University of Cincinnati Law Review

Volume 92 | Issue 1 Article 3

October 2023

Coordination of the Uniform Commercial Code and Common Law

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COORDINATION OF THE UNIFORM COMMERCIAL CODE AND COMMON LAW

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† Citation usages herein include the following: Citations to the Uniform Commercial Code omit reference to its sponsors, the Uniform Law Commission ("ULC") and the American Law Institute. Citations to other uniform acts omit reference to their sponsor, the ULC. The ULC publishes its annual proceedings in a volume entitled (with minor variations) HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS [ordinal number] YEAR ([year]), cited as ULC [year] HANDBOOK. UNIFORM COMMERCIAL CODE DRAFTS (Elizabeth Slusser Kelly ed. 1984) is cited as UCC DRAFTS.

I. INTRODUCTION

This is an age of statutes. Deciding whether an issue that is in the ambit of a statute should be resolved by reference to the statute alone, or whether other sources of law should be applied, is an interpretative task that must be perennial in such an age.

Such has been the experience from the beginning of the era of codification. Aside from such local phenomena as the Field Codes enacted by a few western states and Louisiana's unique civilian experience, codification of private law in this country began in 1896 with the issuance by the Uniform Law Commission ("ULC")[1] of its first significant uniform act, the Negotiable Instruments Law ("NIL").[2] The NIL was received enthusiastically by legislatures, being enacted by most states within a decade and every state by 1924. Yet disputes soon arose as to whether the answers to some important questions are to be found in the provisions of the NIL alone. For instance: May a writing that does not satisfy the exacting formal qualifications of a negotiable instrument under the NIL have the attributes of negotiability by virtue of other law?[3] To what extent, if any, does the common law of suretyship modify liabilities imposed by the NIL?[4] Is a bank that pays a forged instrument governed by the NIL ever entitled to recover from the payee under the doctrine of mistake?[5]

"Questions of this sort need to be minimized by careful and imaginative drafting," was the sage observation of two scholars engaged decades later

1. The ULC, organized in 1892, went by various names until 1915, when it adopted "National Conference of Commissioners on Uniform State Laws." In 2007 it adopted "Uniform Law Commission" as an alternative name, also retaining the older name. This paper refers to it at all times as the "ULC." On pre-ULC codification in the United States, see Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 498-517 (2000).

2. As noted *infra* at note 138, the NIL was renamed the "Uniform Negotiable Instruments Act" in 1910. This paper refers to it at all times by its original name.

3. The NIL purported to be the exclusive law of negotiability, as N.I.L. § 1 (1896) begins: "An instrument to be negotiable must conform to the following requirements: . . ." Nonetheless, some items lacking those requirements, such as bonds in registered form, common stock, and documents of title, were asserted to have some or all of the attributes of negotiability. For the ensuing controversy, see 2 ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS § 1740A, at 1427-28 (1908), Ralph W. Aigler, *Recognition of New Types of Negotiable Instruments*, 24 COLUM. L. REV. 563, 577-93 (1924), and Roscoe Turner Steffen & Henry E. Russell, *The Negotiability of Corporate Bonds*, 41 YALE. L.J. 799 (1932). *See also infra* notes 10 and 124.

4. Ellen A. Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 YALE L.J. 833, 836 n.14 (1968), cites a selection of the sizable literature on this topic under the NIL.

5. This topic is traditionally identified with *Price v. Neal* (1762) 97 Eng. Rep. 871, in which Lord Mansfield held that a drawee who had paid a forged bill of exchange was not entitled to recover from the payee. N.I.L. § 62 (1896) precluded a drawee who accepts a negotiable instrument from contesting the genuineness of the drawer's signature, but nothing in the NIL spoke to the situation in which a drawee pays an instrument without first accepting it. *See* Steven B. Dow, *The Doctrine of* Price v. Neal *in English and American Forgery Law: A Comparative Analysis*, 6 TUL. J. INT'L & COMP. L. 113, 141-44 (1998).

to advise the New York legislature about the implications of codifying much of commercial law by enacting the Uniform Commercial Code ("UCC").[6] The key word in that sentence is "minimized." Care and imagination sufficient to answer all questions about the extent to which a statute should be treated as the exclusive source of law are not vouchsafed to any mortal drafter.

