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# MODELING UCC DRAFTING

A. Brooke Overby\*

[T]his should be borne in mind, that it is neither safe nor conducive to concord rashly to do away with those things that have been handed down with the authority of the past and that long usage and general agreement have confirmed. Nor should anything be changed except under pressure of necessity or for evident benefit.<sup>1</sup>

## I. INTRODUCTION

The wake left by the 1990 revisions to Articles 3 and 4 of the Uniform Commercial Code (UCC or Code) indicates that the UCC is approaching, if not wholly immersed in, a midlife crisis alluded to some years back by Grant Gilmore.<sup>2</sup> The alleged pro-bank, anti-consumer bias of those revisions and their inefficient treatment of many payment law issues have led not only to remonstrations on the substantive provisions of those articles,<sup>3</sup> but also to demands for a

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1. *On Mending the Peace of the Church*, in THE ESSENTIAL ERASMUS 331, 378 (John P. Dolan trans., 1983).

2. GRANT GILMORE, THE AGES OF AMERICAN LAW 96 (1977) ("The most difficult period in the life of a statute—as in the life of a human being—is middle age. Admittedly the statute is no longer what it once was but there is [] life in the old dog yet."); see also Grant Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 471-72 (1967) [hereinafter Gilmore, *Obsolescence*] ("[W]e shall no doubt be surprised by what happens to the Uniform Commercial Code between now and the year 2000.").

3. See, e.g., Mark E. Budnitz, *The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action*, 43 MERCER L. REV. 827, 827 (1992) (noting that the revision "represents a major failure in process"); Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA. L. REV. 679, 682-84 (1991) (discussing impact of revisions on consumers); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 106-20 (1993) (critiquing anticonsumer aspects of Article 4); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 592 (1991) [hereinafter Rubin, *Efficiency and Equity*] (concluding that the revisions of Articles 3 and 4 are "inequitable" and economically inefficient); Edward L. Rubin, *Thinking Like a*

critical reexamination of the entire process by which the UCC is drafted.<sup>4</sup> The principal targets in this frontal assault on the Code are the UCC's sponsors—specifically the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL)—and their perceived willingness to cater to powerful interest groups in the drafting process. Harsh edicts call for those institutions to reform the UCC drafting process,<sup>5</sup> undergo significant institutional reform,<sup>6</sup> or be abolished.<sup>7</sup> A small number of states have non-uniformly enacted revised Articles 3 and 4,<sup>8</sup> which evidences the commercial law community's reception of these criticisms. In addition, scholars have begun to scrutinize the structure and products of quasi legislatures such as the ALI and NCCUSL, as well as their susceptibility to interest group pressures.<sup>9</sup>

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*Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 781-88 (1993) [hereinafter Rubin, *Thinking Like a Lawyer*] (arguing that Articles 3 and 4 reflect a failure of the legislative process); Edward L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 OHIO ST. L.J. 1251, 1275 (1989) (concluding that consumers are marginalized in the uniform state laws process).

Defenses of the failure of revised Articles 3 and 4 to address aggressively consumer issues are rare. See, e.g., Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405, 412-16 (1991) [hereinafter Miller, *Study in Process*] (defending anticonsumer stance of Articles 3 and 4); William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811, 821-22 (1993) (arguing that uniform laws process does not function well with consumer issues).

4. See Patchel, *supra* note 3; Rubin, *Efficiency and Equity*, *supra* note 3; Rubin, *Thinking Like a Lawyer*, *supra* note 3; see also 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, 553 (1993) (questioning whether nineteenth century governmental theory ought to dictate twenty-first century commercial law).

5. See generally Patchel, *supra* note 3, at 156-57 (arguing that the drafting process should be more accessible); Rubin, *Thinking Like a Lawyer*, *supra* note 3 (discussing problems with the current drafting process and its lack of consumer participation).

6. See Patchel, *supra* note 3, at 161-62 (suggesting that the NCCUSL ought to reconsider its role as protector of state autonomy); Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 787 (tracing inefficient and inequitable results in Articles 3 and 4 to structure).

7. Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 788.

8. *Id.* at 784. In an earlier volume of the *Loyola of Los Angeles Law Review*, Professor Rubin recounted his letter writing campaign against revised Articles 3 and 4. *Id.* at 782-85. Consumer group lobbyists in California were able to parlay Rubin's objections into several nonuniform amendments to Articles 3 and 4. See Gail K. Hillebrand, *UCC Articles 3 and 4 in the California Legislature: A New Focus on Consumer Protection in Uniform Law Proposals*, 47 CONSUMER FIN. L.Q. REP. 123 (1993) [hereinafter Hillebrand, *A New Focus*].

9. See generally Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform Laws*, 25 J. LEGAL STUD. (forthcoming 1996) (examining whether the NCCUSL's proposals lead to efficient uniformity); Alan Schwartz & Robert E. Scott, *The Political*

Underlying these complaints is the suggestion that the drafters gravely erred in failing to produce an efficient, policy-driven, and pro-consumer piece of legislation. The complaints imply that the revisions are bad law because they failed to make changes to the UCC that would have been in the "public interest" or because the changes that were made contravene the public interest. The inevitable conclusion is that the process which generated such revisions must be corrupt. Although born in the revisions to Articles 3 and 4,<sup>10</sup> the challenge to the NCCUSL and ALI has great significance as the UCC continues along a journey of revision and expansion<sup>11</sup> that inevitably will transform the Code. Yet, while commentaries on the most recent revisions to Articles 3 and 4 and on the revision projects in progress have become legal scholarship's growth industry,<sup>12</sup> analysis of the issue of what rules and standards the revision efforts ideally ought to produce, is often inconclusive or highly debatable.<sup>13</sup> To claim, therefore, that those rules and standards ought to be efficient or pro-consumer, and to fault the NCCUSL and ALI should the Code come up short in that regard, relies upon a mistaken assumption that

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*Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (presenting an indepth study of the ALI and NCCUSL); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994) (examining the lawmaking process of Article 9).

10. Article 3 of the UCC applies to negotiable instruments, *see* U.C.C. § 3-102(a) (1990), while Article 4 applies to bank deposits and collections of "items," *see id.* § 4-102(a). "'Item' means an instrument or a promise or order to pay money handled by a bank for collection or payment." *Id.* § 4-104(a)(9). Transactions governed by Article 4A are expressly excluded from Article 4, as are credit or debit card slips. *Id.*

11. *See* Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 26-28 (1992) (discussing the scope of revisions); Patchel, *supra* note 3, at 85 n.4 (detailing revisions on an article-by-article basis).

12. *See generally* Symposium, *Is the UCC Dead, or Alive and Well?*, 26 LOY. L.A. L. REV. 535 (1993) (academic commentaries on Code revision efforts); Symposium, *Is the UCC Dead, or Alive and Well? Practitioners' Perspectives*, 28 LOY. L.A. L. REV. 89 (1994) (practitioners' views on Code revision efforts); Symposium, "Managing the Paper Trail": *Evaluating and Reforming the Article 9 Filing System*, 79 MINN. L. REV. 519 (1995) (academic commentaries on Article 9 filing rules and systems); Symposium, *Revised U.C.C. Articles 3 & 4 and New Article 4A*, 42 ALA. L. REV. 351 (1991) (academic commentaries on Articles 3, 4, and 4A); Symposium, *The Revision of Article 2 of the Uniform Commercial Code*, 35 WM. & MARY L. REV. 1299 (1994) (academic commentaries on Article 2 revision process); Symposium on the Revision of Article 9 of the Uniform Commercial Code, 80 VA. L. REV. 1783 (1994) (academic commentaries on Article 9 revision efforts); *see also* Patchel, *supra* note 3 (critiquing revisions to Articles 3 and 4); Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. PITT. L. REV. 441 (1994) (discussing UCC federalism issues).

13. *See infra* text accompanying notes 60-70.

agreement exists among Code practitioners and scholars on the proper substantive goals of the revisions. In light of the majestic role that the ALI and NCCUSL have played in the development of United States commercial law, suggestions that those organizations be taken out and shot—or at least embark upon a program of extensive therapy—are disquieting, especially in the absence of a consensus on the end goals of the Code revision enterprise.

These proposals for an actively political, reformist, and regulatory UCC also represent a significant departure from the approach taken by the original drafters of the UCC and contravene many of the NCCUSL's founding principles.<sup>14</sup> To a great extent revised Articles 3 and 4 take a view of public policy matters that is not unprecedented and that often is entirely consistent with the attitude of those who "invented" our Code.<sup>15</sup> In spite of their intellectual strengths, the drafters of the original UCC simply may have erred in failing to obtain

14. See, e.g., *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts*, in HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS AND PROCEEDINGS 431, ¶ 3, at 432-33 (1988) [hereinafter *Statement of Policy*]. Criteria considered by the NCCUSL to be "negative" in proposing or considering uniform laws are whether the subjects of the laws are

- (1) entirely novel and with regard to which neither legislative nor administrative experience is available;
- (2) controversial because of disparities in social, economic or political policies or philosophies among the various states; and
- (3) of purely local or state concern and without substantial interstate implications unless conceived and drafted to fill emergent needs or to modernize antiquated concepts.

*Id.*

15. See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 290-92 (1973) (discussing the drafting process and Llewellyn's sympathy toward the consumer); David W. Carroll, *Harpooning Whales, of Which Karl N. Llewellyn Is the Hero of the Piece; Or Searching for More Expansion Joints in Karl's Crumbling Cathedral*, 12 B.C. INDUS. & COM. L. REV. 139, 140-41 (1970) (discussing the effect of the original Code's failure to take a stance on consumer protection issues); Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 248 (1965) [hereinafter Dunham, *History of NCCUSL*] (finding that the original Code deliberately avoided consumer credit issues); Allison Dunham, *Reflections of a Drafter*, 43 OHIO ST. L.J. 569, 575 (1982) (stating that one of the "great omissions" in the original Code was avoidance of consumer protection); Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625, 625 (1993) (arguing that the original Code consciously left consumer protection issues to legislatures and courts); Homer Kripke, *Reflections of a Drafter*, 43 OHIO ST. L.J. 577, 582-83 (1982) (rejecting efforts to include consumer protection issues in original Article 9); Lary Lawrence, *Misconceptions About Article 3 of the Uniform Commercial Code: A Suggested Methodology and Proposed Revisions*, 62 N.C. L. REV. 115, 147 (1983) (suggesting that original Articles 3 and 4 gave little thought to consumer issues because drafters merely restated the preconsumer NIL).

a more consumer- and policy-oriented UCC. Evidence suggests that even some of the original Code drafters, were they to have had it their way, might have preferred a different, sometimes even more activist approach.<sup>16</sup> Moreover, in the years since adoption of the original UCC, the consumer and law-and-economics movements have reached maturity; legal theory has advanced; significant shifts in social attitudes, business culture, and business practices have occurred; and the interplay of state and federal roles in the regulation of commercial transactions has been transformed. It might be that such developments warrant a markedly different attitude toward content and substance in revising the UCC. Yet, time's inevitable progression by itself does not necessarily compel a brave, new public Code for our brave, new public world. That the revised UCC ought to provide a fountainhead for consumer rights or be a handbook for rational efficiency is not patently obvious, at least when viewed in the context of the whole history of the Code.

As perhaps is common to all midlife crises, the Code stands poised somewhat uneasily between tradition and radical change. This Article focuses on the revisions to Articles 3 and 4 and advances the case to be made for tradition—for an anticonsumer and inefficient UCC. The Article argues that, despite some imperfections, the basic structure of revised Articles 3 and 4 is sound, and the drafters' decision not to address aggressively consumer protection or efficiency issues was and is the proper approach for UCC drafting. Part II discusses briefly the role of the NCCUSL and ALI in the UCC revision project.<sup>17</sup> Part III develops and refines models for the drafting process that have emerged from the debate over the revisions.<sup>18</sup> Part IV rejects the prevailing "public interest" perspective on the UCC revisions and advances a functional methodology for

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16. See, e.g., TWining, *supra* note 15, at 125 (discussing Llewellyn's compromise on consumer issues); Kripke, *supra* note 15, at 582-83 (acknowledging Soia Mentschikoff's efforts to include consumer protection issues in Article 9); Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953) ("I am ashamed of it in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down."); William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 5 (1967) (explaining that the ultimate Code was not ideal in Llewellyn's view); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 468-70 (1987) (extensively discussing the drafting process and compromises that led to the Article 2 merchant rules).

17. See *infra* text accompanying notes 24-70.

18. See *infra* text accompanying notes 71-123.

evaluating those models.<sup>19</sup> Part IV then discusses the interest group debate in the specific context of the development of Articles 3 and 4<sup>20</sup> and argues that, while interest group theory illuminates the important values that inclusion in the drafting process evokes, a satisfactory model for UCC drafting must go beyond process values and address accountability and substance concerns as well.<sup>21</sup> Part IV concludes that a "contextual rules model" for the drafting process most adequately accommodates the values of inclusion with those of accountability and substance.<sup>22</sup> Part V applies this model to revised Articles 3 and 4 and concludes that the current complaints with Articles 3 and 4 are greatly exaggerated, if not completely unwarranted.<sup>23</sup>

## II. THE PARTICIPANTS AND GOALS

The UCC is the product of a collaborative effort of the NCCUSL and ALI. Founded in 1892, the NCCUSL is constituted of Commissioners—usually lawyers, judges, law teachers, and legislative drafting experts. These Commissioners are appointed by the governor or legislature of each state, the District of Columbia, Puerto Rico, and the Virgin Islands, but presumably owe no political allegiance to their respective jurisdiction.<sup>24</sup> The ALI, organized in 1923 and composed of judges, lawyers, and law professors, has as its purposes "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."<sup>25</sup> It

19. See *infra* text accompanying notes 129-43.

20. See *infra* text accompanying notes 158-79.

21. See *infra* text accompanying notes 144-93.

22. See *infra* text accompanying notes 194-214.

23. See *infra* text accompanying notes 215-86.

24. Detailed discussions of the NCCUSL's organizational structure can be found in Bugge, *supra* note 11, at 14-16; Patchel, *supra* note 3, at 88-93; Schwartz & Scott, *supra* note 9, at 601-02. A 1992 article broke down the various legal careers of the 322 NCCUSL Commissioners as follows:

- 49%—private practice;
- 14%—law professors or deans of law schools;
- 7%—state or federal judges;
- 25%—state officials or employees;
- 3%—in-house counsel or private business;
- 3%—full-time state legislators.

Bugge, *supra* note 11, at 14.

25. Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. U. L.Q. 283, 285-86 (quoting *By-Laws*, 2 A.L.I. PROC. 429 (1923)).

chooses its own members.<sup>26</sup> Although the ALI and NCCUSL actively engage in a number of other law reform efforts,<sup>27</sup> the two organizations joined forces as co-sponsors of the original UCC.

While the ALI's stated purposes are broadly articulated and public-spirited in orientation, the NCCUSL's are far more circumscribed. The NCCUSL's constitution provides that its purpose is merely "to promote uniformity in the law among the several states on subjects as to which uniformity is desirable and practicable."<sup>28</sup> The NCCUSL's role in the uniform laws process is deeply entrenched in the federalist tradition. The federal/state dynamic in particular has had an extremely profound influence on the development of commercial law. After a nineteenth-century flirtation with a federal commercial common law,<sup>29</sup> the United States Supreme Court in *Erie Railroad Co. v. Tompkins*<sup>30</sup> established that state law would govern most ordinary commercial transactions.<sup>31</sup> The uniform state laws process paralleled these judicial developments as "a means of removing any excuse for the federal government to absorb powers thought to belong rightfully to the states."<sup>32</sup> Another view relates the founding of the NCCUSL to perceptions that some subjects were outside of Congress's Commerce Clause jurisdiction, as then understood.<sup>33</sup> The UCC itself played an important role in continuing the perceived power of the states to regulate in the commercial law area. The NCCUSL's specific involvement with the Code began after a

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26. Schwartz & Scott, *supra* note 9, at 600.

27. The NCCUSL promulgates both model and uniform acts. *Statement of Policy*, *supra* note 14, at 433. Uniform acts seek to alleviate problems caused by lack of uniformity among the laws of the states that might deter "the free flow of goods, credit, services, and persons between the states; restrain full economic and social development; and generate pressures for federal intervention to compel uniformity." *Id.* at 388.

In contrast to uniform acts, model acts do not affect relationships among the states but involve problems common to many or all of the states. *Id.* In addition to its UCC efforts, the ALI proposes restatements of the law and sponsors other special projects. See Schwartz & Scott, *supra* note 9, at 600-01 (describing the ALI's participation in other law reform projects).

28. *Constitution and Bylaws*, in HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS AND PROCEEDINGS, *supra* note 14, 391 § 1.2, at 391.

29. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); Boris I. Bittker, *The Dormant Commerce Clause Doctrine*, *Swift v. Tyson*, *Uniform State Commercial Laws, and Federal Common Law: Ships that Passed in the Night?*, 8 CONST. COMMENTARY 87, 94 (1991).

30. 304 U.S. 64 (1938).

31. *Id.* at 78.

32. Dunham, *History of NCCUSL*, *supra* note 15, at 237.

33. See Bittker, *supra* note 29, at 95-96 (discussing nineteenth-century perception of congressional commerce powers).



movement arose to enact a Federal Sales Act, a movement that initially had the support of Karl Llewellyn.<sup>34</sup> Sensing a threat to the states' established role in regulating commercial law, the NCCUSL stepped in and proposed the UCC project as a substitute for the federal act.<sup>35</sup>

In spite of the federalist origins of the UCC, a century-long commercial law debate on the continuing vitality of federalism<sup>36</sup> has recently been reopened. The commercial world that the original UCC addressed was relatively simple, at least by comparison with today. In the years since the states enacted the original UCC, the federal government has enacted a significant amount of federal consumer protection legislation that affects commercial transactions<sup>37</sup> and has been directly involved in the areas covered by the UCC.<sup>38</sup> Some commentators, therefore, have argued that these changes now either mandate substantial, if not entire, federal preemption of the commercial law area<sup>39</sup> or oblige the NCCUSL to relinquish its role as the key protector of state legislative power.<sup>40</sup> Presumably the underlying argument is that, at this particular moment in history, the need for a national federal commercial law has become critical. As

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34. TWINING, *supra* note 15, at 277-79.

35. *See id.*

36. *See* Gilmore, *Obsolescence*, *supra* note 2, at 463-66, 475-76 (discussing the periodic emergence of the federalism debate throughout history).

37. *See, e.g.*, Truth in Savings Act § 261, 12 U.S.C. §§ 4301-4313 (1994) (requiring disclosure of interest rates on deposit accounts); Truth in Lending Act § 101, 15 U.S.C. §§ 1601-1665 (1994) (assuring "meaningful disclosure of credit terms" to consumers); Fair Credit Reporting Act § 601, 15 U.S.C. § 1681 (1994) (regulating when a consumer reporting agency may furnish a consumer report).

