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ESSAYS

ON THE UCC REVISION PROCESS: A REPLY TO DEAN SCOTT

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I. INTRODUCTION

The Uniform Commercial Code (UCC or the Code) drafting and revision processes are under siege; critics of the Code's formulation of fundamental rules and principles are attacking the conventions of the sponsors of the uniform commercial law and

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the deliberations of the study and drafting committees charged with modernizing the commercial law[1] This Article responds to the indictment leveled by two particularly influential critics—Dean Robert E. Scott[2] and Professor Alan Schwartz[3]—as their work relates to the current project to revise Article 9 of the Code concerning "Secured Transactions"—loans against collateral.[4]

While the Uniform Commercial Code drafting and revision processes may be flawed, obscuring deficiencies in the status quo by discovering "false positives" frustrates rather than serves the crucial goal of accomplishing meaningful reform. Ultimately, commentators who misidentify deficiencies mask real shortcomings and, in fact, may exacerbate the problems of the current system.

Each of the Authors has been involved in Uniform Commercial Code drafting and revision projects over the course of the last fifteen years.[5] The actors and entities responsible for maintaining the integrity of the system have not conspired to formulate rules that perpetrate injustice. In fact, a trend seems to have arisen toward greater balance in the commercial law than has ever before been realized in Anglo-American jurisprudence.

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1. *See, e.g.*, Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who Is Saving the UCC?*, 26 LOY. L.A. L. REV. 563 (1993); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); 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 (1994); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993).

2. Dean, Lewis F Powell, Jr., Professor of Law, and Arnold H. Leon Professor of Law, University of Virginia.

3. Sterling Professor of Law, Yale Law School.

4. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994).

5. The Authors are members of the ALI and the ABA and have participated in those groups' deliberations concerning revision of the Uniform Commercial Code. Professor Alces was the Chair of the ABA Task Force studying the Article 9 Filing System. Professor Frisch is the ABA's advisor to the Article 2 Revision Committee. As counsel to the AIAM, Professor Alces has attended the meetings of the Article 2 Revision Committee.

This Article takes account of the forces that shape revisions of the commercial law and notes the relationship between those forces and the tenor of the resulting codification: Part II peruses Scott's thesis. It responds to his criticism of the UCC drafting and revision processes and describes how uniform commercial law jurisprudence reveals the incongruities in his analysis. Part III tests Scott's conclusions about private legislatures[6] by considering the realist jurisprudence of the UCC and compares the UCC's "private legislature" (PL) commercial law to the commercial-law product of a "public legislature," the Bankruptcy Code promulgated by the United States Congress. Part IV focuses on the aspects of the Article 9 revision that Scott used to illustrate the operation of the Schwartz and Scott thesis—the filing system, purchase money security interests, and proceeds of collateral.[7]

II. THE SCOTT THESIS IN A NUTSHELL

Scott argues that special interests dominate uniform commercial law revision because the process lacks the system of checks and balances provided by public legislatures.[8] Revision efforts therefore develop commercial law that serves those special interests at the expense of constituencies impotent to protect their rights.[9] Scott endeavors to substantiate his criticism of the private legislatures that compose the Uniform Commercial Code by reviewing the draft provisions of revised Article 9, specifically the sections that provide "Rules That Advantage Financing Insiders"[10] and Article 9 filing system rules "That Advantage Less Informed Creditors."[11] According to Scott, the measure of UCC

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6. Scott, *supra* note 4, at 1810-22.

7. *Id.* at 1829-38.

8. Because Article 9 regulates asset-based financers, a paradigmatic example of well-organized and cohesive interests, the process is susceptible to disproportionate influence by a single active interest group representing particular financing interests. In such a case, I suggest that the law revision process will tend to propose rules that are both transactionally efficient and distributionally favorable to the dominating interests.

Id. at 1850.

9. *Id.*

10. *Id.* at 1795.

11. *Id.* at 1799.

drafting inequity is the extent to which those two sections vindicate special interests at the expense of parties who would be better represented in a public legislature.[12] This section will first treat the premises supporting Scott's critique of the private legislature model of UCC revision.

A. *"Logrolling Is Very Difficult"*[13]

Scott describes "logrolling" as the practice of legislators' trading one legislative provision for another.[14] For example, in a public legislature, a representative from a tobacco state might agree to support public transportation funding for a state with a concentrated urban population in return for the urban legislator's promise to vote against increased cigarette taxes. Logrolling makes no claim to moral superiority over other ways of reaching an agreement, but it does provide a means of getting things done. Scott argues that the private legislators involved in UCC drafting processes "cannot typically resolve disputes by agreeing to trade one Article 9 provision for another."[15] He does acknowledge, however, the possibility of trade-offs within particular provisions.[16]

Scott's description of this type of "trade" does not address the fairness of the rule that results from a regime with no, or less, logrolling. Logrolling in public legislatures may serve the interests of legislators by pleasing the constituencies that will vote to keep them in office but may do little or perhaps nothing to improve the broader society A net societal loss might well result if Virginia farmers grow and sell more tobacco, even though New York obtains funding for public transportation projects. Assuming that the transportation funding is a good idea, it is difficult to see why more people should die of cancer at substantial cost to nonsmokers so that New York can obtain that funding. Indeed, if that type of quid pro quo is the hallmark of a

12. *See id.* at 1830-31.

13. *Id.* at 1812.

14. *Id.*

15. *Id.* The history of commercial-law drafting, if it proves anything, proves that the ALI and the National Conference of Commissioners on Uniform State Laws (NCCUSL) do get things done.

16. *Id.*

public legislature, the UCC private legislature model might well be preferable.[17]

Even assuming that logrolling improves the legislative process, consider Scott's conclusion, without citation of any authority whatsoever, that private legislators will make trades within provisions but will not trade one provision for another.[18] That matter of form should not determine substance. For example, under Scott's pessimistic view of special interests, would not a manufacturer of goods for ultimate sale to consumers be inclined to trade the scope of warranty protection for the substance of warranty protection? That is, if the warranty section says that buyers may recover consequential damages from sellers upon certain types of breach, why would an adjustment to the warranty disclaimer provisions not vindicate seller interests?

Scott's arguments in support of his logrolling conclusion are not convincing. He suggests that study group members work on discrete projects and are not in a position to trade, for example, a sales provision for a secured transactions provision: "Study groups are asked to draft single projects and are dismissed when the projects are completed."[19] In fact, many of the same people are active in more than one UCC revision project, either as members of study committees or as participants in the open drafting committee meetings.[20] Of course, that degree of participation does not necessarily guarantee more balanced legislation, but it does ensure that the attorney arguing for a particular provision in one enactment is considerate of that provision's

17. For a comparison of the congressional lawmaking process with the NCCUSL model, see Carlyle C. Ring, *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287, 305-07 (1994).

18. Scott, *supra* note 4, at 1812.

19. *Id.*

20. Because the NCCUSL and the ALI concern themselves with more than just the commercial law, not all of the members of those groups are active in the commercial-law projects. *See* Schwartz & Scott, *supra* note 4, at 600-02 (describing the makeup and procedures of the ALI and NCCUSL); *see also* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-EIGHTH YEAR 35-50 (William S. Hein & Co. 1994) (listing members of all of NCCUSL's special committees). Therefore, a limited number of NCCUSL commissioners and ALI members have a particular interest in the UCC and comprise either the drafting or advisory committees.

cooperation with parallel provisions. While an actual "trade" may not occur—for example, the exchange of a commercial interest provision for a consumer interest section in a different article—more coordination exists between parallel enactments than Scott acknowledges.[21]

Scott's most glaring error with regard to the composition of drafting committees relates to the expertise of the committee members: "Drafting committee members, however, are chosen because they are 'experts,' not because they represent the larger bodies, and the larger bodies have almost no voice in selecting the committee members or the reporters."[22] Of course, it would be curious indeed if the members of legislative drafting committees were selected for their ignorance rather than for their general familiarity with the commercial law.[23] Further reason exists, however, to consider skeptically Scott's observations.

The members of the Uniform Commercial Code drafting committees are selected from the membership of the NCCUSL, an organization comprised of political appointees.[24] Evidence sug-

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21. To a considerable extent, this coordination results from a blurring of the lines that distinguish the scope of parallel commercial enactments. For example, although Article 2 of the UCC applies to the *sale* of goods, Article 2A applies to *leases* of personal property. Many of the provisions in the two articles track one another, and the comments to Article 2A acknowledge when it departs from the sales law formulation of a rule to conform Article 2A with leasing practices. *See, e.g.*, U.C.C. § 2A-201 cmt. (1994):

> **Changes:** This section is modeled on Section 2-201, with changes to reflect the differences between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds a requirement that the writing "describe the goods leased and the lease term," borrowing that concept, with revisions, from the provisions of Section 9-203(1)(a). Subsection (2), relying on the statutory analogue in Section 9-110, sets forth the minimum criterion for satisfying that requirement.

Id. This comment also reveals the relationship among the sales, lease, and personal property security regimes of the UCC. Further, the commentary to other Article 2A provisions concerning consumer protection cites analogous Uniform Consumer Credit Code provisions. *See, e.g.*, *id.* §§ 2A-108 to -109.

22. Scott, *supra* note 4, at 1812-13.

23. For a discussion of the benefits of expertise in the drafting of commercial legislation, see Ring, *supra* note 17, at 306-07.

24. Scott, *supra* note 4, at 1805. Dean Scott erroneously asserts that the more than 300 Commissioners that comprise the NCCUSL are "appointed on a nonpolitical basis." *Id.* at 1804. Insofar as elected political officials in the states, most often the governors, appoint the commissioners, no reason exists for believing that the same

gests that the members of the drafting committees are selected, to an extent, on the basis of the geographic diversity that they will bring to the project.[25] That selection criterion is crucial to the enactment effort once the project is finished. Legislatures in the different regions of the country are more likely to enact legislation bearing the imprimatur of drafters who have their region's parochial interests in mind.

In addition, Scott is not completely accurate when he says that the members of the drafting committees are experts. The members of the drafting committees for Articles 2 and 9 are not the leading sales and secured transactions attorneys in the country. To a considerable extent, they are representatives of different legal perspectives rather than leading commercial-law scholars.[26] The membership of these committees was set when Scott wrote his article, but he offers no concrete examples to support his inaccurate generalizations.

B. "PL Members Act As Individuals and Have No Independent Political Power"[27]

Scott points out that the NCCUSL and the ALI are not political organizations in the partisan sense.[28] He concludes, therefore, that the ALI and the NCCUSL "need interest group support, or at least the absence of interest group opposition, to en-

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political considerations that drive gubernatorial appointments generally do not dictate these appointments. Dean Scott offered no support, anecdotal or otherwise, for his assertion that officials make these political appointments on a nonpolitical basis.

25. For example, consider the geographic diversity of the members of the Article 9 Revision Committee: William M. Burke, Chair, California; William S. Arnold, Arkansas; Marion Benfield, California; Trudi Bird, Connecticut; Dale G. Higer, Idaho; William C. Hillman, Massachusetts; Randal C. Picker, Illinois; Donald J. Rapson, New Jersey; Harry C. Sigman, California; Bradley Y. Smith, New York; Edwin E. Smith, Massachusetts; Sandra S. Stern, New York; Steven L. Harris, Reporter, Illinois; Charles W. Mooney, Reporter, Pennsylvania. THE AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE REVISED ARTICLE 9. PARTS 4 AND 5 (WITH CONFORMING AND MISCELLANEOUS AMENDMENTS TO SECTIONS 1-102, 9-105, AND 9-318) (Draft, Feb. 10, 1995).