Whether a statute should be treated as the exclusive source of law on a given issue is a matter of interpretation. The consequences of uncertainty in interpreting a uniform act are familiar today: courts in different enacting states may resolve the issue differently, defeating the object of uniformity; and some courts are bound to resolve the issue more sensibly than others. Uncertainty might be dispelled by a legislative delegation of interpretative authority to a single expert agency. But there has never been political appetite to pursue that approach with vigor in the case of the UCC. The UCC's sponsors, the ULC and the American Law Institute ("ALI"), have long maintained a standing committee, the Permanent Editorial Board for the Uniform Commercial Code ("PEB"), which they have authorized to issue interpretations of the UCC.[7] The UCC itself has never recognized the PEB, or anyone else, as having an interpretative role. Nevertheless, the PEB's interpretations are often implemented by amendments to the official comments to the UCC, which raises the question of the role of the comments in interpreting the UCC. The idea of attaching comments to the UCC came from its intellectual father, Karl Llewellyn, and if he had had his way the UCC might have included a provision making reference to the comments mandatory when interpreting the UCC.[8] But as finally promulgated the statutory text of the

6. Edwin W. Patterson & Rudolph B. Schlesinger, *Problems of Codification of Commercial Law*, in 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1955, at 31, 68 (1955).

7. Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code, at B.5.b (July 31, 1986, amended January 18, 1998) vests the PEB with authority to "prepar[e] and publish[] supplemental Comments or Annotations to the Uniform Commercial Code and other articulations as appropriate to reflect the correct interpretation of the Code . . . ; provided, however, that Annotations or Comments which suggest a substantial departure from an accepted interpretation of the Code shall first also be approved by the Executive Committees of [the ULC and the ALI] . . . ." The PEB has issued 27 commentaries through 2022, some of which have been superseded by later changes to the statutory text. The ULC, in collaboration with other organizations, maintains several "Joint Editorial Boards" to oversee other uniform acts, and some of those boards have issued interpretations of the acts they oversee.

8. In the early 1940s Llewellyn worked on a revision of the Uniform Sales Act that later became the basis of Articles 1 and 2 of the UCC. An early draft provided that "[the] comments *are to be used* as a guide in the construction and application of this Act." REPORT AND SECOND DRAFT THE REVISED UNIF. SALES ACT § 1-A(2) (December 1941) (italics added), *reprinted in* 1 UCC DRAFTS 269, 327. That was deleted in 1943. *See* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 499-501 (1987). For a summary of the drafting history of the original UCC, see *infra* note 16.

UCC does not so much as mention the comments, much less PEB interpretations not embodied in a comment.[9] Comments and PEB interpretations therefore have only persuasive force. The only way to bind courts to a uniform interpretation is to amend the statutory text, and then induce the states to enact the amendment.

Such was the fate of the three issues noted earlier about the exclusivity of the NIL. Each was eventually addressed by the UCC, Article 3 of which superseded the NIL.[10] Of course, preparation of a new uniform act or an amendment to an existing uniform act, followed by enactment by each of the states, is a painfully slow and cumbersome process.

Whether the UCC is the exclusive source of law in a transaction to which the UCC applies is a pervasive question. Yet, like Poe's Purloined Letter, it is a question that rarely impinges upon legal consciousness because of its very conspicuousness. For example, the UCC does not say that a person can be bound by the actions of an agent, nor does it prescribe rules of agency law. Nor does the UCC prescribe rules on legal capacity.[11] Everyone knows that such matters are remitted to non-UCC law, and the application of non-UCC law on these matters in a transaction to which the UCC applies is automatic, instinctive, and not perceived as raising an issue at all. Only rarely does the UCC say explicitly that a given rule of non-UCC law should or should not be applied to a transaction to which the UCC applies.[12] In the absence of explicit cues as to the applicability or inapplicability of non-UCC law the legal community seems to navigate

9. The first polished version of the UCC mentioned the comments, but only to allow reference to them: "The Comments . . . *may be consulted* in the construction and application of this Act but if text and comments conflict, text controls." U.C.C. § 1-102(3)(f) (1952) (italics added). That provision was deleted in 1956, and since then the statutory text has made no reference to the comments. *See* Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WISC. L. REV. 597, 599-601. On the origin of the comments, see also *infra* at notes 39-42.