38. *See, e.g.*, Home Ownership and Equity Protection Act of 1994 § 153, 15 U.S.C. §§ 1640-1641 (1995) (eliminating Article 3 holder in due course status in certain types of high interest rate home equity loans); Expedited Funds Availability Act § 613, 12 U.S.C. §§ 4001-4010 (1994) (intruding into Article 4 check collections); Magnuson-Moss Warranty-Federal Trade Commission Improvement Act § 101, 15 U.S.C. §§ 2301-2312 (1994) (regulating written warranties); FTC Holder-in-Due-Course Regulations, 16 C.F.R. § 433 (1995) (intruding into Article 3 holder in due course doctrine).

39. *See, e.g.*, E. Hunter Taylor, Jr., *Foreword: Federalism or Uniformity of Commercial Law*, 11 RUT.-CAM. L.J. 527, 528 (1980) (arguing that isolated federal legislation creates "complexity and confusion" and that substantial federal action is merited); E. Hunter Taylor, Jr., *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 338 (1978) (arguing that substantial federal action is merited).

40. *See generally* Patchel, *supra* note 3, at 154-62 (suggesting that the NCCUSL should consider whether areas ought to be covered by federal as opposed to state law); Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 777-81 (mocking Article 4 participants' "reverence for state law and distaste for the federal administrative process").

this Article later discusses,<sup>41</sup> strong reasons exist that weigh against such a choice.

The UCC unquestionably is the NCCUSL's biggest success story, with the NCCUSL having secured adoption of the original UCC in nearly every state.<sup>42</sup> Additional Articles proposed subsequent to drafting of the original UCC have also received widespread acceptance in state legislatures.<sup>43</sup> The UCC revision process begins when the Permanent Editorial Board of the UCC recommends to the ALI and NCCUSL that revisions are desirable.<sup>44</sup> A study group, usually comprised of a mix of academics and practitioners, is appointed to research the need for change and to prepare a report on the revision, which is sent to the ALI and NCCUSL for approval.<sup>45</sup> From that point on, an NCCUSL drafting committee handles the transformation of the study group report into a final proposed uniform statute.<sup>46</sup> The drafting committee is comprised of practicing lawyers, although academics frequently act as reporters for the committee.<sup>47</sup> Both the ALI and NCCUSL then must approve the revisions prior to submission to the state legislatures.<sup>48</sup> However, the NCCUSL alone is responsible for seeking enactment of the finished product in the individual state legislatures.<sup>49</sup>

Although the NCCUSL and ALI play the predominant role in revising the UCC, the American Bar Association (ABA) also has significant influence on the overall revision process. First, ABA committees play a key advisory role throughout the drafting process.<sup>50</sup> More importantly, however, is the recent practice of submitting ALI and NCCUSL approved drafts to the ABA House of Dele-

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41. See *infra* text accompanying notes 180-92.

42. See Ribstein & Kobayashi, *supra* note 9 (manuscript at 52 tbl. A1, on file with *Loyola of Los Angeles Law Review*) (listing states' record of passage of NCCUSL acts).

43. See *id.*; see also Bugge, *supra* note 11, at 24-28 (discussing the original UCC and subsequent proposed Articles).

44. Schwartz & Scott, *supra* note 9, at 600.

45. *Id.* at 600-01; see also Marianne B. Culhane, *The UCC Revision Process: Legislation You Should See in the Making*, 26 CREIGHTON L. REV. 29, 46-58 (1992) (discussing in detail the steps involved in the approval process). Criteria governing the selection of the study group include subject-matter expertise, credibility, and mix of academics and practitioners. Schwartz & Scott, *supra* note 9, at 601.

46. Schwartz & Scott, *supra* note 9, at 601-02.

47. *Id.* at 602.

48. See *id.* at 601.

49. See Miller, *Study in Process*, *supra* note 3, at 406.

50. See Culhane, *supra* note 45, at 45-46 (discussing the ABA participation in the drafting process).

gates.<sup>51</sup> Failure to secure ABA approval of the proposed legislation may substantially undermine the possibility of widespread enactment of the law by the individual states.<sup>52</sup> Finally, the ABA aids the NCCUSL in attempting to secure enactment at the state level.<sup>53</sup>

While the interrelationship between the uniform state laws process and federalism concerns has served to define the institutional character of the NCCUSL, significant ambiguity still exists regarding the substance and scope of the legislation produced by the uniform laws process. Unlike other law-making bodies, the ALI and NCCUSL, sponsors of the UCC, are unique because they remain largely politically unaccountable to any constituent body.<sup>54</sup> Also unlike other legislative bodies, the NCCUSL and ALI lack the ability to enact the laws that they propose.<sup>55</sup> That right remains with the state legislatures. The success of any proposed uniform law therefore rises or falls with the NCCUSL's ability to convince state legislatures to enact the legislation.

This interplay between the NCCUSL's unaccountability and its inability to create binding law is a significant component of attempts to describe the goals of the uniform laws process. In the public legislative process, political accountability of legislators is thought to be a key safeguard that ensures "public-regarding" legislation.<sup>56</sup> Yet, it is the presumed independence of the UCC drafting process that some deem to be the NCCUSL's most valuable asset.<sup>57</sup> The lack of political pressures ought to result in law that, at least in some sense, is of superior quality than that wrangled out through the ordinary political process.<sup>58</sup> This qualitative superiority in the legislative product supports enactment of the proposed law by the states. Some

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51. *Id.*

52. *Id.* at 52.

53. *Id.* at 55-58.

54. See *supra* text accompanying notes 24-26 (discussing the appointment of ALI and NCCUSL members).

55. See James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2096 (1991).

56. Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 75 (1990).

57. See White, *supra* note 55, at 2096 (suggesting that lack of accountability "produces a group that is much more sophisticated in the law and more interested in long-range questions").

58. See *id.* at 2097 ("[T]he principal argument that the Commissioners can make on behalf of a uniform law when it is considered by a state legislature is its technical and substantive superiority over a law born in the back room of a state legislature and sired by a lobbying organization.").

evidence, though, suggests that interest groups can and do exert significant influence on the UCC drafting committees.<sup>59</sup> Should interest group domination of the revision process exist, it would have significant ramifications on current views of the proper substance, as well as the success, of the UCC. To the extent that the Code revisions are tainted by undue special interests, the key reason for enacting any revision—qualitative superiority—becomes substantially less powerful.

Apart from the question of independence, the specific details of the way in which the law produced by the NCCUSL and ALI is qualitatively better than that produced on a state-by-state basis are vague. Some commentators have suggested that, with respect to substance of uniform laws, the NCCUSL ought to seek to produce the best law,<sup>60</sup> neutral law,<sup>61</sup> better law,<sup>62</sup> superior law,<sup>63</sup> “fair, balanced, and passable” law,<sup>64</sup> “wise and workable” law,<sup>65</sup> or perhaps just merely “enactable” law.<sup>66</sup> Others have argued that the UCC revisions ought to serve the “public interest,”<sup>67</sup> be “balanced [and] public-oriented,”<sup>68</sup> or advance the “common good.”<sup>69</sup> Or, finally, some have suggested that the revisions ought simply be “useful[] to society.”<sup>70</sup> The opacity of these attempts to articulate the goals of the revision efforts is easily discernible. Perhaps in recognition of this, recent literature has attempted to develop with greater clarity an

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59. See generally Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 781-88 (arguing that interest groups dominated revisions to Articles 3 and 4); see also Schwartz & Scott, *supra* note 9, at 607-37 (developing formal models for interest group pressures in uniform laws process); Scott, *supra* note 9, at 1784-1851 (discussing politics of Article 9).

60. See Patchel, *supra* note 3, at 126, 139, 162.

61. *Id.* at 146, 162.

62. See generally Rubin, *Efficiency and Equity*, *supra* note 3, 579-86 (arguing that the Code is inferior to federal legislation).

63. White, *supra* note 55, at 2096.

64. Marion W. Benfield, Jr. & Peter A. Alces, *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405, 1423-24 (1994) (emphasis omitted).

65. Culhane, *supra* note 45, at 30.

66. See Miller, *Study in Process*, *supra* note 3, at 408; White, *supra* note 55, at 2097.

67. Donald J. Rapson, *Who Is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249, 255-59 (1994); Carlyle C. Ring, Jr., *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287, 290 (1994).

68. Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 762.

69. Scott, *supra* note 9, at 1820.

70. Richard A. Elbrecht, *The NCCUSL Should Abandon Its Search for Consensus and Address More Difficult and Controversial Issues Applying “Process” Concepts*, 28 LOY. L.A. L. REV. 147, 152 (1994).

overall framework for assessing the proper content of the UCC revisions. The next Part of this Article sets forth these approaches.

### III. MODELS OF THE PROCESS AND THE PRODUCT

As revised Articles 3 and 4 make their way through the state legislatures and as other UCC revision efforts progress, a growing amount of commentary has begun to address the complex relationship between the ALI, the NCCUSL, the Code drafting process, and the proper goals of the revision efforts.<sup>71</sup> The growth in substantive commercial law doctrine and the myriad of legislative bodies now engaged in the regulation of commercial transactions set the revision process in a world arguably far different from that which the original drafters of the UCC confronted. For example, commercial law has become increasingly fragmented between the UCC and other state commercial legislation. At the same time, the federal role in regulating commercial transactions has attained greater importance. In the face of such changes, the UCC revision process raises, if only potentially, legal issues of greater complexity and political and normative dimension.

Precisely how the revision process should be designed in order to accommodate these developments is an open issue. Certainly legislative process, institutional, and structural considerations bear significantly upon the final product of any revision effort.<sup>72</sup> In addition, the ultimate resolution of this panoply of issues emerges only after much debate, negotiation, and compromise. Because the ALI and NCCUSL function as "legislatures," albeit private ones, positive political theory has been used to evaluate their institutional structure and that structure's relationship to the legislation that it produces.<sup>73</sup> In a similar vein, the give-and-take and political dynamics inherent in any legislative process have caused some commentators to allude to negotiated rulemaking when addressing the proper scope of the UCC revision process.<sup>74</sup>

71. See, for example, sources cited *supra* note 12 (listing commentaries on the process).

72. See Schwartz & Scott, *supra* note 9, at 597 ("[T]he form and substance of a law are significantly endogenous to the law-creating institution.").

73. See generally *id.* (analyzing how such lawmaking groups function); Scott, *supra* note 9, at 1803-06 (describing the nature and function of the UCC lawmaking process).

74. See Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 744, 786-87; see also Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *GEO. L.J.* 1 (1982) (describing a negotiating process which would result in better rules); Charles H. Koch, Jr. & Beth

Although useful, these analogies to the public legislative process in an attempt to model and understand the UCC process can be somewhat misleading. The process of negotiating administrative rules, federal agency rulemaking, and the political dynamics of public legislatures do not necessarily carry over directly into the uniform laws arena. Consider negotiated rulemaking. Any negotiation relies upon rules of the game that will ensure stability of the process and also produce an acceptable outcome in the particular legal context.<sup>75</sup> Evaluating negotiated rulemaking as a law-making process thus involves consideration of the propriety of negotiation against the backdrop of views on the political role of federal agencies.<sup>76</sup> Similarly, federal agency rulemaking proceeds within the arena of administrative law issues such as standing, agency discretion, and delegation concerns.<sup>77</sup> These are federal constitutional issues that have little practical direct application to the UCC and the entities that create it.

Nor are political theories about public legislatures necessarily germane to all aspects of the UCC revision process. Although the ALI and NCCUSL are indeed "legislatures" in the sense that they "pass" a proposed UCC, they significantly lack the ability even as lawmakers to enact the UCC as binding law. Enactment, rather, is the choice of the state legislatures to which the proposal is submitted. It is only within these narrow confines that the "legislative" function of the ALI and NCCUSL can be modeled, understood, and evaluated. Straightforward application of public law theories to the UCC revision process might, therefore, misdirect the analysis. The analogies to administrative law and to the legislative process usefully illuminate the negotiations that occur in the revision process and the lawmaking

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Martin, *FTC Rulemaking Through Negotiation*, 61 N.C. L. REV. 275 (1983) (arguing for an informal rule-making procedure); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206 (1994) (arguing that incentive-based systems should be emphasized); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985) (discussing the Environmental Protection Agency's approach to negotiated rulemaking).

75. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 4 (2d ed., Penguin Books 1991) (1981); see also Harter, *supra* note 74, at 42-112 (discussing criteria that may lead to successful negotiations of regulatory rules).

76. Harter, *supra* note 74, at 7-8. Even in the regulatory context, negotiation might not always be the appropriate tool with which to develop a regulation. See *id.* at 42-52 (suggesting conditions under which negotiation may lead to success).

77. See *id.* at 2-18.

function of the ALI and NCCUSL. However, political, legislative, and constitutional concerns arise in those areas that often might be absent in, or inapplicable to, the UCC revision process.

A political or legislative perspective on the UCC revision process is certainly not entirely off the point. The revision efforts aspire to produce law that has the potential to have a binding effect and are indeed a "law-making" process. Many concerns about public lawmaking in general thus apply equally to the private process that produces the UCC. Rather, off-the-shelf application of theory regarding *public* legislative processes to model a *private* process risks placing the UCC in a procrustean bed in which the public-based model accommodates public concerns not applicable to the UCC and, at the same time, fails to accommodate concerns idiosyncratic to private lawmaking and lawmakers. Any model or evaluation of the UCC process simply first requires a basic framework for the UCC law-making effort, one that accurately reflects the private uniform laws process rather than administrative or public legislative processes.

Recent scholarship addressing various aspects of the revision efforts suggests three general approaches to this issue. First, the most vocal critics of revised Articles 3 and 4 have advanced what might be termed a "policy" model as the foundation for their critiques of those revisions.<sup>78</sup> Alternatively, it has been suggested that the political dynamics of the private legislative process might tend to create politically biased rules, suggesting the possibility that these dynamics might be exploited to formulate a model for the process.<sup>79</sup> Finally, what will be called a "contextual rules" model would seek to ground the revisions in the history and development of the UCC as well as the practices it regulates.<sup>80</sup> After discussing the approaches in this Part, Part IV of the Article will evaluate them.<sup>81</sup>

#### A. Policy/Theory

A predominant theme in critical attacks on the revisions to Articles 3 and 4 faults those articles for their failure to arrive at a correct balance among the numerous public policy issues that the revisions evoked.<sup>82</sup> Underlying this view is the implicit claim that

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78. See *infra* text accompanying notes 82-88.

79. See *infra* text accompanying notes 89-96.

80. See *infra* text accompanying notes 97-123.

81. See *infra* text accompanying notes 124-214.

82. See Patchel, *supra* note 3, at 110 (stating that revised Articles 3 and 4 were

the NCCUSL and ALI *ought* to structure the revision process in order to produce legislation that does correctly balance those policy issues. Accordingly, this might be entitled a "policy model" of the revision process. A recent critique of revised Articles 3 and 4 succinctly sets forth one perspective on the policy model:

We have learned to view legal rules, particularly in the commercial area, as an instrument of social policy rather than an autonomous body of doctrine reflecting general and apolitical principles of law. The basic questions to be asked, therefore, in evaluating legal rules are what purpose they serve and how well they achieve that purpose. There is no methodical way to catalogue the entire range of social policies in a given area, so the best rules must be developed by judgment and instruction. The two main policies that appear relevant to a payment system such as checks are economic efficiency and social equity; two subsidiary ones are the maintenance of the system and the maintenance of the institutions that operate the system.<sup>83</sup>

In its attempt to attain a proper balance between competing public policy choices, the policy model first advocates that the NCCUSL and ALI ensure that the drafting process remains accessible to all interested parties.<sup>84</sup> With respect to Articles 3 and 4, these interests might generally be categorized as businesses, banks, and

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excessively balanced against consumers); *id.* at 162 (faulting uniform laws process for failing to design legislation which "reach[es] reasonable accommodation among the interests of all affected groups"); Rubin, *Efficiency and Equity*, *supra* note 3, at 592-93 (arguing that revisions are inefficient and inequitable).

83. Rubin, *Efficiency and Equity*, *supra* note 3, at 560.

84. See Patchel, *supra* note 3, at 156-57 (drafting process needs to be opened up to include all interested groups); Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 787-88 (criticizing alleged exclusion of consumer groups from revisions to Articles 3 and 4).



consumers.<sup>85</sup> According to the critics of revised Articles 3 and 4, the process ought then to have proceeded as follows:

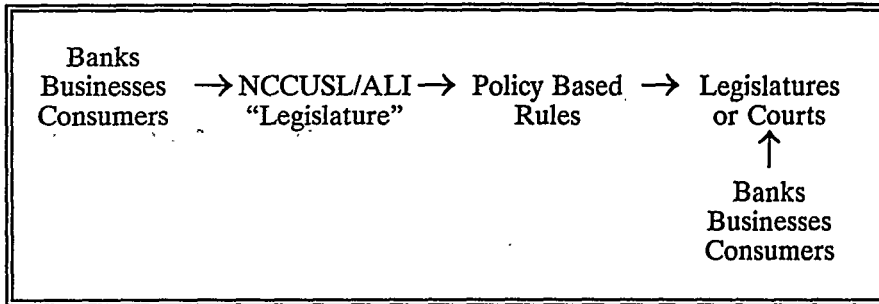


FIGURE 1

Underlying the policy model in *Figure 1* is the premise that the NCCUSL study groups and drafting committees ought to balance all interest group concerns and use policy considerations, efficiency and equity in the context of Articles 3 and 4, as the guides for formulating revised UCC rules.<sup>86</sup> To the extent that interest groups are not successful in obtaining a desired result through the uniform laws process, those interest groups always could lobby the relevant state legislature at the enactment stage, either by opposing enactment or by seeking nonuniform amendments to the uniform law approved by the NCCUSL and ALI. In addition, interest groups could seek federal preemption of the area or part of the area, or seek favorable interpretations of the law using the judicial process.

85. See U.C.C. art. 3 prefatory note (1990) (listing advisors and interest group representatives). In addition to banks, businesses, and consumers, federal agencies regulating payment issues, legal academics, and nonbank entities involved in the payment system of course have a strong interest in the substantive rules that govern the payment system. See *id.* (listing federal reserve and association representatives). Any omission is not intended to imply otherwise, but only to focus upon the most significant interest groups involved in the Article 3 and 4 drafting process.

The pertinent interest groups would vary depending upon the Article of the UCC being revised. In the Article 9 revision process, for example, the predominant interest groups include not only consumer debtors but also specialized asset-based lenders, commercial banks, unsecured creditors and debtors, business lawyers, and academics. See Scott, *supra* note 9, at 1806-07 (discussing interests affected by Article 9 revisions); see also Rapson, *supra* note 67, at 267-68 (discussing interest group involvement in Article 5 revision process).

86. Throughout this Article the term "rules" is used to denote both bright-line, concise rules as well as broad, open-textured rules frequently referred to as standards. See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-62 (1992) (discussing distinctions commonly drawn between rules and standards).

