (1941); K. N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 558 (1940).

16. Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 546 (2000) (citing 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 3 (3d ed. 1988)); Taylor, *supra* note 10, at 530.

17. Dom Calabrese et al., *Karl Llewellyn’s Letters to Emma Cortsvet Llewellyn from the Fall 1941 Meeting of the National Conference of Commissioners on Uniform State Laws*, 27 CONN. L. REV. 523, 526 (1995); Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 277 (1998); Maggs, *supra* note 16, at 546.

18. Kamp, *supra* note 17, at 277 (citing WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 279–86 (1973)).

19. *Id.* at 276–77.

transactions; . . . and (3) to make uniform the law among the various jurisdictions.”²⁰ This focus on uniformity in sales law is both legitimate and essential. Uniformity creates predictability, which promotes economic development by easing the process of conducting business in a number of ways.²¹ First, uniformity prevents businesses from the costly need to adapt a product and its warranties to satisfy what would otherwise be varying state laws.²² This reduction of costs enables businesses to maintain lower prices thus increasing sales or invest the savings in the improvement of existing products or the development of new products.²³ Second, uniformity simplifies transactions through consistency, thereby reducing the time and costs of negotiating and drafting.²⁴ This reduction of negotiating and drafting time can benefit the economy through an increased number of sales as the parties can finalize the agreement and proceed to the next transaction quickly. Further, the reduction in costs can result in lower prices to buyers or an investment in new product development.²⁵

In addition to stimulating economic development, uniformity reduces disputes.²⁶ Uniformity provides certainty in a transaction, which allows the parties to know more clearly their contract rights and obligations and perform accordingly.²⁷ Also, certainty eliminates the incentive of parties to choose litigation over settlement, reducing the number of lawsuits and the associated costs to both the parties and the judicial system.²⁸ Moreover, uniformity reduces the need for forum shopping and removes disputes over choice of law, relieving some of the burden on the court system.²⁹

20. U.C.C. § 1-103(a) (2012).

21. Bugge, *supra* note 10, at 18; A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 311 (2003).

22. Richard A. Elbrecht, *The NCCUSL Should Abandon Its Search for Consensus and Address More Difficult and Controversial Issues Applying “Process” Concepts*, 26 LOY. L.A. L. REV. 147, 151 (1994); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996).

23. See Elbrecht, *supra* note 22, at 151; Overby, *supra* note 21, at 311.

24. Bugge, *supra* note 10, at 18; Overby, *supra* note 21, at 311; Ribstein & Kobayashi, *supra* note 22, at 138.

25. Overby, *supra* note 21, at 311.

26. See Elbrecht, *supra* note 22, at 148.

27. Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 253 (1993).

28. See *id.* at 254.

29. Ribstein & Kobayashi, *supra* note 22, at 138; see, e.g., *Mann v. Weyerhaeuser Co.*, 703 F.2d 272, 274 (8th Cir. 1983). See generally R. LAFONTAINE ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS (2009) (providing an overview of state courts’ substantial caseloads); *The Feeblest Branch*, ECONOMIST, Oct. 1, 2011, at 31 (describing how state courts are overburdened and underfunded).

When disputes do occur, uniformity results in equal treatment of similarly situated parties regardless of their location.³⁰

Despite its clear goal and the benefits of this goal, Article 2 fails at accomplishing uniformity in the sale of goods. First, Article 2 contains internal nonuniformity, as evidenced by section 2-318.³¹ Unlike the majority of Article 2, which provides one provision per section, section 2-318 offers three alternatives from which states' legislatures can choose to enact on when third parties can sue a seller or manufacturer for breach of warranty.³² The alternatives, aptly named Alternative A, Alternative B, and Alternative C, cover a wide spectrum of third parties permitted to sue for breach of warranty.³³ By offering these three alternatives rather than one provision, the drafters endorse nonuniformity in direct contradiction to their stated purpose. Indeed, nonuniformity is precisely the result as the distribution of the alternatives among the states is uneven, with a majority of states adopting Alternative A,³⁴ six states adopting Alternative B,³⁵ and eight states adopting Alternative C.³⁶ Even with three alternatives from which to choose, eight states decided not to enact any of the three alternatives.³⁷ These alternatives result in the same fact pattern leading to different outcomes depending on the applicable alternative.

30. See Taylor, *supra* note 10, at 552.

31. U.C.C. § 2-318 (2012); E. Hunter Taylor, Jr., *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 343 (1978).

32. U.C.C. § 2-318; William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions that Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L. REV. 1215, 1228–29 (1993).

33. For a detailed discussion of section 2-318, see Jennifer Camero, *Too Many: Third Party Beneficiaries of Warranties Under the Uniform Commercial Code*, 86 ST. JOHN'S L. REV. 1 (2012).

34. Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin have adopted Alternative A. Shawn M. Bates & Deborah J. Karakowsky, *U.C.C. Section 2-318: The ABCs of Defense*, COM. & BUS. LITIG. (Am. Bar Ass'n Section of Litig., Chi., Ill.), Summer 2009, at 1, 17, available at <http://law.capital.edu/TwoColumnPB.aspx?pageid=22402>.

35. Alabama, Delaware, Kansas, New York, South Carolina, and Vermont have adopted Alternative B. *Id.*

36. Colorado, Hawaii, Iowa, Minnesota, North Dakota, South Dakota, Utah, and Wyoming have adopted Alternative C. *Id.*

37. California, Louisiana, Maine, Massachusetts, New Hampshire, Rhode Island, Texas, and Virginia have not enacted any of the alternatives of section 2-318. *Id.* Louisiana has adopted every article of the UCC except Article 2A and portions of Article 2. Henry D. Gabriel, *The Revisions of the Uniform Commercial Code—Process and*

Second, even though Article 2 covers all sales of goods—not just sales between businesses—the Commissioners purposely exclude consumer-oriented provisions from Article 2, indicating that they believe such provisions are too controversial and thus prevent state enactment due to strong business lobbying at the state level.³⁸ As a result, consumer-oriented laws are left to the individual states to enact.³⁹ Although some similarities exist among the laws governing consumer transactions of the fifty states, quite a few variations exist among them.⁴⁰ Consequently, by generally ignoring consumer-oriented provisions in Article 2, the Commissioners endorse nonuniformity in the sale of goods to consumers.

Third, although the Commissioners discouraged the states from revising Article 2 before enactment, not one state adopted it without making any changes.⁴¹ For example, thirty-four states amended or chose not to adopt section 2-201, the statute of frauds,⁴² thirty-two states amended or chose not to adopt section 2-202, the parol evidence rule,⁴³ and twenty-nine states amended or chose not to adopt section 2-207, the battle of the forms.⁴⁴ These examples are only three sections from one subchapter of Article 2; the total number of variations is so staggering that an entire database exists to track the variations.⁴⁵ Ultimately, the language and substance of Article 2 differs not only internally but also from state to

Politics, 19 J.L. & COM. 125, 125 n.1 (1999); Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1032 n.76 (2002).

38. Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 13 (1997); Speidel, *supra* note 7, at 608 & n.5 (citing James J. White, *Comments at 1997 AALS Annual Meeting: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 219 (1997)).

39. Speidel, *supra* note 7, at 608.

40. Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593, 1600 (1994).

41. Neil B. Cohen & Barry L. Zaretsky, *Drafting Commercial Law for the New Millennium: Will the Current Process Suffice?*, 26 LOY. L.A. L. REV. 551, 552 (1993); Taylor, *supra* note 10, at 531; Harold A. Hintze, Note, *Disparate Judicial Construction of the Uniform Commercial Code—The Need for Federal Legislation*, 1969 UTAH L. REV. 722, 722.

42. U.C.C. Local Code Variations, 2010–2011 U.C.C. Rep. Serv. § 2-201, at 110–19 (West). Twenty-five states did not adopt section 2-201 and nine made changes to the language prior to adopting Article 2. *Id.*

43. *Id.* § 2-202, at 119–24. Twenty-five states chose not to adopt section 2-202 and seven changed the language prior to adopting Article 2. *Id.*

44. *Id.* § 2-207, at 133–44. All twenty-nine states chose not to adopt section 2-207 and instead developed their own language. *Id.*

45. *Id. passim*. Even in 1966, which was only a short time after the UCC's creation, 750 nonuniform variations existed. William A. Schnader, *The Uniform Commercial Code—Today and Tomorrow*, 22 BUS. LAW. 229, 230 (1966).

state such that not one body of sales law exists but fifty different sales laws.⁴⁶

Uniformity in the language of the law is just half the battle to achieving true uniformity.⁴⁷ The interpretation of those laws by the courts must also be uniform, which does not occur in the judicial decisions related to Article 2.⁴⁸ These varying judicial interpretations stem from a number of problems. First, as discussed above, the judges are working with different language from state to state so the playing field is uneven from the beginning.⁴⁹

Additionally, the Commissioners purposefully drafted Article 2 by relying on broad language and standards such as “reasonableness” and “trade usage” rather than bright-line rules.⁵⁰ Regardless of the merits of this choice,⁵¹ such broad language and standards grant judges and juries wide latitude in their interpretations, leading to a nonuniform application of the same language or standard.⁵²

For example, courts vary on the interpretation of the phrase “basis of the bargain” in section 2-313.⁵³ This section dictates that a seller creates an express warranty when the seller makes an affirmation, describes the good, or provides a sample of the good when such affirmation, description, or sample is made part of the basis of the bargain.⁵⁴ Some courts interpret

46. David M. Phillips, *Secured Credit and Bankruptcy: A Call for the Federalization of Personal Property Security Law*, 50 LAW & CONTEMP. PROBS. 53, 66 (1987); Taylor, *supra* note 10, at 531.