10. As to the negotiability of items other than negotiable instruments, abortive efforts were made to amend the NIL. *See, e.g.*, ULC 1934 HANDBOOK 73-75, 134-56. Pre-UCC uniform acts vested corporate stock and some documents of title with attributes of negotiability. Unlike the NIL, Article 3 of the UCC does not claim to be the exclusive law of negotiability, and Articles 7 and 8 broadly vest documents of title and securities with attributes of negotiability.

As to the interface with the law of suretyship, the response in the original version of Article 3 is detailed in Peters, *supra* note 4. Article 3's rules on the subject were changed substantially when Article 3 was revised in 1990, and again in 2002. *See* Neil B. Cohen, *The Calamitous Law of Notes*, 68 OHIO ST. L.J. 161, 170-74 (2007).

As to the rule of *Price v. Neal*, see Dow, *supra* note 5, at 145-58.

11. These generalizations are subject to modest qualification. For example, U.C.C. § 3-402 (2020) partly codifies and partly modifies some principles of agency law as applied to a negotiable instrument.

12. For examples of UCC provisions that say explicitly that a rule of non-UCC law should be applied, see U.C.C. §§ 4A-303(a), 9-201(b), 9-311(a) (2020). For an example of a comment to that effect, see *id.* § 9-625 cmt. 3 para. 2.

For examples of UCC provisions that say explicitly that a rule of non-UCC law should not be applied, see U.C.C. §§ 8-503(e), 8-510(a) (2020). For an example of a comment to that effect, see *id.* § 4A-102 cmt. para. 4.

such issues more by instinct than analysis. It is remarkable that this has not been more disruptive than it has been. Disputes about the applicability of non-UCC law to UCC transactions, though by no means unknown, do not dominate discourse. This relatively happy state of affairs might be ascribed partly to the UCC's "careful and imaginative drafting," and partly to amendments of frequency sufficient to keep the wolves from the door.

This paper examines the subject of coordination of the UCC with non-UCC law. The UCC contains rules of interpretation that address the subject, and those rules have not been altered substantively since the UCC was first generally enacted. Those rules are not difficult to understand. But one cannot have as much confidence as one might wish that a court will apply them properly in a given case. There are several reasons why that is so.

One source of unease is that one of those rules, now designated section 1-103(a), requires the provisions of the UCC to be interpreted by reference to the purposes and policies that underlie them. A court cannot employ purposive interpretation wisely unless it has a sophisticated understanding of the statute and the legal and factual milieu in which it operates. There may be anxiety as to whether a court will be up to that task. Furthermore, there has been much debate in recent decades as to the propriety of interpreting a statute by reference to its purposes. That debate generally has focused, explicitly or implicitly, on federal statutes that do not contain a provision mandating purposive interpretation, so the debate properly should not bear on interpretation of the UCC, which does so provide. Nonetheless, a court that is not inclined to interpret statutes by reference to their purposes as a general matter may not be inclined to apply purposive methodology to the UCC with a whole heart, or at all.

A second source of unease derives from a different provision, now designated section 1-103(b), that directly addresses coordination of the UCC with non-UCC law. That provision was not concocted for the UCC. A substantially identical provision was in the earliest uniform acts, half a century before the UCC, whose drafters took it from the British models of those acts. Later uniform acts in turn copied the provision with no apparent thought. The provision is clear enough on its face: it is surplusage, which does no more than direct courts to do what they should do if it did not exist. Nevertheless it has been a mild malignancy, because leading commentators on the UCC, and a prominent early case, have interpreted it in ways that are wildly divergent and demonstrably wrong.[13]

13. The case, *French Lumber Co. v. Commercial Realty & Fin. Co*., 195 N.E.2d 507 (Mass. 1964), is discussed in Part II.B.5 at notes 187-196.