Although the policy approach was advanced specifically to critique the revisions to Articles 3 and 4, recent views on other Code revision projects are conceptually similar to the policy approach explained above by suggesting that legal theory ought to play a predominant role in the drafting process. For example, Professor Richard Speidel, reporter to the Article 2 drafting committee, has suggested that relational contract theory ought to inform and guide the Article 2 revisions.<sup>87</sup> Alternatively, law and economic scholars, not surprisingly, have asserted that the NCCUSL ought to draft laws "that reduce operational inefficiencies imposed on socially beneficial private transactions."<sup>88</sup> In each case, reference to an overarching policy or theory is used to support a particular view on the appropriate substance of the Code. Therefore, each might properly be classified as a policy approach to the revision process.

### B. Politics

Another recent response to the debate over the UCC revision process has been to apply interest group theory to the private uniform laws process.<sup>89</sup> Falling generally under the rubric of "public choice theory,"<sup>90</sup> this line of attack seeks to assess the effects that interest-group influences and voting behavior might have on the revision process and on the final content of the Code.<sup>91</sup> It is important to note that although the approach seeks to explain interest-group influence and its relationship to the substantive law produced by the revision

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87. See Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789 (1993) (discussing the characteristics and importance of relational contract theory).

88. Scott, *supra* note 9, at 1820 (stating views on the common good).

89. See generally Patchel, *supra* note 3 (assessing pro-business bias of the uniform law process in light of interest group theory); Schwartz & Scott, *supra* note 9 (analyzing interest group effects on the law-making process); Scott, *supra* note 9 (analyzing the political economy of the private law-making process responsible for creation of the UCC).

90. A good introduction to public choice can be found in Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987). Public choice literature has two dominant themes. First, it focuses on the structure of voting rules and the effect that voting structures have on the outcomes of collective decision making. Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 126 (1989). Second, it focuses on the explanation or prediction of political behavior and falls under the general category of "interest group theory." *Id.*

91. See Schwartz & Scott, *supra* note 9, at 607-10 (summarizing conclusions on the relation between information availability, interest group lobbying, and forms of rules produced); Scott, *supra* note 9, at 1816-22 (discussing effects of interest groups on the law-making process).

process, it does not prescribe the content of the rules generated by the drafting effort. The public choice perspective, however, is not wholly disengaged from normative issues relating to substantive content of the laws emerging from the process. Public choice aims to establish that improper influence by interest groups may justify a court or state legislature in disregarding the privileged status that the NCCUSL's products normally might have with those entities.<sup>92</sup>

Although largely explanatory, public choice suggests that political dynamics in the process exist which raise interesting possibilities for the substance of the UCC. Under this view interest groups can exert strong, if not overwhelming, pressure over the revisions. This pressure, by hypothesis, plays a significant role in the final content of the rules created by that process.<sup>93</sup> Interest group involvement, which can reflect anything from public-spirited participation to capture by particular groups of the drafting committees, could be reflected in the drafting process through inclusion or exclusion in the drafting enterprise of particular interest groups.<sup>94</sup> Some underlying principles of a political model for the drafting process would differ from those of the policy model in *Figure 1*. A political model would seek to favor one particular interest group or collection of interest groups over others rather than attempt to accommodate competing groups in the process. Nor would the process consider policy or theory to evaluate the content of the rules produced. Rather, the content would inevitably be biased toward the participating groups. Although the groups that might be deemed as the selected beneficiaries would vary depending on the portion of the Code being revised, in the Article 3 or 4 context experience suggests that the process

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92. Schwartz & Scott, *supra* note 9, at 597-98; Scott, *supra* note 9, at 1811.

93. See Schwartz & Scott, *supra* note 9, at 609-10. Professors Schwartz and Scott hypothesize, using structure-induced equilibrium theory, that when participants are symmetrically informed as to the consequences of a proposal, the process will result in vague rules. *Id.* at 615-21. In a world of asymmetric information where a single interest group dominates the revision process, bright-line rules favoring the dominant interest group will be generated. See *id.* at 630-33.

94. Some commentators have vaguely suggested that manipulation of the process through exclusion or inclusion might result in normatively appealing results. Cf. Rapson, *supra* note 67, at 266-67 (suggesting closure of process to limit interest group pressures on drafting committees); Scott, *supra* note 9, at 1848 ("[O]pening the NCCUSL process to a wider range of competing interest groups runs the risk of sacrificing the clarity of the Article 9 rule structure. Ironically, it is the clarity of the rules that makes the statute so attractive to all affected [parties] in the first place.").

might seek to favor either consumers or banks and other financial institutions.<sup>95</sup>

Under a "consumer rights" political model, interest groups representing consumer interests would receive predominant consideration in the drafting process. Rather than seeking an overall balance among the varying interests by applying public policy, the goal under this model would be to ensure adequately consumer interests, irrespective of the needs, goals, or agendas of other interest groups.<sup>96</sup> The consumer rights model can be diagrammed as follows:

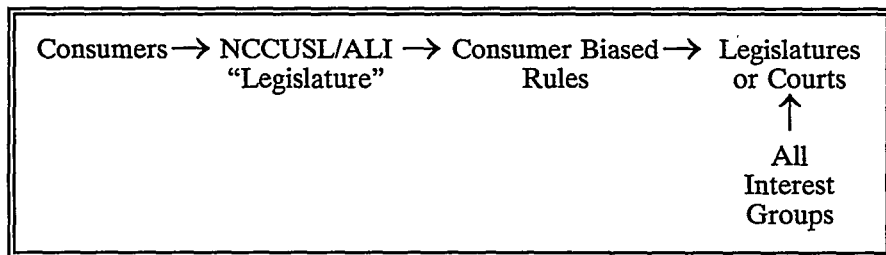


FIGURE 2.1

Banks and other business interests would then seek to have their interests incorporated into the law by either opposing enactment on a state-by-state basis, seeking nonuniform amendments, seeking federal intervention in the area, or using the judicial process to obtain favorable interpretations of relevant statutory provisions.

Quite obviously, if the desire is to accommodate business interests rather than consumer interests, a different group, such as financial institutions, could be substituted as follows:

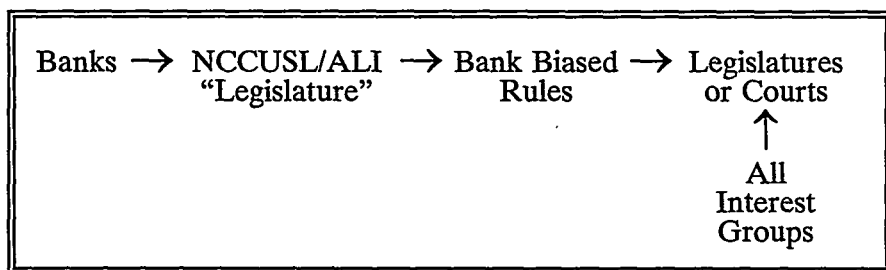


FIGURE 2.2

95. See *supra* note 85 and accompanying text.

96. In contrast, a policy approach to the drafting process would seek to balance the interests using policy considerations rather than to favor one particular interest over the other.

Under this "bank rights" political model, for example, banks would be favored by the ALI and NCCUSL in an effort to produce a uniform law that inevitably would protect bank interests. Consumer groups would be left to secure their interests by directly lobbying the state legislatures against enactment, by seeking nonuniform amendments, by seeking federal preemption of the area, or by seeking judicial interpretations of the statute that favor consumer interests.

### C. Context

A final general approach to the revision process disengages the revision process from the political pressures or policy analysis that the preceding models seek to emphasize. This approach refers to the UCC itself and to the practices it regulates in order to determine the appropriate scope and substance of the revisions. Because this approach seeks to ground the revision process in the overall context in which the law is to apply, it appropriately might be called a "contextual rules" model.

Professor Robert Hillman's comprehensive analysis of "no oral modification" clauses in the context of revising Article 2<sup>97</sup> illustrates in detail one application of the contextual rules approach. Hillman first suggests that any benefits resulting from a revision of a particular UCC rule might be exceeded by its costs.<sup>98</sup> Such costs include those incurred through drafting miscalculations or inferior compromises that diminish the effectiveness of the Code section being revised and that conflict with the overall vision of the Code Article.<sup>99</sup> In addition, there are costs incurred in seeking fifty-state reenactment, reeducation costs, and litigation costs.<sup>100</sup> Hillman then goes on to suggest numerous general principles that ought to guide and constrain the NCCUSL's assessment of whether, and to what extent, a particular UCC section should be revised.<sup>101</sup> Under this approach, reconsideration is warranted when (1) the provision has been the subject of frequent litigation that reveals inconsistent, vague, or ambiguous language;<sup>102</sup> (2) a major and relatively complete change in technolo-

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97. Robert A. Hillman, *Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model*, 35 WM. & MARY L. REV. 1509 (1994).

98. *Id.* at 1509.

99. *Id.*

100. *Id.* at 1509-10.

101. *See id.* at 1513-22.

102. *Id.* at 1514-16. While litigation is one indication that revision may be necessary, it is not a sufficient one. Certain UCC sections setting forth open-textured standards such

gy has rendered the section obsolete;<sup>103</sup> (3) substantial empirical evidence demonstrates that the section impedes acceptable commercial practices;<sup>104</sup> (4) the section is inconsistent with other law;<sup>105</sup> or (5) the section has been subject to several nonuniform amendments.<sup>106</sup> All of these criteria focus on the context in which the rule under consideration for revision has operated in order to determine the scope of the revision.

Other recent analyses of possible UCC revisions also reflect, if only implicitly, this contextual approach to the process. For example, James J. White's proposal for repeal of UCC section 9-301(1)(b),<sup>107</sup> which subordinates an unperfected security interest to the rights of lien creditors, relies predominantly upon context as the reason supporting repeal of that section.<sup>108</sup> After assessing the consequences of repeal in terms of fairness and efficiency,<sup>109</sup> White exhaustively addresses the case law and concludes that repeal would reduce wasteful litigation.<sup>110</sup> Similarly, Raymond Nimmer's overall approach to codification and to the Article 2 revisions is grounded in an

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as the obligation of good faith and fair dealing, *see* U.C.C. §§ 1-203, 2-103 (1990), and the Article 2 doctrine of unconscionability, *see id.* § 2-302, have intentionally been left open-ended and invite litigation on a case-by-case basis. In these instances litigation alone does not suggest a need for revision. Hillman, *supra* note 97, at 1514-15. However, analysis of litigation under such standards may reveal that judicial resources are being wasted in a vexatious and meaningless fashion, which may justify at least a preliminary reconsideration of the scope of the standard. *See generally* A. Brooke Overby, *Bondage, Domination, and the Art of the Deal: An Assessment of Judicial Strategies in Lender Liability Good Faith Litigation*, 61 FORDHAM L. REV. 963 (1993) (reviewing lender liability good faith litigation and arguing that the obligation of good faith has resulted in excessive litigation).

103. Hillman, *supra* note 97, at 1516-17.

104. *Id.* at 1517-18.

105. *Id.* at 1518.

106. *Id.* at 1518-19. In addition, Professor Hillman suggests another general principle that deals more with drafting style and format than with substantive content: The Code rules and standards should be set forth in the text of the UCC rather than in its commentary. *Id.* at 1519.

107. U.C.C. § 9-301(1)(b) (1990).

108. James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823 (1993).

109. *Id.* at 826-30.

110. *See id.* at 830-41. White takes a similar empirical and contextual approach to the UCC in his evaluation of the impact of Article 2. *See* James J. White, *Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition*, 75 MICH. L. REV. 1262 (1977). A thorough analysis of Article 2 litigation leads White to point to particular provisions that ought to raise concerns for drafters. *Id.* at 1281-82 (judicial confusion arising between U.C.C. § 2-201 and § 2-207); *see also* James J. White, *Reforming Article 9 Priorities in Light of Old Ignorance and New Filing Rules*, 79 MINN. L. REV. 529 (1995) (adopting contextual approach in evaluating Article 9 filing rules).

overall contextual framework.<sup>111</sup> Nimmer's approach clearly rejects a wholly theoretical or policy-based view on the revisions in favor of an approach that involves a detailed examination of commercial practice, commercial law, and contract policy.<sup>112</sup>

In addition to its visibility in many analyses of revisions in progress, context as the guiding principle for UCC drafting also has support in the history of the Code. The contextual model bears an obvious similarity to Karl Llewellyn's idea of "situation-sense" in judging.<sup>113</sup> What Llewellyn meant by the term is a subject of much debate.<sup>114</sup> Views on situation-sense range from the concept being an analytic and systematic method for classifying facts to being a natural law theory under which immanent law is uncovered by the decisionmaker.<sup>115</sup> One can reject the latter view of situation-sense—uncovering of immanent law—without denying the power of the former view as a useful framework for guiding a codification process. It is clear that context was important to the original drafters of the UCC. While difficult to articulate precisely, contextual rules in the sense used by the original drafters imply three distinctive attributes. First, contextual rules are reflective on the past.<sup>116</sup> Accordingly they cannot be deduced solely from abstract concepts such as efficiency, fairness, autonomy, or equality, at least in the absence of some justification or support from the past.<sup>117</sup> Second,

111. See Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinforcing Article 2*, 35 WM. & MARY L. REV. 1337 (1994).

112. *Id.* at 1365. Nimmer asserts that the source for substantive commercial law default rules

lies not in a theoretical model, but in a reference to commercial and trade practices. This is not simple faith in empirical over normative sources for commercial law. Rather, it stems from the reality that, even though we may not know how law interacts with contract practice, decisions about contract law in a codification or in common law will continue to be made. Unless countervailing policy concerns clearly appear, we should make those decisions by reference to sources that reflect an accumulation of practical choices made in actual transactions.

*Id.* at 1360.

113. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121-57 (1960).

114. TWINING, *supra* note 15, at 216-27 (discussing competing interpretations of situation-sense).

115. *Id.*

116. Karl N. Llewellyn, *Two Documents on the Uniform Commercial Code: Keynote Memorandum*, in TWINING, *supra* note 15, app. E at 527 [hereinafter Llewellyn, *Keynote Memorandum*] (noting that drafters should recanvass work and experience).

117. See Hillman, *supra* note 97, at 1519 (rejecting the idea that normative criteria such as efficiency or fairness play any role in the revision effort); Nimmer, *supra* note 111, at

contextual rules seek to codify existing business practices<sup>118</sup> and thereby ensure reliability and predictability in commercial transactions.<sup>119</sup> Finally, contextual rules are forward-looking because they encourage development, rather than stagnation, of the law.<sup>120</sup>

A contextual rules approach to the Articles 3 and 4 revisions might be diagrammed as follows:

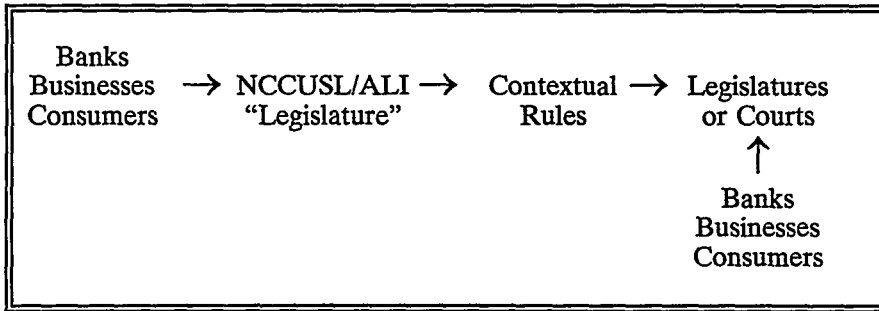


FIGURE 3

The contextual rules model in *Figure 3* differs in some significant respects from the policy and political models discussed previously. As with the policy model, *Figure 1*, all interested parties are included in the drafting process. Yet, unlike the policy model, the contextual rules model does not seek to balance the rights of consumers and banks using independently derived policy considerations. Unlike the consumer rights model, *Figure 2.1*, or the bank rights model, *Figure 2.2*, the contextual rules model accommodates all interested parties in the drafting process. Those interest groups, of course, always have the ability to lobby the state legislature for or against enactment, for nonuniform amendments, or for additional legislation that seeks to protect rights not recognized under the contextual rules model. In

1362-63 (rejecting the "hypothetical bargain" in contract theory as artificial and unpredictable).

118. Soia Mentschikoff, *Reflections of a Drafter*, 43 OHIO ST. L.J. 537, 540-41 (1982) (focusing on business practice and policy); Schnader, *supra* note 16, at 4 (stating Llewellyn believed the UCC should reflect actual practice, rather than other legislation or decisions).

119. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1147 (1984) (noting that Llewellyn wanted reliability and predictability).

120. Llewellyn, *Keynote Memorandum*, *supra* note 116, at 526 (stating that a statute ought to encourage development of law).



addition, those groups may seek federal preemption of the area or attempt to advance their interests through the litigation process.

Tensions quite obviously exist among the general principles of the contextual approach. For example, continuing to regulate a business practice that no longer exists<sup>121</sup> would be reflective of the past but certainly would not be reflective of actual practice or forward-looking. Moreover, determining what the context demands in assessing a revision can evoke considerable ambiguity. As with rules derived under the policy model, the rules derived under the contextual rules model also "must be developed by judgment and instruction."<sup>122</sup> A key distinction between the two models is that the judgment and instruction involved in such an assessment under the contextual rules model stem from a different source. Under the policy model, the UCC rules result from the drafters' discernment and weighing of competing public policies, theories, or political views. Under the contextual rules model, the rules are grounded in an assessment of the past, examination of existing practices, and a look to the future and the development and growth of the law. While some policy considerations certainly might weigh into that analysis,<sup>123</sup> those considerations do not predominate the decisional process in the manner dictated by the policy model.

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121. An example of such a practice is the "process of posting," defined by the original UCC as "the usual procedure followed by a payor bank in determining to pay an item and in recording payment." U.C.C. § 4-109 (1989). Completion of the process of posting could constitute final payment under original UCC § 4-213, resulting in the payor bank being held accountable for the item. A conflict arose in the courts over whether final payment under the original Article 4 could occur before the payor bank's midnight deadline because the bank had completed the process of posting prior to that time. *Compare* *West Side Bank v. Marine Nat'l Exch. Bank*, 155 N.W.2d 587 (Wis. 1968) (finding that process of posting is not complete until midnight deadline and time to reverse entries has passed) *with* *H. Schultz & Sons, Inc. v. Bank of Suffolk County*, 439 F. Supp. 1137 (E.D.N.Y. 1977) (rejecting *West Side Bank* and finding that final payment through completion of process of posting can occur before deadline).

However, few modern financial institutions "post" a check in the manner contemplated by the process of posting test, and instead rely upon highly automated check collection procedures. DOUGLAS J. WHALEY, *PROBLEMS AND MATERIALS ON COMMERCIAL LAW* 499 (4th ed. 1995). In recognition of this change in practice, the revised version of Article 4 has abandoned the process of posting test. *See* U.C.C. § 4-215 cmt. 5 (1990).

122. *See supra* text accompanying notes 82-88 (describing the policy model) (quoting Rubin, *Efficiency and Equity, supra* note 3, at 560).