47. McCurdy, *supra* note 9, at 578–79 (quoting PROCEEDINGS OF THE TWENTY-THIRD ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 92 (1913)); Robert E. Scott, *Is Article 2 the Best We Can Do?*, 52 HASTINGS L.J. 677, 684 (2001).

48. Scott, *supra* note 47, at 684.

49. Taylor, *supra* note 10, at 531.

50. Maggs, *supra* note 16, at 553–54. The rationale for this decision was to allow courts to evolve commercial law through their decisions, as the drafters recognized that amending Article 2 would be difficult. *Id.*; Imad D. Abyad, Note, *Commercial Reasonableness in Karl Llewellyn’s Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429, 441 (1997).

51. See *infra* notes 99–100 and accompanying text.

52. Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 784–85 (1999); Rasmussen, *supra* note 5, at 1100; Hintze, *supra* note 41, at 734. See generally Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931. Given the “substantial freedom in the content they give these doctrines[,] . . . [e]ven if courts do not make systematic errors or have systematic biases, they may consistently arrive at factual determinations that are ‘surprising’ and legal determinations that are difficult to predict.” Ben-Shahar, *supra*, at 813.

53. U.C.C. § 2-313 (2012).

54. Express warranties by the seller are created as follows:

basis of the bargain to require reliance by the buyer on the affirmation, description, or sample.⁵⁵ Other courts simply require that the seller make the affirmation, describe the good, or provide the sample without requiring any reliance by the buyer.⁵⁶ Further adding to the variations in interpretation, among those courts that agree that proof of reliance is not necessary, conflicts exist as to whether knowledge of the alleged warranty is necessary.⁵⁷

Even with relatively straightforward provisions, courts' interpretations vary.⁵⁸ To illustrate, section 2-318's Alternative A simply states: "A seller's warranty [to an immediate buyer] . . . extends to any natural person who is in the family or household of [the immediate] buyer or who is a guest in his home."⁵⁹ However, the case law varies dramatically as to whether an employee of a purchaser can sue for breach of warranty under this

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- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

U.C.C. § 2-313(1).

55. *E.g.*, *Dileno v. Libbey Glass Div., Owens-Illinois, Inc.*, 668 F. Supp. 373, 376 (D. Del. 1987) ("It is clear that a successful action for breach of an expressed warranty may not be maintained in Delaware absent some reliance by the buyer on the warranty."); *Thomas v. Amway Corp.*, 488 A.2d 716, 720 (R.I. 1985) ("The plaintiff who claims breach of express warranty has the burden of proving that the statements or representations made by the seller induced her to purchase that product and that she relied upon such statements or representations."); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 (Tex. 2002) ("Reliance is also not only relevant to, but an element of proof of, plaintiffs' claims of breach of express warranty . . .").

56. *E.g.*, *Torres v. Nw. Eng'g Co.*, 949 P.2d 1004, 1013 (Haw. Ct. App. 1997) ("[R]eliance is not an essential element of a breach of express warranty claim under the UCC."); *Rite Aid Corp. v. Levy-Gray*, 894 A.2d 563, 573 (Md. 2006) ("Rite-Aid argues that . . . the consumer must at least have been aware of its existence prior to the consummation of the deal. Based on the circumstances surrounding most purchases in modern commercial dealing, we disagree."); *Daughtrey v. Ashe*, 413 S.E.2d 336, 338 (Va. 1992) ("[T]he 'part of the basis of the bargain' language . . . does not establish a buyer's reliance requirement.").

57. *Compare* *Schmaltz v. Nissen*, 431 N.W.2d 657, 661 (S.D. 1988), *with* *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 645 (10th Cir. 1991).

58. *See* Frank R. Kennedy, *Federalism and the Uniform Commercial Code*, 29 BUS. LAW. 1225, 1228 (1973-1974) ("Judge Friendly speaks of the difficulties of . . . 'getting unruly judges to interpret them uniformly.'" (quoting HENRY J. FRIENDLY, IN PRAISE OF ERIE—AND OF THE NEW FEDERAL COMMON LAW 37 (1964))). Section 2-202 is a prime example of a seemingly straightforward provision with varying judicial interpretations. Taylor, *supra* note 31, at 346. For a detailed discussion of the variations of section 2-202, see *id.* at 346-49, as well as *infra* notes 105-11 and accompanying text.

59. U.C.C. § 2-318(1) (2012).

provision. Only family members, household members, or guests of the purchaser may sue a seller for breach of warranty, as the word “employee” is excluded from the language of Alternative A. Accordingly, many courts appropriately bar employees in Alternative A jurisdictions from maintaining a breach of warranty claim.⁶⁰ Nonetheless, many courts ignore the plain language and have extended Alternative A to include employees of purchasers.⁶¹

In the end, Article 2 fails to achieve its clear goal of uniformity. Not only does the language of Article 2 vary state to state, but the judicial interpretations of Article 2 also vary. With no one court to resolve those conflicts, Article 2 loses its uniformity and thus its predictability and simplicity.

B. A Biased Uniform Commercial Code

The UCC is a private code in that it is developed outside the typical legislative process.⁶² The Commissioners, comprised of academics,

60. See, e.g., *Cowens v. Siemens-Elma AB*, 837 F.2d 817, 822 (8th Cir. 1988); *Halderman v. Sanderson Forklifts Co.*, 818 S.W.2d 270, 273 (Ky. Ct. App. 1991); *Bruns v. Cooper Indus., Inc.*, 605 N.E.2d 395, 432 (Ohio Ct. App. 1992). For a detailed discussion of privity in relation to a purchaser’s employees, see Lauren Fallick, Comment, *Are Employees ‘A’ O.K.?: An Analysis of Jurisdictions Extending or Denying Warranty Coverage to a Purchaser’s Employees Under Uniform Commercial Code Section 2-318, Alternative A*, 29 NOVA L. REV. 721 (2005). Interestingly, the proposed final draft of the original 1950 Uniform Commercial Code, which contained only Alternative A, included language in its official comments specifically stating that employees are covered under Alternative A; however, this language never made it into the final version. U.C.C. § 2-318 cmt. 3 (Proposed Official Draft 1950) (“[E]mployees of an industrial consumer are covered and the policy of this Article intends that neither the privity concept . . . nor any technical constructions of ‘employment’ shall defeat adequate protection under this section.”).

61. E.g., *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913, 921 (Me. 1973). The *McNally* court stretched the meaning of family to include employees:

Indeed, in the present circumstances, it takes only the attribution of a figurative bent to the word ‘family’ to bring plaintiff, as an employee of the corporate ‘buyer’, within the policy scope of Section 2-318 since plaintiff may be regarded as a member of such ‘family’ as a corporation may reasonably be said to have.

Id.

62. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 604 (1995). The process described in this Article is a truncated version. For a complete description of the process, see Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 712–16 (1998).

judges, and practicing attorneys selected by each state,⁶³ appoint members to a drafting committee to either create a new uniform code or amend a current UCC article.⁶⁴ The drafting committee can, but is not obligated to, consult interested parties during the drafting process.⁶⁵ The only party the drafting committee must consult is the American Bar Association.⁶⁶ Once the drafting committee completes a draft, the Commissioners read it line by line then discuss it before taking it to a vote.⁶⁷ When voting, the Commissioners have no obligation to represent the interests of their state and therefore consider themselves independent.⁶⁸

Although the Commissioners pride themselves on being neutral,⁶⁹ interest groups representing businesses have influenced the UCC from its beginning.⁷⁰ The original push for a uniform commercial law stemmed from the Merchants' Association of New York's desire for enactment of a federal sales act.⁷¹ Moreover, as the Commissioners undertook the UCC drafting process, they consulted interested industries and business organizations, including the Merchants' Association of New York, not only for background information but also for views on preferred rules.⁷²

Even now, business interest groups dominate the amendment process,⁷³ with sixty-six percent of third parties involved in the recent Article 2 revision process representing commercial interests.⁷⁴ Professor Speidel, former reporter for Revised Article 2, noted that “‘strong sellers,’ such as

63. *About the ULC*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Feb. 15, 2013). Today, more than 300 attorneys from the fifty states, Puerto Rico, Virgin Islands, and District of Columbia compose the Commissioners. *Id.*

64. Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 90–91 (1993).

65. *Id.* at 91.

66. *Id.*; see also *Types of Committees*, UNIFORM L. COMMISSION, <http://nccuslwww.uniformlaws.org/Narrative.aspx?title=Types%20of%20Committees> (last visited Feb. 15, 2013) (describing the role of the ABA in the drafting process).

67. *Types of Committees*, *supra* note 66.

68. Patchel, *supra* note 64, at 89, 91.

69. *Id.* at 92. Note that former reporter for Article 2, Professor Richard Speidel, stated that “there is no such thing as a politically neutral revision.” Speidel, *supra* note 7, at 609.

70. See Patchel, *supra* note 64, at 120.

71. *Id.* at 120; see *infra* notes 150–54 and accompanying text.

72. 51 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM STATE LAWS & PROC. 136 (1941); Patchel, *supra* note 64, at 98–101, 121–22.