In this paper "common law" means all judge-made law, including doctrines that historically spring from equity.

II. THE PROVISIONS OF THE UCC RELATING TO COORDINATION WITH NON-UCC LAW

The extent to which law other than the UCC is properly applied to a transaction to which the UCC applies is addressed by the UCC's interpretative rules. The relevant rules are set forth in section 1-103, which consists of two quite distinct provisions. The first, section 1-103(a), addresses how the UCC's provisions should be interpreted as a general matter. The second, section 1-103(b), speaks to the coordination of the UCC with non-UCC law.

Section 1-103(b) speaks to coordination of the UCC with non-UCC law of any sort, but it is relevant chiefly to judge-made law (that is, common law, as that term is used in this paper), rather than to statutory law. The applicability of a non-UCC statute to a transaction to which the UCC applies usually will be determined by the terms of that statute and, if the statute is not clear on the subject, by the rules of construction applicable to conflicting statutes.[14] Also potentially relevant to such analysis is the UCC's provision that no part of the UCC should be deemed to be implicitly repealed by subsequent legislation if that construction can reasonably be avoided.[15] This paper is concerned with common law, not non-UCC statutory law.

Analysis of the two provisions of section 1-103 is not complicated by amendments. The text of section 1-103 has changed only trivially and insubstantially since the 1957 version of the UCC, which was the first version enacted by the states at large.[16] Looking back earlier, to the first polished draft of the UCC in 1952, one finds a change to the wording of

14. This point, always evident, has been stated explicitly in comment 3 to section 1-103 since the 2001 revision of Article 1.

15. U.C.C. § 1-104 (2020). Except for trivial changes of style, this provision has not changed since the first polished version of the UCC was issued in 1952.

16. The drafting history of the original UCC can be summarized as follows: In the early 1940s Karl Llewellyn worked on a revision of the Uniform Sales Act that became the basis of Articles 1 and 2 of the UCC when work on the UCC began in 1945. A draft of the UCC was approved by its sponsors in 1951, a polished draft with comments first appeared in 1952, and it was first enacted by Pennsylvania in 1953. Enactments then ceased while it was studied by New York's Law Revision Commission. A revised text responsive to criticisms made in the New York study was issued in 1957, with minor changes in 1958 and 1962. Massachusetts became the second state to enact in 1957, and by 1967 every state but Louisiana had enacted it. The 1962 text was the first to be widely enacted. *See* William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967); Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958).

what is now section 1-103(a), but even that change was insignificant.[17] Article 1 of the UCC was comprehensively revised in 2001, but the wording of section 1-103 was left untouched except for what the revisers rightly described as "minor stylistic changes."[18] Though the text was static, the revisers redesignated it, with post-revision section 1-103(a) carrying forward the text of pre-revision sections 1-102(1) and (2), and post-revision section 1-103(b) carrying forward the text of pre-revision section 1-103. Hence one can read cases and commentaries that discuss the pre-revision provisions with assurance that their text is substantively identical to that of today's section 1-103. When discussing pre-revision cases or commentaries this paper usually speaks of them as if they referred to current section 1-103.

The content of the two provisions of section 1-103, as glossed by their comments, is straightforward. The provisions of the UCC are to be read liberally to promote their respective policies and purposes and the policies and purposes of the UCC as a whole. Non-UCC law is superseded to the extent that it conflicts with the provisions of the UCC, read purposively and liberally as just stated.

The two provisions of section 1-103 merit the closer attention this paper gives them. Long after the UCC was written and enacted the general theory of statutory interpretation emerged from its past quiescence to become the subject of sustained debate. Part II.A considers in light of that debate section 1-103(a), which directs that the provisions of the UCC be given a purposive interpretation. Section 1-103(b), which speaks directly to coordination of the UCC with non-UCC law, though always clear enough and elaborated in no uncertain terms by comments added in the 2001 revision, nonetheless has been a perennial source of confusion, with prominent commentators and a significant early case enunciating widely different and equally fallacious views about its meaning. Part II.B examines section 1-103(b). Part III sets forth observations about policy and modest recommendations for action by the PEB and future revisers of the UCC.