26. On the Article 2 Committee, for example, Commissioner Langrock frequently raises issues of concern to trial lawyers, and Professor Spanogle is an international business law scholar.

27. Scott, *supra* note 4, at 1813.

28. *Id.*

sure the passage of their proposals by state legislators."[29] That observation certainly is accurate and is borne out by UCC experience, particularly in the case of enactments that would order the rights of strong constituencies versus the interests of weaker groups.[30] Strong and well-organized interest groups, such as banks, would be in a position to block state enactment of commercial legislation perceived as too indulgent of the rights of less organized and, therefore, less powerful interest groups, such as consumers and small business interests.[31]

This asymmetry between the influence of groups on opposite sides of the debate over commercial legislation has frustrated the uniform commercial law from the time of Karl Llewellyn's vision of the UCC.[32] That the NCCUSL and the ALI have done any worse job in adjusting for that asymmetry than have more "political" institutions, such as the United States Congress, is not at all clear.[33] Such a comparison is the test of the UCC drafting process.

C. "There Are Information Asymmetries Between PL Committees and Study Groups and the Membership at Large"[34]

According to Scott, the members of the NCCUSL and ALI drafting committees are "experts" in the area of law that is the subject of the committees' deliberations.[35] That conclusion is

29. *Id.* at 1813-14.

30. Consider, in this regard, the conclusions of Professors Beutel and Gilmore with regard to the original Article 4 of the UCC. Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted,* 61 YALE L.J. 334, 361-62 (1952) (claiming that Article 4 "was drafted entirely with the purpose of protecting the banks so that they could carry on their business at the risk of the customer" and calling it "a deliberate sell-out to the bank lobby"); Grant Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel,* 61 YALE L.J. 364, 376 (1952) (arguing that "[s]ection 4-103 goes far beyond what is wise or permissible in allowing banks to rewrite the law their way whenever things get tough").

31. *See* Beutel, *supra* note 30; Gilmore, *supra* note 30.

32. For a description of and commentary on Llewellyn's involvement in the drafting of the UCC, see Eugene F Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law,* 11 VILL. L. REV. 213 (1966).

33. *See infra* part III.B.

34. Scott, *supra* note 4, at 1814.

35. *Id.*, *see supra* notes 22-25 and accompanying text.

something of an overstatement and, as well, is misleading in its construction of the term "expertise." Scott also states that because the members of the private legislatures of the ALI and the NCCUSL know little about the subject matter of the drafting committees' work, they are at the mercy of the members of the drafting committee and cannot reach informed conclusions on their own.[36]

Scott does not cite the composition of any particular drafting committee to support this portion of his critique.[37] If he had considered carefully the membership of particular drafting committees, he likely would have found a combination of experts on discrete subtopics within the scope of the drafting projects and generalists familiar with a majority of the legal contexts affected by the draft law He also would have found that both the ALI and NCCUSL committees included members with no particular expertise in the subject matter of the draft.[38] Presumably, they are appointed because they serve as effective bellwethers to indicate the strategic strong points of the draft not immediately accessible to the sponsoring organizations' membership-at-large.

Seniority does not determine the membership of the drafting committees, although effective service on other committees does matter. Why membership based on representation of an interest group—certainly the case with congressional committees—would yield better, more balanced law than would membership based on the criteria applied by the ALI and the NCCUSL is not immediately clear.

Scott concludes that the members of a PL "unlike members of a typical legislature   have little incentive to become more educated before voting."[39] That assertion follows from Scott's observation that

> the typical uninformed PL member seeks to maximize the

36. *See* Scott, *supra* note 4, at 1814 ("[T]he median PL member knows little about the subject matter of any particular drafting project.").

37. *See id.* at 1814-15.

38. The Reporter for the original Article 3 of the UCC, Professor William Prosser, was appointed to that position precisely because he would not bring any biases to the process. Soia Mentschikoff, *Reflections of a Drafter*, 43 OHIO ST. L.J. 537, 542 (1982). He was a torts scholar and not an expert in commercial paper law. *Id.*

39. Scott, *supra* note 4, at 1814.

> public good (as she conceives of it) subject to several constraints: (1) that her private interest—for example, her law practice—is not directly impaired; (2) that her reputation for good judgment is not impaired; and (3) that she spends little time on PL business.[40]

The result of that state of affairs, Scott asserts, is model law consistent with the position of the most prominent interest group.[41] Alternatively, when competition exists between two influential interest groups, either maintenance of the status quo or an accommodation of the conflicting positions may result.[42] Scott reaches those conclusions without reference to any particular issue, controversial or otherwise, treated on the floor of the annual meetings of the ALI or the NCCUSL. In fact, Scott's description of the process is not consistent with the Authors' impressions of both groups' annual meetings. Members who take issue with a draft's treatment of a matter distribute position papers, and real, substantial debate takes place concerning the drafters' accommodation of divergent views.[43] The processes as

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40. *Id.* at 1814-15. Scott would do well to heed Carlyle Ring's warning that

> it should not be forgotten that ultimately each uniform act must be enacted state-by-state, and thus is subjected to review by experts and interested members of the public in that process. But if the NCCUSL has done its job well, the commissioners from each state have worked to make the act suitable for enactment in their state, and recognizing that uniformity must be a compromise consensus that grows from diversity of thought and experience, the act should be appropriate for enactment without amendment.

Ring, *supra* note 17, at 307.

41. *See* Scott, *supra* note 4, at 1790.

42. *Id.* at 1815.

43. *See* Harry C. Sigman, *Improving the UCC Revision Process: Two Specific Proposals*, 28 LOY. L.A. L. REV. 325, 326 n.9 (1994) ("I note with pride that the California Bar UCC Committee delivered to an NCCUSL annual meeting a paper advocating repeal of Article 6 I believe that paper was highly influential in persuading the Conference the following year to adopt that proposal."). Carlyle Ring has observed that:

> From its earliest days, the practice of the NCCUSL has been to read word-by-word every section of the draft and to discuss the draft section-by-section at a minimum of two annual meetings. For instance, Article 4A was read at three annual meetings, consuming substantial floor time with questions, comments, and motions from the floor on specific elements. Similarly, at the annual meeting of the ALI in 1989, the draft was considered by the full membership of the ALI for their input, ques-

they are currently constituted are not a panacea, but Scott's conclusions lack a realistic referent.

D. *"Members of the Drafting Committees and Study Groups Tend To Have Stronger Preferences for Revision Than the Median PL Member"*[44]

Scott asserts that both academicians and the members of drafting committees, who necessarily, in his view, represent interest groups, favor revision over maintenance of the status quo.[45] The drafting committee members who represent interest groups seek legislation that will skew the law in favor of their constituents, and academics favor revision because it gives them something to write about, which is, after all, what academics do for a living.[46] The two prongs of that conclusion are fatally flawed. First, Scott offers no concrete empirical evidence to establish that members of the drafting committees represent interest groups favoring revision.[47] In fact, the interest groups that would be profoundly affected by any revision of Article 2 neither have representatives on the drafting committees nor any demonstrated enthusiasm for revision of Article 2.[48] Further, Scott's

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tions, and critique.

Ring, *supra* note 17, at 298.

44. Scott, *supra* note 4, at 1815.

45. *Id.* at 1815-16. Sitting judges also participate as members of drafting committees. *See* Ring, *supra* note 17, at 294. The interest group served by the judiciary is not clear, and Scott does not make it any clearer.

46. "[Academics] have an institutional commitment to reform because most law professors earn reputations by writing articles about how the law can be improved, rather than by defending the status quo." Scott, *supra* note 4, at 1816.

47. *See id.* at 1816-22.

48. The correspondence to the Article 2 Revision Committee from the large manufacturing interests has urged the Committee to maintain the status quo and not to disturb the fundamental commercial practices that have evolved since the promulgation of the original UCC. *See, e.g.*, Letter from Michael J. Altier, Vice President & Gen. Counsel, Nat'l Retail Fed'n, to Nat'l Conference of Comm'ners on Uniform State Laws (Apr. 19, 1994) (on file with Authors); Letter from Carl Edwards, Jr., Lennox Int'l Inc., to Edith O. Davies, Executive Secretary, Nat'l Conference of Comm'ners of Uniform State Laws (Dec. 19, 1994) (on file with Authors); Letter from Steven C. Hoffman, Senior Corporate Attorney, Caterpillar, Inc., to Edith O. Davies, Executive Secretary, Uniform Law Comm'ners (Dec. 14, 1994) (on file with Authors); Letter from Daniel L. Jaffe, Ass'n of Nat'l Advertisers, Inc., to Members of the Conference (July 24, 1995) (on file with Authors); Letter from Frank T. Judge III, Assistant

conclusions about the motives of academicians are cynical. He fails to appreciate that law teachers can write as much about what is wrong with the law as they can about revisions of the law

Despite the deficiencies of his premises, however, Scott's conclusion is not off the mark; drafting committees prefer doing something over doing nothing. That tendency, however, may well reflect nothing more than their perception of inadequacies in the current law and an estimation of their ability to improve the law There is simply no reason to believe that the urge to reform is a function of interest group pressure or academic efforts to make work.

Notwithstanding his perceptions of interest group and academic motives, Scott concludes that the outcome of most PL processes will be a conservative adjustment of the status quo, unless the members of the drafting committee can convince the members of the ALI and the NCCUSL that the current law warrants more aggressive changes.[49] That really is a nonconclusion, in that it says nothing about the PL process that meaningfully distinguishes it from the public lawmaking process. It also does nothing to reveal any inadequacy in the ALI and the NCCUSL as instruments of commercial-law revision.

Gen. Counsel & Assistant Secretary, Timex Corp., to Edith O. Davies, Executive Secretary, Nat'l Conference of Comm'ners on Uniform State Laws (Dec. 22, 1994) (on file with Authors); Letter from D.G. Lautz, Senior Counsel, Modine Mfg. Co., to Edith O. Davies, Executive Secretary, Nat'l Conference of Comm'ners on Uniform State Laws (Dec. 20, 1994) (on file with Authors); Letter from Charles H. Lockwood, II, Vice President & Gen. Counsel, Ass'n of Int'l Automobile Manufacturers, Inc., to Members of the Drafting Comm. of UCC Revised Article 2 (Mar. 3, 1995) (on file with Authors); Letter from George S. Pappayliou, Assistant Gen. Counsel, Tomkins Indus., Inc., to Edith O. Davies, Executive Secretary, Nat'l Conference of Comm'ners on Uniform State Laws (Dec. 19, 1994) (on file with Authors); Letter from Jill Steps, Gen. Counsel, & Mitch Eisenberg, Attorney, Burndy Corp., to Edith O. Davies, Executive Secretary, Nat'l Conference of Comm'ners on Uniform Laws (Dec. 21, 1994) (on file with Authors).

49. Scott, *supra* note 4, at 1816.

III. TESTING SCOTT'S CONCLUSIONS ABOUT THE PRIVATE LEGISLATURE AND COMMERCIAL LEGISLATION

From the foregoing premises, Scott concludes that the PL process is more susceptible to the influence of interest groups than is the public lawmaking process.[50] Presumably, then, Congress and the state legislatures would devise better commercial law than do the ALI and the NCCUSL.