73. See Patchel, *supra* note 64, at 124; Ribstein & Kobayashi, *supra* note 22, at 143.

74. See Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69, 90 (1997) (involved parties included National Association of Manufacturers, IBM, Chrysler, Mobile Oil, National Electrical Manufacturers Association, and Microsoft).

General Electric, the American Automobile Manufacturer's Association, and other manufacturers, were well represented in the Article 2 drafting process.⁷⁵ These "strong sellers" participated in the discussions regarding Article 2 revisions, prepared memoranda in response to proposed revisions, and ultimately lobbied against the revisions.⁷⁶ The Commissioners acquiesced to this opposition and changed the revision process from a complete overhaul to discrete amendments to appease the business community.⁷⁷ Ultimately, the business community seems to prefer the uniform code model because the Commissioners always favor the needs of business over those of the consumer.⁷⁸

This bias toward business interests occurs for a number of reasons. First, consumer groups are often unaware of the amendment process. At the beginning of the drafting process, the drafting committee identifies interested groups and invites them to participate in the revision process.⁷⁹ These invited groups generally represent the interests of businesses but not consumers.⁸⁰ This exclusion could be because the drafters generally are commercial lawyers who bring that perspective into the drafting process.⁸¹ Alternatively, the Commissioners may be concerned that consumer-oriented provisions prevent enactment at the state level due to the state lobbying power of businesses,⁸² and therefore do not invite consumer groups—or invite a limited number of consumer groups—in order to avoid the issue altogether.

Although any interest group may participate in the revision process without an invitation, the average consumer—and, unfortunately, even the average attorney—is unfamiliar with the NCCUSL and therefore unaware of any of its drafting meetings.⁸³ Without knowledge of the

75. Speidel, *supra* note 7, at 617.

76. *Id.* at 618 ("The attitude was do it our way or else . . .").

77. *Id.*

78. Julian B. McDonnell, *The Code Project Confronts Fundamental Dilemmas*, 26 LOY. L.A. L. REV. 683, 688 (1993). On the flipside, "[f]rom a consumer advocate's point of view, the UCC never provided a real base for consumer protection. The UCC appears biased against . . . the retail consumer . . ." Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625, 635 (1993).

79. Miller, *supra* note 62, at 716.

80. See Patchel, *supra* note 64, at 122.

81. Cohen & Zaretsky, *supra* note 41, at 559; Patchel, *supra* note 64, at 131; Ribstein & Kobayashi, *supra* note 22, at 145.

82. Patchel, *supra* note 64, at 124, 137, 148.

83. *Id.* at 129.

NCCUSL and its activities, consumer groups expectedly are absent from the amendment process.

Second, participation in the amendment process is too costly for consumer groups.⁸⁴ The revision process generally takes three to five years, which requires considerable resources for such a long commitment.⁸⁵ Funding for state consumer agencies and consumer interest groups varies each year, making it difficult to commit to such a long amendment process.⁸⁶ Moreover, the complex and technical nature of the knowledge required to participate in the revision process requires consumer groups, which are often staffed by nonattorneys, to consult costly experts.⁸⁷ Consumer agencies and interest groups simply do not have the resources to invest in this costly revision process.⁸⁸

Finally, the Commissioners themselves are generally attorneys who represent commercial clients and inadvertently bring that bias into the revision process.⁸⁹ During the most recent attempt to revise Article 2, the drafting committee consisted of thirteen members, five of which were private attorneys with business clients.⁹⁰ These members have a familiarity with the practices and needs of business, which increases their sensitivity to those needs.⁹¹ As such, they tend to focus on the needs and desires of their commercial clients during the revision process. Additionally, although the members themselves are also consumers, they are not the “average” consumer in that they are of higher income and education.⁹² This disconnect often leads to unfamiliarity with how the revisions will impact the average consumer.⁹³

Article 2’s bias toward business is problematic. The Commissioners, by drafting provisions from the perspective of businesses, fail to remember that Article 2 applies to all sales of goods, not just sales between

84. Hillebrand, *supra* note 74, at 82–83; Patchel, *supra* note 64, at 132.

85. Hillebrand, *supra* note 74, at 82; William J. Woodward, Jr., *Private Legislation in the United States: How the Uniform Commercial Code Becomes Law*, 72 TEMP. L. REV. 451, 457–58 & n.32 (1999).

86. Hillebrand, *supra* note 74, at 82.

87. *Id.* at 83; Patchel, *supra* note 64, at 132, 135.

88. Hillebrand, *supra* note 74, at 82.

89. Cohen & Zaretsky, *supra* note 41, at 559; Patchel, *supra* note 64, at 131; Ribstein & Kobayashi, *supra* note 22, at 145. Members of the subcommittees of the Commissioners typically do not include public interest attorneys or attorneys who represent consumers but rather attorneys with commercial law practices. Hillebrand, *supra* note 74, at 84; Woodward, *supra* note 85, at 456–57.

90. Hillebrand, *supra* note 74, at 85 (seven law professors, one state legislator, and five private attorneys).

91. *Id.* at 84.

92. *Id.* (citing James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2096–97 (1991); Jean Braucher, *The UCC Gets Another Rewrite*, A.B.A. J., Oct. 1966, at 66, 68).

93. *Id.*

businesses.⁹⁴ Consumers ultimately drive our national economy; without consumers to buy the end product, business becomes unnecessary.⁹⁵ A sales law should work for all parties involved in the transaction rather than favor one party, especially when the favored party tends to be the stronger party in the transaction.⁹⁶

Admittedly, interest group involvement in the American lawmaking process is not radical or unique to the UCC process. However, unlike the lobbies or interest groups in the typical legislative process who try to influence the people making the laws, the business interest groups in the UCC model actually help draft the laws by participating in study groups and advisory boards.⁹⁷ The Commissioners incorporate the business interest groups' comments into the draft or simply leave untouched any provisions to which those groups oppose changes.⁹⁸ This extensive involvement coupled with the lack of consumer representation results in a process that promotes business interests over consumer interests rather than balancing the competing interests for a more comprehensive and inclusive body of sales law.

C. A Static Uniform Commercial Code

Given the increasing complexity of our commercial environment, sales law must adapt to the needs of commerce in order to be an efficient and effective body of law.⁹⁹ The law must serve the needs of its users, and to do so, it must change as the needs of its users change. Moreover, a body of sales law must be amended easily to address poor language choices as they present themselves. Unfortunately, Article 2 has failed to adapt to the changes in both commerce and the needs of its users.¹⁰⁰ In fact, Article 2 has not been updated materially since it was first widely adopted over half a century ago.¹⁰¹

Over the past fifty years, a number of issues have come to light regarding the outdated and complex nature of Article 2. First, the

94. Rosmarin, *supra* note 40, at 1594.

95. *See id.* at 1595.

96. Miller, *supra* note 62, at 726; Rosmarin, *supra* note 40, at 1594–95; Speidel, *supra* note 7, at 618.

97. Hillebrand, *supra* note 74, at 89; Schwartz & Scott, *supra* note 62, at 610.

98. Ribstein & Kobayashi, *supra* note 22, at 143 (citing Patchel, *supra* note 64, at 124).

99. Phillips, *supra* note 46, at 65; Smythe, *supra* note 8, at 452.

100. Guttman, *supra* note 78, at 628.

101. William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131, 131 (2009).

Commissioners purposely drafted Article 2 using standards rather than precise rules with the expectation that judges would define the standards.¹⁰² The idea was to allow the law to adapt as times changed, without going through the difficult amendment process. However, standards such as reasonableness and good faith are difficult concepts to ascertain for judges and juries as these concepts require knowledge of the applicable industry.¹⁰³ The end result of Article 2's standards is dramatically different opinions on the same provision.¹⁰⁴ Although standards play an important role in sales law, more clarification is needed in Article 2 to assist the fact finder in correctly analyzing the applicable standard.

Second, poor drafting choices have presented themselves as courts struggle to interpret Article 2. Certain language choices that seemed clear initially have proven anything but clear. A prime example is section 2-202, Article 2's codification of the parol evidence rule.¹⁰⁵ On its face, section 2-202 seems quite straightforward: additional, consistent terms can supplement an agreement unless the writing was intended as a complete and exclusive statement of the terms.¹⁰⁶ However, one look at the jurisprudence demonstrates the chaos in determining "intent."¹⁰⁷ One approach is to view intent by looking at the "four corners" of the agreement; if the document appears final, then the parties intended for the document to be complete and exclusive.¹⁰⁸ The second approach is to examine the conduct and language of the parties to determine whether the parties intended the document to be complete and exclusive.¹⁰⁹ If the particular subject matter is not dealt with in the agreement, then the agreement likely is not complete and exclusive.¹¹⁰ The final approach is to examine the surrounding circumstances of the agreement to determine the parties' actual intent.¹¹¹ Ultimately, the Commissioners must revise provisions such as section 2-202 to ensure Article 2 is a clear and concrete body of sales law.

102. Maggs, *supra* note 16, at 556. For an interesting discussion on how standards are not a conscious policy choice but instead the result of the private lawmaking process of the Uniform Commercial Code, see Schwartz & Scott, *supra* note 62.

103. See Rasmussen, *supra* note 5, at 1100.

104. See Scott, *supra* note 47, at 684; *supra* notes 47–49 and accompanying text.

105. See Taylor, *supra* note 31, at 346.

106. U.C.C. § 2-202(b) (2012).

107. Taylor, *supra* note 31, at 346–47.

108. *Id.* at 346 (citing 4 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 633 (3d ed. 1961)).