123. This Article rejects Professor Hillman's view that public policy and legal theory have *nothing* to do with the revision process. *See supra* note 117 and accompanying text. Yet, while policy considerations are a factor even under the contextual rules model, policy carries only nominal weight in the overall decision process.

#### IV. ASSESSING THE OPTIONS

The discussion of the general approaches in the previous section is not, and is not intended to be, exclusive of all other conceivable approaches to revising the UCC.<sup>124</sup> However, the fundamentally different principles that animate each of the approaches provide an overall structure for evaluating the manner in which UCC revision efforts have progressed in the past and for guiding the revisions currently in progress. Each model leads the NCCUSL down divergent paths: toward implementation of external views on proper public policy, toward wholehearted involvement in the political arena, or toward tailoring the law to accommodate commercial contexts. Given that they differ on such fundamental points, an important initial observation is that casual reliance upon any one particular approach to evaluate the revisions ought to be mistrusted. Indeed, the multiplicity of views indicates that substantial disagreement exists over the proper way in which the NCCUSL and ALI ought to proceed. Reluctance of the NCCUSL to proceed in one direction cannot *ipso facto* represent a failure in process, or evidence of industry domination. That direction may not have been the proper route to take in the first place. Objections to the Articles 3 and 4 revisions, therefore, are decidedly unpersuasive without a convincing argument in support of the model upon which the objections are based.

There has been little discussion on this underlying issue of the best approach. This Part begins with an analysis of the criteria that ought to be used to evaluate the competing models.<sup>125</sup> The section first rejects the prevailing "public interest" approach for evaluating the revisions.<sup>126</sup> The section then argues that largely neutral and noncontroversial criteria of political accountability, inclusion, and uniformity ought to be used to evaluate the alternative models set forth in Part III of this Article.<sup>127</sup> The remainder of the Part applies the criteria to those models and concludes that the "contextual rules"

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124. For other approaches, see generally Steven J. Burton, *Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View*, 35 WM. & MARY L. REV. 1533 (1994) ("practice" view of contractual obligation of good faith and fair dealing); Elbrecht, *supra* note 70 ("process" view on revisions).

125. See discussion *infra* part IV.A.1-5.

126. See discussion *infra* part IV.A.1.

127. See discussion *infra* part IV.A.2-5.

model, *Figure 3*, most satisfactorily advances the goals of the UCC revision effort.<sup>128</sup>

### A. *Evaluative Criteria*

#### 1. Transcending the public interest

Even if the UCC drafting process is viewed as a negotiation, and even if the NCCUSL and ALI are viewed as legislatures, the criteria used to evaluate that process obviously must advance an acceptable result, given the surrounding circumstances.<sup>129</sup> As discussed earlier, there are a myriad of views on the substantive goals of the UCC.<sup>130</sup> Yet, the vagueness of these views, not to mention the tensions among them, render them unsatisfactory principles to guide the revision process or to evaluate the substantive law generated by the process.

A common theme that can be drawn from the existing views is that the UCC revision process ought to be an endeavor dedicated to advancing the public interest and ought to generate in some way a "better" law than otherwise would be obtained through ordinary state-by-state legislative enactment. Consider, though, suggestions that the drafting process ought to produce the "best" law. The best law may not necessarily be "neutral" law, an alternative view of the goals of the drafting process. The best law, or even merely better law, may not be "enactable" law. On the other hand, enactable law may not be good public policy. The strength of any claim as to the superiority of any piece of legislation significantly depends upon the criteria relied upon to support that claim. The best law therefore may be, *inter alia*, that which advances efficiency or individual autonomy, is fair, or protects the powerful or powerless. Assertions that any one law or rule is better than another similarly demand some standard with which to make the comparison, evoking the same concerns as the notion of the best law. Even if the participants in the UCC drafting process could arrive at an agreement on the evaluative criteria to be used to guide the process, the law might not be widely enactable at the state legislature level, particularly if disagreement exists outside of the drafting committees about the agreed upon method of evaluation.

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128. See discussion *infra* part IV.B.

129. See *supra* text accompanying note 75.

130. See *supra* text accompanying notes 60-70.

The current views on the substantive goals of the UCC revisions are therefore confusing and vague, if not at times exquisitely contradictory. They are sharply contingent upon the validity of, or consensus on, external methodologies and political or legal theories which themselves are subject to debate and controversy. Concomitantly, the failure of the ALI and NCCUSL to accommodate actively any preferred notion of the public interest into the final legislative product—the UCC—would be seen as an enormous failure of the drafting process. Simply put, public interest theory, in whatever manner it is articulated, cannot provide a meaningful perspective on the substantive goals of the UCC revision project.<sup>131</sup>

The mistaken reliance upon the public interest to guide the revisions has brought about two extreme perspectives on the drafting process. On the one hand, public choice has sought to reveal the self-interests that often parade under the guise of the public interest. Some analysts have suggested that the participants in the revision process are largely unconstrained in their decision to favor or to oppose a particular revision proposal.<sup>132</sup> For example, participants

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131. For a discussion of the failure of rhetorical attempts to define and understand what the public interest requires, and an attempt to model the conditions under which special or general interests may be reflected in regulation, see Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORGANIZATION 167, 172-85 (1990). The following passage describes forcefully the problem of understanding the public interest:

When we ask whether regulation is undertaken in the public interest, what are we asking? Are we asking whether regulation and regulators do what is "best" for the public? By what test of "best"? Are we asking whether regulation is efficient? Are we asking who benefits from regulation? Are we asking whether regulation is largely about wealth creation and transfer, or whether other values are at stake? Is a "public interest" theory a normative theory about the desirability of reflecting the preferences of a general polity over special interests? Is it a normative theory about the desirability of promoting other-regarding goals over self-regarding ones? Is it a positive theory about the degree to which regulators will promote general interests over special interests? Or is it a positive theory about the opportunities available to regulators to pursue personal but other-regarding views rather than policies that favor either general or special interest in increasing personal utility?

*Id.* at 172. A recent debate over precisely what the public interest demands with regard to the UCC revisions evidences the equivocation as it applies to the UCC. Compare Rapson, *supra* note 67, at 257-59 (arguing that the public interest includes good faith, efficiency, and fairness) with Ring, *supra* note 67, at 302-05 (disagreeing with Rapson's views).

132. For example, Professors Schwartz and Scott assume in modeling the uniform laws process that there is weak enactment constraint on the participants; that the decision "to accept or reject a proposal is not importantly influenced by the likelihood that the proposal will be widely enacted." Schwartz & Scott, *supra* note 9, at 609. To support this assumption, they point to the low enactment rate of NCCUSL products *overall*. See *id.*

seeking law reform—usually law professors—will seek to advance those interests through participation on study groups and drafting committees.<sup>133</sup> Industry groups and lobbyists participate to the extent that, given costs, they can persuade the committees to enact rules in their favor.<sup>134</sup> The individual members of the ALI and NCCUSL who vote to approve the work of the study groups and drafting committees base those votes on the individual member's own ideal views on the consequences of a particular law-reform proposal.<sup>135</sup> These ideals, of course, seek to maximize the members' own utility.<sup>136</sup> The result that emerges from this cacophony of utility maximization is a Code revision process that is driven toward retention of the status quo and that is highly subject to capture by special interests.<sup>137</sup> Public choice thus exposes the relentless pursuit of self-interest in the drafting process and undermines claims that the Code is somehow "superior" to legislation created through the more traditional public legislative process.

At one extreme the public interest and its public choice antithesis create a Code revision effort resounding with despair and largely unconstrained by any consensus on collective goals that transcend individual self-interest. At the other extreme the public interest is used to evaluate cynically the substantive provisions that emerge from that process. For example, if one holds the view that the public interest demands law that draws upon economic analysis in order to allocate losses that inevitably result in maintaining a payment

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at 609 & n.34. While this assumption certainly may be a legitimate one to draw with respect to some more esoteric NCCUSL products other than the UCC, assuming weak enactment constraint on the revisions to the UCC is a highly controversial move. The UCC is beyond question the NCCUSL's most successful product. *See supra* text accompanying notes 42-43. That considerations of enactment would not bear strongly upon an assessment of revisions to that product implies that, even in spite of any original success of the product, participants are oblivious to maintaining that success. This assumption when applied to the UCC revisions seems as curious as Coca-Cola's ill-fated decision to change the formula of its successful Coke soft drink. If this key modeling assumption is off-base when applied to the UCC, the Schwartz and Scott conclusions as they apply to the revisions should be appropriately discounted.

133. Schwartz & Scott, *supra* note 9, at 610-11, 618.

134. *Id.* at 610-11.

135. *See, e.g., id.* at 611-13 (describing the "ideal" points of private legislature members).

136. *See id.* at 612; *see also id.* at 615-19 (modeling member preferences in a world of symmetric information); *id.* at 621-24 (modeling member preferences in a world of asymmetric information).

137. *See id.* at 650-51.

system,<sup>138</sup> the failure of the Code's revisions to accommodate those views would be met with opprobrium.<sup>139</sup> Moreover, given that the public interest was not served by the revisions, that fact provides evidence of industry domination of the process and supports rejection of the Code by the individual states.

The ill-conceived, and in fact impossible, attempt to create an understanding of the public interest that is both meaningful and relatively noncontroversial thus results in a political perspective on the Code that is inherently fraught with conflict. Perhaps it is inevitable that the selection of *any* criteria to guide and evaluate the UCC drafting process is a controversial and uncertain move. Yet, this conclusion would bring with it some troubling implications. Taken to its extreme, the view means that there can be no consensus at all about the UCC. Even a modest consensus on the substantive goals that the UCC law-making effort ought to advance is unlikely. At the same time, the NCCUSL's role in, and approach to, every UCC drafting effort is open to scrutiny and criticism, depending upon the criteria used to critique the product of the process. This inevitably leads to the view that the Code drafting process and the Code itself is radically contingent upon legislator self-interest—unprincipled and corrupt. This disturbing conclusion leads one to consider entirely jettisoning the uniform laws process as a method of lawmaking.

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138. See generally Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63 (1987) (advancing an economic framework for resolving loss allocation issues).

139. See Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 768-70. Professor Rubin reflects on his unsuccessful attempt to raise economic analysis in ABA committee discussions on the revisions to Article 4 as follows:

[L]aw and economics analysis was greeted by most of the committee members with complete incomprehension. Some of this may have been the result of the bank attorneys' identification with their clients . . . . But law and economics is not generally regarded as a liberal, pro-consumer approach. Had the attorneys been prepared to think in economic terms, they easily could have contested my statements . . . . But the blank stares that I received from [some] members of the committee indicated a much more profound rejection of the ideas I was proposing.

*Id.* at 768. Rubin attributes much of the ABA subcommittee's reluctance to accept his views to the members' narrow, elitist world-view, their unfamiliarity with developments in legal theory, and their corruption. See, e.g., *id.* at 749 (stating that the "conceptual framework" of members "was the product of being white, male and upper-middle class"), 752-54 (noting that members psychologically identify with clients), 755-57 (attributing rejection of his views to the members' identification with clients), 768 (pointing out members' lack of familiarity with theories of Ackerman, Selznick, Nonet, and Posner).

As a matter of critical discussion perhaps the above account of the drafting process could be an acceptable perspective on the revision process. However, the public choice critique offers little in the way of positive guidance for participants in the process. Presumably those participants do not wish to fling themselves lemminglike over the cliff into the sea of commercial law history. Yet, that is the end to which the public choice critique points, if taken seriously by the participants. The radical uncertainty that the public interest perspective, taken with its public choice antithesis, gives rise to must then be alleviated in order to develop a positive methodology for structuring and evaluating the revision process. This can be done first by acknowledging that, as a matter of the actual practice of revising the UCC, participants are constrained in their choices.<sup>140</sup> Next, the criteria for evaluating the preceding models ought to reflect and advance the role that the NCCUSL plays in the overall law-making enterprise. The best model should simply advance the role that the NCCUSL, as a private legislature, is well-suited to play.<sup>141</sup> By acting in accordance with that best model, the NCCUSL maximizes its effectiveness as a lawmaker, given its institutional role.

This functional and institutional approach to structuring the UCC revision process can be illustrated by conceiving of the NCCUSL as a supplier in the law-making market.<sup>142</sup> One of its principal products is uniform state laws.<sup>143</sup> As a supplier, the NCCUSL has a strong interest in inducing customers—state legislatures—to consider the product. Competition in the form of private contract, individual state action or inaction, federal intervention, or agency rulemaking of course exists. At the same time, citizens in general have an interest in ensuring that any law-making process is conducted in a manner that comports with their fundamental concepts of proper legislative action, given that enactment of the product may act to constrain their liberty. The best product that the NCCUSL can offer is the one that the

140. *See supra* note 132 and accompanying text.

141. *Cf.* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102-03 (1980) (adopting a functional approach to judicial review); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (advancing a comparative institutional framework for analyzing legal decisions).

142. *Cf.* Roberta Romano, *Law As a Product: Some Pieces of the Incorporation Puzzle*, 1 *J.L. ECON. & ORGANIZATION* 225 (1985) (reviewing incorporation statutes in terms of state competition).

143. *See supra* note 27.

NCCUSL is functionally proficient at producing and is competitive in the market for law, but created by a process that comports with views on fundamental base-line constraints on any law-making process.

An institutional methodology for evaluating the drafting process can yield relatively neutral evaluatory principles that are much less controversial than vague assertions that the UCC ought somehow to be the "best enactable public-spirited law." Because such principles would reflect and seek to advance the role that the NCCUSL and ALI play as legislatures in the commercial law-making market, they would be much less indeterminate than the public interest perspective. Further, because the principles would reflect generally accepted views of the NCCUSL's and ALI's institutional function, they would obtain greater legitimacy as criteria with which to assess the UCC drafting process. A legislative process conducted in a manner that advances the relatively noncontroversial law-making function and goals of the lawmaking entity within the overall governmental structure ought to be entitled to a great amount of deference. In this way, the institutional perspective avoids the extreme uncertainty that the public interest/public choice perspective necessarily generates, and therefore provides a more acceptable basis for evaluating the models of the drafting process.

## 2. Structure: political accountability

The first largely uncontroversial principle that reflects the institutional function of the NCCUSL and ALI is that of political accountability. Unlike other legislatures, the participants in the UCC process are not accountable through election to any constituency. Rather, NCCUSL members are appointed by the states, whose politically accountable legislators retain the ultimate decision to enact the final legislative product.<sup>144</sup> ALI members and other participants are essentially accountable to no particular persons or institutions.<sup>145</sup> This political unaccountability of ALI and NCCUSL members clearly has benefits. Independence allows those organizations to work outside of the political pressures that bear upon the public legislative process and presumably facilitates open inquiry, debate, evaluation, and experimentation throughout the drafting process. But, the independence of the ALI and NCCUSL has a darker side. When substantially unaccountable organizations offer laws to the states that

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144. See *supra* text accompanying note 24.

145. See *supra* text accompanying notes 25-26.



constrain the behavior of the state's polity, and when the stamp of the ALI and NCCUSL on such proposed laws carries significant weight with state legislatures, a cautionary exercise of such independence is warranted.

The structural and political issue revolves around states' delegation of legislative power to private organizations. The uniform laws enterprise is one of the oldest examples of "privatization."<sup>146</sup> In the public sector such delegations to private entities raise not only due process but also legitimacy and representative government issues.<sup>147</sup> While in the context of uniform state laws, the federal constitutional issues—and most likely any state constitutional issues<sup>148</sup>—are absent, similar accountability and legitimacy problems nonetheless remain. Private delegation raises concerns, applicable to any delegation, that the law-making process might proceed outside checks that constrain the public legislature and also that the public legislature may wish to use delegation to avoid responsibility for policy decisions that properly ought to be made by elected officials.<sup>149</sup> These concerns are equally germane to the uniform laws process.

If there were indications that states in fact relied upon the uniform laws enterprise to avoid responsibilities to their constituencies, a strong legitimacy argument could be raised against the entire process. However, evidence points to the contrary. The relationship between the states and the NCCUSL can be seen as a relationship in which the states have delegated a certain portion of legislative power to the NCCUSL. It is difficult to view this grant of power as a wholesale, vague delegation of legislative authority to act in the general public interest and promote the general welfare. In addition, there is scant evidence that might suggest that state legislative powers are delegated to the NCCUSL in order to avoid the political

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146. The term "privatization" refers in general either to the sale by governments of government-owned businesses to the private sector or to the delegation of governmental powers or functions to private entities. See Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 450-52 (1987). The use of the term in the text refers to the latter kind of privatization.

147. See *id.* at 497-502 (discussing delegation problems); Krent, *supra* note 56, at 69-80 (discussing constitutional limitations on congressional private delegations); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 658-72 (1986) (discussing constitutional principles invoked by private delegations).

148. Lawrence, *supra* note 147, at 647, 664-68.

149. See Krent, *supra* note 56, at 75-77 (discussing concerns that underlie private delegations of public power).

consequences of individual state action. The states retain a "veto" right that can be, and often is, exercised by refusing to adopt a proposed uniform law or by enacting nonuniform amendments to the proposal. Beyond these rather weak monitoring devices,<sup>150</sup> the NCCUSL and ALI are largely unconstrained by any formal checks on their legislative activities. Yet, states' refusal to enact some NCCUSL products strongly suggests that the delegation is less than complete, although the precise scope of the delegated authority indeed is often ineluctable.

Accordingly, only self-regulation and market forces act to check the NCCUSL from going beyond the limits of delegated powers. Proposed uniform legislation that goes beyond the scope of the delegated power can have two consequences. First, the state legislature can either consciously accept or reject the proposed uniform law or enact nonuniform amendments to correct provisions deemed beyond the NCCUSL's power. In these cases market forces adequately check the NCCUSL's exercise of retained state legislative authority. However, exercise of these market checks may have the effect of creating nonuniformity.<sup>151</sup> On the other hand, the uniform law might be enacted by the state legislature, an instance of market failure, in which case state citizens are bound by a law that not only exceeded the authority given to the NCCUSL but also was created outside of the checks provided in the public arena. In this objectionable case the NCCUSL's usurpation of retained state law-making power creates a severe problem of legitimacy. Transgressing the bounds of delegated authority can thus lead either to nonuniformity or to serious questions concerning the political legitimacy of the private laws process.

An extension of this perspective on political accountability would advance a claim for abolishing private legislatures such as the ALI and NCCUSL entirely. Any topic now otherwise before the NCCUSL would be wrangled out in each state legislature, or at the federal level, with interest groups using the political process to advance their positions through traditional legislative efforts.<sup>152</sup>

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150. Recent empirical analysis has begun to analyze the extent to which states effectively sort through NCCUSL proposals. *See generally* Ribstein & Kobayashi, *supra* note 9 (analyzing whether the NCCUSL's proposals lead to efficient uniformity and whether the proposals result in enactment of inefficient laws).