A. *"Precision" in the Uniform Commercial Code*

Scott asserts that the way to test for the presence of a dominant interest group and the pernicious effects of that group on the PL process is to look for "precise, clear, bright-line rules" in the draft legislation. "[P]recise rules reduce the industry's costs of compliance with the rules, and, if they are rules that help the industry, give the interpreters of the rules (i.e., judges) less ability to read the rule in a way contrary to the industry's interest."[51]

Aspects of that argument are, indeed, curious. Certainly, a dominant interest group will not favor a bright-line rule that operates in a manner inconsistent with the group's interest—such as a rule that invalidates a disclaimer of liability for personal injury.[52] None of the position papers submitted to the Article 2 Revision Committee so far, however, objects to that rule in the current version of Article 2. Further, in certain circumstances, a dominant interest group will favor a more flexible standard than that provided by a bright-line rule, as in the case of the subjective good faith standard in negotiable instruments law. Financial institutions in favor of maintaining the subjective standard argued that the adoption of an objective standard would freeze commercial practices.[53] Bright-line rules or even

50. *Id.* at 1817.

51. *Id.* at 1819.

52. *See* U.C.C. § 2-719(3) (1994) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.").

53. *See* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 812-13 (1958).

just brighter-line rules—demanding objective rather than subjective good faith—do not always operate in favor of dominant interest groups.[54] Reliable conclusions about whom the rule favors depend on the operation of the rule (as well as on the operation of more ostensibly flexible alternatives).

A more fundamental incongruity plagues Scott's conclusion. The rule that appears more flexible may indeed better afford transactional certainty A court confronted with an ostensibly certain rule that the court deems inconsistent with its own conception of immanent justice will do violence to the statutory prescription or ignore the statutory language altogether.[55] Consider, for example, the provision in the original version of Article 3 insulating depositary banks from liability for conversion when they cashed checks bearing forged indorsements.[56] The Code protected the depositary in a manner that clearly made many courts uncomfortable. Several decisions did not consider the statutory formulation, which clearly favored banks.[57] When Article 3 was revised, depositary banks were no longer insulated from conversion liability [58]

The Article 2 experience with unconscionability also reveals the relationship between bright-line rules and transaction certainty Section 2-302 of the Code provides that a court may void an unconscionable contract or provision upon the court's finding, as a matter of law, that the offensive contract or provision is

54. *Id.*

55. *See, e.g.*, Montgomery v. First Nat'l Bank, 508 P.2d 428, 431-33 (Or. 1973) (holding that a bank failed to act according to reasonable commercial standards rather than insulating the bank from liability for conversion as provided by U.C.C. § 3-419(3)).

56. U.C.C. § 3-419(3).

57. *See, e.g*, *Montgomery*, 508 P.2d at 431-33; Ervin v. Dauphin Deposit Trust Co., 38 Pa. D. & C.2d 473, 483-84 (C.P Dauphin County 1965) (depositary bank that paid funds over the counter to party presenting checks bearing forged indorsements held to have paid out its own funds and to have remained in possession of proceeds of check).

58. *See* U.C.C. § 3-420(c).

> A representative, *other than a depositary bank*, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

Id. (emphasis added).

unconscionable.[59] The Code does not define the term "unconscionable" and leaves the courts to their own devices to make sense of this limitation on the freedom of contract.[60] Professor Leff criticized the unconscionability section as lacking a "reality referent."[61] In response, Professor Ellinghaus demonstrated that this ostensible imprecision was the source of the power of the unconscionability section; the provision enables courts to discern the immanent justice of a situation and reach a result consistent with that sense of the situation.[62] Prior to the promulgation of the unconscionability rule, courts had to entertain insubstantial common-law contract fictions to rule in favor of the contract "victim."[63]

Article 2A, the uniform personal property leasing law, contains an unconscionability provision modeled after the Article 2 analog.[64] The Article 2A provision goes further, however, and is more indulgent of the rights of the victims of predatory contracting.[65] That development is particularly noteworthy in regard to Scott's conclusions about the impact of dominant interest groups because transactions within the scope of Article 2A involve a dominant party—large institutional lessors of personal property Article 2 does not similarly proceed from the perspective of a single dominant transactor group; the large institutional seller is also the large institutional buyer. So, if anything, Article 2A reasonably should have a more restrictive rather than less restrictive unconscionability provision than the one found in Article 2.

The foregoing treatment of the unconscionability principle in the law of sales and leases is not intended to demonstrate that commercial-law enactments are unindulgent of particularly

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59. *Id.* § 2-302(1).

60. *See id.* §§ 1-201, 2-103 (failing to define the term).

61. Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485, 558 (1967).

62. M.P Ellinghaus, *In Defense of Unconscionability,* 78 YALE L.J. 757, 814-15 (1969).

63. *See id.* at 763.

64. U.C.C. § 2A-108.

65. Note that U.C.C. § 2A-108(2) permits a court to grant "appropriate relief" if another party's unconscionable conduct induces a consumer to enter into a lease contract. U.C.C. § 2A-108(2).

influential interest groups. Certainly, the influence of financial institutions in payments law cannot be ignored. The point remains, however, that Scott's analysis does not tell very much about the influence of such groups on particular commercial legislation. As careful consideration of his "proof" reveals, his "test"[66] for excessive influence and his criticism of the ALI and the NCCUSL processes is fundamentally flawed.

According to Scott, the interest group model strongly suggests that the competitive environment in which the drafting of legal rules takes place directly affects their character.[67] He argues that, "where several groups are in competition[,] the process will tend to generate vague, imprecise rules and ambiguous standards."[68] His favorite example of the "vague and nondirective" rules that result from an absence of dominant interest groups from the drafting process is Article 2.[69] Within this area, Scott's argument for his theory of lawmaking processes has some initial plausibility

Unlike the various commercial actors who engage in transactions governed by other articles of the Code, buyers and sellers of goods share substantially the same interests. The seller in one Article 2 transaction is often the buyer in the next. The fact that buyers and sellers are interchangeable from one deal to the next suggests that, at the time of Article 2's drafting, a single interest group could not have dominated the private lawmakers. After all, "Sears as buyer would not want to push too hard for fear of prejudicing the interests of Sears as seller."[70] So, Article 2 is a

66. Scott, *supra* note 4, at 1822-50.

67. *Id.*

68. *Id.* at 1825.

69. *Id.* ("The striking contrast between the rules of Article 2 and those found in Articles 3, 4, and 9 provide [sic] a particularly salient illustration of this observation.").

70. Peter A. Alces, *Roll Over, Llewellyn?*, 26 LOY. L.A. L. REV. 543, 544 (1993). Schwartz and Scott make this same point in Schwartz & Scott, *supra* note 4, at 645 ("The effects of sales law do not fall systematically on any interest group—businesses and consumers are both buyers and sellers."). This reality and the fact that parties can contract out of most sales-law rules lead Schwartz and Scott to surmise that commercial interest groups probably were not very active participants in the original deliberations over Article 2 and to predict that they are unlikely to take an active role in its revision. *See id.* at 646. The experience of these Authors indicates otherwise. *See supra* note 48 and accompanying text. Schwartz and Scott thus suggest that Article 2 is loaded with vague rules not because interest groups

model statute that, in terms of interest group politics[71] and drafting style, seems to conform to Scott's model.

The Article 2 example does not, however, support the validity of Scott's model as much as he implies. His conclusion is vulnerable to a basic objection: it ignores the jurisprudential theories of Professor Karl Llewellyn, the principal drafter.[72] To appreciate this assertion, some background is needed.

During the late nineteenth century, a classical jurisprudence prevailed in which the law was understood to be scientific; that is, law was believed to be a discipline complete in itself, with "rules" that had a universality and validity that were absolute.[73] To proceed effectively, a court needed only to discover by deduction the correct rule and apply it to the issues posed in the dispute at hand, without regard for the practical or political consequences of its application.[74] From the beginning of the twentieth century, the foundations of this system of legal orthodoxy were under attack, first from the early Progressives[75] and, lat-

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are in competition but because they are largely disinterested. *See* Schwartz & Scott, *supra* note 4, at 645-47.

71. No cohesive interest group dominated the drafting process.

72. *See* Mooney, *supra* note 32, at 223.

> Although much of the actual drafting of the various articles was done by committees, Llewellyn was the coordinator and, as such, exercised both tremendous influence and practical control over the whole project. He and Professor Corbin served on the committee drafting the sales article and in great measure Llewellyn wrote that section of the Code to suit himself. The first version was published in 1949 and although there have been numerous and extensive revisions since then, the sales article and the all-important introductory article (Article 1) retain most of the characteristics built into them by Llewellyn.

Id. (footnotes omitted).

73. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 4 (1992). According to Horwitz, Professor Duncan Kennedy was the first to characterize this belief as "Classical Legal Thought." *See id.* at 3 n.1. Others have appropriately called it "mechanical jurisprudence," *see* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908), and "fundamentalism," *see* JEROME FRANK, LAW AND THE MODERN MIND 48-56 (1930). Whatever its name, its most influential proponent was Harvard Law School Dean Christopher Columbus Langdell. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 10 (1973). For a succinct summary of classical legal ideas, see James B. Ames, *The Vocation of the Law Professor*, *in* LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 354, 368-69 (1913).

74. *See* FRANK, *supra* note 73, at 8-9.

75. Morton Horwitz marks Lochner v. New York, 198 U.S. 45 (1905), in which the

er, during the 1920s and 1930s, from the "Legal Realists."[76] These diverse theorists shared a common skepticism regarding the existence of a structure of determinate and nondiscretionary answers to legal questions. For them, law was not a structure of neutral and nonpolitical norms that could be disengaged from the realities of life.

One of the most dramatic examples of the move away from classical legal thought can be seen in the law of contracts. As early as 1919, Professor Corbin wrote that

> law does not consist of a series of unchangeable rules or principles . . . . Every system of justice and of right is of human development, and the necessary corollary is that no known system is eternal. In the long history of the law can be observed the birth and death of legal principles. . . . The law is merely a part of our changing civilization. The history of law is the history of man and of society. Legal principles represent the prevailing *mores* of the time, and with the *mores* they must necessarily be born, survive for the appointed season, and perish.[77]

The collapse of the classical model of contract at once freed the legal system from an archaic emphasis on categorical thinking and foreshadowed a profound "shift in method . . . revealed by the dominance of standards over rules in the processes of con-

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Supreme Court used freedom of contract as a constitutional doctrine to strike down a maximum hours law for bakers, as the watershed event that established progressive legal thinking and marked the beginning of the end of classical thought, HORWITZ, *supra* note 73, at 33-39. For a Progressive critique of *Lochner*, see Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). The most striking tenet of the Progressive movement was a belief that the legal system was inseparable from existing political and social conditions. *See generally id.* (describing social realities that undermined judicial reasoning in the freedom of contract cases of the late nineteenth and early twentieth centuries).

76. The term "legal realism" has its genesis in an article by Llewellyn. *See* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). Although realism "was neither a coherent intellectual movement nor a consistent or systematic jurisprudence," HORWITZ, *supra* note 73, at 169, Morton Horwitz explains that "above all, Realism is a continuation of the Progressive attack on the attempt of late-nineteenth-century Classical Legal Thought to create a sharp distinction between law and politics and to portray law as neutral, natural, and apolitical," *id.* at 170.