109. *Id.* at 346–47 (quoting 9 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2430, at 98 (3d ed. 1940)).

110. *Id.* at 347.

111. *Id.* (quoting 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 577, at 396–400 (1960)).

Third, Article 2 contains many complex and nonsensical provisions. For example, legal scholars and practitioners alike rightfully have criticized section 2-207's battle of the forms as overly technical, arbitrary, and unpredictable.¹¹² Section 2-207 determines whether standard form agreements exchanged by the parties constitute a contract, and if so, the terms of that contract.¹¹³ It ultimately grants one party an "unearned and unfair advantage" simply based on timing; the party that happens to send the form first—or in some cases, second—receives the advantage by having the terms of its agreement govern the transaction despite the parties not explicitly agreeing to those terms.¹¹⁴ As such, section 2-207 is completely arbitrary in its application and fails to adhere to one of the underlying policies of Article 2—to enforce the actual bargain of the parties. The Commissioners must revise provisions such as section 2-207 so that the outcome reflects the intent of the parties rather than determine the outcome based upon chance.¹¹⁵

Fourth, Article 2 contains a number of outdated provisions. By the time states widely adopted Article 2 in the 1960s, the language was almost twenty years old.¹¹⁶ To add to its obsolescence, Article 2 has not been updated materially since its original adoption.¹¹⁷ One example is section 2-201's statute of frauds. The statute of frauds, which the American legal system borrowed from England as a way to prevent perjury, has been repealed in England, and most other countries do not

112. There are numerous discussions and critiques of section 2-207. *See, e.g.*, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 2-3, at 37–54 (6th ed. 2010) ("Unfortunately, the section is like an amphibious tank that was originally designed to fight in swamps, but was sent to fight in the desert."); Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893 (1991); Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678 (2000); John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307 (1986); Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 KY. L.J. 815 (1992).

113. U.C.C. § 2-207 (2012).

114. JAMES J. WHITE & ROBERT S. SUMMERS, PRINCIPLES OF SALES LAW § 2-3, at 44–46 (2009).

115. For similar critiques of section 2-209, see Beth A. Eisler, *Oral Modification of Sales Contracts Under the Uniform Commercial Code: The Statute of Frauds Problem*, 58 WASH. U. L.Q. 277 (1980); John E. Murray, Jr., *The Modification Mystery: Section 2-209 of the Uniform Commercial Code*, 32 VILL. L. REV. 1 (1987); and Douglas K. Newell, *Cleaning Up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487 (1990).

116. *See* Kamp, *supra* note 17, at 277.

117. *See* Henning, *supra* note 101, at 131.

have a similar concept.¹¹⁸ Requiring a written document in order to have an enforceable contract is a “formalistic anachronism.”¹¹⁹ Today’s technological advances make forgery of written documents as easy as perjury, thus defeating the underlying purpose of the statute of frauds. Moreover, the Commissioners have not revised Article 2 to update the \$500 floor for inflation since Article 2’s inception.¹²⁰ Five hundred dollars in 1950 translates to approximately \$4800 today.¹²¹ With outdated provisions like section 2-201, Article 2 is a body of sales law crafted to meet the needs of commerce during a time when deals were consummated in a room with a pen and not via e-mail with an electronic signature. The Commissioners must update Article 2 to ensure that it meets the current needs of modern commerce, taking into account how business is conducted in today’s technologically driven commercial environment.¹²²

Fifth, sales law must recognize that consumer sales are merely a type of sales transaction. Article 2 governs all sales of goods, regardless of whether the transaction involves businesses, consumers, or both. As such, Article 2 should include provisions fair and useful to consumers and not just businesses.¹²³ Currently, Article 2 contains few provisions that address consumer issues,¹²⁴ and many of the provisions that do

118. See Guttman, *supra* note 78, at 628.

119. *Id.*

120. See U.C.C. § 2-201(1) (2012).

121. The relative value of \$500 in 1950 was approximately \$4770 in 2012. See *Relative Value of the US Dollar*, MEASURINGWORTH.COM, <http://www.measuringworth.com/uscompare/> (enter “1950” in “Initial Year” form, “500” in “Initial Amount” form, and “2012” in “Desired Year” form; then follow “Calculate” hyperlink) (last visited Feb. 15, 2013).

122. For a detailed discussion regarding the defects related to the statute of frauds, see Michael J. Herbert, *Procedure and Promise: Rethinking the Admissions Exception to the Statute of Frauds Under U.C.C. Articles 2, 2A, and 8*, 45 OKLA. L. REV. 203 (1992); Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39 (1974–1975); and John M. Feser, Jr., *Legislation Review, Has Communications Technology Rendered the Statute of Frauds a Fraud of a Statute?*, 30 MCGEORGE L. REV. 431 (1999). Criticism over the statute of frauds dates back well over a century. *E.g.*, Francis M. Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916); James Fitzjames Stephen & Frederick Pollock, *Section Seventeen of the Statute of Frauds*, 1 LAW Q. REV. 1 (1885); Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427 (1928).

123. Rosmarin, *supra* note 40, at 1594–95; see also Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1 (advocating stronger protections for consumers from unconscionable contracts); *supra* notes 38–40 and accompanying text (discussing the exclusion of consumer-oriented provisions from Article 2). For a discussion of possible consumer provisions the Commissioners should consider for Article 2, see Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187 (1997); Rosmarin, *supra* note 40, at 1606–33; Rubin, *supra* note 38, at 53–54, 65–68.

124. Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565, 1571 (1994).

address consumer transactions fail to acknowledge that transactions involving consumers vary drastically from transactions between businesses.¹²⁵ Merchants generally have resources and technical knowledge that consumers simply do not possess.¹²⁶ Additionally, consumers and merchants possess different expectations.¹²⁷ If an underlying policy of Article 2 is to protect the reasonable expectations of the parties, then it should recognize this difference in expectations.¹²⁸ Accordingly, the Commissioners must revise Article 2 to include more provisions that address this imbalance between merchants and consumers.

The fact that the Commissioners have not updated Article 2 materially in over half a century is not for lack of desire or effort on the part of the Commissioners.¹²⁹ The problem lies in the uniform code model itself, which is not conducive to fixing drafting issues or adapting to changing commerce quickly and effectively. Not only do the Commissioners have to reach a consensus on what changes to accept, the Commissioners must convince fifty states to adopt those changes.¹³⁰ Aware of this conundrum, no matter the effort or dedication, the Commissioners develop “vague and open-ended revision[s] that largely reinforce[] the status quo” or avoid the issue altogether in order to ensure enactment by the states.¹³¹

This arduous and fruitless process is demonstrated by the NCCUSL’s recent failure to amend Article 2. The process was so dramatic and

125. Caroline Edwards, *Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal To Experiment*, 78 ST. JOHN’S L. REV. 663, 699 (2004) (“[Article 2] continues, with only limited exceptions, the common law tradition of providing rules that make no distinction between merchant and non-merchant contracts or between consumer and merchant contracts.”); Rosmarin, *supra* note 40, at 1593; Rubin, *supra* note 38, at 14 (“[C]ommon law has remained at the foundation of the vast majority of the Code’s provisions. As a result, the Code inherits the common law’s blindness to consumer concerns . . .”).

126. See Rosmarin, *supra* note 40, at 1596.

127. *Id.* at 1607.

128. *Id.* (“Protecting the reasonable expectations of the parties is one of the overriding policies of the U.C.C.” (citing U.C.C. § 1-205 cmt. 1 (1990))).

129. Henning, *supra* note 101, at 131–32.

130. Patchel, *supra* note 64, at 92; see also Hiram Thomas, *The Federal Sales Bill as Viewed by the Merchant and the Practitioner*, 26 VA. L. REV. 537, 538 (1940) (discussing the difficulty of convincing states to adopt uniform codes).

131. Scott, *supra* note 47, at 680; see Patchel, *supra* note 64, at 101; Rasmussen, *supra* note 5, at 1101; Speidel, *supra* note 7, at 608 (“[T]he goal of NCCUSL is to ‘get it right enough to get it enacted.’”).

protracted that a number of legal scholars and participants in the process have written entire articles on the failed attempt to revise Article 2.¹³²

In short, the NCCUSL appointed a study group to evaluate Article 2 for areas of improvement in the late 1980s.¹³³ After the study group submitted its findings, which contained many of the substantive defects mentioned above, the Commissioners appointed commercial law expert Professor Richard Speidel as the reporter for the Committee to Revise Uniform Commercial Code Article 2 (the Committee) and, a few years later, Professor Linda Rusch as the associate reporter.¹³⁴ The Commissioners gave broad instructions to the Committee for drafting the revisions.¹³⁵ The result was an entire reorganization of Article 2 under a “hub and spoke” approach with one chapter devoted to general provisions—the hub—and two chapters devoted each to sale of goods and licensing—the spokes.¹³⁶ The Committee revised virtually every section of Article 2 and changed the numbering system.¹³⁷

When the Committee presented the draft to the Commissioners for a vote, the backlash was instantaneous due to the substantial number of changes and the inclusion of licensing.¹³⁸ The Commissioners received numerous objection letters from businesses that led to a fierce debate among the Commissioners.¹³⁹ The fight became so vicious that the business community placed a full-page advertisement in *USA Today* to urge rejection of the draft.¹⁴⁰ The hostility and debate over the revisions led Professors Speidel and Rusch to resign in protest.¹⁴¹

As a result, the NCCUSL appointed a new reporter and decided to turn the revision into discrete amendments despite the recognized need for an overhaul of Article 2 in order to achieve consensus.¹⁴² In 2003, the Commissioners agreed upon a revised Article 2 that they released for enactment.¹⁴³ Although the Commissioners were finally able to agree on

132. E.g., Henning, *supra* note 101; Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999); Speidel, *supra* note 7.

133. Henning, *supra* note 101, at 132.

134. *Id.*; Fred H. Miller, *Uniform Commercial Code Article 2 on Sales of Goods and the Uniform Law Process: A True Story of Good v. ?*, 11 DUQ. BUS. L.J. 143, 145 (2009).