151. For a discussion of uniformity as a principle for guiding the UCC revisions, see *infra* part IV.A.4.

152. *See* Dunham, *History of NCCUSL*, *supra* note 15, at 233 (discussing uniformity

However, use of private drafting committees has benefits that cannot be obtained through traditional state legislative action. A single drafting entity can dramatically reduce the costs that would arise if each state were individually to attempt to cobble together its own bit of payment, sales, or other commercial law. The ALI and NCCUSL also have the expertise to create a uniform commercial law that has a relatively long period of effectiveness, thus advancing the goal of federalism<sup>153</sup> and allowing incremental development of the substantive areas covered by the UCC.<sup>154</sup> Finally, the ALI and NCCUSL process provides an effective forum for gathering information on divergent approaches to issues that have arisen in commercial law areas. This forum promotes a meaningful debate on the advantages and disadvantages of such approaches. In this way the uniform laws process reduces the costs of enacting state law. Yet, the values that ensue from independence must be weighed with the NCCUSL's and ALI's lack of accountability to the citizens of each state.

To shield itself from attacks based on accountability, the NCCUSL therefore ought to seek to draw an appropriate line between delegated law-making power and those powers retained by the states. A myriad of factors can weigh into and guide that assessment. The NCCUSL criteria for determining when a subject is or is not a potential area for uniform legislation<sup>155</sup> are sound initial limitations that reflect concerns over accountability. By avoiding novel, untested, or controversial areas, the NCCUSL restrains itself from venturing into subjects more appropriately the concern of politically accountable public legislatures. Past experience with other uniform laws also can instruct the attempt to delimit the scope of legislative power. For example, two of the NCCUSL's least successful commercial law products have been the Uniform Consumer Credit Code (U3C)<sup>156</sup> and the Uniform Consumer Sales Practices Act (UCSPA).<sup>157</sup> This provides a signal from the states that such issues

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through voluntary action, agreement, and delegation).

153. See *infra* text accompanying notes 180-92.

154. Cf. U.C.C. § 1-102(2)(b) (1990) (promoting incremental development of substantive areas through custom, usage, and agreement of the parties).

155. See *supra* note 14.

156. See Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565, 1566-67 (1994). Merely 11 states have adopted the U3C in some version. *Id.* at 1567.

157. *Id.* The UCSPA has been enacted, with substantial changes, by only four states. *Id.*

are considered to some extent to be properly within the province of the states. Finally, areas in which significant nonuniform amendments have arisen may indicate that the area is one in which states wish to retain control. Analysis of these factors, as well as testing the waters for the states' views on particular issues, can aid in developing a coherent sense of the intended scope of the drafters' delegated authority.

### 3. Process: inclusion

Some evidence suggests that in the UCC drafting process the ALI and NCCUSL have not been immune from interest group pressures. Reforms to the process, therefore, have focused on the ways in which the revision efforts can accommodate more fully the often conflicting interests of those involved in the process and neutralize the power that special interests may seek to exert in the process. However, as will be suggested in this section, the interest group perspective on the UCC—and the derivative principle of inclusion of those groups—plays an important but limited role in the overall Code drafting effort.

The much told tale of the history of Article 4<sup>158</sup> exemplifies special interest involvement in and, according to some, domination of the Code drafting process. The story traces back at least to Frederick Beutel's often histrionic and now immortal attack on the UCC.<sup>159</sup> While the Code in its entirety was the focus of Beutel's objections,<sup>160</sup> much of his venom was reserved for the original version of Article 4. The pro-bank, anticonsumer one-sidedness of Article 4, according to Beutel, resulted in "a vicious piece of class legislation" and a "deliberate sell-out" by the ALI and NCCUSL to the bank

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158. For extremely comprehensive, but biased, accounts of the Article 4 story, see generally Patchel, *supra* note 3; Rubin, *Efficiency and Equity*, *supra* note 3.

159. See Frederick K. Beutel, *The Proposed Uniform[?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952) [hereinafter Beutel, *The Proposed Uniform[?] Code*]; see also Grant Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE L.J. 364 (1952) (responding to some of Beutel's criticisms of the UCC).

160. Beutel considered the language of the UCC to be "strange" and "unduly complicated" and felt that the UCC offered little improvement over existing law while causing "confusion." Beutel, *The Proposed Uniform[?] Code*, *supra* note 159, at 335-36. At the same time Beutel felt that the Code acted to favor bankers and lawyers, at the expense of the business community. *Id.* Recently it has been argued that many of Beutel's objections ought to be discarded because his predictions were not borne out by the Code as enacted. See Carl Felsenfeld, *But the Proposed Uniform[?] Commercial Code Was Adopted*, 26 LOY. L.A. L. REV. 597 (1993).

lobby.<sup>161</sup> Beutel's account of the bank lobby's involvement in the Uniform Bank Collections Code that preceded Article 4, of the tentative decision to omit Article 4 from the UCC, and of the subsequent cramdown of what became former Article 4 through the ALI, NCCUSL, and ABA, formed the basis for Beutel's conclusions that Article 4 ought to be rejected wholesale.<sup>162</sup>

Notably, the drafting of the original Article 4 also resulted in the first summary execution by the bank lobby, in an almost Aeschylean venting of "fury,"<sup>163</sup> of the principal architect of their displeasure. Their hapless victim was Fairfax Leary, a University of Pennsylvania law professor appointed by Karl Llewellyn to head the Article 4 drafting effort. Leary produced a draft of Article 4 that sought to reconceptualize significantly the field of bank collections.<sup>164</sup> Such suggested radical change evoked the intense dissatisfaction of the banks and resulted in Leary's removal as well as the initial elimination of Article 4 from the UCC. The banks then cobbled together their own bank collections code, allegedly forced it *vi et armis* by the ALI, NCCUSL, and ABA, and thus, the original Article 4 was born.

Beutel's objections encompassed both process and substance. Not only was the process detestable in its concerted effort to exclude any group other than the powerful from the debate, but substantively Article 4 contained rules that were, in Beutel's view, dramatically pro-bank, anticonsumer, and unfair.<sup>165</sup> Subsequent events indicate that we have yet to escape from the ordeal accounted by Beutel, at least according to some participants in those developments. The failure of the 3-4-8 Committee/New Payments Code (NPC) effort in the 1970s and 1980s<sup>166</sup> has been traced to the inability of participants to

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161. Beutel, *The Proposed Uniform[?] Code*, *supra* note 159, at 357-63; *see also* Frederick K. Beutel, *The Negotiable Instruments Act Should Not Be Amended*, 80 U. PA. L. REV. 368, 378-79 (1932) (suggesting that Code drafting has class legislation aspect). A brief account of the Article 4 drafting process by one of its principals can be found in Fairfax Leary, Jr. & Michael A. Schmitt, *Some Bad News and Some Good News from Articles Three and Four*, 43 OHIO ST. L.J. 611 (1982).

162. Beutel, *The Proposed Uniform[?] Code*, *supra* note 159, at 357-63.

163. *See* Rubin, *Efficiency and Equity*, *supra* note 3, at 555; Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 746.

164. Leary & Schmitt, *supra* note 161, at 614-15; Rubin, *Efficiency and Equity*, *supra* note 3, at 555.

165. Beutel, *The Proposed Uniform[?] Code*, *supra* note 159, at 359-63.

166. For detailed accounts of the 3-4-8 Committee/NPC effort, *see generally* Fred H. Miller, *A Report on the New Payments Code*, 39 BUS. LAW. 1215 (1984) [hereinafter Miller, *Report on NPC*]; Miller, *Study in Process*, *supra* note 3; Rubin, *Efficiency and Equity*, *supra* note 3.

withstand adequately interest group pressures as well as to recognize the need for significant change in the substance of payment law. The 3-4-8 Committee and the NPC were efforts spearheaded by the NCCUSL to accommodate within the rubric of uniform state laws the technological changes and innovations bearing upon payment law that had emerged since enactment of the original versions of Articles 3 and 4. As with the original Article 4, the reporter for the project, Harvard Professor Hal Scott, attempted to make a case for significant substantive change.<sup>167</sup> Scott proposed to synthesize conceptually as well as terminologically into a "new payments code" the rules for the myriad of payment forms that had emerged since original Articles 3 and 4.<sup>168</sup> Some evidence suggests that the NPC drafting enterprise failed to be opened sufficiently as to allow affected parties to comment on a proposal that would have altered significantly their rights under existing law.<sup>169</sup> The draft also contained consumer protection provisions, although these were ultimately removed in an attempt to secure support for the effort.<sup>170</sup>

Scott's NPC met much the same end as Leary's Article 4. Interest groups were capable of destroying an arguably superior proposal—although with respect to the NPC even consumer groups joined in—presumably because all stood to lose something through change.<sup>171</sup> Again, then, interest groups effectively halted the development of payment law; this time the victim was a proposal that sought to harmonize the largely divergent treatment of payment systems, while giving due regard to consumer interests. The reporter was "excoriated" by these groups in a meeting so apparently horrifying that it can only obliquely be alluded to, in the words of one

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167. The reporter's views on payment law can be found in Hal S. Scott, *The Risk Fixers*, 91 HARV. L. REV. 737 (1978). Professor Scott, who disavows that there is any "real jurisprudence" of commercial law, *id.* at 737, believes that statutory rules are designed to alter rather than to codify existing practice, *id.* at 739.

168. See Miller, *Study in Process*, *supra* note 3, at 407-09; Rubin, *Efficiency and Equity*, *supra* note 3, at 557-58. For accounts of some substantive issues addressed by the NPC, see Fairfax Leary, Jr. & Patricia B. Fry, *A "Systems" Approach to Payment Modes: Moving Toward a New Payments Code*, 16 UCC L.J. 283 (1984); Fairfax Leary, Jr. & J. Stephen Pitcairn, *The Uniform New Payments Code: The Essential Identity of "Pay" Orders and "Draw" Orders*, 12 HOFSTRA L. REV. 913 (1984); Miller, *Report on NPC*, *supra* note 166.

169. See Miller, *Study in Process*, *supra* note 3, at 408.

170. See Leary & Fry, *supra* note 168, at 286 n.8; Miller, *Study in Process*, *supra* note 3, at 408-09; Rubin, *Efficiency and Equity*, *supra* note 3, at 557-58.

171. See Patchel, *supra* note 3, at 108; Rubin, *Efficiency and Equity*, *supra* note 3, at 557-58.

commentator, as “grisly.”<sup>172</sup> In a retreat from the unpleasantness of the NPC experience, the NCCUSL embarked upon a modest and limited rewrite of Article 3 and amendments to Article 4.<sup>173</sup> Those revisions were approved by the ALI and NCCUSL in 1990, and are now making their way through the state legislatures.<sup>174</sup> Yet, some persons closely involved with that modest revision project have commented at length on a perceived usurpation by the bank lobby of the drafting process, leading to the resignation of an academic heading an ABA subcommittee participating in the revisions.<sup>175</sup>

An important point with regard to the above account of Article 4 is that the account draws from narratives concerning the process. Yet, the use of “stories” to shape our values and opinions and to advance a particular political position is widely known.<sup>176</sup> Whether these narratives are intended to reflect what “really” happened or have some other motive is an open question. The history of Article 4, nevertheless, unquestionably demonstrates the significant role that interest groups can play in the development, or lack thereof, of the UCC. Indeed, usurpation of the UCC drafting process by special interests and the exclusion of other interested parties is undesirable as a general political matter. Inclusion of persons whose lives are affected by proposed legal rules into the debate on those rules is an important principle not to be taken lightly by the ALI and NCCUSL. Suggestions for reform to the process that seek to advance this principle of inclusion therefore ought to be considered seriously by the NCCUSL.<sup>177</sup>

172. Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 746.

173. See Miller, *Study in Process*, *supra* note 3, at 410-16 (discussing scope of, and drafters' approach to, Articles 3 and 4 in light of NPC experience).

174. See *supra* note 8 and accompanying text.

175. See generally Rubin, *Thinking Like a Lawyer*, *supra* note 3 (describing the bank industry's involvement in the drafting process and criticizing choices made in the revisions); Rubin, *Efficiency and Equity*, *supra* note 3 (arguing that revisions fail to implement proper social policy and ought not to be enacted). Professor Rubin's scathing charges concerning the ABA subcommittee are rebutted in Rapson, *supra* note 67, at 250-55.

176. See PLATO, *THE REPUBLIC* 129-57 (D. Lee trans., 2d rev. ed. 1974) (discussing the use of stories in the state).

177. See, e.g., Thomas C. Baxter, Jr., *The UCC Thrives in the Law of Commercial Payment*, 28 *LOY. L.A. L. REV.* 113, 129 (1994) (arguing that participation of consumers in the drafting process ought to be funded); Patchel, *supra* note 3, at 156-57 (suggesting the NCCUSL open up the drafting process, even by affirmative action, to accommodate barriers to collective action); Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 *WM. & MARY L. REV.* 1593, 1593 (1994) (arguing that consumers need to be included in drafting).

Seeking inclusion in the Code revision process undeniably advances important participatory values crucial to any normatively appealing law-making process. Yet, the bare directive of "inclusion" is distinct from the substantive goals of that process. It is important to note that the other persistently recurring theme of the period spanning from original Article 4 to revised Article 4 relates to substance rather than process. In each attempt to revise Article 4, proposals for fundamental conceptual change to payment law were made and rejected. Even assuming that a rogue band of bank lawyers<sup>178</sup> has held hostage the proper development of payment law for the last century, that fact alone, however disturbing, would be insufficient to conclude that inclusion will resolve all the issues that arise in every UCC drafting effort. Such a position erroneously relies upon a "hot tub" theory<sup>179</sup> of UCC drafting by naively assuming that once all groups are brought into the process, somehow a substantively satisfactory and enactable UCC will emerge from the debate.

Thus, while inclusion advances the give-and-take in any negotiation or legislative process and brings with it the values of participation, nonetheless in any negotiation some substantive criteria are necessary to further circumscribe the rules for that negotiation. Beyond inclusion, other principles and values related toward substance rather than participation are required to assess fully the UCC drafting process. The following section will discuss that substantive issue.

#### 4. Substance: uniformity

Transcending the concept of public interest as a guide for evaluating the substance of the rules generated by the UCC drafting

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The NCCUSL's "Planning and Coordinating Enactments" (PACE) plan requirement attempts to address inclusion values. The PACE plan, which is implemented by the drafting committee, identifies outside interests possibly affected by the proposed revisions and solicits their input. Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861, 868 (1995) [hereinafter Miller, *The Future*].

178. Current trends provide that those parties advancing the interests of financial institutions be designated "bank lawyers" or "bank attorneys." Those advancing consumer interests go by the more enlightened and statesman-like title of "consumer representatives." See generally Rubin, *Thinking Like a Lawyer*, *supra* note 3 (using terminology throughout).

179. See Harter, *supra* note 74, at 31 ("[I]f only we strip off the armor of an adversarial hearing, everyone will jump into negotiations with beguiling honesty and openness to reach the optimum solution to the problem at hand.").



process leaves one principle, uniformity, as the key substantive goal of the UCC revisions. The principle of uniformity as used in commercial law invokes two interrelated concerns. It first addresses the strong federalism concerns that have served to define the role of the NCCUSL in the legislative process. To the extent that largely uniform enactment among the states is obtained, the historic power of the states to regulate commercial transactions<sup>180</sup> is preserved. "Uniformity" has another dimension in the UCC that initially appears unrelated to federalism concerns. Uniformity of the substantive law that applies to any class of particular commercial transactions has long been recognized as a general commercial, business need; this issue is frequently referred to as "mercantile uniformity." The UCC itself recognizes mercantile uniformity among its principal purposes.<sup>181</sup>

The values of federalism and of mercantile certainty that underlie the need for uniformity work in tandem. Substantive uniformity of rules between states is necessary to facilitate commercial transactions. If such uniformity is largely obtained at the state level,<sup>182</sup> the potential for federal incursion into the area is lessened and the power of the states retained. Conversely, if a substantial lack of uniformity exists among the states which impedes commercial transactions, the potential for federal involvement is heightened, and a concomitant decrease in the power of the states will ensue. If a uniform commercial act fails to obtain widespread enactment or to accommodate the mercantile interest in certainty, the potential for federal intervention in the name of mercantile uniformity may occur, at the expense of federalism concerns. Uniformity thus seeks to advance the commercial community's interest in mercantile uniformity, with the overarching purpose of protecting federalism concerns. Uniformity is not necessary to protect mercantile interests alone, but rather to protect mercantile interests through state legislation.

The claim that the NCCUSL and ALI ought to develop commercial law that has the potential to be uniformly enacted by the states is increasingly coming under fire. Some have suggested, for example, that perhaps the time finally has come for a "National

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180. See *supra* text accompanying notes 29-35.

181. See U.C.C. § 1-102(2)(a) (1990).

182. Complete interstate uniformity of the UCC probably never will be realized in this world. See Silber, *supra* note 12, at 456-59 (discussing the Code's "imperfect uniformity"). Nor is complete uniformity necessarily an end that the NCCUSL aggressively ought to pursue. See *id.* at 456-57 (discussing advantages inherent in "rough" uniformity).

Commercial Code."<sup>183</sup> The changed relationship between the state and federal governments and the emergence of a more national, integrated economy also have led to claims that the sponsors of the UCC ought to consider whether proposed legislation is better dealt with by the states or by the federal government.<sup>184</sup> Finally, a few commentators have argued the NCCUSL and ALI should abandon their attempt to craft rules that have potential for uniform enactment.<sup>185</sup> These arguments against uniformity are decidedly unpersuasive.

First, the claim that the NCCUSL no longer ought to use the uniform laws process to preserve states' power to regulate in the commercial law area implicitly carries with it a rejection of federalism altogether. Just because commercial law in recent years increasingly has become a matter of national as well as local concern ought not spell the death of the federalism concern in commercial law. Although some might view the federalist system as "America's neurosis,"<sup>186</sup> substantial, intelligent, and meaningful disagreement exists over the proper relationship between the federal and state governments. The Supreme Court's recent opinion that struck down the Gun-Free School Zones Act of 1990 as beyond Congress's Commerce Clause authority<sup>187</sup> indicates that the debate is far from being resolved. It would therefore be a highly controversial move for the NCCUSL, at this time, to abandon the federalist tradition altogether.

Second, legislating at the state level frequently has benefits over legislating at the federal level.<sup>188</sup> Federal lawmaking has the

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183. See Cohen & Zaretsky, *supra* note 4, at 557-61. Under this solution, the NCCUSL and ALI would be excluded from the process. Professors Cohen and Zaretsky conclude, however, that a federal process might not be preferable to the existing uniform laws process. *Id.* at 561.

184. See Patchel, *supra* note 3, at 160-62.

185. *Id.* at 159-60 (arguing that drafters "need to change their attitude about the importance of the enactment of proposed uniform laws as the measure of their success"); Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 783-87 (criticizing sharply the NCCUSL for seeking uniformity).

186. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994).

187. *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995).