A. Purposive Construction of the UCC under Section 1-103(a)

In 1983 a scholar wrote: "The general contemporary American view of statutory interpretation is that there is not a great deal to say about the subject."[19] He thereby assured himself of sardonic citations, because the

17. *See infra* at notes 27-28.

18. U.C.C. § 1-103 cmt. "Changes from former law" (2020).

19. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Proc*ess, 35 STAN. L. REV. 213, 213 (1983).

remark coincided with an enormous upsurge of thinking, or at least of writing, on the subject. The outpouring continues to the present day, albeit at a reduced rate.

Long before then the drafters of the UCC put the subject of how to interpret the UCC beyond debate—or at least did their best to do so—by including in it a provision directing that a purposive approach be taken to its interpretation. In other words, the meaning of a provision of the UCC is to be filled out by the purposes and policies underlying that provision and the purposes and policies of the UCC as a whole. This purposive approach is consistent with thinking that prevailed for most of the twentieth century about the wisest approach to statutory interpretation as a general matter (that is, in the absence of a statutory directive as to the method of interpretation). The main axis around which the debate of recent decades has revolved relates to the contrast between the purposive approach and a different approach, usually referred to as textualist. The word "textualism" has been invested with different shades of meaning, but a standard version, famously espoused by the late Justice Antonin Scalia, is that textualism contemplates interpreting a statute in accordance with the meaning that would be given its words, taken in context, by reasonable people. Textualism, so understood, eschews divination of statutory purpose, unless necessary to choose between different textually permissible meanings if such exist. It also eschews reference to extratextual sources, such as legislative history.[20]

The debate of recent decades on methodologies of statutory interpretation should not properly affect interpretation of the UCC. Courts are bound to respect the UCC's directive that its provisions be interpreted in accordance with their purposes. Even if that were not so, the arguments against the purposive approach advanced in those debates lose most if not all of their force as applied to the UCC, in contrast to other statutes.

1. Analyzing Section 1-103(a)

Section 1-103(a) reads as follows:

> (a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are:
>
> (1) to simplify, clarify, and modernize the law governing commercial transactions;

20. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 33-41, 63-65, 369-90 (2012). The literature on statutory interpretation is "stupendously voluminous," as stated at the start of the vast bibliography in *id.* at 465. For a primer of sources on the purposivism-textualism debate, see David K. Ismay & M. Anthony Brown, *The Not So New Textualism: A Critique of John Manning's Second Generation Textualism*, 31 J.L. & POL. 187, 190 n.14 (2015).

(2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

(3) to make uniform the law among the various jurisdictions.[21]

Paragraph (3), which states the goal of uniform interpretation, merits only brief attention. Unlike paragraphs (1) and (2), which relate to the substance of how the UCC is to be interpreted, paragraph (3) in effect relates to who should have the last word if opinions differ. Beginning in 1906 with the Uniform Sales Act and the Uniform Warehouse Receipts Act, the ULC's policy has been to insert paragraph (3) or its equivalent into each of its uniform acts.[22] What courts have made of this provision in uniform acts is not a subject that has drawn much scholarly attention.[23] The line usually taken by courts applying the UCC is familiar to anyone with even a passing acquaintance with UCC cases: a court will give respectful attention to decisions in other states on issues not previously decided by a higher court of its state, but such decisions are not treated as binding; moreover, stare decisis is applied as usual, though contrary rulings in other states might make a court marginally more inclined to rethink a position it previously took than would otherwise be the case. No evidence has been unearthed to show that the 1906 drafters expected courts to give this provision any force more drastic than the foregoing.[24] Indeed, it is doubtful that omission of paragraph (3) would make any difference at all to judicial behavior, for courts dealt with the NIL in the same way notwithstanding that it lacked such a provision (having been drafted before 1906).[25]

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21. U.C.C. § 1-103(a) (2020). Before 2001 this provision, with trivial stylistic changes, was designated § 1-102(1), (2). *See supra* following note 18.