135. Henning, *supra* note 101, at 132.

136. *Id.* at 134; Speidel, *supra* note 7, at 612.

137. See Henning, *supra* note 101, at 132.

138. See *id.* at 132–35.

139. *Id.* at 135.

140. *Id.* at 135–36.

141. *Id.* at 136; Speidel, *supra* note 7, at 611.

142. Henning, *supra* note 101, at 132.

143. David Frisch, *Amended U.C.C. Article 2 as Code Commentary*, 11 DUQ. BUS. L.J. 175, 176 (2009).

discrete amendments, they could not convince even one state to adopt the revision.¹⁴⁴ All in all, the revision process took well over a decade, resulted only in minor changes, and failed to yield enactment at the state level because the minor revisions were not worth taking the time and effort to adopt.¹⁴⁵ Recognizing this failure, the Commissioners officially withdrew the revised Article 2 in May 2011.¹⁴⁶

Ultimately, despite the need for numerous substantive changes to Article 2 in order to bring greater clarity, predictability, and uniformity to the law of sales, the Commissioners have been unsuccessful in amending Article 2 in any meaningful way.

III. THE BENEFITS OF FEDERALIZATION

Given Article 2's current deficiencies, the time for a new solution is now, before the deficiencies affect commerce more profoundly. That new solution is the enactment of a federal sales act to supplant fully Article 2.

The concept of a federal sales act certainly is not novel. Recognizing the failure of the Uniform Sales Act to produce uniformity among the states, Professor Williston, with the backing of the American Bar Association, proposed a federal sales act in 1922.¹⁴⁷ The proposed bill was based on the Uniform Sales Act but with revisions and clarifications.¹⁴⁸ Although the bill was introduced in Congress and legislative hearings occurred, the proposal died quickly and quietly without explanation.¹⁴⁹

Over the next decade, powerful interest groups continued to lobby for a federal sales act to bring uniformity and predictability to commercial transactions.¹⁵⁰ Finally, in January 1937, their lobbying resulted in Representative Walter Chandler, a former member of the NCCUSL,

144. *Id.*

145. *See id.*; Henning, *supra* note 101, at 132.

146. *88th Annual Meeting Updates*, AM. L. INST., <http://2011am.ali.org/updates.cfm> (last visited Feb. 15, 2013).

147. George W. Bacon, *The Proposed Federal Sales Act*, 9 *FORDHAM L. REV.* 233, 233 (1940).

148. Thomas, *supra* note 130, at 543.

149. Bacon, *supra* note 147, at 233; McCurdy, *supra* note 9, at 587; Thomas, *supra* note 130, at 543.

150. Smythe, *supra* note 8, at 468.

introducing a federal sales bill in Congress that mirrored the federal sales act proposed by Professor Williston in 1922.¹⁵¹

When the bill was proposed, the Merchants' Association of New York, a not-for-profit organization to foster trade and commerce, began a study of that bill to determine whether the bill provided a practical guide for merchants.¹⁵² Within months, the Merchants' Association recommended many amendments to the federal sales bill that Representative Chandler incorporated into a new bill that he introduced in Congress in July 1937.¹⁵³ This bill reached the Committee on Interstate and Foreign Commerce, but never made it to a hearing and subsequently died, again without explanation.¹⁵⁴

A few years later, the federal sales bill was reawakened due to a roundtable discussion at a conference held by the Association of American Law Schools.¹⁵⁵ As a result, Representative Herron Pearson introduced in Congress a new federal sales bill that would apply only to interstate sales of goods.¹⁵⁶

This proposed act greatly concerned the Commissioners.¹⁵⁷ After seeing the changes made to the failed 1937 bill, the Commissioners were concerned that the federal sales bill would be so vastly different from the Uniform Sales Act that it would lead to different results depending on whether the transaction was interstate or intrastate, thus moving further away from their goal of uniformity in the law of sales.¹⁵⁸ Also, the Commissioners were concerned that a federal sales bill could erode states' rights to legislate on matters pertaining to intrastate sales.¹⁵⁹ Consequently, the Commissioners began revising the Uniform Sales Act

151. H.R. 1619, 75th Cong. (1937); 47 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM STATE LAWS & PROC. 85 (1937).

152. Thomas, *supra* note 130, at 543–44.

153. H.R. 7824, 75th Cong. (1937); Patchel, *supra* note 64, at 95 (citing TWINING, *supra* note 18, at 277); Thomas, *supra* note 130, at 544.

154. See Thomas, *supra* note 130, at 544.

155. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 15, at 4; Bacon, *supra* note 147, at 233.

156. H.R. 8176, 76th Cong. (1940); see Patchel, *supra* note 64, at 97; Taylor, *supra* note 10, at 530; Thomas, *supra* note 130, at 544–45.

157. Taylor, *supra* note 10, at 530.

158. McCurdy, *supra* note 9, at 589–90 (quoting 48 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM STATE LAWS & PROC. 249 (1938)).

159. Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349, 353 (2007) (quoting Taylor, *supra* note 31, at 361–62); *id.* at 353 n.13 (citing Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 237 (1965)); Smythe, *supra* note 8, at 468 (citing WALTER P. ARMSTRONG, *A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 53 (1991)).

and lobbying against the bill in Congress.¹⁶⁰ In the end, the Commissioners had a bit of luck on their side. Due to World War II, the proposed federal sales act died, giving the Commissioners much needed time to revise the Uniform Sales Act before a new federal sales bill could be brought before Congress again.¹⁶¹

The Commissioners teamed up with the American Law Institute and released the first version of the UCC in 1951.¹⁶² Only Pennsylvania initially adopted the UCC, in 1953.¹⁶³ It was not until a number of changes were made at the suggestion of a New York law reform commission that the remaining states followed suit.¹⁶⁴ By 1968, Louisiana was the only state that had not adopted the UCC due to that state's civil law system.¹⁶⁵ This overwhelming success of the UCC displaced the need for a federal sales act.¹⁶⁶ Consequently, a federal sales bill has not been introduced in Congress since the inception of the UCC.

Article 2's increasing ineffectiveness and antiquated nature coupled with a more defined scope of congressional power under the Commerce Clause now make a federal sales act a viable option. First, a federal sales act solves the uniformity issue quite easily.¹⁶⁷ Replacing Article 2 with a federal sales act automatically brings the count from fifty sales laws to just one national sales law. Also, even with concurrent jurisdiction between the federal and state judiciaries, a federal sales act makes substantial progress toward solving variations due to judicial interpretations. Not only would every judge work with the same language, a federal sales act could also remove some of the vagueness of Article 2.¹⁶⁸ Therefore, less chance exists for varying interpretations among courts. When variations in interpretation do occur, the Supreme Court can resolve those conflicts to keep the law consistent and predictable.¹⁶⁹

160. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 15, at 8; McCurdy, *supra* note 9, at 589–90; Taylor, *supra* note 10, at 530.

161. *See* Taylor, *supra* note 10, at 530.

162. *See* Kennedy, *supra* note 58, at 1225; Maggs, *supra* note 16, at 547.

163. Maggs, *supra* note 16, at 547.

164. *Id.* at 547–48.

165. *Id.* at 548.

166. Kennedy, *supra* note 58, at 1234 (“[F]ederal enactment of the Code . . . is not an urgent agenda item.”).

167. *See* Llewellyn, *supra* note 15, at 561.

168. *See* discussion *supra* notes 47–57 and accompanying text.

169. Bacon, *supra* note 147, at 238; Schnader, *supra* note 45, at 232; Hintze, *supra* note 41, at 741.

Some objectors to a federal sales act are concerned that creating a federal sales law would add to the already burdened federal courts.¹⁷⁰ However, a large number of cases involving Article 2 are already brought in federal court so any additional burden would be minimal.¹⁷¹ Also, lawsuits are less likely to occur under a federal sales act, because, as discussed above, the federal sales act would be more uniform and therefore its outcome more predictable with less need for litigation.¹⁷² Finally, small claims courts would remain in place, leaving these claims at the state court level.¹⁷³

Second, a federal sales act addresses many of the issues that arise in the amendment process for Article 2. Congress can pass amendments that apply to the entire country rather than require the Commissioners to agree upon an amendment and then hope that each state passes that amendment.¹⁷⁴ Congress regularly amends acts, and amending a federal sales act would be no different.¹⁷⁵ Also, unlike the Commissioners, Congress does not need to worry about whether the states will pass the act, so amendments can have substance rather than just continue the status quo in order to ensure enactment.¹⁷⁶ Whereas the Commissioners simply avoid contentious issues to ensure enactment at the state level,¹⁷⁷

170. See Braucher, *supra* note 9, at 111; Hintze, *supra* note 41, at 741–42.

171. The Author conducted two informal surveys of cases organized under the Westlaw “Sales” keynote and of UCC cases through Westlaw Next. These studies evaluated the number of opinions published between 2008 and 2011 by federal and state courts with respect to commercial law matters. The first study examined the number of opinions addressing the UCC in general during that timeframe and found that over fifty percent of opinions were published by federal courts. The second study examined the number of opinions addressing sale of goods during that timeframe and found that over sixty percent of opinions were published by federal courts. The Author acknowledges the imprecise nature of these studies as they only evaluate the number of opinions published and not the number of cases filed. However, the disparity between federal and state court opinions seems to suggest that the number of federal cases addressing Article 2 issues certainly is not insignificant. The likely reason for this disparity is that the parties file in federal court due to diversity jurisdiction—thus supporting the contention that our commercial environment is a truly national commercial environment.