188. For general discussions in the commercial law field addressing the comparative advantages and disadvantages of state and federal legislative processes, see Bugge, *supra* note 11, at 23-24; Miller, *The Future*, *supra* note 177, at 869-71; Fred H. Miller, *Is Karl's Kode Kaput?*, 26 LOY. L.A. L. REV. 703, 705-06 (1993) [hereinafter Miller, *Karl's Kode*]; Rubin, *Efficiency and Equity*, *supra* note 3, at 587-92.

obvious efficiencies that ensue from having one legislative body addressing the issue at hand, perhaps better representation of interests, and the advantage in creating true uniformity at a national level. Nonetheless, there are also benefits to be obtained by seeking uniformity through state-by-state uniform law enactment. Uniformity achieved through federal legislation may provide a uniform solution acceptable only to a majority of states, with minority interests or local, regional interests being forced to accept whatever regulation the majority prefers. Some evidence also suggests that federal law is more difficult to amend than state law, making federal law less sensitive to changes in technologies, processes, or mercantile practices that might affect transactions in the commercial area being regulated.<sup>189</sup> It is not until those changes become so widespread on a national basis that the impetus for amendment obtains sufficient force to merit federal deployment of scarce resources to accommodate changed practices. In contrast, state-by-state enactment has the benefit of allowing states to experiment with the Code and with other state legislation to address local mercantile practices or contract issues that might not be widespread nationally. This allows for individually-tailored law that still accomplishes the underlying federalism goals of the UCC. Moreover, Congress arguably is less able politically to act responsibly and quickly, and is highly subject to pressure from special interests, perhaps even more so than the NCCUSL and ALI.<sup>190</sup>

Finally, and most importantly, institutional considerations support the NCCUSL maintaining its role in our federalist system as a protector of state control over commercial law. In some individual cases or in some areas of the UCC, perhaps the above reasons for seeking to achieve uniformity at the state level fail.<sup>191</sup> Perhaps other

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189. Robert G. Ballen, *The Federalization of Articles 3 and 4*, 19 UCC L.J. 34, 45 (1986). *But see* Cohen & Zaretsky, *supra* note 4, at 558-59 (discussing comparative advantages of modifications and amendments at the federal level).

190. Miller, *Karl's Kode*, *supra* note 188, at 706.

191. For example, practices regarding maintenance of the check collection system perhaps now are so similar throughout the country that there is little need for state-by-state legislation to address regional variations. The Federal Reserve Board has been given broad authority to regulate the check collection system. *See* 12 U.S.C. § 4008(c)(1)(A) (1994) (granting power to the Federal Reserve System to regulate "any aspect of the payment system, including the receipt, payment, collection, or clearing of checks"). Furthermore, the Board already plays a significant role in regulating that system. *See* 12 C.F.R. § 210 (1995) (Regulation J); 12 C.F.R. § 229 (1995) (Regulation CC). Thus, additional regulation at the federal level would incur few additional costs and involve little action on the part of a slow Congress. However, indications are that federal regulators have little interest in expanding their involvement in areas covered by Articles 3 and 4.

lawmaking processes can generate more normatively appealing or efficient legislation. Even assuming, though, that the time in fact has finally arrived in which a federal commercial law is inevitable, or even assuming that federal law may often have benefits over state law, the NCCUSL is simply the wrong legislature through which to accomplish that goal. The resolution of the federalism debate ought to be a decision for the state and federal legislatures and for the judiciary, rather than a bargaining chip on the UCC drafting table. Certainly a private organization composed of unelected scholars and legal practitioners ought not to catalyze the death of state legislative power over commercial transactions on little more than fuzzy perceptions that federalism is dead. Any decision to take from the states that which, until now, has been their prerogative ought to emerge from the federal government, rather than the NCCUSL. Any decision by the state legislatures to retain or relinquish rights thought to be within their historic province ought to come from the states. And finally, it must be noted that the NCCUSL is, after all, an organization which by its constitution is dedicated to the development of uniform *state* laws and to the preservation of *state* legislative power through their enactment.<sup>192</sup>

### 5. Conclusion

As argued above, the current public interest approach to the UCC revision process is fundamentally flawed. Reliance upon any particular conception of the public interest to evaluate the product of the ongoing UCC project is methodologically unsound given the absence of a consensus on the public interest. Perceptions of what type of legislation is in the public interest are too widely disparate in our pluralist society to guide meaningfully the Code process. At the same time, public choice as a response to the public interest approach eviscerates the UCC revision process of anything beyond narrow maximization of the individual utilities of the participants in the process.

An institutional perspective on the drafting process can transcend the public interest/public choice dialectic. Under this perspective, a satisfactory model for the UCC revision process should comport with largely noncontroversial principles that have a basis in the institutional role of the NCCUSL and ALI as legislatures and as lawmakers. This

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See Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 780.

192. See *supra* text accompanying note 28.

section has argued that political accountability, inclusion, and uniformity are such principles. Political accountability reflects the status of the ALI and NCCUSL as unelected law makers. Inclusion advances participatory process values. Finally, uniformity seeks to protect the rights of the states to legislate in the commercial law area. The next section will evaluate the approaches to UCC drafting discussed earlier in this Article<sup>193</sup> using these three criteria.

### B. *The Case for Context*

Accountability, inclusion, and uniformity warrant easy rejection of the politically biased models.<sup>194</sup> Those models—the consumer rights model, *Figure 2.1*, and the bank rights model, *Figure 2.2*—clearly are problematic. First, both seek to exclude particular groups from the drafting process, either through closing of the process or otherwise. Even if no physical exclusion occurs in fact, the underlying presumption of bias that drives the content in those models mutes any meaningful participation of groups invited to the process but whose contributions are dismissed because they contravene the need for bias. Accordingly, the principle of inclusion is seriously undermined by the biased models.

Of even greater concern is the substantive political bias of the rules generated through the consumer rights and bank rights models and, concomitantly, the accountability principle. Under each model, the politically unaccountable ALI and NCCUSL place their imprimatur upon a statute which is, and which from the start was intended to be, a politically biased protection of class rights. Indeed, many facets of the bank rights model have formed the basis for criticizing the process which begat Article 4.<sup>195</sup> On the other hand, suggestions that the NCCUSL and ALI take a more aggressive approach to UCC issues involving consumer rights<sup>196</sup> are equally as suspect to the extent that those suggestions are interpreted to mandate political bias toward the consumer. The consumer rights model is subject to the same charges as those levied against the bank rights model because

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193. *See supra* text accompanying notes 82-123.

194. *See supra* text accompanying notes 89-96.

195. *See supra* text accompanying notes 158-75.

196. *E.g.*, Rosmarin, *supra* note 177, at 1602-04 (suggesting that the NCCUSL "should use its leadership . . . [to take] an affirmative, aggressive approach to adding appropriate consumer provisions").

it seeks merely to protect a different class and, therefore, ought to be as objectionable as the bank rights model.

The politically biased models also threaten to undermine the principle of uniformity. The excluded party is left to lobby the particular state legislature in order to forestall enactment of the product generated under the biased models, an inevitability that comes at the expense of widespread speedy enactment. States ideologically leaning toward the excluded group most likely will reject enactment entirely.<sup>197</sup> Even if enactment is inevitable, the extreme political bias at the drafting stage nonetheless leads to substantial delays in the process of enactment, as state legislatures sort out the bias in particular provisions and consider nonuniform amendments that seek to balance otherwise slanted provisions in a uniform act. In this way, the biased models pose a great threat to substantial interstate uniformity, and thereby heighten the potential for federal intervention in the area.

Perhaps in response to the deficiencies of the biased models, the emerging paradigm for the UCC drafting process is the policy model, *Figure 1*.<sup>198</sup> Under this view, through inclusion of all interested parties in the drafting process and the weighing of the often competing policy implications of particular UCC provisions, the end result ought to be a proposed uniform law that adequately balances, on policy grounds, the interests of all concerned.<sup>199</sup> While the values that the principle of inclusion brings to the drafting process cannot be overemphasized, and while some evidence suggests the absence of consumer representation in the process of revising Articles 3 and 4,<sup>200</sup> nonetheless the other aspect of the policy model, policy balance, is more open to question and scrutiny.

The policy model suggests that the drafters should carefully weigh the competing public policies and theories that are evoked by provisions under consideration, make a considered choice, and render their determination as to how the balance was obtained. Several

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197. As has occurred in a small number of states that have considered enacting revised Articles 3 and 4. See *supra* note 8 and accompanying text.

198. See generally Patchel, *supra* note 3 (relying upon policy model to critique anticonsumer aspects of Article 4); Rubin, *Efficiency and Equity*, *supra* note 3 (relying upon policy model to argue that Articles 3 and 4 reflect a failure of the legislative process); Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 743 (relying upon policy model to argue that Articles 3 and 4 reflect interest group influence).

199. See *supra* text accompanying notes 82-88.

200. See *supra* text accompanying notes 158-77.

arguments have been advanced in support of the argument for policy-derived rules. First, its supporters claim that the policy model is the appropriate model for the UCC drafting process because we have "learned" that legal rules in the commercial area are instruments of social policy and not a reflection of general, apolitical principles of law.<sup>201</sup> Next, they state that the idea that "commercial law, or any law, is non-political,"<sup>202</sup> is outdated and archaic, if not entirely absurd.<sup>203</sup> Finally, because our "dominant legal paradigm" has evolved through the years since the formation of the NCCUSL and the enactment of the original UCC and because we now apply "modern jurisprudential concepts,"<sup>204</sup> the policy model is necessarily the preferred, if not inevitable and required, process for UCC drafting.

Two common themes run through this defense. First, it assumes that modernity and fashion by and in themselves bear great, if not conclusive, weight in determining the substance of the UCC. Second, it claims that the transformation of commercial law from a nonpolitical to a political nature renders the policy model a modern fact of life. These claims are unconvincing. Many interesting things about commercial law may have been "learned" from the pages of law journals and books in the days since the Realists, but even if indeed anything about commercial law can be truly learned, that fact alone hardly compels a conclusion that the policy model is therefore inevitable. The validity of that learning, and more particularly its practical application to the UCC drafting process, is always a matter of scrutiny, debate, modification, and perhaps rejection. No UCC drafting process necessarily must reflect whatever social, political, or academic theory is in fashion, or perhaps learned, at the particular historical moment of a revision.

As advocates of the policy model assert, it may in fact be verifiable that commercial law is not, when viewed as a mass of legal doctrine, entirely apolitical in nature. But, it does not logically follow from that assertion that, therefore, *all* commercial law *must be* drafted to be political in nature. While some areas of commercial law may be, and surely ought to be, political in nature, it is not inconceivable

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201. Rubin, *Efficiency and Equity*, *supra* note 3, at 560; *see also supra* text accompanying note 83 (discussing premises underlying the policy model).

202. Patchel, *supra* note 3, at 87.

203. *Id.*

204. *Id.* at 163-64.

that other areas may be *very largely* nonpolitical in nature.<sup>205</sup> Moreover, reliance upon Karl Llewellyn's statement concerning the nonpolitical nature of commercial law<sup>206</sup> to contrast the jurisprudence of today with the outdated world view of the original drafters ignores the intended meaning of that claim, which is an open question.<sup>207</sup> Some evidence suggests that Llewellyn used the term idiosyncratically, and intended it to mean "noncontroversial."<sup>208</sup> Finally, even if a political dimension can be isolated within every single commercial law rule or standard, the conclusion—that the NCCUSL and ALI ought therefore implement the UCC drafting process to exploit and advance that political dimension to the exclusion of other values that might exist within the rule or standard and without due regard to their institutional function in the commercial lawmaking process—is debatable.

An analysis of the policy model under the principles of uniformity and accountability supports its rejection. Assume, for example, that the policy model compels on a consumer-related issue a determination of Rule *X* in favor of the consumer. Assume also that the state legislature, if considering the issue alone, would have arrived at the balance differently, or Rule *Y* in favor of businesses.<sup>209</sup> Presented with the proposed uniform Rule *X*, the legislature must then consider whether to enact Rule *X* or its preferred Rule *Y*.<sup>210</sup> A twofold argument supports adoption of the official text over the legislature's own preference: first, that Rule *X* is the result of a superior decision making process—that is, the legislature is wrong;

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205. Indeed, this appeared to be Llewellyn's view on the substance and scope of the Code: "There is a very considerable body of commercial law which is *very largely* nonpolitical in character, and which can be put into shape to be flexibly permanent." Llewellyn, *Keynote Memorandum, supra* note 116, at 524 (emphasis added).

206. *Id.*

207. See Patchel, *supra* note 3, at 87 ("Indeed, much has changed since Llewellyn made the statement [and] few legal scholars today would suggest that commercial law, or any law, is nonpolitical.").

208. See Wiseman, *supra* note 16, at 494, 539-40 (concluding, after extensive analysis of Llewellyn's views on the Code, that "nonpolitical" was idiosyncratic and intended to mean "noncontroversial").

209. This could occur if (1) the state legislature disagreed on the proper balance struck by the NCCUSL through its own deliberative process or (2) if interest groups in the jurisdiction exerted sufficient control over the legislature to sway it to change the balance struck in the drafting process.

210. While it is conceivable that a state might blindly enact the uniform law, depending upon the controversial nature of the right, interest groups have a great incentive to lobby their legislatures to alter Rule *X*.



second, that adoption of the state's preferred Rule Y would lead to interstate nonuniformity and the concomitant federalism concerns.

Presumably the ALI and NCCUSL would seek to conduct an independent inquiry that might lead to a better determination in some social policy sense. Yet, it is questionable whether the incentive to adopt a better rule will outweigh the state legislatures' strong need to accommodate the interests of their polity. Policy or theory might dictate enactment of Rule X, but the states' accountability to its citizens dictates enactment of Rule Y. Certainly the state has, in the interest of federalism and mercantile uniformity, some incentive to adopt the UCC rule. However, whether allegiance to the uniform laws process will outweigh state legislatures' responsibilities to their citizens is an open matter, particularly when the issue involves significant political issues such as consumer protection statutes. Certainly, it seems conceivable that many state legislators might deem accountability to their citizens more significant than any esoteric values that ensue from uniformity, and therefore enact Rule Y. Enactment of Rule Y is a much easier course for the state legislatures than explaining to state citizens the often ineluctable and tenuous relationship between state and federal governments. Accordingly, under the policy model we should expect to see a greater amount of nonuniform enactment, and therefore an eroding uniformity of the UCC.

The policy model in this manner hinders enactment of the UCC and encourages nonuniformity, and, at least by hypothesis, might result in increased costs of enactment on a state-by-state basis. It presumes that state legislatures will value uniform enactment over their obligations to their constituents or to private political interests. Yet, interest group pressures on the state legislatures as well as legitimate, deeply felt concerns of accountability to state citizens make this less likely to be the case. That uniformity will prevail when the UCC drafting process makes significant policy determinations on controversial political rights is unlikely, particularly given the divergent interests of the states. This is because the decisions were made in the absence of consideration of the legislators' accountability to the state citizens.

The contextual rules model,<sup>211</sup> *Figure 3*, minimizes these problems. The contextual rules model advances inclusion to the same

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211. See *supra* text accompanying notes 97-123.

degree as the policy model, but avoids many accountability and uniformity concerns. Contextual rules are grounded in existing commercial practice and in the development of state commercial law. A contextual approach takes an initial stance on the revisions that attempts to remain politically and theoretically neutral, although rules derived from the process are not neutral. It also attempts to codify existing commercial practice rather than leaping bravely into uncharted territory on untested notions of public policy or legal theory.<sup>212</sup> Context thus provides the state legislatures with verifiable reasons for the revision. Given that these reasons are supported by empirical evidence and actual practice, they constitute a more persuasive argument for enactment than mere reference to abstract and controversial views on public policy. This primary focus upon context as the reason that supports the legislature enacting the UCC revision lessens not only the political involvement of the ALI and NCCUSL and the accountability problems that ensue therefrom, but also the potential for nonuniform enactment.

Even if context ought to be the essential focus in the drafting process, some policy choices inevitably do enter into that process.<sup>213</sup> Context may point to two, or even more, possible approaches to an issue. Should such choices become inevitable at that time, certainly a policy analysis is appropriate. In the face of such a choice, the drafters ought to inquire closely into context and weigh the factors that lead it to propose the particular rule in the manner in which it does. The drafters also should provide due guidance to the state legislatures and courts, in the official comments to the text, as to why the balance was struck in the manner it was and the competing factors that weighed into the analysis.

One argument for uniformity may be raised against the contextual rules model. The model clearly will result in legislation that is modest in scope. Controversial political, public policy issues are outside the scope of the revisions absent evidence from practice or concrete legal developments that warrant addressing those issues in the revisions. This creates a need for state legislation to accommodate concerns not properly the subject of the Code under the model—for example by enacting consumer protective legislation either through nonuniform amendments or, more preferably, through additional statutes that supplement the UCC. However, leaving this

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212. See *supra* text accompanying notes 121-23.

213. See *supra* note 123 and accompanying text.

right to the state legislatures rather than usurping their legislative function leads only to a narrow area of nonuniformity rather than a radical nonuniformity that threatens the entire existence of the Code. Allowing individual states to protect rights not identified or resolved in the drafting process in addition gives the states the opportunity to tailor law to particular needs of their citizenry and to experiment with new protections and limitations that will expand, rather than constrict, the development of commercial law.

Two other objections, which are related in concept, also might be raised against the contextual rules model. On the one hand, some might claim that the use of context to determine the proper scope of the revisions is a cleverly disguised argument for retaining the "status quo," a position that frequently has regressive, antireformist overtones. In contemplating a revision, however, the option of retaining an existing rule or principle that has been shown to be functioning well, even if it is the status quo, is not necessarily myopic. Change for the sake of change is not a goal that zealously ought to be pursued to the exclusion of other considerations. Substantial social and economic costs inevitably ensue when changes in the rules governing commercial transactions occur.<sup>214</sup> Moreover, few assurances exist that any proposed change will, once fully implemented, operate as effectively as its advocates assert. There is always the possibility that change ultimately may prove to have been ill-advised. Nor does the contextual rules model mandate that the NCCUSL adhere cautiously to the status quo. Rather, the model seeks to accommodate the need for change within an overall framework of context for determining the scope of that change. Changes merely must be supported by reference to the rule's commercial context. In many areas, a wide diversity of views on the application and scope of particular UCC sections has emerged through case law, doctrinal research, empirical studies, nonuniform amendments, and changes in commercial practice. The model merely demands that those sources be consulted when arriving at a revised approach to the issue.

At the other side, others might claim that the model gives the UCC little room to break the chains of commercial context and be free of all the biases, inequities, immoralities, and inefficiencies that any legal practice carries with it. Therefore, the revisions promise little dramatic or sweeping reform. Whether the Code can so easily

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214. See *supra* text accompanying notes 99-100.

be liberated into commercial law truth is debatable. Law, in practice, always seems deficient when viewed in the shadow of our ideals. In addition, policy-based rules and policy analysis suffer from as many shortcomings, biases, and ambiguities as context-based rules. Finally, the contextual rules model does not reject substantial reforms and significant legal changes. Absent support from the UCC as practiced and in context, the model rather simply leaves those decisions to the state and federal legislatures, the places where perhaps those decisions ought properly be made.