77. Arthur L. Corbin, *Preface to Third American Edition* of WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT (Arthur L. Corbin ed., 1919).

tract formation and interpretation."[78] Into this setting came Karl Llewellyn.

Llewellyn was one of the most influential figures in the realist assault on the conceptualism of the old order.[79] He believed in finding the law in the commercial context that gave rise to the dispute. Accordingly, the judicial task was to discover this so-called "immanent law " Llewellyn accepted the view that

> [e]very fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law [80]

That Llewellyn assigned for himself the responsibility of drafting Article 2 is not surprising. After all, the sales construct is a peculiarly appropriate model for the drafting style that Llewellyn had in mind. Unlike the other articles of the Code, Article 2 contemplates an essentially bipartite transaction between a seller and a buyer. Third parties may play a role, but their participation is essentially minor.[81] In the sales context, the values of certainty and predictability are able to take a

78. Richard E. Speidel, Restatement Second: *Omitted Terms and Contract Method,* 67 CORNELL L. REV. 785, 786 (1982) (footnote omitted).

79. *See generally* TWINING, *supra* note 73 (providing an interpretation of Llewellyn's thought and its development).

80. KARL N. LLEWELLYN, THE COMMON LAW TRADITION 122 (1960) (quoting Levin Goldschmidt). According to Richard Danzig:

> Llewellyn saw law as an articulation and regularization of unconsciously evolved mores—as a crystallization of a generally recognized and almost indisputably right rule (a "singing reason"), inherent in, but very possibly obscured by, existing patterns of relationships. To him an "immanent law" lay embedded in any situation and the task of the law authority was to discover it.

Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code,* 27 STAN. L. REV. 621, 624 (1975).

81. *See, e.g.,* U.C.C. §§ 2-104, -506 (1994) (financing agency); *id.* §§ 2-504, -509(1), -705 (carrier); *id.* §§ 2-503(4), -509(2) (bailee).

backseat to the need to divine and fulfill the parties' expectations created by their factual bargain.[82] To accomplish this, Llewellyn drafted a statute that requires a court to familiarize itself with relevant commercial practices. It does this

> by utilizing flexible standards, such as commercial reasonableness and good faith, rather than rules that purport to capture and solidify prevailing practices and norms. Each dispute between a seller and buyer is placed in its functional setting where the parties are expected to find and prove relevant "habits," i.e., trade usage or practices, as part of the agreement. Under these standards, the court is given flexibility (at some cost to certainty and administrability) to resolve the new or unique dispute. Moreover, standards are thought to reduce the gap between law and practice and to insure that decisions are practical and responsive to the needs, proven in the particular case, of the parties and the relevant business community.[83]

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82. The foundation for much of Article 2 is therefore made to rest on the concept of "agreement." The definition provides: "'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance ...." *Id.* § 1-201(3). Comment 1 to § 1-205 further reinforces the notion that expectations develop in the context of commercial practices.

> This Act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

Id. § 1-205 cmt. 1.

This emphasis on real commercial life may, at times, undermine Article 2's certainty. Some find no fault in this conclusion. One of the Authors, for example, has argued that the open-ended drafting style of Article 2 helps guide courts toward the best results. *See* Alces, *supra* note 70, at 546; *see also* John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1450-52 (1994) (discussing Article 2's flexible standards). Others, however, grimly contemplate the prospect of cases with unpredictable outcomes. *See, e.g.*, Danzig, *supra* note 80, at 630 ("[T]he Llewellyn approach seems paradoxically to undermine that very certainty and consistency in the law that the Uniform Commercial Code was dedicated to obtaining."); Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962) ("The tastes of the practicing lawyers who advised the draftsmen were, in most cases, opposed to the flexible ideas of the Chief Reporter: they preferred, they insisted on, a tightly-drawn statute, precise, detailed and rigid.").

83. PEB STUDY GROUP, PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL

Seen in this light, Article 2 is a "jurisprudential statement."[84] It reflects not merely a particular view about the appropriate source of sales law but also, and perhaps more interestingly, a distinctive theory about how cases ought to be decided. Llewellyn recognized that deciding difficult cases involves considerations of various kinds. Because courts make their decisions after the dispute has arisen and because the common law focuses on individual cases, the common-law process has a significant advantage over legislation in responding to changing conditions and mores. The sales article reflects a salutary understanding that judges rather than legislators should make some judgments of policy and principle. In sum, Article 2 is best understood and defended as a means of facilitating common-law decisionmaking. A quite general conclusion emerges from this discussion: the style of Article 2 is the way it is because a "self-conscious jurisprude" drafted it.[85] In short, good reason exists for doubting that the real cause of its imprecision is the ability and willingness of interest groups to compete in the political marketplace.

CODE, UNIFORM COMMERCIAL CODE ARTICLE 2 PRELIMINARY REPORT 9 (1990) (footnotes omitted). The drafting approach of Article 9 is quite different. Donald Rapson describes the difference this way: "Compared to Article 2 which looks to the courts and other forums to decide disputes by applying Article 2 principles, Article 9 endeavors to prevent the disputes by anticipating the issues and furnishing answers." Alces, *supra* note 70, at 545 (quoting Letter from Donald J. Rapson, Member, Permanent Editorial Bd. of the UCC, to Peter A. Alces, Associate Professor of Law, University of Alabama 1-2 (Mar. 31, 1986)). The odd thing is that Scott himself suggests at least one functional distinction between Articles 2 and 9 that may explain the different drafting styles. *See* Scott, *supra* note 4, at 1799-1800 ("Article 9's filing system seeks to regulate the provision of information, leaving the regulation of misbehavior to private ordering among the parties."). Notice, however, that, when Article 9 attempts to regulate behavior, as it does in Part 5, it does so in a style similar to the approach taken in Article 2. *See, e.g.*, Donald J. Rapson, *Repurchase (of Collateral?) Agreements and the Larger Issue of Deficiency Actions: What Does Section 9-504(5) Mean?*, 29 IDAHO L. REV. 649, 680-92 (1992-1993) (criticizing the application of the "commercial reasonableness" standard when applied in the context of deficiency actions).

84. Alces, *supra* note 70, at 543.

85. Danzig, *supra* note 80, at 621.

B. Commercial Legislation by Public Legislature: The Bankruptcy Code Experience

No one has the data necessary to draw intellectually defensible conclusions about patterns of special interest group influence on both the private and public lawmaking processes. The impression that a PL is especially vulnerable to interest group capture is almost certainly incorrect. Instances in which a PL might have succumbed to the will of a special interest group whose interests may not coincide with the public interest may provide a basis for criticism of the PL as a lawmaking institution. The issue, however, really must be: with what should the decisions of a PL be compared? Public legislatures are also far from perfect. The legislative output of public legislatures shows signs of interest group influence no better, and perhaps far worse, than the indications of such pressure seen in the product of PLs.[86] Indeed, in light of the more complete and systematic evidence regarding the commercial legislation produced by public legislatures, one can hardly avoid the conclusion that, at least in the area of commercial law, the ALI and the NCCUSL are two of our society's most reliable lawmaking institutions.

Several bodies of federal law clearly reflect the political demands of special interests. Perhaps the most prominent example is bankruptcy law, which is so riddled with legal rules designed to benefit the narrow preferences of discrete interest groups rather than those of the public-at-large that it has compromised the potential rehabilitation of many financially distressed companies.[87] The following examples provide just a small sampling of special interest legislation netted from the Bankruptcy Code as it stood prior to the 1994 amendments.[88]

When the Supreme Court held that firms could reject unfavor-

86. *See, e.g., infra* notes 87-107 and accompanying text.

87. This theme has been articulated in much of the academic commentary on the Bankruptcy Code. *See, e.g.,* Daniel Keating, *Bankruptcy Code § 1114: Congress' Empty Response to the Retiree Plight,* 67 AM. BANKR. L.J. 17, 19 (1993) ("[T]here is a growing sentiment among prominent members of the bankruptcy community that the proliferation of special interest legislation in the Bankruptcy Code tends to thwart one of its primary functions: the financial rehabilitation of struggling companies.").

88. For discussion of the Bankruptcy Reform Act of 1994, see *infra* notes 99-107 and accompanying text.

able collective bargaining agreements because they were executory contracts,[89] Congress came under immediate fire from organized labor seeking protective legislation.[90] As a result of this intense lobbying effort, § 1113 was added to the Bankruptcy Code.[91] This section permits a firm to escape its collective bargaining agreement only after it has engaged in elaborate negotiations.[92] Admittedly, there is room for disagreement about whether this legislation coincides with the public interest. The tension between the influence of a special interest group and the congressional response is, however, undeniable.

Another manifestation of the significant influence of a discrete interest group is § 1114, which favors retiree claims to medical benefits by treating the firm's obligations as administrative expenses.[93] The result is that the debtor will pay these claims

89. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984). The Court was unanimous in its holding that the term "executory contract" in § 365(a) of the Bankruptcy Code includes collective bargaining agreements. *Id.* at 517-27. In a narrow five-to-four decision, the Court also held that a debtor does not commit an unfair labor practice when it unilaterally rejects or modifies a collective bargaining agreement without prior approval of the bankruptcy court. *Id.* at 532-34.

90. *See* William Serrin, *Labor Leaders Voice Concern*, N.Y. TIMES, Feb. 23, 1984, at D25; *see also* Charlene R. Ehrenwerth & Maureen E. Lally-Green, *The New Bankruptcy Procedures for Rejection of Collective-Bargaining Agreements: Is the Pendulum Swinging Back*, 23 DUQ. L. REV. 939, 950 (1985) (describing Congress's swift reaction in the wake of *Bildisco*); Richard H. Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325, 326 (1984) (describing congressional deadlock over corrective legislation); Rosalind Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 AM. BANKR. L.J. 293, 312-21 (1984) (same); James J. White, *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169, 1190-98 (1984) (same).

91. 11 U.S.C. § 1113 (1994).

92. Essentially, § 1113 provides that a bankruptcy court may approve the rejection of a collective bargaining agreement only after: (1) the debtor makes a proposal that provides for modifications to the agreement "necessary" to permit an effective reorganization, (2) the union rejects the proposal without good cause, and (3) the balance of equities clearly favors rejection of the agreement. *Id.* § 1113(c)(1)-(3). This section reflects "insistent congressional effort to replace the *Bildisco* standard with one that [is] more sensitive to the national policy favoring collective bargaining agreements." Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074, 1089 (3d Cir. 1986).

93. The Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, § 2(a), 102 Stat. 610 (codified at 11 U.S.C. § 1114), added § 1114 to the Bankruptcy Code. Daniel Keating wrote about the impetus behind the law.

> Anybody even vaguely familiar with this law knows that it was enacted

ahead of the claims of current employees and unsecured creditors.[94] Not surprisingly, many commentators with little sympathy for legislators subject to interest group pressure have adopted the view that this retiree legislation, driven by one particular interest group, and the rehabilitative goal of Chapter 11 of the Bankruptcy Code are incompatible. Leslie T. Gladstone put it this way:

> Special interest legislation is becoming increasingly prevalent under the Bankruptcy Code. Chapter 11 was designed to balance the various competing interests. That delicate balance is upset by special interest legislation. Certainly retirees are deserving of protection. Equally deserving, however, are tort claimants or, indeed, low-income creditors as a whole. If Congress were to accommodate all deserving interests, chapter 11's utility would effectively be destroyed. Congress's selective accommodation seriously undermines the policy favoring equal distribution among creditors. An overall benefit can be achieved only if the various claimants share equally and refrain from fighting for preferential treatment.[95]

These observations about § 1114 do not necessarily mean that every provision motivated by special interest politics is wrong. The Bankruptcy Code's text and legislative history, however, prove that the section was a triumph for one politically active group. These considerations weigh against facile acceptance of the belief that PLs are peculiarly susceptible to influence by a dominant interest group.