22. UNIF. SALES ACT § 74 (1906), *from* ULC 1906 HANDBOOK 185; UNIF. WAREHOUSE RECEIPTS ACT § 57 (1906), *from* ULC 1906 HANDBOOK 214. For the current enunciation of this policy, see UNIF. L. COMM'N, DRAFTING RULES AND STYLE MANUAL r. 401 (2021 ed.).

23. A rare examination is Kevin Bennardo, *The Third Precedent*, 25 GEO. MASON L. REV. 148, 152-65 (2017). A recent paper, Gregory A. Elinson & Robert H. Sitkoff, *When a Statute Comes with a User Manual: Reconciling Textualism and Uniform Acts*, 71 EMORY L.J. 1073 (2022), argues that the promotion-of-uniformity provision in a uniform act compels judicial respect for the act's official comments. That is dubious. Respect for the comments may be likely to promote uniformity, but the same would be true of respect for any relevant treatise one might choose to name. The practice of issuing comments with uniform acts began with the UCC, whose drafters contemplated that comments are entitled to respect because they support purposive interpretation of the statutory text, which in the case of the UCC is compelled by section 1-103(a). *See infra* at notes 39-42.

24. Samuel Williston, the reporter for both of the uniform acts in which this provision made its debut, described it mildly thus: "The law of all the States must be considered, and the purpose to unify that law must be borne in mind." SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT LAW AND UNDER THE UNIFORM SALES ACT § 617, at 1033 (1909). *See also* Jacob Sicherman, *Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation*, 2 A.B.A. J. 60 (1916).

25. *See* FREDERICK K. BEUTEL, BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW § 190, at 1334-35 (7th ed. 1948); COMM'RS ON UNIF. STATE LAWS IN NAT'L CONF., AMERICAN UNIFORM COMMERCIAL ACTS 181-82 (1910) [hereinafter ACTS 1910].

Paragraphs (1) and (2) declare the purposes and policies of the UCC as a whole. Those provisions may have helped to guide the drafting of the UCC's substantive provisions, but they are of small use in interpreting them. Paragraphs (1) and (2) are too vapid and airy to give much traction for deciding cases.[26] Moreover, they are at odds with each other. Accommodating changes in commercial practices (which seems to be the thought expressed by the peculiar idiom "continued expansion") is a worthy goal, but it is in tension with simplicity and clarity, also worthy. This point did not escape the New York State Law Revision Commission in its massive study of the 1952 version of the UCC, for the Commission noted the tension between the various aspirations stated in these paragraphs as they were then worded.[27] The UCC's sponsors responded to the New York study by revising the UCC extensively in 1957, and one change reworded the provisions now designated paragraphs (1) and (2) of section 1-103(a) to the language that now appears. That remains the only nontrivial change to any part of today's section 1-103 since the UCC was first promulgated in 1951. The rewording implemented the sponsors' urgent wish to do something to appease New York, enactment by which was crucial to the success of the UCC project, but substantively it was negligible. Even its drafters described the rewording as doing no more than "simplify and clarify."[28] Still, New York enacted the UCC without further cavil about this provision, so the rewording was good enough for government work.

The meat of section 1-103(a) is in its comment, which has not changed significantly since the comments were first issued in 1952.[29] The comment expresses several thoughts. The most fundamental is that interpretation should be based on the purposes and policies underlying the particular rule of the UCC that is in question, as well as the purposes and policies of the UCC as a whole as stated in section 1-103(a).[30] That thought is so natural, so central to practical interpretation of the UCC, and so easy to express, that one wonders why it was not stated in those words in the statutory text. The drafters of the 2001 revision of Article 1 toyed

26. For empirical confirmation of this evident fact, see *infra* note 84.

27. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1955, at 138-41 (1955). In the 1952 text of the UCC, § 1-102(2)(a), (b), the predecessors of today's § 1-103(a)(1), (2), read as follows:

> (a) to simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions;
>
> (b) to preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage and agreement of the parties;

28. 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, at 2 (1957), *reprinted in* 18 UCC DRAFTS 1, 26.