In sum, the debate over the revisions to Articles 3 and 4 has sent the ALI and NCCUSL a seductive invitation to move toward the policy model of UCC drafting. While application of public policy and theory may at times be necessary, strong arguments exist to support rejecting the model as a general approach for the UCC revisions. Freely applied, the policy model threatens the independent judgment of the states on important policy issues and impedes widespread enactment of a largely uniform UCC. Given that nonuniformity increases the potential for federal preemption, the policy model in fact is, in disguise, an invitation to the NCCUSL and ALI to destroy the UCC—their most successful product. In contrast, although reflecting a less grand and comprehensive idea of the UCC revision efforts, the contextual rules model acts to ensure the proper political role of the ALI and NCCUSL as unaccountable legislatures, as well as the continued vitality and growth of the UCC.

#### V. IS IT HALF SO BAD WITH ARTICLES 3 AND 4 AS THEY SAY?<sup>215</sup>

As stated earlier in this Article, it was the 1990 revisions to Articles 3 and 4 that provoked renewed interest in examining the processes that produced the UCC.<sup>216</sup> More specifically, it has been claimed that the Articles 3 and 4 drafting enterprise was a “disgrace”<sup>217</sup> and that the NCCUSL and ALI lent their names to a

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215. In the words of Ralph Waldo Emerson:

People grieve and bemoan themselves, but it is not half so bad with them as they say. There are moods in which we court suffering, in the hope that here at least we shall find reality, sharp peaks and edges of truth. But it turns out to be scene-painting and counterfeit.

RALPH WALDO EMERSON, *Experience*, in *ESSAYS BY RALPH WALDO EMERSON* 292, at 295 (Harper & Row 1951) (1926).

216. See *supra* text accompanying notes 2-9.

217. Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 788.

“bankers’ enterprise” while giving “the banking industry the ability to clothe itself with public policy and to overwhelm most state legislatures with a false aura of public-oriented impartiality.”<sup>218</sup> These indeed are serious charges, and to prove them critics of the Article 3 and 4 revision process point to the substantively biased nature of the revisions toward banks and businesses and against consumers.<sup>219</sup>

A full and comprehensive analysis of the scope of all the changes to Articles 3 and 4 is beyond the scope of this Article. This section will focus specifically on the provisions that critics claim most strongly support their charges of industry capture of the revisions—the UCC provisions concerning allocation of theft and fraud losses in the Articles 3 and 4 payment system<sup>220</sup> and concerning the bank/depositor relationship.<sup>221</sup> While those provisions are not entirely without flaws, it will be argued that application of the contextual rules model severely undercuts claims that the drafters erred significantly in failing to adopt a more consumer-oriented, or more efficient, scheme for addressing those issues. In fact, those provisions are largely consistent with a proper approach to the UCC drafting process. Reliance upon these provisions to claim industry group capture of the drafting process is therefore misplaced.

#### A. Allocation of Fraud Losses

Perhaps the most significant departure that revised Articles 3 and 4 take from prior law involves the allocation of theft and fraud losses. A significant risk in running a check-based payment system are monetary losses incurred when the payor bank<sup>222</sup> pays a check that bears a forged or unauthorized drawer’s signature, a forged or unauthorized indorsement, or an alteration. Under both the original

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218. *Id.*

219. See Patchel, *supra* note 3, at 110 (“[T]he revised Articles 3 and 4 are even more pro-bank than were their predecessors.”), 110-20 (arguing in detail how revisions act against consumers); Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 786-87 (concluding that drafters’ “ongoing commitment to the common-law model” evidences lobbying efforts, and questioning whether that approach will result in “proper” rules or policies); Schwartz & Scott, *supra* note 9, at 643-45 (claiming that the form of rules produced by Articles 3 and 4 revisions are indicative of single industry domination of the drafting process).

220. See *infra* text accompanying notes 222-56.

221. See *infra* text accompanying notes 257-86.

222. “Payor bank” means a bank that is the drawee of a draft. U.C.C. § 4-105(3) (1990). The term “drawee” is the Article 3 equivalent. See *id.* § 3-103(a)(3).

Articles 3 and 4 will be hereinafter cited as either “Original” or “Revised.” “Original” refers to the 1989 version of the Code; “Revised” refers to the 1990 version.

and revised Codes, vis-à-vis its customer, the payor bank as an initial matter bears the loss because such items are not considered "properly payable."<sup>223</sup> Similarly, the payor bank is liable in conversion to the owner of an instrument when it pays an instrument bearing a forged indorsement.<sup>224</sup> The payor bank then may seek to recover from prior transferors for breach of presentment warranties made by those transferors.<sup>225</sup>

The original versions of Articles 3 and 4 implemented a contributory negligence scheme for allocating losses when a party's negligence contributed to the loss. The Code accomplished this by providing that only a bank that had acted with ordinary care could assert the negligent conduct of another party as a defense.<sup>226</sup> Thus, for example, if a payor bank's customer was asserting that the bank paid a check bearing an unauthorized drawer's signature, the bank could only assert the negligence of the customer as a defense if the

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223. See U.C.C. § 4-401 (Revised); U.C.C. § 4-401 (Original).

224. See U.C.C. § 3-420(a) (Revised); U.C.C. § 3-419(1)(c) (Original).

225. See U.C.C. §§ 3-417, 4-208 (Revised); U.C.C. §§ 3-417(1), 4-207(1) (Original).

Application of the UCC causes of action leads to the general result, absent a valid defense, that the payor bank will bear the loss in the case of a forged or unauthorized drawer's signature, because transferors only warrant to the payor bank that they have no knowledge that the signature of the drawer is unauthorized. See U.C.C. § 4-208(a)(3) (Revised); U.C.C. § 4-207(1)(b) (Original). The payor bank rarely will be successful in showing that warrantors have the requisite knowledge, and thus will bear the loss. In the case of forged indorsements and alterations, however, the first party who dealt with the thief generally will bear the loss because all transferors warrant absolutely to their transferees and to the payor bank that there are no forged indorsements or alterations. See U.C.C. §§ 4-207(a), 4-208(a) (Revised); U.C.C. § 4-207(1)-(2) (Original). Thus, in the latter types of cases, the payor bank's warranty action will be successful and the loss will be shifted upstream.

226. See U.C.C. §§ 3-406, 4-406 (Original). Those sections accomplished the intended contributory negligence standard by providing, in the case of § 3-406, that a party whose negligence substantially contributed to the making of an unauthorized signature or a material alteration was precluded from asserting an unauthorized signature or alteration, as applicable, against "a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." *Id.* § 3-406. Under § 4-406 a bank could not raise the negligent failure of its customer to examine bank statements as provided by that section "if the customer establishe[d] lack of ordinary care on the part of the bank in paying the item(s)." *Id.* § 4-406(3). Thus, only banks that had paid the instrument in accordance with reasonable commercial standards, *id.* § 3-406, or had exercised ordinary care, *id.* § 4-406, could assert those defenses and shift the loss back to the party raising the action. Whether § 3-405 also implemented a contributory negligence standard was a matter of debate. Original § 3-405, the "fictitious payee rule," failed to state that it applied only when the drawee or payor bank had acted with ordinary care. See *Prudential Ins. Co. v. Marine Nat'l Exch. Bank*, 371 F. Supp. 1002, 1003 (E.D. Wis. 1974) (finding bank's failure to exercise ordinary care irrelevant for § 3-405 purposes).

bank itself had acted with ordinary care. If so, the bank could shift the entire loss back onto the negligent customer, assuming that the customer's behavior fell within the scope of the defenses provided by the original Code.

The core idea of the original Code's loss allocation scheme was that the payor bank was in the best position to have prevented the loss from a forged drawer's signature because it could examine the signature of the drawer on the signature card on file with the bank. However, heavy volume and an increasingly mechanized system of check collection had impelled some banks to limit or omit entirely sight examination of checks presented for payment. Extensive litigation under the loss allocation provisions addressed the issue of whether a payor bank that had failed to examine the instrument had exercised ordinary care in paying an instrument, and thus could assert the negligence of another party. The original Code did give some limited guidance on the issue by providing that action or inaction that was consistent with "general banking usage" constituted prima facie exercise of ordinary care.<sup>227</sup> In spite of this language, some courts indicated that, regardless of any general bank practices or usages, a bank's failure to conduct a sight examination of every instrument per se constituted a lack of ordinary care.<sup>228</sup> Other courts paid greater attention to banking usage in order to ascertain whether a limited sight review or failure to conduct any sight review nonetheless could constitute exercise of ordinary care. Judicial attitudes were largely irreconcilable, with some courts finding that a limited review of items over only a set dollar amount could constitute ordinary care if other institutions in the area had similar procedures.<sup>229</sup> Other courts found a similar dollar cut-off but with no random examination of items under that amount could constitute a lack of ordinary care,<sup>230</sup>

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227. U.C.C. § 4-103(3) (Original).

228. See *Hanover Ins. Cos. v. Brotherhood State Bank*, 482 F. Supp. 501, 506 (D. Kan. 1979); *Perley v. Glastonbury Bank & Trust Co.*, 368 A.2d 149, 155 (Conn. 1976); *Jackson v. First Nat'l Bank*, 403 S.W.2d 109, 113 (Tenn. Ct. App. 1966), *overruled by* *Vending Chattanooga, Inc. v. American Nat'l Bank & Trust Co.*, 730 S.W.2d 624, 628 (Tenn. 1987); see also *Rhode Island Hosp. Trust Nat'l Bank v. Zapata Corp.*, 848 F.2d 291, 295-96 (1st Cir. 1988) (discussing precedent implying such a result).

229. See, e.g., *Wilder Binding Co. v. Oak Park Trust & Sav. Bank*, 552 N.E.2d 783, 787 (Ill. 1990) (finding sight review only of checks over \$1000 to be a triable issue of fact in exercising ordinary care).

230. See, e.g., *Medford Irrigation Dist. v. Western Bank*, 676 P.2d 329, 332 (Or. Ct. App. 1984) (holding policy of sight review only of checks over \$5000 as failing bank's statutory responsibility).

and still others found a dollar cut-off together with random examination of checks for lesser amounts could constitute exercise of ordinary care.<sup>231</sup>

The revisions to Articles 3 and 4 retain the underlying structure of the original provisions but significantly abandon the contributory negligence scheme in favor of comparative negligence. As with the prior law, Articles 3 and 4 begin with the basic rule that the payor bank is liable if it pays an instrument that contains an unauthorized signature or alteration.<sup>232</sup> Thus, the payor bank still bears the loss as an initial matter. Yet, the revisions expand the defenses that a payor bank may raise. First, with respect to a forged indorsement, the payor bank may claim that the indorsement is effective under either section 3-404<sup>233</sup> or section 3-405.<sup>234</sup> The payor bank also may assert that a customer's lack of ordinary care that substantially contributed to the making of an unauthorized signature or an alteration ought to preclude the person from raising the unauthorized signature or alteration.<sup>235</sup> Finally, the payor bank may attempt to claim that its customer's failure to examine a bank statement promptly ought to preclude the customer from asserting its unauthorized signature or an alteration.<sup>236</sup> Unlike prior law, the revisions omit the requirement that the bank have acted with ordinary care in order to raise these defenses.<sup>237</sup> Rather, upon satisfactory proof of a relevant defense, the loss shifts back to the party who initially asserted the improper payment.<sup>238</sup> That party then bears the burden of proving that the bank, too, failed to exercise ordinary care and that

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231. *Zapata*, 848 F.2d at 294-95 (finding sight review of checks over \$1000 and random exam of checks less than \$1000 to satisfy ordinary care).

232. U.C.C. §§ 3-420, 4-401 (Revised).

233. Section 3-404 of the revised UCC renders an indorsement effective in favor of a person who, in good faith, has paid the instrument or has taken it for value or collection when, inter alia, (1) an impostor has induced the issuer of the instrument to issue the instrument to the impostor, *id.* § 3-404(a), (2) the person whose intent determines to whom the instrument is payable does not intend the payee to have any interest in the instrument, *id.* § 3-404(b)(i), or (3) the payee is a fictitious person, *id.* § 3-404(b)(ii).

234. Section 3-405 of the revised UCC renders an indorsement effective in favor of a person who, in good faith, has paid the instrument or has taken it for value or collection when an employer entrusts an employee with responsibility with respect to instruments and the employee makes a fraudulent indorsement of the instrument. *Id.* § 3-405(b).

235. *Id.* § 3-406.

236. *Id.* § 4-406.

237. *See id.*; U.C.C. § 4-406 (Original).

238. *See* U.C.C. §§ 3-404(d), 3-405(b), 3-406(b), 4-406(e) (Revised).



the loss ought to be allocated according to the parties' respective fault.<sup>239</sup> Although under the revisions the loss initially is placed upon the payor bank, it may raise an expanded number of defenses to shift the loss back to the party asserting improper payment irrespective of the bank's lack of ordinary care. That party, usually a bank's customer, then must prove the bank's lack of ordinary care in order to shift some of the loss back to the bank.

The definition of the bank's duty of ordinary care also has substantially changed from the duty imposed by some case law that had developed prior to the revisions. According to the revisions, the general duty of ordinary care means not only observance of reasonable commercial standards, but also

In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by [Article 3] or Article 4.<sup>240</sup>

With this swift move the body of case law, which had found a bank to have per se failed to exercise ordinary care if it failed to examine an instrument for forgeries,<sup>241</sup> had been overruled.

It has been claimed that these changes represent not only a substantial loss to consumers but, concomitantly, evidence of industry domination of the revision process.<sup>242</sup> It is important first to note the types of fact situations in which the loss allocation provisions of Articles 3 and 4 become germane. The litigation most often is between a bank, or group of banks, and a business whose faithless employee has embezzled large amounts of money.<sup>243</sup> The sight examination requirement in effect acted to insulate businesses from significant fraud losses by barring a payor bank from raising the businesses' negligence on the sole basis of failure to comply with a practice that largely had become out of date. Accordingly, those with

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239. *Id.*

240. *Id.* § 3-103(a)(7).

241. *See supra* note 228 and accompanying text.

242. *See generally* Patchel, *supra* note 3, at 110-20 (disapproving of interest group influence over UCC revision).

243. *See, e.g., Zapata*, 848 F.2d at 292 (concerning employee theft); *Wilder Binding*, 552 N.E.2d at 784 (concerning bookkeeper embezzlement); *Medford Irrigation*, 676 P.2d at 331 (concerning bookkeeper embezzlement).

the greatest interest in retaining the sight evaluation requirement imposed by some courts were businesses rather than consumers. Evidence suggests that those parties most interested in the change were adequately represented at the drafting stage.<sup>244</sup> It is hard to see how the revisions' sanctioning of no sight review—only when “it does not violate the bank’s prescribed procedures”<sup>245</sup> and only when it does “not vary unreasonably from general banking usage”<sup>246</sup>—can therefore be viewed as a conspiracy against *consumers* when *corporate* interests were the interests most negatively affected by the change.

Admittedly, a few consumers might be worse off due to the new definition of “ordinary care.” A recent critic of the revisions suggests that fully informed customers—implying ordinary consumers—would object strenuously to the change.<sup>247</sup> Yet, no cases or empirical evidence are provided to indicate that sight examination inured to the benefit of consumers—rather than negligent businesses—or that banks were abusing rights granted to them by the Code in a manner adversely affecting consumers. Applying the revised Code provisions, the consumers most affected by the new definition of ordinary care and the comparative negligence scheme are those consumers who (1) are negligent themselves in contributing to the scheme;<sup>248</sup> (2) either reside in jurisdictions that found a failure to conduct sight examination was a per se lack of ordinary care<sup>249</sup> or write extremely large checks that fell over the bank’s cut-off for sight examination—an unlikely circumstance in the case of consumer check writing habits;<sup>250</sup> and (3) are the victims of an on-going forgery scheme.<sup>251</sup>

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244. See generally Rubin, *Thinking Like a Lawyer*, *supra* note 3 (describing the revision process of Articles 3 and 4).

245. U.C.C. § 3-103(a)(7) (Revised).

246. *Id.*

247. See Patchel, *supra* note 3, at 117 n.168 (“Certainly a reasonable customer might be willing to pay a small share of \$125,000 in order to avoid the possibility of bearing the entire burden of a \$109,000 loss.”); *id.* at 133-34 (consumers would object to the revisions). Professor Patchel provides no data indicating that any *consumers* have been forced to bear a \$109,000 loss under the Code’s loss allocation rules.

248. This is because consumers who are not negligent are *always* successful. The bank’s duty of ordinary care is only applicable when the bank wishes to assert the negligence of another party. See U.C.C. § 4-406(e) (Revised).

249. Thus, under the original provisions, the bank could not assert the negligence of the consumer. Under the revisions, the consumer now will bear the loss absent proof of bank negligence not related to the mere absence of sight review.

250. Checks under the cut-off amounts were not reviewed and thus the consumer received no benefit from sight review.

251. A one-shot forgery is not likely to result in consumer liability because (1) § 4-

One wonders whether the changes affect consumers in such a serious manner as critics claim or whether all consumers would wish to subsidize these negligent consumers through codifying a sight evaluation requirement. At the same time, the costs of maintaining a sight examination procedure to prevent a bank from being held liable to a negligent business entity for enormous fraud losses, and of litigating the sight review requirement, most likely were passed on to the bank's customers, including their individual consumer customers.

Some commentators also claim that the revisions' new loss allocation scheme is inefficient and does not strike an appropriate balance among the competing policies that loss allocation issues raise.<sup>252</sup> These arguments also are unpersuasive. As argued in the previous section, the policy model upon which these critiques of the comparative negligence scheme rely is erroneous. At the same time, the contextual rules model of Code drafting illuminates the value and validity of the new comparative negligence provisions. The move from contributory to comparative negligence accurately reflects the changes in tort law that have ensued since enactment of the old versions of Articles 3 and 4. Reliance upon general tort principles provides an easily understandable conceptual framework for judicial dispute resolution. The revisions to the definition of ordinary care reflect the actual practice of financial institutions in processing and paying checks by automated means. Finally, the new comparative negligence provisions allow for the expansion and development of the UCC through judicial interpretation of the new provisions. The loss allocation rules thus reflect actual practice and law, encourage development of the area, and promise fairly uniform enactment by the states.

Imagine that a proposal for an entirely efficient, fair method of loss allocation<sup>253</sup> had been offered by the NCCUSL to the state

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406(d) precludes a customer from raising an unauthorized signature most often in cases where the same wrongdoer continues to forge checks over a period of time, *see infra* note 275, and (2) § 3-406's preclusion most often will be factually inapplicable, or difficult to prove, in the case of a one-shot forgery. Section 3-404 is rarely applicable in consumer cases, and § 3-405 is entirely inapplicable.

252. *See generally* Rubin, *Efficiency and Equity*, *supra* note 3 (arguing that revisions are inequitable and fail to achieve a policy of economic efficiency).