Ironically, at least in the realm of bankruptcy law, the phe-

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> in direct response to LTV Corporation's cutoff of retiree medical benefits when it entered chapter 11 bankruptcy in the summer of 1986. In effect, the new legislation told LTV and any other company with similar intentions that they must, absent extenuating circumstances, continue to honor promises of medical benefits made to retirees even if the company was in chapter 11.

Keating, *supra* note 87, at 17-18. Although the modification of retiree benefits is possible under a process strikingly similar to the steps required under § 1113 for rejection of collective bargaining agreements, *see supra* note 92, there is some evidence that Congress intended greater protection for retiree benefits, *see* Leslie T. Gladstone, *Retiree Benefits Bankruptcy Protection Act of 1988: Welfare Benefits in Need of Reform*, 65 AM. BANKR. L.J. 427, 447 (1991).

94. *See* 11 U.S.C. §§ 503, 507, 726.

95. Gladstone, *supra* note 93, at 450-51 (footnotes omitted).

nomenon of capture extends beyond the efforts of lobbyists for private special interests. When the issue was the constitutional status of bankruptcy judges and the bankruptcy courts, even the Chief Justice of the United States and the Judicial Conference of the United States became active lobbyists.[96] No one has yet come forward with evidence of this type of judicial intrusion into the private legislative process.[97]

The point goes deeper still. Scott surmises that secured financing insiders enjoy an organizational advantage in dealing

96. In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Supreme Court held that bankruptcy judges, as Article I judges, were without judicial power under the Constitution to hear a *Marathon*-type case involving purely state-law issues when no basis of jurisdiction other than the Bankruptcy Code existed, *id.* at 76. These cases could only be heard by an Article III judge with life tenure. *Id.* The practical effect of this decision was to undermine the entire jurisdictional scheme of the 1978 Bankruptcy Code. Congress could have provided the necessary constitutional fix simply by making the bankruptcy judges Article III judges. This idea proved to be politically unfeasible. *See New Court Decisions—Bankruptcy*, 53 U.S.L.W. 2297, 2298 (Dec. 18, 1984). Instead, Congress responded with the Bankruptcy Amendments and Federal Judgeship Act of 1984, which gave the requisite bankruptcy jurisdiction to Article III judges in the district courts. 28 U.S.C. § 1334 (1994). Congress then provided that district courts can delegate jurisdiction to the bankruptcy courts in "cases under" the Bankruptcy Code and in "proceedings arising under or arising in or related to" the Code. *Id.* § 157(a). Still, constitutional issues remain. *See generally* Vern Countryman, *The Bankruptcy Judges: Jurisdiction by Neglect*, 92 COM. L.J. 1 (1987) (critiquing the uncertain bases for bankruptcy court jurisdiction); Lloyd King, *A Chart of Bankruptcy Jurisdiction for Admiralty Lawyers*, 59 TUL. L. REV. 1264 (1985) (describing procedures by which admiralty lawyers may avoid bankruptcy court jurisdiction). Professor Countryman explains why:

> Many of the 1984 defects are doubtlessly due to the fact that too many special interest cooks were stirring the broth, each concerned with adding its own ingredient but without much knowledge of or interest in the impact on the overall end product. Nothing more is to be expected of lobbyists for the consumer credit industry or other private interests. But it is most disturbing that the special interest lobbyists in this case included the Chief Justice of the United States and the Judicial Conference of the United States. It is also most disturbing that the one ingredient essential to them in any solution was that bankruptcy judges not be given Article III status.

Vern Countryman, *Scrambling To Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 43-44 (1985).

97. For a recent discussion of the propriety of a judge's participation in ALI deliberations and projects, see Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1, 25-30.

with private legislators that is lacking in their dealings with public lawmakers.[98] Yet the recently enacted Bankruptcy Reform Act of 1994 paradoxically suggests a different understanding of the relative ease with which this group can capture a public legislature. On its face, this legislation is far more hospitable to the interests of secured creditors than to the needs of unsecured creditors.[99] Many of its provisions do not merely provide a clear statement from Congress and thus seek to promote principles of consistent and certain adjudication; they represent a quite general effort to resolve issues in a way that systematically benefits secured parties.[100]

Examples include overruling the *Deprizio* line of cases,[101] protecting security interests in postpetition rents,[102] expanding

98. *See* Scott, *supra* note 4, at 1818 ("This suggests, inter alia, that an institution that functions as the ALI and NCCUSL do is sometimes easier to influence than ordinary legislatures; as a consequence, it will enact more special interest legislation.").

99. This notion apparently contradicts Scott's statement that "there is at least impressionistic evidence that unsecured creditors, managers, and debtors had some role in molding the Bankruptcy Code to suit their needs, which were driven in large part by the sympathetic stance toward secured creditors evident in Article 9." *Id.* at 1849 n.215.

100. *See infra* notes 101-05 and accompanying text.

101. *See* Ray v. City Bank & Trust Co. (*In re* C-L Cartage Co.), 899 F.2d 1490 (6th Cir. 1990); Manufacturers Hanover Leasing Corp. v. Lowrey (*In re* Robinson Bros. Drilling, Inc.), 892 F.2d 850 (10th Cir. 1989); Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186 (7th Cir. 1989) (generally referred to in the bankruptcy field as *In re* V.N. Deprizio Constr. Co.). In these cases, courts reasoned that, in situations involving an "insider" guarantee, the trustee has authority to recapture preferential payments made to undersecured and unsecured creditors a full year prior to the bankruptcy filing. *See Ray*, 899 F.2d at 1494; *Manufacturers Hanover*, 892 F.2d at 850; *Deprizio*, 874 F.2d at 1193-94. The new law changes the *Deprizio* result by adding a new subsection (c) to 11 U.S.C. § 550. This provision makes it clear that transfers made between 90 days and one year before the filing of the petition cannot be recovered from non-insider transferees. 11 U.S.C. § 550(c) (1994).

102. In Butner v. United States, 440 U.S. 48, 53-54 (1979), the Court held that lenders have a security interest in postpetition rents only to the extent that they have perfected their security interest under applicable state law. Because, in many states, this requirement involves the appointment of a receiver, creditors who failed to take this step have often had secured claims denied. *See, e.g.*, *In re* Multi-Group III Ltd. Partnership, 99 B.R. 5 (Bankr. D. Ariz. 1989); *In re* Metro Square, 93 B.R. 990 (Bankr. D. Minn. 1988), *order rev'd*, 106 B.R. 584 (D. Minn. 1989); *In re* TM Carlton House Partners, Ltd., 91 B.R. 349 (Bankr. E.D. Pa. 1988), *aff'd*, 928 F.2d 1131 (3d Cir. 1991). The Bankruptcy Code now provides for an enforceable security interest in rents if the secured party has perfected the lien on the underlying prop-

the protection given to purchase money security interests,[103] broadening the exceptions to the automatic stay,[104] and enhancing the rights of secured creditors in consumer bankruptcies.[105] Any suggestion that the decidedly pro-secured creditor stance taken by the new act is unrelated to interest group politics would be odd. Indeed, many of the new provisions appear to be a self-conscious effort to reflect a particular interest group's own view of how the Bankruptcy Code ought to work.[106]

If the above assertions are true, the establishment of a National Bankruptcy Review Commission to review the Code might be defended as a frank recognition that, at times, a study group similar to the NCCUSL model is uniquely well situated to make relevant policy decisions.[107] This assessment is not a mechani-

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erty and the security agreement extends to rents. 11 U.S.C. § 552(b). Moreover, subject to an "equities of the case" exception, this subsection also protects a secured party's interest in revenue streams generated by hotels and other lodging properties. *Id.*

103. Congress amended § 547(c)(3) to provide that a trustee may not avoid as a preference the perfection of a purchase money security interest if it occurs within 20 days of the debtor's receiving possession of the collateral. 11 U.S.C. § 547(c)(3). Congress intended the extension of the grace period from 10 to 20 days to conform the Bankruptcy Code with the prevailing version of UCC § 9-301(2). *Id.* § 547 (historical and revision notes).

104. One important new exception involves "single asset real estate," as defined in § 101(51B). A secured creditor may have the stay lifted after 90 days unless the debtor has filed a reasonable reorganization plan or has commenced monthly interest payments to the creditor. *Id.* § 362(d)(3). Another noteworthy change is to § 1110. Formerly, this section permitted a creditor to ignore the automatic stay if it claimed a purchase money security interest in certain types of aircraft and vessels. *See* 11 U.S.C. § 1110 (1992). Congress has now broadened the scope of § 1110 to include all security interests, not just interests obtained to enable the debtor to acquire the equipment. 11 U.S.C. § 1110 (1994).

105. Congress amended § 522(f) to prohibit debtor avoidance of nonpossessory, nonpurchase money security interests in tools, animals, and crops to the extent that the value of such property is in excess of $5,000. 11 U.S.C. § 522(f)(3) (1994). This new provision, however, applies only when the debtor has chosen or is required to utilize the state exemptions and the state prohibits the avoidance of consensual liens on exempt property or state law permits exemptions without limitation in amount. *See id.*

106. *See supra* notes 101-05 and accompanying text.

107. Title VI of the new act provides for the creation of a nine-member commission to study the Bankruptcy Code and make formal recommendations on needed reforms. *See* National Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4147 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). The President, Congress, and the Chief Justice of the United States appoint members of the

cal exercise to uncover general legislative superiority It calls for a judgment about comparative competence, undertaken in light of the statutory structure and the applicable considerations of both fact and policy Special interest group politics poses no more significant challenge to the PL process than it does to lawmaking as a whole.

IV THE FILING SYSTEM

Scott reviewed the Article 9 revision committee's treatment of the filing system to prove his points about the failures of the uniform commercial law drafting process.[108] In Scott's estimation, the dominance of large institutional lenders tilts the filing system playing field in favor of those lenders' interests.[109] Scott errs both in his understanding of the filing system rules, including their operation and political context, and in his conclusions concerning what the filing system reveals about the politics of Article 9 and the uniform commercial law movement.

A. *Scott on Filing System Politics*

The filing system of Article 9 is the foundation of the uniform personal property security law [110] Article 9 is a "race" statute because the first to file or otherwise perfect a collateral interest in the debtor's property will have priority over virtually all com-

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Commission. *Id.* § 604(a). Members of Congress and the executive branch are ineligible for appointment. *Id.* The principal benefits of the Commission seem to be a reduction in the influence of special interest groups and a corresponding increase in the influence of "experts" with a greater understanding of the reorganization process and of the general thrust of bankruptcy law. *See* J. Vincent Aug, Jr., *"A View from the Bench" or the Other "R" Word*, 61 U. CIN. L. REV. 397, 403 (1992).

> I think of what a powerful and prestigious review commission could accomplish. First of all, it could be an end to tinkering with the Code by special interest groups. These special interest groups' understanding of the Bankruptcy Code almost never gets beneath the surface of nondischargeability of a certain type of debt or inclusion or exclusion of types of assets from a bankruptcy estate. If you showed these folks a judicial impact statement, they wouldn't understand what you were talking about. They are very superficial in their approach.