172. See *supra* notes 26–30 and accompanying text.

173. These small claims decisions would not upset uniformity as these decisions are not reported and thus not binding precedent. See W. Mark C. Weidemaier, *Arbitration and the Individualization Critique*, 49 ARIZ. L. REV. 69, 78 (2007) (“[S]mall claims courts typically [do not] publish their decisions or create precedent . . .” (citing Glenn E. Roper, *Eternal Student Loan Liability: Who Can Sue Under 20 U.S.C. § 1091a?*, 20 BYU J. PUB. L. 35, 38 (2005))).

174. Thomas, *supra* note 130, at 540.

175. See Fred H. Miller & Albert J. Rosenthal, *Uniform State Laws: A Discussion Focused on Revision of the Uniform Commercial Code*, 22 OKLA. CITY U. L. REV. 257, 319 (1997).

176. See Scott, *supra* note 47, at 680.

177. See Jean Braucher, *Foreword: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L. Q. 1, 2 (1997).

Congress generally tackles them and discovers ways to resolve such matters.¹⁷⁸ “While Congress, as an institution, is hardly the hotbed of political courage, it consists of politicians accustomed to resolving many matters by contested votes rather than by consensus.”¹⁷⁹ By no means is passing amendments in Congress easy, quick, or amicable, but the legislative process is still better than the current uniform model for drafting and passing amendments that contain real substance.

Third, the federal legislative process, although certainly not interest group free, is better at balancing these competing interests. A greater number of interest groups exist at the federal legislative level, which serves to weaken the power of any one group.¹⁸⁰ In 2012, 12,374 lobbyists registered at the federal level representing a variety of interests.¹⁸¹ With the sheer number of interest groups, a greater percentage of which represent consumer interests than in the Article 2 amendment process,¹⁸² the influence of industry would not be as strong at the federal level as it is with the Commissioners.

Also, consumer interest groups are more likely to take notice of federal legislation than activities of the NCCUSL.¹⁸³ The federal legislative process is quite public, and journalists and activists monitor and report its activities regularly. Thus, the likelihood of consumer interest groups becoming involved is greater at the federal level due to greater awareness of the pending legislation that would impact consumers.

Moreover, the federal legislative process has standing committees with the ability to gather information that can be used to resolve conflicting factual claims by competing interest groups.¹⁸⁴ Federal legislators gather empirical data and conduct hearings with sworn witnesses as part of their drafting process.¹⁸⁵ The Commissioners, on the

178. Cohen & Zaretsky, *supra* note 41, at 560; Schwartz & Scott, *supra* note 62, at 651.

179. Cohen & Zaretsky, *supra* note 41, at 560.

180. See Patchel, *supra* note 64, at 143 (citing HARMON ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY 46 (1965)); *id.* at 149.

181. Ctr. for Responsive Politics, *Lobbying Database*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/index.php> (last visited Feb. 15, 2013); see also Ctr. for Responsive Politics, *Top Issues*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/top.php?_showYear=2012&indexType=u (last visited Feb. 15, 2013) (almost 7300 clients on issues relating to taxation, budgetary, and health care issues).

182. See *supra* notes 79–82 and accompanying text.

183. See Miller & Rosenthal, *supra* note 175, at 319.

184. See Rasmussen, *supra* note 5, at 1126; Schwartz & Scott, *supra* note 62, at 651; Scott, *supra* note 47, at 683.

185. See Schwartz & Scott, *supra* note 62, at 630.

other hand, rely solely on information obtained from interested parties who “may have an incentive to misrepresent the truth” and face no consequence for doing so.¹⁸⁶ Federal legislators, therefore, have access to empirical data and reliable testimony during their decisionmaking to better resolve the competing interests of businesses and consumers.

Finally, federal legislators are more aware of consumer interests than the Commissioners given legislators’ accountability to their constituents.¹⁸⁷ While the Commissioners have no obligation to represent the interest of their respective state or residents thereof,¹⁸⁸ federal legislators are elected to do just that and consequently are more conscious of the needs of their constituents.

Ultimately, the federal legislative process, albeit imperfect, is still better than the uniform code model. The federal legislative process has varied and numerous interest groups, a more public process, a formal and thorough information-gathering process, and accountability to constituents. Additionally, although interest groups may influence federal legislators, interest groups do not take part in the drafting process. Consequently, the federal legislative process is better at understanding and balancing consumer interests with business interests to produce a comprehensive sales law that is beneficial to all parties.

IV. THE VIABILITY OF FEDERALIZATION

A federal sales act is a viable solution to the defects in the law of sales within the American system of government. Not only does such an act fall within the powers the Constitution grants to Congress under the Commerce Clause, but it also complies with traditional notions of federalism.

A. *Legal Viability—The Commerce Clause*

The Commerce Clause of the U.S. Constitution grants Congress the authority “[t]o regulate Commerce . . . among the several States.”¹⁸⁹ These words have vested Congress with one of its most fundamental and comprehensive authorities. The attempts to define the boundaries of Congress’s power under the Commerce Clause involve some of the most

186. *Id.*; see also Speidel, *supra* note 7, at 608 (noting how the drafting committee rarely conducts empirical studies).

187. See Cohen & Zaretsky, *supra* note 41, at 559; Patchel, *supra* note 64, at 145–46.

188. See Patchel, *supra* note 64, at 89, 91.

189. U.S. CONST. art. I, § 8, cl. 3.

debated litigation in the history of the Supreme Court.¹⁹⁰ In those seminal cases, the Court shaped the Commerce Clause into a broad congressional power over commerce that Congress can utilize to enact and enforce a federal sales act.¹⁹¹

The most recent case fresh in the minds of legal scholars is *National Federation of Independent Business v. Sebelius*, in which the Supreme Court reviewed the power of Congress to mandate health insurance

190. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 32 (2005) (upholding federal law regulating intrastate, private use of medical marijuana); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating federal law providing civil remedy for gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding law prohibiting possession of guns near a school zone outside the scope of the Commerce Clause); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding federal statute that reached purely local hotel); *Katzenbach v. McClung*, 379 U.S. 294, 302–04 (1964) (confirming Congress’s power to regulate intrastate retail establishments that affect interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (permitting Congress to regulate home-grown and home-consumed wheat); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (extending Commerce Clause power to “those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce . . . , Congress cannot be denied the power to exercise that control.”); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (holding statute regulating wage and labor arrangements of intrastate coal producers beyond the scope of the Commerce Clause); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (invalidating federal statute fixing employee hours and wages); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 374 (1935) (striking down federal statute regulating railroad pension plans); *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 485 (1924) (“When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established.”); *Hous., E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 353 (1914) (“[Congress] does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions . . . may thereby be controlled.”); *N. Sec. Co. v. United States*, 193 U.S. 197, 357–58 (1904) (explaining liberty of contract does not override congressional power to regulate interstate commerce under the Commerce Clause); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228–29 (1899) (deciding Sherman Antitrust Act reaches private contracts); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16–18 (1895) (barring Congress from regulating an intrastate sugar refining monopoly); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 459 (1827) (invalidating Maryland law requiring importers of foreign goods to obtain a fifty dollar license); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239–40 (1824) (prohibiting grant of monopoly to navigate Hudson River that required any out-of-state boats to obtain a license from the holder of the monopoly).

191. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585 (2012) (“The path of our Commerce Clause decisions has not always run smooth . . . but it is now well established that Congress has broad authority under the Clause.”).

coverage.¹⁹² Although the Court upheld the mandate under the congressional power to tax, it invalidated the mandate as exceeding congressional power under the Commerce Clause.¹⁹³ The Court acknowledged Congress's broad power under the Commerce Clause to regulate matters substantially affecting interstate commerce, but Congress nonetheless may not force individuals to purchase an unwanted product:

Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.¹⁹⁴

Despite this and other recent limitations, Congress still possesses fairly broad powers under the Commerce Clause. Congress undoubtedly can regulate a good or activity that involves interstate commerce.¹⁹⁵ When the activity or good regulated is solely intrastate, Congress may still regulate the transaction provided four requirements are met. First, the intrastate activity must have a substantial effect on interstate commerce.¹⁹⁶ Each instance of the particular intrastate activity does not need to substantially affect interstate commerce; rather, the type of intrastate activity in the aggregate only needs to substantially affect interstate commerce.¹⁹⁷ Therefore, so long as the “total incidence” of the activity affects the national economy, Congress may regulate a truly local incident of that activity.¹⁹⁸

Second, Congress must demonstrate empirically that the intrastate activity substantially affects interstate commerce.¹⁹⁹ “[S]imply because Congress may conclude that a particular activity substantially affects

192. *Id.* at 2576.