253. *See* Cooter & Rubin, *supra* note 138. Professors Cooter and Rubin assert that three principles of efficiency ought to govern the design of any loss allocation system. The *loss spreading* principle assigns liability to the party that can achieve risk neutrality at the lowest cost. *Id.* at 70-73. The *loss reduction* principle assigns liability to the party that can reduce losses at the lowest cost. *Id.* at 73-77. Finally, the *loss imposition* principle

legislatures. For example, the drafters could have adopted a loss allocation framework that set a specific dollar limit for consumer losses irrespective of negligence, an approach adopted at the federal level for some noncheck based payment systems.<sup>254</sup> Suppose that the official draft of Articles 3 and 4 as presented to the states contained a loss limit of fifty dollars in the case of consumers.<sup>255</sup> Certainly this approach would have increased the possibility of nonuniform enactment, as interest groups lobbied the legislatures either to omit the provisions entirely, or to raise or lower the dollar threshold depending upon local customs. At the same time, the rigidity of the proposed dollar threshold would have undermined the longevity of the Code. Changed circumstances might present an argument for changing the initial sum, requiring nonuniform amendments on a jurisdiction-by-jurisdiction basis. This continual political pressure on fifty separate state legislatures obviously has not only monetary costs but also costs such as lost legislator time, which presumably could be devoted to more pressing social issues.

Thus, an analysis of the revised Code's loss allocation scheme does not indicate that it is adverse to consumers in any significant respect. The forms of the rules themselves do not indicate significant interest group domination applying recent public choice hypotheses concerning the product of the drafting process.<sup>256</sup> Moreover, the scheme is consistent with the context in which those rules are to apply. Finally, its inefficiencies, for the large part, are a matter for the legislatures rather than the NCCUSL.

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mandates that enforcement be as inexpensive as possible. *Id.* at 78-84. This Article does not join issue with the Rubin and Cooter view that, in an ideal world, application of these principles might lead to a loss allocation scheme that perfectly balanced the efficiency and equity concerns raised by the problem of losses in the payment system.

254. For example, consumers are liable only for the first \$50 of loss due to an unauthorized use of a credit card. 15 U.S.C. § 1643(a) (1994). Consumer liability for unauthorized electronic funds transfers is tiered. Basic liability is \$50, *see* 12 C.F.R. § 205.6(b) (1995), but can rise to \$500 if the consumer fails to notify the institution after discovering a theft of the ATM card or PIN number, *see id.* § 205.6(b)(1), or can be unlimited for unauthorized transfers occurring after the consumer neglects to report unauthorized transfers which appeared on the consumer's periodic statement, *see id.* § 205.6(b)(2).

255. *See* 15 U.S.C. § 1643(a) (capping credit card losses at \$50).

256. *See* Schwartz & Scott, *supra* note 9. Professors Schwartz and Scott hypothesize that industry group domination is evidenced by production of "Model 1" bright-line rules. *Id.* at 638. However, the loss allocation provisions are characterized principally by their use of vague standards of "ordinary care" and "reasonableness"—evidence of lesser industry influence.

### B. Bank/Depositor Relations

A second point of major contention in the revisions to Articles 3 and 4 lies in those Articles' claimed anticonsumer attitude toward the bank/depositor relationship. In addition to being relieved of subsidizing a judicially imposed sight evaluation requirement, which acted principally to benefit grossly negligent corporations who failed to supervise properly their employees, consumers also receive many benefits from the revisions in this area.

As a general matter, the relationship between a bank and its customer is treated by the UCC as a matter of general contract law.<sup>257</sup> Great latitude is given to the principle of freedom of contract under section 4-103(a), which provides:

The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.<sup>258</sup>

This broad validation of freedom of contract is, and has always been, one of the most controversial provisions of Article 4.<sup>259</sup> Consumers ordinarily do not examine their deposit agreement closely upon opening a checking account, if they examine it at all. The bank/depositor agreement is a quintessential adhesion contract. The continuing presence of section 4-103 in the UCC has fueled some objections to the revisions.<sup>260</sup> The existence of the nearly identical provision in the final version of the original Article 4 in fact swayed Grant Gilmore to oppose enactment of that Article in its entirety.<sup>261</sup> Those who rely upon Gilmore's objections to this section fail to note the ambiguity that surrounded his concerns:

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257. See U.C.C. § 4-401(a) (Revised) ("A bank may charge against the account of a customer an item that is properly payable from the account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.").

258. *Id.* § 4-103(a).

259. See Patchel, *supra* note 3, at 111 (discussing Gilmore's objections to § 4-103).

260. See *id.*; Rubin, *Efficiency and Equity*, *supra* note 3, at 555-56 (noting criticism of Article 4).

261. Gilmore, *supra* note 159, at 375-77.

Let us not overstate the case. I do not believe that it is time to man the barricades. Our way of life will not be in jeopardy even if Article 4 is enacted. Luncheon at the Bankers' Club is not given over to devising ways and means of hoisting the poor customer each day a little higher on his own petard. I do not ascribe to the draftsmen of the final version of Article 4 motives which are in any way improper or malevolent.

A cheap, speedy and efficient collection system is in the private interest of banks as much as it is in the public interest of customers of banks. We may anticipate that in general and in good times banks would use the powers conferred on them under § 4-103 in a good faith effort to improve the collection system. But there are bad times as well as good times; there may even be bad banks as well as good banks. Section 4-103 goes far beyond what is wise or permissible in allowing banks to rewrite the law their way whenever things get tough . . . .<sup>262</sup>

Consumer representatives have presented scant empirical evidence that banks have significantly abused the freedom of contract granted to them under original section 4-103. Presumably, over the forty years from UCC past to UCC present, abundant evidence should exist to support the view that financial institutions have been abusing this privilege in a manner unchecked by legal intervention.<sup>263</sup> Certainly if they have been, a wealth of case law, consumer testimony, and empirical data would unveil these practices and

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262. *Id.* at 376-77.

263. One area where financial institutions got a bit frisky was with respect to funds availability. Institutions instituted a practice of restricting withdrawals of deposited funds, as long as three weeks—15 business days—in the case of some checks. This was ostensibly because some deposited checks ultimately might prove to be uncollectable, a legitimate concern for the depository institution. In practice, though, institutions in effect got free use of the depositor's money during most of the hold period. Litigation on the issue often focused on § 4-103. *See, e.g.,* Rapp v. Dime Sav. Bank, 408 N.Y.S.2d 540 (App. Div. 1978) (finding in favor of bank), *aff'd*, 396 N.E.2d 740 (1979). These practices led to enactment of the Expedited Funds Availability Act of 1987, 12 U.S.C. §§ 4001-4010 (1994), and to the Federal Reserve Board's promulgation of Regulation CC, 12 C.F.R. § 229 (1995).

Regulation CC contains detailed rules on the time limits for when a bank must make deposited funds available to its customer. *See id.* §§ 229.10, 229.12. It further has rules for an expedited return obligation for unpaid checks. *See, e.g., id.* § 229.30 (establishing guidelines that paying banks must follow). These are not popular regulations in the financial community. Perhaps the banks have learned that kittenish play with § 4-103 rights might lead to unpopular, onerous, and costly federal regulation.

buttress the consumer activists' claims. Critics of Article 4 provide little such evidence. In Gilmore's words, perhaps the objectors tend to "overstate the case." In the years following original Article 4, consumers in fact have won significant victories in the courts by arguing for expansion of the doctrines of unconscionability<sup>264</sup> and good faith and fair dealing<sup>265</sup> into the bank/depositor contractual relationship. Instead of the parade of horrors Gilmore alluded to in his discussion of section 4-103, the legal system in the years between original Article 4 and its revisions appears adequately—albeit imperfectly—to have been accommodating the tensions between section 4-103 and the adhesion relationship established by the bank/depositor agreement.

Nor does the revisions' treatment of these pro-consumer developments in the interim indicate a significant desire to take away rights given earlier by the courts. In many respects the revisions legitimate, and sometimes even expand upon, those developments. For example, judicial cases approving of the use of unconscionability and good faith and fair dealing to protect consumers are mentioned in the comments to section 4-401.<sup>266</sup> In a significant consumer victory, the definition of good faith has been expanded from the definition in original Articles 3 and 4. The original Articles defined good faith solely as "honesty in fact."<sup>267</sup> Many courts have narrowly interpreted this definition to require that the bank must only be subjectively honest in its dealings with its customer.<sup>268</sup> The revisions alter the definition to include not only honesty in fact but also

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264. *E.g.*, *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 702 P.2d 503, 216 Cal. Rptr. 345 (1985) (allowing unconscionability claim to be raised in an action to invalidate fees set by a bank).

265. *E.g.*, *Best v. United States Nat'l Bank*, 739 P.2d 554 (Or. 1987) (holding a bank's breach of good faith in setting fees to be a triable issue of fact).

266. *See* U.C.C. § 4-401 cmt. 3 (Revised).

This Act does not regulate fees that banks charge their customers . . . but under principles of law such as unconscionability or good faith and fair dealing, courts have reviewed fees and the bank's exercise of discretion to set fees. In addition, Section 1-203 provides that every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

*Id.* (citations omitted).

267. U.C.C. § 1-201(19) (1989).

268. *See, e.g.*, *First Interstate Bank v. Wilkerson*, 876 P.2d 326, 329 (Or. Ct. App. 1994) (applying subjective state-of-mind standard and rejecting objective standards of reasonableness and fairness); *see also* Overby, *supra* note 102, at 972-73 (discussing subjective, objective, and mixed judicial approaches to "honesty in fact" definition of good faith).

“observance of reasonable commercial standards of fair dealing”<sup>269</sup> and indicate in the commentary that the new objective standard of “fair dealing” imposes on banks a duty to act “fairly” toward their customers.<sup>270</sup> Although the expanded definition will act to benefit a bank’s business clients, certainly ordinary consumers will be beneficiaries of the revised definition of good faith as well.

The revised Code’s attitude toward “check truncation” and related issues also has been cited as representing the revisions’ substantial bias toward business interests.<sup>271</sup> As check collection technology has advanced, the physical transfer envisioned by original Article 4 of checks from bank to bank along a convoluted collection chain is becoming more and more dated. These changes, along with considerations of expense, have impelled some institutions to consider returning monthly statements without the actual checks drawn by the customer. Under the Code the customer has a duty to review the statement for unauthorized payments due to an unauthorized customer’s signature or an alteration.<sup>272</sup> Failure to discover the unauthorized payment will result in precluding the customer from raising, in some very limited instances, the unauthorized payment.<sup>273</sup> The emerging practice of retaining the physical checks obviously bears significantly on this duty. The revisions handle the problem by providing that a customer’s duty only arises if the bank sends or makes available a statement and either returns or makes available the items paid to the customer or provides “information in the statement of account sufficient to allow the customer reasonably to identify the items paid.”<sup>274</sup> Information is sufficient if it is “described by item number, amount, and date of payment.”<sup>275</sup> If the requisite state-

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269. U.C.C. § 3-103(a)(4) (Revised).

270. *Id.* § 3-103 cmt. 4.

271. See Patchel, *supra* note 3, at 118-20, 134.

272. U.C.C. § 4-406(c) (Revised). The general duty is to “exercise reasonable promptness in examining the statement.” *Id.*

273. *Id.* § 4-406(d). The preclusion will arise with respect to the customer’s unauthorized signature or to alterations (1) on an item reflected in the statement *only* if the bank can prove it “suffered a loss” because of the customer’s failure properly to examine the statement, *id.* § 4-406(d)(1), or (2) on items by the same wrongdoer paid in good faith by the bank after the first statement was made available to the customer for a reasonable period not exceeding 30 days, *id.* § 4-406(d)(2).

274. *Id.* § 4-406(a).

275. *Id.* The addition of this requirement into revised Article 4 is unfortunate for reasons entirely unrelated to consumer fairness. The requirement grounds the rule in the immediate present and allows little future judicial development of the overall general requirement that information be “sufficient.” Practices and technology might change in



ment and information is sent, the customer's duty to inspect arises, and, "[i]f, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts."<sup>276</sup>

It has been claimed that these revisions "create[] a hardship for bank customers who keep less than perfect records,"<sup>277</sup> and would be strenuously objected to by consumers if they had the ability to understand the changes.<sup>278</sup> It is questionable whether consumers who keep sloppy records ought to merit sympathy in the revision process. The issues raised by check truncation do not fall so neatly into bank versus consumer lines. Consumers who keep good records conceivably might object to subsidizing the sloppy practices of marginal consumers who have been given additional time<sup>279</sup> in which to perform this relatively simple task before any significant liability is imposed by the Code. In addition, the limited nature of the bank's rights, should it elect to omit physical return of items, undermines the strength of these pro-consumer arguments. Should the bank provide the relevant, albeit limited data, the customer has a duty to discover *only* those unauthorized payments that reasonably could have been discovered based on the statement or items provided.<sup>280</sup> Finally, it is the *bank* who initially bears the loss for an unauthorized signature,<sup>281</sup> it is the *bank* who has the burden of proving that customers

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ways that either would render this rule obsolete or make another approach more appealing.

276. *Id.* § 4-406(c).

277. Patchel, *supra* note 3, at 119.

278. *See id.* at 134 ("If [consumers] knew that these revisions mean they probably no longer will receive their canceled checks with their statement, and thus will be required to discover forged checks from their statements alone . . . consumers might get a little hot under the collar."). Consumer representatives' rhetoric is misleading. True, a customer cannot discover a "forged check" in a statement that does not include the returned checks. The wrongful act is not the forged check, however, but rather the unauthorized payment by the payor bank. Sanctioning no return of checks does take away one *sign* that represents the wrong or harm—the physical instrument—but it does not in any manner attempt to alter a bank's liability for the wrongful act. The only question is whether the statement contains sufficient information to allow a consumer to determine whether a harm has occurred.

279. *See* U.C.C. § 4-406(d)(2) (Revised) (expanding "same wrongdoer rule" time period to 30 days).

280. *Id.* § 4-406(c). To quell consumer lobbyist concerns about § 4-406, a few states have reiterated this in the official comments, even though it is stated in the text of the statute. *See* Hillebrand, *A New Focus*, *supra* note 8, at 126 & n.11 (noting Pennsylvania and California amendments and comments to § 4-406).

281. *See supra* text accompanying note 232.

failed to exercise their duties to examine the statement,<sup>282</sup> and given the limited nature of the preclusion that applies should the bank surmount those difficulties,<sup>283</sup> it is the *bank* who most likely will bear the loss in most cases. Thus, it is questionable that the Code's treatment of these issues represents a substantial bias toward financial institutions and against consumers.

Economic analysis and research into the ways in which legislation can be designed to accommodate inequalities in bargaining power and barriers to raising rights in the judicial system admittedly provide interesting possibilities for commercial law. Yet, the real issue is whether those possibilities ought to be reflected in the UCC, rather than in state or federal legislation. For example, the UCC takes no approach on fee regulation other than through the general rubrics of unconscionability and good faith and fair dealing.<sup>284</sup> Whether fee regulation could be accomplished without destroying uniformity is highly debatable. Requiring institutions to adhere to a set procedure for returning items<sup>285</sup> to their customers also significantly threatens largely uniform enactment because of interest-group pressures on state legislatures and because those procedures are only in their infancy and, if codified, would do little more than ground the Code in a technology that soon will become out of date. State-by-state nonuniform amendments or federal preemption would then be required to bring the Code up to date.

The drafters' attitude to the bank/depositor relationship also is largely consistent with the contextual rules model of the drafting process. The revisions attempt to resolve fairly consumer-related issues that evoked considerable litigation under the doctrines of unconscionability and good faith. Technological changes and commercial practices that have emerged along with check truncation are accommodated in a manner not significantly adverse to consumer interests. The revisions' reluctance to transcend context and take a more activist and regulatory stance on consumer issues such as fee regulation is defensible under the model. The overall approach taken by the revisions not only reflects many consumer victories and the law

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282. See U.C.C. § 4-406(d) (Revised) ("If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c) . . .").

283. See *supra* note 273.

284. See *supra* note 266.

285. See, e.g., Patchel, *supra* note 3, at 119 (implying that the Code ought to require a bank to provide checkbooks with carbon copies).

as it has developed to date, but also promises to result in largely uniform enactment.

Finally, as with the new loss allocation rules, the forms of the rules themselves—which are articulated in broad terms of good faith, fairness, and reasonableness—do not indicate significant interest group domination, applying recent public choice hypotheses concerning the drafting process.<sup>286</sup> Charges that the revisions represent a failure of the UCC drafting process, are substantially biased against consumers, and evidence the financial industry capture of the drafting committee are therefore grossly overstated, if not entirely unwarranted.

## VI. CONCLUSION

Human nature perhaps always compels that “[w]e instinctively think of codification as a noble experiment: radical in its inspiration, reformist in its aims, rational in its methods.”<sup>287</sup> The ongoing process of revising the UCC has sparked again the call for revolution and reform in commercial law. The controversy that has ensued from the revisions to Articles 3 and 4 revisits the conflict between expectation and experience that inherently underlies every codification process. That the revisions are neither radical, reformist, nor completely rational ought not come as a great surprise.

It has been argued that the revisions are flawed because they represent industry group domination of the revision process and because they do not incorporate policy-oriented provisions such as consumer protection regulations that would have been in the public interest. These arguments first proceed on the underlying assumption that substantial agreement exists on the proper scope of the UCC revision effort. As discussed in this Article, that assumption is incorrect. The arguments also assume that public interest theory provides a satisfactory framework in which to evaluate the revisions. However, the public interest is a meaningless, vague, and transitory concept that is highly inappropriate for evaluating the NCCUSL lawmaking effort and ought to be abandoned. In its place principles such as political accountability, inclusion, and uniformity which advance the legislative values underlying the private uniform laws

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286. *See supra* note 256.

287. Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 456 (1979).

process ought to be used to assess any proposed model for the UCC revision process.

As this Article has argued, under the preferred model of Code drafting—the contextual rules model—the drafters of the revisions to Articles 3 and 4 did not wander too far from their proper role. Charges that the revision process represents an evident corruption of the NCCUSL and ALI ought therefore be viewed with a great deal of skepticism. In their continued effort to preserve the integrity of the law,<sup>288</sup> the bank lawyers rather ironically might be viewed as the heroes of the Article 4 tale.<sup>289</sup> Yet, it seems that the policy model of UCC drafting is attaining and will continue to attain greater acceptance. The pursuit of balance, efficiency, equity, or whichever social policy, reform, or legal theory is of fashion at the moment, will guide how we go about constructing our new Code. The value of the contextual rules model, then, is perhaps only that it amplifies in the uneasy pause which presages any radical and revolutionary step forward, a whisper that something grand may be lost.

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288. Cf. Rubin, *Thinking Like a Lawyer*, *supra* note 3, at 768-81 (“They preferred promulgating a well-formulated, familiar-looking statute, brimming with integrity.”).

289. See *supra* text accompanying notes 158-75.