Id.

108. Scott, *supra* note 4, at 1788-90.

109. *Id.* at 1785-87.

110. *See* U.C.C. § 9-401 (1994) (setting forth provisions for required filings).

peting creditors.[111] The debtor and all creditors of the debtor thus depend on the integrity of the filing system. So long as the system works, the cost of credit should be less than if a coherent filing or public notice system were not in place.

The current Article 9 filing system has been the subject of substantial debate, both in academic and practitioner circles.[112] The committee drafting the revision of Article 9 has drawn upon comprehensive studies of the current filing system to fashion adjustments to the status quo.[113] They have designed these adjustments to improve the integrity of the system and thereby lower the cost of credit by reducing some of the risk imposed on the Article 9 scheme by deficiencies in the filing system.[114] In addition, the drafting committee has rethought the place of perfection by filing in the array of available and sometimes competing forms of perfection.[115]

Amendments to filing practices are problematic to effect for a number of reasons. First, a comprehensive commercial statute such as Article 9 cannot easily micromanage the interstices of the filing system, a regime largely within the province of clerical and administrative staff at the state and local levels throughout the country.[116] Second, the benefits of improving the system

111. *Id.* § 9-301 (establishing priorities for certain creditors based on filing status).

112. A recent symposium issue of the *Minnesota Law Review* was devoted to the Article 9 filing system. Symposium, *"Managing the Paper Trail": Evaluating and Reforming the Article 9 Filing System*, 79 MINN. L. REV. 519 (1995).

113. PEB STUDY GROUP, PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE, UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT 88 (1992) [hereinafter FINAL REPORT]; Peter A. Alces & Robert M. Lloyd, *An Agenda for Reform of the Article 9 Filing System*, 44 OKLA. L. REV. 99, 101-05, 115-24 (1991); *see* PEB STUDY GROUP, PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE, UNIFORM COMMERCIAL CODE ARTICLE 9 APPENDICES TO REPORT 15-136 (1992) (providing the results of the Article 9 Filing System Task Force's study of the current filing system).

114. FINAL REPORT, *supra* note 113, at 88.

115. For a review of alternative perfection systems, see generally Lynn M. LoPucki, *Computerization of the Article 9 Filing System: Thoughts on Building the Electronic Highway*, LAW & CONTEMP. PROBS., Summer 1992, at 5 (discussing the possibility and promise of a computerized filing system); David M. Phillips, *Flawed Perfection: From Possession to Filing Under Article 9* (pts. 1 & 2), 59 B.U. L. REV. 1 (1979) (analyzing the considerations that have contributed to the declining importance of possession), 59 B.U. L. REV. 209 (1979) (examining the impact of possession on the Article 9 filing system).

116. *See* U.C.C. § 9-401 (1994) (setting forth detailed filing requirements, including

are not compelling because the parties that would realize the greatest gains from improvement of the system have not indicated that they have any means of effecting the improvements.[117] Third, no consensus exists as to what would constitute real improvement of the system because no consensus has arisen as to what the system should do.[118] Fourth, the filing system is captive to the technology spiral; the available means to modernize (i.e., computerize) the system multiply apace, but not all filing venues can afford to avail themselves of the evolving technologies.[119] Paradoxically, the pace of advance combined with the inconsistent level of funding for new technologies within and among the states means that the prospects for true uniformity of filing practices may be more bleak than at any time in the history of the Uniform Commercial Code.

Any determination of the adjustments in the filing system that would best serve the interests of a particular constituency necessitates a coming to terms with the way in which the system, as currently constituted, fixes the priority of some creditors over others. The general rule of Article 9 is "first to file or perfect wins."[120] The race characteristic of the system favors the vigilant and punishes individuals who do not appreciate the system's operation and who fail to apprise themselves of the information that the system provides or to provide the information that the system requires.

Against that "first-in-time-wins" backdrop, current Article 9 provides certain exceptions and traps for the less wary For example, a financing statement improperly filed will still operate against an individual with actual knowledge of it,[121] thus diluting the pure race nature of the system. In addition and more

proper localities in which to file).

117. *See* Peter A. Alces, *Abolish the Article 9 Filing System*, 79 MINN. L. REV. 679, 707 (1995) (arguing that the only purpose of the filing system is to assure secured creditors of the priority interests given under Article 9).

118. *Id.* at 692-704.

119. *See* LoPucki, *supra* note 115, at 15 (discussing technological improvements in the filing system).

120. *See* U.C.C. §§ 9-301, -312 (listing creditors who take priority over unperfected security interests and establishing rules for prioritizing among conflicting security interests).

121. *Id.* § 9-401(2).

consequentially, Article 9 provides special rules to favor purchase money financing, assuring, so the argument goes, that one lender will not enjoy monopoly power over the debtor.[122] Further, in some circumstances, the article deems certain creditors automatically perfected, without any necessity of a filing.[123] That means that automatic perfection may, on the right facts, prevail over a security interest perfected by filing.[124] In other instances, "secret liens" operate in favor of individuals who have not been the first to file or perfect in the proper venue.[125]

Large institutional creditors, the group that Scott argues is in the best position to influence the revision of Article 9,[126] engage in many forms of secured and unsecured lending. Some of the secured lending is "purchase money," and other portions of a particular bank's portfolio may involve unsecured loans, working capital loans secured by all or only a portion of the tangible and intangible assets of a debtor. As a result, the form of both the lending and the collateral will determine, from one case to the next, which Article 9 rules will operate. To the extent that a rule reduces the lender's risk in some loans but does so at the expense of competing creditor interests, that same rule may increase the lender's risk in the next deal and thereby the cost of that loan.

Professor Gillette recognized this key to the failure of Scott's test of interest group impact on the Article 9 revision process: "I have some quibble with the inherent assumption that the world can easily be divided into camps of secured and unsecured creditors or occasional creditors and financial insiders such that members of each camp share the same interests."[127] The footnote accompanying that text is telling:

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122. *See* Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1167-75 (1979) (discussing situational monopoly and the purchase money priority).

123. U.C.C. §§ 9-302(2)-(4), -304 to -305.

124. *Id.* § 9-312.

125. *See* LoPucki, *supra* note 115, at 7-9 (discussing filings that remain effective even though they cannot be discovered in a search).

126. *See* Scott, *supra* note 4, at 1786-87.

127. Clayton P Gillette, *Politics and Revision: A Comment on Scott*, 80 VA. L. REV. 1853, 1857 (1994).

> The interests of those who take purchase money security interests or who are more likely to be purchasers of chattel paper will vary from the interests of general financers who take wraparound security interests. Thus, any complete interest group theory will have to account for the way conflicts among these groups are treated in the revision process.[128]

Insofar as Scott's premise that large institutional creditors occupy one transactional position and benefit from rules that favor that position at the expense of those occupying other positions[129] relies on his incomplete appreciation of large institutional creditors' loan portfolios, the conclusions proceeding from that premise are necessarily flawed. Consideration of Scott's particular conclusions about the operation of the filing system revisions with respect to purchase money security interests and proceeds of collateral reveals the fatal flaw

In the section of his article captioned "Filing, PMSIs, and Proceeds,"[130] Scott describes the Article 9 Study Group Report on the state of the filing system and then compares the proposals for reform with his conception of the interests of large institutional secured creditors.[131] Scott correctly explains that the Article 9 Study Group Report on the filing system described numerous deficiencies of the extant system.[132] He also writes that, in response, "the Filing Report recommended a series of revisions, ranging from wholesale technological reform, to keeping the current system while requiring more centralized filing practices, such as filing by taxpayer identification number, clarifying the debtor's name requirement, and imposing time limits on filing processing."[133]

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128. *Id.* at 1857 n.9.

129. *See* Scott, *supra* note 4, at 1785-87.

130. *Id.* at 1829.

131. *Id.* at 1829-38.

132. *Id.* at 1829-30.

133. *Id.* In the footnote accompanying that text, Scott somewhat cryptically and curiously observes that "neither the minutes nor the correspondence of the Study Group indicate that its members ever questioned the assumption that the concerns enumerated in the Filing Report cause real hardship for secured creditors." *Id.* at 1830 n.140. Is Scott suggesting that deficiencies in the status quo do not compromise the efficiency and reliability of the system? Would not any deficiency that undermines the certainty of the system necessarily increase risk and therefore increase

Scott opines that the Study Group could have recommended one of "two polar alternatives"[134]—a reinforcement of the role of the filing system at the expense of the primary secured creditors who, Scott concludes, would subsidize the expensive improvements or, alternatively, the elimination of public filing altogether.[135] Scott then explains that the Study Group Report advocated a middle ground—a compromise—Scott asserts, that is best explained by his interest group analysis.[136] The compromise expands "the existing categories of exemptions from some or all of the filing rules so long as the benefits of the larger exemptions accrue to members of the [dominant interest group, large institutional secured creditors]."[137] Scott never makes clear why these powerful interest groups did not simply use all of their resources to abrogate the filing system altogether.[138] Such a result occurred in the promulgation of Article 2A, when the ostensible ownership issues were before the drafting committee, and the final product included no filing requirement whatsoever.[139]

B. Choice of Law

Scott offers the Study Group recommendations concerning choice of law as a "clear example"[140] of the type of relatively precise rule indicative of interest group capture.[141] Currently, the correct office for filing purposes, though of critical importance to the secured party,[142] can be difficult to determine.[143]

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the cost of all secured transactions in which filing matters? The point is not that deficiencies of the filing system cause hardship for secured creditors but rather that they burden the secured credit system and thereby cause hardship for all creditors. Debtors are also affected because they will pay more for credit than they would if the security system was more reliable.

134. *Id.* at 1830.

135. *Id.*

136. *Id.* at 1830-31.

137. *Id.* at 1832.

138. *See id.* at 1831 n.144 (discussing the incentive structure in public and private disclosure systems).

139. *See* U.C.C. § 2A-101 cmt. (1994).

140. Scott, *supra* note 4, at 1826.

141. *Id.*

142. If the secured party files in the wrong place or not in all of the places required by the UCC, the security interest will remain unperfected. *In re* Walker, 142

The first thing to decide is the state in which the secured party must file a financing statement.[144] The answer to this question is found in the conflict-of-laws rules of section 9-103.[145] This section consists of six subsections, each of which contains the conflict-of-laws provision for a particular type of collateral.[146] The primary rule for tangible collateral with a relatively permanent situs is that the law of the jurisdiction in which the collateral is located governs perfection and the effect of perfection.[147]

On its face, such a rule seems simple enough. The secured party must only determine where the collateral is located and then comply with that jurisdiction's perfection requirements.[148] Such a rule, though simple, is not satisfactory; the various types

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B.R. 484, 485 (Bankr. M.D. Fla. 1992) (construing the filing requirement strictly). The general rule is that "[e]xcept as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors." U.C.C. § 9-201. Despite the general rule, an unperfected security interest is unenforceable against most third parties because the number of exceptions to the general rule have, in fact, gobbled up the rule. *See, e.g.*, U.C.C. § 9-301 (listing persons who take priority over an unperfected security interest); *see also* 11 U.S.C. § 544(a)(1) (1994) (declaring that the bankruptcy trustee prevails over secured creditors whose interests are unperfected on the date of bankruptcy).

143. The number of cases involving an allegedly misfiled financing statement reported in a UCC reporting service exceeds 200. 26 U.C.C. Rep. Serv. (Callaghan) §§ 9401.26-.27 (1989 & Supp. 1995).