193. *Id.* at 2591, 2600.

194. *Id.* at 2587.

195. *See* *United States v. Darby*, 312 U.S. 100, 114–16 (1941).

196. *United States v. Lopez*, 514 U.S. 548, 559 (1995) (“[A]dmittedly, our case law has not been clear whether an activity must ‘affect’ or ‘substantially affect’ interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause. . . . We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”).

197. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003).

198. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)) (internal quotation marks omitted).

199. *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (“The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration.”).

interstate commerce does not necessarily make it so.”²⁰⁰ This requirement, however, does not mean that Congress must have precise scientific data, especially when the connection to commerce is obvious.²⁰¹ If the connection to commerce is obvious, Congress’s failure to make specific findings does not invalidate its power under the Commerce Clause.²⁰²

Third, Congress may regulate only economic intrastate activities under the Commerce Clause.²⁰³ Solely intrastate criminal activities, such as firearm possession and gender-motivated crimes, are noneconomic activities unreachable by Congress.²⁰⁴ Economic activities, including the manufacture, distribution, and sale of commodities, are within Congress’s power to regulate under the Commerce Clause.²⁰⁵

Finally, Congress may only regulate an *existing* commercial activity.²⁰⁶ In other words, Congress may not require individuals to engage in a commercial activity, but may only regulate their activities once they actually become engaged in commercial activity.²⁰⁷ Otherwise, allowing Congress to create a commercial activity is overly expansive and would make “many of the provisions in the Constitution . . . superfluous.”²⁰⁸

Congress, through this expansive power granted to it under the Commerce Clause, can enact a federal sales act governing all sales of goods that would preempt any state sales laws. Indeed, Congress has already utilized this power to regulate certain commercial matters covered in the UCC. Examples include the Expedited Funds Availability Act (UCC Article 4),²⁰⁹ the Market Reform Act (UCC Article 8),²¹⁰ the Magnuson-Moss Warranty Act (UCC Article 2),²¹¹ the Door-to-Door

200. *Lopez*, 514 U.S. at 557 n.2 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)).

201. *See Gonzales*, 545 U.S. at 21.

202. *Id.*

203. *Lopez*, 514 U.S. at 561, 567.

204. *United States v. Morrison*, 529 U.S. 598, 610–11 (2000); *Lopez*, 514 U.S. at 561–62, 567.

205. *Gonzales*, 545 U.S. at 25–26.

206. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012).

207. *Id.* at 2587 (“As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching ‘activity.’ It is nearly impossible to avoid the word when quoting them.”).

208. *Id.* at 2586.

209. 12 U.S.C. § 4001 (2006).

210. Pub. L. 101-432, § 5(b), 104 Stat. 963, 973–74 (1990) (codified as amended in scattered subsections of 15 U.S.C. § 78 (2006)).

211. 15 U.S.C. §§ 2301–2312 (2006).

Sales Rule (UCC Article 2),²¹² and the Federal Trade Commission Credit Practices Rule (UCC Articles 3 and 9).²¹³

As expressly stated by the Supreme Court, the sale of goods is an economic activity that Congress may regulate.²¹⁴ Moreover, due to technological advances, a majority of sales transactions transcend state borders. The growth of online-only retailers such as Amazon.com and Overstock.com is increasing exponentially every year, with sales on these sites in the billions of dollars.²¹⁵ Big-box retailers like Sears, Wal-Mart, and Home Depot are recognizing this shift from in-store to online purchasing and are consequently expanding their Internet presence.²¹⁶ These Internet purchases are almost always interstate, with the average good purchased online traveling 1169 miles to its purchaser.²¹⁷ Additionally, Internet purchasing is not limited to consumers; even businesses are ordering their goods online, with many of those goods crossing state borders to reach their destination.²¹⁸

In addition to the considerable number of interstate sales transactions resulting from Internet transactions, most goods sold at retail stores travel interstate. National retail chains have replaced the local mom-and-pop store,²¹⁹ with these national chains shipping a majority of their

212. 16 C.F.R. §§ 429.0–.3 (2012).

213. 16 C.F.R. §§ 444.1–.5 (2012); *see also* Boss, *supra* note 159, at 354 & n.15; Bugge, *supra* note 10, at 22.

214. *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005).

215. Press Release, Amazon.com, Amazon.com Announces Second Quarter Sales Up 51% to \$9.91 Billion (July 26, 2011), <http://www.businesswire.com/news/home/20110726007053/en/Amazon.com-Announces-Quarter-Sales-51-9.91-Billion> (describing net sales of \$9.91 billion in second quarter of 2011, with \$5.41 billion alone from North America); *Who We Are*, OVERSTOCK.COM, <http://www.overstock.com/about> (last visited Feb. 15, 2013) (2012 revenues equaled \$1,099,289,000).

216. *See* Zeke Faux, *Bondholders Fret as Sears Burns Cash*, BLOOMBERG BUSINESSWEEK MAG. (June 30, 2011), <http://www.businessweek.com/magazine/bondholders-fret-as-sears-burns-cash-07012011.html>; Robert Malone, *Wal-Mart Takes Over the World*, NBCNEWS.COM, http://www.msnbc.msn.com/id/10838942/ns/business-forbes_com/t/wal-mart-takes-over-world/ (last updated Jan. 13, 2006, 5:32 PM); Trefis, *Home Depot Lays a Foundation for Online Growth*, DAILYFINANCE (June 22, 2011, 8:00 AM), <http://www.dailyfinance.com/2011/06/22/home-depot-lays-a-foundation-for-online-growth/>.

217. *Shipment Characteristics by Origin Geography by NAICS: 2007 Commodity Flow Survey*, U.S. CENSUS BUREAU AM. FACTFINDER, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=CFS_2007_00A05&prodType=table (last visited Feb. 15, 2013).

218. *See E-Stats*, U.S. CENSUS BUREAU (May 10, 2012), <http://www.census.gov/econ/estats/2010/2010reportfinal.pdf> (indicating that forty-six percent of all manufacturing shipments were ordered online in 2010).

219. *See, e.g.*, Erin Durkin & Bill Hutchinson, *Chains Chokin' Off Mom-and-Pop Shops*, N.Y. DAILY NEWS (July 31, 2008, 11:11 PM), http://articles.nydailynews.com/2008-07-31/local/29435094_1_jonathan-bowles-chain-stores-urban-future (acknowledging more than 5700 national chains within the five boroughs of New York City).

goods from warehouses or distributors outside of the states where the branch stores are located.²²⁰ Even locally-owned stores purchase goods from out of state for sale in the stores. Thus, most consumers are buying goods that have traveled interstate, and as a result, those sales transactions impact interstate commerce.

In the grand scheme of the national economy, truly intrastate transactions are rare. Even though the product may have been produced locally and sold locally, the local business purchases equipment, supplies, and other business-related items from out of state. Indeed, numerous studies exist that demonstrate that local businesses that locally produce and sell products spend a significant percentage of their revenues outside of the local economy.²²¹ Consequently, it is difficult to argue that these few intrastate transactions, as a whole, do not affect the national economy.

The end result is that a majority of today's commercial transactions have some interstate component, and the aggregate of the very few truly intrastate transactions that exist today nonetheless have some effect upon interstate commerce. Accordingly, Congress can demonstrate a rational basis for enacting a federal sales law governing all sales transactions using the power the Constitution grants to it under the Commerce Clause.

B. Philosophical Viability—Federalism

The United States was founded under the principle of federalism, which is the belief that the federal government should possess a limited

220. See, e.g., *Target Distribution Centers*, TARGET (July 21, 2008), <http://pressroom.target.com/backgrounders/target-distribution-centers>; see also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937) (“When industries organize themselves on a national scale . . . how can it be maintained that . . . Congress may not enter when it is necessary to protect interstate commerce . . . ?”).

221. For example, in the midcoast region Maine, out-of-state purchases account for forty-seven percent of total spending by local businesses. INST. FOR LOCAL SELF-RELIANCE, THE ECONOMIC IMPACT OF LOCALLY OWNED BUSINESSES VS. CHAINS: A CASE STUDY IN MIDCOAST MAINE 2 (2003), available at <http://www.ilsr.org/wp-content/uploads/files/midcoaststudy.pdf>. In Austin, Texas, approximately fifty-four percent of total spending by local business occurs outside of the local economy. See CIVIC ECONOMICS, ECONOMIC IMPACT ANALYSIS: A CASE STUDY—LOCAL MERCHANTS VS. CHAIN RETAILERS 14 (2002), available at <http://civiceconomics.com/app/download/5841748704/Lamar+Retail+Analysis.pdf>. In Chicago, fifty-seven percent of chain firm spending occurs outside of the local economy and thirty-two percent of local business spending occurs outside of the local economy. CIVIC ECONOMICS, THE ANDERSONVILLE STUDY OF RETAIL ECONOMICS 5 (2004), available at <http://civiceconomics.com/app/download/5841713404/AndersonvilleStudy.pdf>.

and defined role in the American political system.²²² Recently severed from the British monarchy, the Framers were concerned that creating an unchecked federal government could lead to an abuse of power and result in the same tyranny they fought against in the American Revolution.²²³ Indeed, James Madison and Alexander Hamilton wrote many of the *Federalist Papers* in the hopes of alleviating such fears.²²⁴ They explained that the federal government's powers were limited to matters affecting the entire country, such as foreign relations, the military, and the national economy.²²⁵

This concern over the federal government's power resulted in the Tenth Amendment to the Constitution, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."²²⁶ The idea was that this "healthy balance of power between the States and the Federal Government [would] reduce the risk of tyranny and abuse."²²⁷

Because the Commerce Clause expressly grants Congress the power to regulate matters of interstate commerce, the exercise of this power is within the boundaries of the Tenth Amendment. In enacting a federal sales act, Congress simply would use a power already granted to it and nothing more.²²⁸

Nevertheless, the Supreme Court has dismissed outright the argument that the Tenth Amendment imposes any specific limitations on the Commerce Clause:

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the

222. E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35, 36–37 (2009).

223. Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1768 (2006); Julian Epstein, *Evolving Spheres of Federalism after U.S. v. Lopez and Other Cases*, 34 HARV. J. ON LEGIS. 525, 527 (1997).