29. U.C.C. § 1-103 cmt. 1 (2020), originally U.C.C. § 1-102 cmt. 1 (1952).

30. U.C.C. § 1-103 cmt. 1 para. 3 (2020), originally U.C.C. § 1-102 cmt. 1 para. 4 (1952).

with the idea of doing that, but decided to leave well enough alone.[31] The original drafters evidently viewed section 1-103(a) as conveying that thought adequately in its direction to construe the UCC "liberally" to promote its purposes. Lawyers freely conjure with the phrase "liberal construction," but its meaning is not transparent today. It might be taken as a mere repudiation of the canon that "a statute in derogation of the common law should be strictly construed."[32] The meaning of "strict construction" is no more transparent than that of "liberal construction," but "strict construction" does at least suggest something like a crabbed hyperliteralism.[33] There is no mystery about the intended meaning of "liberal" and "strict" construction, however, for when the UCC was drafted it was well understood that those concepts can have meaning only in relation to the purpose of the statute.[34] The direction to interpret the UCC "liberally" is thus, in the contemplation of its drafters, a direction to interpret its provisions in terms of their purposes.

The comment to section 1-103(a) elaborates on the directive for purposive interpretation by insisting that it be applied in a robust way, going far beyond a mere warning to shun crabbed hyperliteralism.[35] The comment enjoins courts to follow the purposes of the act above all other considerations, including textual fidelity. Thus, the comment lauds pre-UCC cases that employed the policies of a statute to situations not within the terms of that statute.[36] More radically, the comment also lauds pre-UCC cases that disregarded a limitation stated in a statute "where the

31. See the drafts of then-section 1-102 in the April 1997 Draft, the 1997 Annual Meeting Draft, the September 1997 Draft, and the September 1999 Draft of Revised Article 1, available at the archive for the Article 1 revision project at the ULC's website, http://www.uniformlaws.org.

32. The derogation canon was reviled by progressives and legal realists of the early decades of the twentieth century, perhaps in small part for its disingenuousness (what statute does not derogate the common law?), but mainly because of its use by judges to emasculate legislation they disliked. For a study of the canon, see Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950); for an early criticism, see Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

33. The late Justice Scalia took care to distinguish the textualism he famously espoused from "strict construction," which he viewed as pernicious for much the same reasons as the early-century critics of the derogation canon. SCALIA & GARNER, *supra* note 20, at 3-41, 355-63.

34. [A] statute is liberally construed when the letter of the statute is extended to include matters within the spirit or purpose of the statute; and a statute is strictly construed when the letter of the statute is narrowed to exclude matters, which if included would defeat the policy of the legislation and lend itself to absurdity. A good example of this sort of liberal and strict construction is the ancient doctrine of the equity of the statute to the effect that cases within the reason, though not within the letter of a statute shall be embraced by its provisions . . . .

3 J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5505, at 41-42 (Frank E. Horack, Jr. ed., 3d ed. 1943) (footnotes omitted), *quoted in* 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1955, at 137 (1955).

35. U.C.C. § 1-103 cmt. 1 para. 2 (2020), originally U.C.C. § 1-102 cmt. 1 para. 3 (1952).

36. *Id.* (citing Commercial Nat. Bank v. Canal-Louisiana Bank & Tr. Co., 239 U.S. 520 (1916)).

reason of the limitation did not apply."[37] Few cases applying the UCC have pushed the purposive approach so far as to make purpose prevail over explicit statutory text to the contrary, as endorsed by this comment, and those few cases have been repudiated by later cases.[38] Nonetheless, this passage emphasizes the strength of the drafters' commitment to purposive interpretation.

The very existence of the official comments is a token of the UCC's commitment to purposive interpretation. The ULC's practice of issuing comments with each uniform act that it promulgates began with the UCC. The drafters of earlier uniform acts sometimes prepared separate "commissioners' notes," but such notes were spotty, brief, and sketchily disseminated. The elaborate comments inseparably riveted to the UCC as published by its sponsors were recognized as being something new under the sun.[39] As the introductory comment to the UCC in substance says, the comments were written to facilitate purposive interpretation.[40]

As mentioned earlier, the comments owe their existence to Karl Llewellyn, the intellectual father of the UCC and chief reporter for the whole, who also was the reporter who drafted the Code-spanning provisions of Article 1 as well as Article 2 on sales of goods. From the outset of the UCC project he contemplated the preparation of elaborate comments that would be issued as an integral part of the UCC.[41] The comments implement the policy that he placed first on his list of drafting

37. *Id.* (citing Fiterman v. J. N. Johnson & Co., 194 N.W. 399 (Minn. 1923)).