144. After the secured party resolves the "which state" question, she must determine the proper office or offices within the state with which to file the financing statement. UCC § 9-401(1) offers each adopting state the choice of three alternative provisions that fix the place to file. U.C.C. § 9-401(1). Depending on which provision a state adopts, the answer to the "where in the state" question could depend on the debtor's place of residence or business, the location of the collateral, or the use of the collateral. *Id.* Because Scott ignores the Study Group's position on this second question, this Article will do the same.

145. *Id.* § 9-103.

146. The six categories of collateral are: (1) documents, instruments, and ordinary goods; (2) goods covered by a certificate of title; (3) accounts, general intangibles, and mobile goods; (4) chattel paper; (5) minerals; and (6) investment property. *Id.*

147. *Id.* Section 9-103(1)(b) provides that:

> Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

Id.

148. *Id.*

of collateral covered by section 9-103(1) have a relatively fixed location but are nevertheless capable of movement.[149] Therefore, section 9-103(1) combines a temporal test with a location test. The statute also tells the secured party to determine the location of the collateral when "the last event occurs on which is based the assertion that the security interest is perfected or unperfected."[150] This provision is the so-called "last event" test.[151]

The Study Group Report recommended applying the law of the jurisdiction where the debtor is located.[152] It did so for several reasons. First, the Study Group focused on the benefits of having a single choice-of-law rule.[153] For example, a single rule will obviate the need for a secured party to make multiple filings in many cases in which such filings are now necessary.[154] One problem with current section 9-103 arises when the debtor does business in more than one jurisdiction. A secured party who wishes to perfect a security interest in the debtor's inventory and accounts must now file both where the inventory is located[155] and where the debtor is located.[156] This double filing would not be necessary in a one-rule regime.[157]

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149. *See id.* § 9-103(1) (covering "[d]ocuments, instruments, and ordinary goods").

150. *Id.* § 9-103(1)(b).

151. The potential ambiguity of the last event test can make its application extraordinarily difficult. For example, must the last event be one of the statutory events required for perfection? The review group that analyzed the issue said "no," characterizing the requirement as an "all events" test. FINAL REPORT, *supra* note 113, at 78. For an overview of the last event test, see David Frisch, *U.C.C. Filings: Changing Circumstances Can Make a Right Filing Wrong. But Can They Make a Wrong Filing Right?*, 56 S. CAL. L. REV. 1247, 1263-71 (1983). The Study Group waffles on whether any form of the last event test deserves inclusion in the new Article 9. *See* FINAL REPORT, *supra* note 113, at 78-79.

152. FINAL REPORT, *supra* note 113, at 74. The report recommends that the "location of the collateral" be retained for those instances in which the secured party perfects by possession. *Id.*

153. *Id.* at 75.

154. *Id.*

155. U.C.C. § 9-103(1) (1994).

156. To perfect a security interest in accounts, the UCC requires a filing in the jurisdiction where the debtor is located. *Id.* § 9-103(3).

157. In addition, going to a single rule will make it easier for a secured party to claim a continuously perfected security interest in proceeds without having to make a second filing. *See* FINAL REPORT, *supra* note 113, at 75.

Further, because debtors change location less often than does collateral, one consequence of a rule that turns on the location of the debtor will be a reduction of the burden of alertness presently imposed upon secured parties.[158] No longer will a secured party run the risk of losing its perfected security interest through the interstate shuffling or movement of goods by the debtor or third parties.[159] Changing the baseline rule thus may decrease the secured party's overall costs.

In making the case for his interest group model, Scott may well be correct when he states that the location of the debtor rule is "cheaper for a primary lender."[160] General financiers, however, may not be the only winners if this rule change is adopted. When facing a complex task such as predicting the behavior of buyers and creditors, the absence of systematic and well-controlled data and a dependence on casually asserted myths about the system are hinderances.

Consider, for example, the implications of the Study Group's recommendation for purchasers of discrete goods. Scott assumes that their costs will increase.[161] One might, however, conclude otherwise. Under current section 9-103(1)(d), if a secured party properly perfects its security interest under the law of the place where the collateral is located when the relevant last event occurs, the original filing remains effective for up to four months after the debtor takes the goods to another state.[162] If the secured party refiles in the removal state within this statutory grace period, the security interest will continue perfected without interruption.[163]

A major consequence of the four-month rule is that fraudulent debtors can go a long way towards making a filing disappear simply by taking goods across state lines. An innocent purchaser wishing to buy the collateral thus must assure herself that the goods have been in-state for at least four months without a filing, or she must check (assuming this information can some-

158. *Id.* at 76-77.
159. *See infra* notes 161-64 and accompanying text.
160. Scott, *supra* note 4, at 1828.
161. *Id.*
162. U.C.C. § 9-103(1)(d)(i) (1994).
163. *Id.* § 9-103(1)(d)(ii).

how be obtained) for a filing in every state where the debtor does or has done business. If a location-of-the-debtor rule becomes effective in the revision of section 9-103(1), this problem, for the most part, will go away.[164]

On the one hand, purchasers might incur greater expenses by searching for a filing "in a potentially distant location."[165] On the other hand, if the proposed rule change reduces the likelihood that the debtor will be able to mislead purchasers, their costs might be less.[166] In sum, no one has the data necessary to draw intellectually defensible conclusions about "who wins" and "who loses" if the Code switches to a location-of-the-debtor rule. In fact, asking such a question can easily produce meaningless or misleading answers.

C. Purchase Money Security Interests

In considering the Study Group's suggestions concerning purchase money security interests (PMSI), Scott again maintains that he has uncovered evidence of interest group power.[167] His claims about PMSIs can be summed up in two related assertions: (1) the direct costs and deficiencies of the filing system provide an incentive for primary or dominant creditors to opt out of the system by relying on private disclosure,[168] and (2) the

164. *See* FINAL REPORT, *supra* note 113, at 76 ("[D]ebtors are unlikely to change locations as frequently as collateral does.").

165. Scott, *supra* note 4, at 1828. Even this conclusion is highly speculative. An obvious first step in any analysis of whether a purchaser's costs will increase, decrease, or remain the same is to study the relevant class to see what percentage of potential purchasers will actually use the filing system. In some instances, a purchaser would be better off by not searching. *See* U.C.C. § 9-401(2) (providing that a misfiled financing statement is nonetheless effective "against any person who has knowledge of the contents of such financing statement"). Second, one must know who conducts searches (e.g., purchasers, attorneys, or private search firms) and how their costs compare. Finally, questions remain as to how the choice of filing office affects those costs. Each issue is worthy of serious attention.

166. Even now, a purchaser of goods may have to search for filings where the debtor is located if the goods are "mobile goods" under § 9-103(3) or if the purchaser is unsure of their classification. In fact, in the latter case, a prudent purchaser would be wise to search where the goods are located (the rule for ordinary goods) *and* where the debtor is located (the rule for mobile goods).

167. *See* Scott, *supra* note 4, at 1832-35.

168. *See id.* at 1829-32.

recommendations offered by the Study Group would permit more of these financial insiders to escape from the Code's first-in-time priority rule by making it easier for them to achieve purchase money status.[169]

This view seems rather confusing and probably not entirely consistent. In discussing the recommendations concerning choice of law, Scott refers to general financiers as the dominant class of secured creditors[170] and seems to adopt the Study Group's conclusion that

> the location of the debtor rule has offsetting costs that must be borne by other creditors, such as purchase money financers of discrete goods, who must now file in the state where the debtor is located (which is a more problematic exercise than filing where the newly acquired collateral is located).[171]

On this view, if understood correctly, no gains by PMSI creditors should result if those gains would be detrimental to the interests of primary lenders.[172] In contrast, if PMSI creditors are the ones who exercised the greatest influence over the Study Group, then Scott would have to explain why the suggested conflicts rules look the way that they do. Quite a different possibility is that these two interest groups were in competition. Where, then, are the vague general standards predicted by Scott's model?[173]

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169. At the end of his critique of the PMSI revisions, Scott claims that "[t]he effects are twofold. First, firms are likely to rely increasingly on private disclosure as a substitute method of policing against debtor misbehavior. Second, the costs of the filing system are increasingly externalized from primary or dominant creditors to less informed or 'occasional' creditors." *Id.* at 1834-35. Scott ignores the fact that, if the PMSI is in inventory, the PMSI creditor must continue to rely on the filing system for information about prior claims because such claimants must receive notice before delivery of the goods to the debtor. *See* U.C.C. § 9-312(3).

170. Scott, *supra* note 4, at 1827.

171. *Id.* at 1828.

172. Because a PMSI creditor will be able to gain priority over prior creditors with floating liens, U.C.C. § 9-312(3)-(4), a rule that benefits the former will almost always come at the expense of primary lenders. This analysis assumes that lenders who engage in general financing are not also substantially engaged in purchase money financing, a conclusion that Scott apparently takes for granted.

173. At one point, Scott does acknowledge that PMSI creditors are in competition with other creditors and claims that the Study Group's unwillingness to recommend

Despite the indispensability of current judicial and statutory trends as an ingredient in making sense of the Study Group Report, direct consideration of this data is absent from Scott's discussion. The Study Group's proposal to revise sections 9-301(2) and 9-312(4) to extend the grace period for perfecting PMSIs from ten to twenty days provides one illustration of how the absence of this information might lead to distorted inferences.[174] The *Final Report* explains that "[a]t least 34 states have amended § 9-301(2), § 9-312(4), or both, so as to extend the 'grace period' for achieving PMSI priority from 10 days to 20 days. In addition, two states have extended each period to 15 days and two others have extended each period to 21 days."[175] Ironically, this trend suggests that, if there is a political story of interest group pressure to tell, it unfolded across the country in *public*, not private legislatures.[176]

D. Proceeds

Scott thinks that, like its treatment of PMSIs, the *Final Report*'s treatment of proceeds gives the reader a meaningful grasp of the political dynamic.[177] The purpose of this Article is not to interpret the evidence but to illustrate several additional sorts of evidence—seemingly more than baseless conclusion or mere anecdote but, on examination, no more informative.[178]

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a default formula for the allocation of payments to a creditor with a PMSI and a non-PMSI security interest in the same collateral is consistent with the prediction of his model. Scott, *supra* note 4, at 1834 n.155. He does not explain why, if there is competition among classes of creditors, there are bright-line rules favorable to PMSI creditors on other issues. While these are difficult policy questions, his model does not seem to settle the matter.

174. FINAL REPORT, *supra* note 113, at 103.

175. *Id.*

176. Indeed, a point rarely written about, but one that Scott must heed, is that, in all Article 9 drafts prior to 1956, the 10-day grace period was applicable to both inventory *and* non-inventory PMSIs. 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 29.5, at 799 (1965). Therefore, questioning whether the Code's treatment of purchase money lenders has improved over time may lead to widely divergent assertions.

177. *See* Scott, *supra* note 4, at 1835 ("Here, the Study Group recommendations work to enhance the favorable position granted to general financing creditors by expanding their ability to maintain their first-in-time priority in proceeds.").