224. See, e.g., THE FEDERALIST NO. 32 (Alexander Hamilton), NOS. 10, 14, 45 (James Madison).

225. THE FEDERALIST NO. 17, at 105–06 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Commerce, finance, nego[t]iation and war seem to comprehend all the objects, which have charms for minds governed by that passion; and all the powers necessary to these objects ought in the first instance to be lodged in the national depository."); see also Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221, 230 (2005) (stating Founders' belief that government would have power over national interests such as foreign relations, defense, and a national economy).

226. U.S. CONST. amend. X.

227. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

228. See *New York v. United States*, 505 U.S. 144, 156–59 (1992).

amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted²²⁹

Thus, the Tenth Amendment permits the federal government to act only when the Constitution expressly grants the federal government the power to act and nothing more.²³⁰

Instead of the Tenth Amendment, the structure of the federal government is the appropriate mechanism for protecting states from federal invasion into truly local concerns.²³¹ The political process, including the selection of the President through electoral votes and participation of state representatives in both the House of Representatives and Senate, serves to prevent Congress from invading areas of state interest.²³² This view is supported in the *Federalist Papers*: “[T]he constituent body of the national representatives, or in other words of the people of the several States, would controul the indulgence of so extravagant an appetite.”²³³

Additionally, one of the Supreme Court’s roles is to enforce the limits on the power of the federal government.²³⁴ Accordingly, the Supreme

229. *United States v. Darby*, 312 U.S. 100, 124 (1941); *accord Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (“[T]he fact that the States remain sovereign as to all powers not vested in Congress or denied them . . . offers no guidance about where the frontier between federal and state power lies. . . . [W]e have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.”); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 291 (1981) (“The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States’ exercise of their police powers.”).

230. *See* THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“This exclusive delegation or rather this alienation of State sovereignty would only exist . . . where the Constitution in express terms granted an exclusive authority to the Union”); THE FEDERALIST NO. 14, at 86 (James Madison) (Jacob Cooke ed., 1961) (“Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic . . .”).

231. *Garcia*, 469 U.S. at 556. “[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system” *Id.* at 552.

232. *Id.* at 550–51, 554 (“[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result. Any substantive restraint . . . must be tailored to compensate for possible failings in the national political process rather than to dictate a ‘sacred province of state autonomy.’” (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983))).

233. THE FEDERALIST NO. 17, at 106 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

234. *See* Chemerinsky, *supra* note 223, at 1768–69.

Court has taken the principles of federalism into account when deciding cases under the Commerce Clause.²³⁵ Thus, if a federal sales act is legally viable under Supreme Court jurisprudence, it is also philosophically viable as the Supreme Court uses federalism in its limits on congressional power under the Commerce Clause.²³⁶ In other words, analyzing whether a federal sales act is legally viable and philosophically viable are not two independent analyses; rather, the two concepts are intertwined.

In addition to the avoidance of tyranny by the federal government, federalists focus on two additional principles in support of federalism. First, local matters are more effectively addressed at the state level.²³⁷ As each state is composed of a unique group of people with their own issues and concerns, government should consider these issues and concerns when legislating on matters affecting its citizens.²³⁸ Because the state government is better in tune with these issues and concerns than the federal government, state government is the more appropriate venue for legislation on local matters.²³⁹ By limiting the federal government to matters that affect the entire nation, the states can legislate as appropriate for their citizens.²⁴⁰

Commercial law, however, and more particularly sales law, is hardly a local concern. As discussed above, the national nature of the American commercial environment makes truly local sales transactions rare.²⁴¹ Additionally, groups affected by commercial law, namely merchants and consumers, have the same issues and concerns regardless of geographic location.²⁴² Sales law simply does not involve social mores or the states' "core police powers," such as criminal law and the protection of health, safety, and welfare, which justify local treatment.²⁴³ Each party desires

235. *E.g.*, *United States v. Morrison*, 529 U.S. 598, 644–45 (2000) (Souter, J., dissenting); *Garcia*, 469 U.S. at 545–52; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29–30, 37 (1937).

236. Indeed, the economic requirement imposed in *Lopez* reflects the view that anything other than economic activity falls outside of the Commerce Clause, a view which exactly reflects the type of restriction imposed by federalism. David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 *FORDHAM L. REV.* 2081, 2096 (2006).

237. Patchel, *supra* note 64, at 150.

238. Taylor, *supra* note 10, at 548.

239. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society”); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 936 (1994); Taylor, *supra* note 10, at 548.

240. Patchel, *supra* note 64, at 150; Rubin & Feeley, *supra* note 239, at 936; Taylor, *supra* note 10, at 548.

241. Phillips, *supra* note 46, at 59; Taylor, *supra* note 10, at 551; *see supra* notes 215–21 and accompanying text.

242. Elbrecht, *supra* note 22, at 151; Taylor, *supra* note 10, at 551.

243. *See Gonzales v. Raich*, 545 U.S. 1, 42–45 (2005) (O’Connor, J., dissenting).

a sales law that is fair and results in the enforcement of the bargain between the parties regardless of geographic location. Federalism simply does not justify why a merchant or consumer in one state should receive more protection than a merchant or consumer in another state.²⁴⁴

The second additional underlying principle of federalism is that state governments are more likely to experiment with legislation to discover the best method to address issues affecting their citizens.²⁴⁵ As such, keeping most regulatory power at the state level allows for greater experimentation.²⁴⁶ This experimentation benefits not only the citizens of the experimenting state, but all similarly situated citizens of other states that see the benefits of those regulations and choose to adopt them.

When it comes to sales laws, states simply do not experiment, and when they do, the experimentation has been ineffective. Because Article 2 exists, the states have no incentive to develop their own sales laws.²⁴⁷ Instead of taking the time and money to invest in their own bodies of sales law, states merely tweak Article 2.²⁴⁸ These tweaks fail to produce new and innovative sales laws. Also, the technical nature of commercial law requires states to collect large amounts of data in order to experiment, a costly and timely task.²⁴⁹ Rather than make that investment, states often wait until another state performs the task for them.²⁵⁰ The experimentation that federalism desires simply does not happen in the sales law arena. Accordingly, a federal sales act would not supplant beneficial experimentation.

Ultimately, a federal sales act is within the Tenth Amendment as the Constitution expressly grants Congress the authority to regulate commerce.

244. Taylor, *supra* note 10, at 551.

245. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“[Federalism] allows for more innovation and experimentation in government”); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without the risk to the rest of the country.”).

246. Taylor, *supra* note 10, at 548.

247. See Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1368–69 (2009); Paul M. Secunda & Jeffrey M. Hirsch, Debate, *Workplace Federalism*, 157 U. PA. L. REV. PENNUMBRA 20, 38 (2008), available at <http://www.pennumbra.com/debates/pdfs/WorkplaceFederalism.pdf>.

248. See *supra* Part II.A.

249. Rubin & Feeley, *supra* note 239, at 926.

250. Galle & Leahy, *supra* note 247, at 1341–42; Rubin & Feeley, *supra* note 239, at 925–26.

Further, the national nature of commercial transactions coupled with the homogenous needs of consumers and merchants remove the federalist concern that sales law is more appropriate at the state level. Thus, a federal sales act is philosophically viable under the doctrine of federalism.

V. CONCLUSION

The idea of federalizing the law of sales is a difficult proposition even in the wake of the criticism of Article 2, as people are always resistant to change.²⁵¹ Even the UCC itself received substantial criticism for its “radical” changes, but despite its flaws the UCC has made great strides in commercial law.²⁵² Irrespective of potential resistance, a massive overhaul is needed in order to modernize the law of sales into a more uniform, predictable, and reliable body of law that meets the needs of businesses and consumers alike. A federal sales act to replace Article 2 is just that needed overhaul.

Even if a federal sales act never comes to fruition, hopefully the mere suggestion of such an act sparks action much the same way it did in the early twentieth century.²⁵³ Whether that action is improvement of the current amendment process or the development of some other process not yet conceived, scholars and practitioners alike must focus on updating and improving sales law given its importance in our complex commercial environment rather than remain complacent and allow the current Article 2 to linger unchanged.

251. See, e.g., Rusch, *supra* note 132, at 1690 (noting resistance to revising Article 2).

252. See generally Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952) (criticizing the UCC at the time of its unveiling).

253. See *supra* notes 147–66 and accompanying text.