178. Answers to most questions about the behavior of the secured credit system are

What is important to know about the current scope of the term "proceeds" under section 9-306 is that it has a transactional focus. The secured party obtains a security interest in anything received upon the "sale, exchange, collection or other disposition of" the collateral.[179] Accordingly, courts have taken the position that the debtor must have transferred title to the collateral before an asset can be classified as proceeds of that collateral.[180] This requirement has led to a series of decisions that have denied proceeds status to such items as lease payments,[181] cash dividends,[182] and various kinds of farm subsidies.[183]

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inherently statistical. For this reason, the evidence that this Article adds to the debate permits only the loosest and weakest of inferences about the matters that the Authors are trying to understand. Yet illuminating the unknowns in the system can aid in the development of a research agenda for obtaining the good and complete data needed.

179. U.C.C. § 9-306(1) (1994).

180. *See, e.g., In re* Hastie, 2 F.3d 1042, 1045 (10th Cir. 1993) ("[E]ach of the foregoing events describes an event whereby one asset is disposed of and another is acquired as its substitute.").

181. *See, e.g., In re* Corpus Christi Hotel Partners, Ltd., 133 B.R. 850 (Bankr. S.D. Tex. 1991); General Elec. Credit Corp. v. Cleary Bros. Constr. Co. (*In re* Cleary Bros. Constr. Co.), 9 B.R. 40 (Bankr. S.D. Fla. 1980). *But see* Investment Hotel Properties, Ltd. v. New W. Fed. Sav. & Loan Ass'n (*In re* Investment Hotel Properties, Ltd.), 109 B.R. 990 (Bankr. D. Colo. 1990) (finding that payment for the use of hotel rooms is proceeds); John Deere Indus. Equip. Co. v. Southern Equip. Sales Co. (*In re* Southern Equip. Sales Co.), 24 B.R. 788 (Bankr. D.N.J. 1982) (holding that the term "proceeds" includes rents). The Permanent Editorial Board for the UCC has taken the position that the right to receive rentals is proceeds.

> Where a debtor has granted to a secured party a security interest in goods that the debtor later leases as lessor, the lease rentals would constitute proceeds of the secured party's collateral for the reason that the debtor's conveyance of a leasehold interest in the goods constitutes a disposition of the goods for purposes of § 9-306(1).

PEB COMMENTARY ON THE UNIFORM COMMERCIAL CODE, PEB COMMENTARY NO. 9, FINAL DRAFT, U.C.C. Rep. Serv. (Callaghan), at 1 (June 5, 1992).

182. *See, e.g., In re* Hastie, 2 F.3d 1042. Courts have drawn a distinction between an ordinary cash dividend and a liquidating dividend. The latter would seem to be proceeds. *See, e.g.,* Aycock v. Texas Commerce Bank, N.A., 127 B.R. 17 (Bankr. S.D. Tex. 1991).

183. Most of the cases in this area have involved the federal payment-in-kind (PIK) program. Under this program, a farmer agrees not to grow crops on a certain percentage of his land and receives, in exchange for that promise, a governmental payment in kind of the foregone crops. *See In re* Sunberg, 729 F.2d 561, 561-62 (8th Cir. 1984). The question is whether the PIK payment or payments under similar

The *Final Report* proposes a dual conception of proceeds that would encompass all varieties of assets. First, the Code would address the "exchange and replacement" cases.[184] Proceeds would include anything "received in place of and in substitution for the original collateral, which has been disposed of or reduced in value (such as by collections)."[185] Under this standard, the secured party presumably would have a claim to lease rentals and to the debtor's tort and warranty claims.[186] The second category of cases are the "close association" cases.[187] These situations would involve "all forms of distributions on account of securities, partnership interests, government subsidies, and other payments that do not involve an 'exchange.'"[188] The Study Group would treat these receipts as proceeds because they are "so necessarily and obviously associated with an interest in the original collateral that a security agreement and financing statement ought not to be required to mention them explicitly."[189]

Within this area, Scott's argument that general financing creditors dominate the Article 9 revision process has some initial plausibility. Adoption of the Study Group recommendations and the resulting expansion of the conception of proceeds surely will redound to the benefit of some general financiers and will, as Scott suggests, have some impact on the integrity of the filing system.[190] As this Article has indicated, however, the recommendations can be meaningless or misleading if examined without reference to context. Scott has taken in too little of the pic-

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programs are proceeds of the crop that never existed. Most courts have held that it is not. *See, e.g.*, *In re* Kingsley, 865 F.2d 975 (8th Cir. 1989); *In re* Binning, 45 B.R. 9 (Bankr. S.D. Ohio 1984).

184. FINAL REPORT, *supra* note 113, at 110-11.

185. *Id.* at 110.

186. *Id.* Although a tort claim might qualify as proceeds under section 9-306(1), it currently could not be the subject of a valid security interest because Article 9 excludes tort claims. U.C.C. § 9-104(k) (1994). The Study Group has suggested that Article 9 include "security interests in claims (other than claims for personal injury) arising out of tort, to the extent that such claims are assignable under applicable non-UCC law." FINAL REPORT, *supra* note 113, at 58.

187. FINAL REPORT, *supra* note 113, at 111.

188. *Id.*

189. *Id.*

190. Scott, *supra* note 4, at 1836-37.

ture. To understand the system better, one should consider the following:

1. The Study Group did not go as far as it might have. For example, the Final Report rejects the idea that a construction contractor's accounts might be proceeds of the construction equipment used on the job.[191] At least one commentator has criticized this position as "placing a formalistic and commercially unjustified *limitation* upon the scope of the term 'proceeds.'"[192]

2. Disaggregation of the reported cases into subcategories reveals that the typical proceeds claimant is not the powerful general financier envisioned by Scott but rather a PMSI or inexperienced creditor who failed to describe the proceeds in the security agreement and financing statement.[193]

3. Along with the suggested reconceptualization of the term "proceeds" are proposals that would confirm and arguably enlarge the protection now afforded to third parties who acquire cash proceeds.[194]

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191. FINAL REPORT, *supra* note 113, at 111 n.16 ("At some point, the acquisition of assets by a debtor, in part as a result of a diminution in value of collateral, will be too attenuated for those assets to be considered proceeds.").

192. R. Wilson Freyermuth, *Rethinking Proceeds: The History, Misinterpretation and Revision of the U.C.C. Section 9-306*, 69 TUL. L. REV. 645, 701 (1995) (emphasis added).

193. *See, e.g.*, *In re* Tri-State Equip., Inc., 792 F.2d 967 (10th Cir. 1986); Appliance Buyers Credit Corp. v. Perrotto Refrigeration, Inc. (*In re* Perrotto Refrigeration, Inc.), 38 B.R. 284 (Bankr. E.D. Pa. 1984); Ford Motor Credit Co. v. Territo (*In re* Territo), 32 B.R. 377 (Bankr. E.D.N.Y. 1983); *In re* Rogers, 6 B.R. 472 (Bankr. S.D. Iowa 1980); First Nat'l Bank v. Boston, 564 P.2d 964 (Colo. Ct. App. 1977). If the court does not characterize a subsequently acquired asset as proceeds, it will nevertheless be subject to the creditor's security interest if the security agreement adequately describes it. *See* U.C.C. § 9-204(1) (1994) (permitting a security agreement to provide for a security interest in after-acquired collateral). Consider, for example, PIK payments. If a secured party described this property along with the anticipated crops to be grown, the proceeds issue would never arise. Indeed, even in those instances in which the proceeds are outside the scope of Article 9, a secured party can usually acquire an interest in the item by some other means. For example, a common-law assignment of a tort claim may be effective.

194. Courts often apply common-law rules of negotiability to protect good faith purchasers of cash proceeds. *See, e.g.*, ITT Commercial Fin. Corp. v. Cullen (*In re* Antinarelli Enters., Inc.), 94 B.R. 227 (Bankr. D. Mass. 1988). Official Comment 2(c)

4. A statutory expansion of the definition of the term "proceeds" might, in some cases, directly benefit unsecured creditors. For example, a Maine statute provides that a judicial lien can reach the proceeds of a debtor's property only if a secured party would be able to reach those same proceeds under section 9-306.[195]

The preceding sampler should convey the flavor of the problem. Without accurate pictures of the factual underpinnings, debates about the Article 9 revision process cannot proceed usefully

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to current § 9-306 reads:

> Where cash proceeds are covered into the debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds. What has been said relates to payments and transfers in ordinary course.

U.C.C. § 9-306 cmt. 2(c); *see also* PEB COMMENTARY ON THE UNIFORM COMMERCIAL CODE, PEB COMMENTARIES 1-7, FINAL DRAFT, U.C.C. Rep. Serv. (Callaghan), at 33 (Mar. 10, 1990) (discussing the relative priorities of security interests in the cash proceeds of accounts). The Study Group would delete the "ordinary course" limitation in the comment and revise it to "make clear that a good faith purchaser for value of cash proceeds or of funds from a deposit account containing cash proceeds cuts off a security interest in the cash proceeds to the extent that the purchaser would take free of other claims to the property." FINAL REPORT, *supra* note 113, at 121-22.

Although the foregoing recommendation may be simply a restatement of current law, a companion recommendation may have the effect of changing it, to the prejudice of the primary lender. One common effort in recent years has been to find a consequence-oriented approach for resolving postdefault conflicts between competing security interests. *See, e.g.*, J. Peter Byrne et al., *Junior Creditors' Realization on Debtors' Equity Under U.C.C. Section 9-311: An Appraisal and a Proposal*, 77 GEO. L.J. 1905 (1989). Although Article 9 explicitly envisions the existence of junior security interests in collateral, *see* U.C.C. § 9-504(3), it presently is silent on many of the issues raised in connection with the junior creditor's enforcement. One topic that has generated extensive discussion concerns the junior creditor's right to retain proceeds arising from the disposition of collateral under § 9-504 or collections from account debtors and other obligors under § 9-502. The Study Group has proposed that the junior creditor has no obligation to apply the proceeds of collection or other disposition to a debt secured by a senior lien on the collateral. FINAL REPORT, *supra* note 113, at 216-22. Although general principles of negotiability might justify this rule change, it may have a profound impact on developing case law. *See, e.g.*, Consolidated Equip. Sales, Inc. v. First State Bank & Trust Co., 627 P.2d 432 (Okla. 1981) (finding that a junior secured party has an obligation to turn proceeds of the sale of the collateral over to the senior secured party).

195. *See* New England Mortgage Servs. Co. v. Petit, 590 A.2d 1054 (Me. 1991) (applying ME. REV. STAT. ANN. tit. 14, § 3131(9) (West Supp. 1990)).

V CONCLUSION

As the foregoing argument demonstrates, the Authors are uneasy with metatheory that reduces complex human interaction to the head of a pin. Any assertion of the inadequacies of the commercial lawmaking process is inappropriate without considering the realities of that process and without coming to terms with the jurisprudential foundations that inform the Uniform Commercial Code. This inquiry has revealed the imprecision of Scott's conclusions and has suggested that his understanding of the competing interests in the Article 9 filing regime is, at best, incomplete.

The greatest benefit of theories like the one proposed by Scott is that they remind us of the extent to which thinking about commercial law is dependent upon empirically validated models of the lawmaking process.[196] The absence of a reliable model of the behavior of the legislative system leaves us in a poor position to evaluate reconsiderations of that system. Even if all agreed on the values and goals of commercial law, no sound basis exists for concluding that abandoning the current system, finding ways to make that system more efficient, or retaining the current system would make the attainment of those goals more likely

196. *See* TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 336 (1989) ("To advocate law reforms without a shred of evidence about how the system currently works, who is likely to be affected, and how those effects may reverberate throughout the system is breathtakingly negligent.").