38. *Fiterman v. J. N. Johnson & Co.*, 194 N.W. 399 (Minn. 1923) has been cited approvingly by only one case applying the UCC, *Burnett v. H.O.U. Corp. (In re Kalamazoo Steel Process, Inc.)*, 503 F.2d 1218 (6th Cir. 1974) (applying the Michigan UCC; holding that a secured party who filed a financing statement properly naming the debtor when the secured party knew that the debtor intended to change its name in the near future became unperfected upon the name change, notwithstanding that the then-version of the Michigan UCC did not require the secured party to update its filing). *Burnett* was rejected by the Michigan Supreme Court in *Cont'l Oil Co. v. Citizens Tr. & Sav. Bank*, 244 N.W.2d 243 (Mich. 1976), and criticized by other courts, *e.g., Fleet Factors Corp. v. Bandolene Indus. Corp.*, 658 N.E.2d 202, 206-07 (N.Y. 1995).

39. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1955, at 158-60 (1955).

40. "To aid in uniform construction these Comments set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction." U.C.C. Title, cmt. para. 1 (1957) (comment to the title of the enacting bill, preceding Article 1). This lengthy introductory comment, which continues in the official text today, in 1972 was recaptioned "General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute" and the quoted sentence slightly reworded to reflect the recaptioning. In addition, as originally issued (see, e.g., the 1952, 1957, 1962 and 1972 Official Texts) the main body of the comments to each section of the UCC was captioned "Purposes" (or, if the section had a predecessor in earlier uniform acts, "Purposes of Changes" or a slight variation). As the UCC's articles have been revised that additional caption has been omitted.

41. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 582-83 (2d ed. 2012) (reprint of a memorandum Llewellyn sent to the ULC's leadership before the UCC project was first publicly proposed in 1940). On the history of the comments, see also *supra* at notes 8-9.

policies for the UCC: "*[P]atent reason*. Every provision should show its reason on its face."[42]

Llewellyn left his mark on the whole UCC, and his responsibility for the UCC's mandate that its provisions be given a purposive interpretation is vivid. Encouraging courts to apply statutes in accordance with their purposes was central to his jurisprudential thought. The strong method of purposive construction that the comment to section 1-103(a) urges courts to employ was a cardinal element of the "Grand Style" of judging he espoused, which calls for a court applying any legal rule, whether statutory or common law, to focus on the purpose of the rule and apply it as far as its purpose goes, but no further.[43] As noted earlier, the comment remains today substantially as Llewellyn wrote it in 1952. Both the statutory requirement of purposive interpretation and its comment are polished versions of language Llewellyn drafted for a proposed revision of the Uniform Sales Act in the early 1940s, before work began on the UCC in 1945.[44]

Section 1-103(a) prescribes a strong form of purposive interpretation not only because of its intrinsic desirability, as perceived by its drafters, but also, as its comment says, in the hope that the UCC would be "a semi-permanent and infrequently amended piece of legislation," and so "[i]t is intended to make it possible for the law embodied in the Uniform Commercial Code to be applied by the courts in the light of unforeseen and new circumstances and practices."[45] In other words, it was hoped that purposive interpretation would help to keep the UCC flexible enough to minimize the need to amend it. Purposive interpretation was only one

42. TWINING, *supra* note 41, at 321-22 (quoting an unpublished 1944 paper by Llewellyn).

43. On Llewellyn's purposive approach to the UCC, see TWINING, *supra* note 41, at 321-30 and Wiseman, *supra* note 8, at 492-503; on Llewellyn's "Grand Style," see KARL N. LLEWELLYN, THE COMMON LAW TRADITION 35-45 (1960) and TWINING, *supra* note 41, at 203-69. Although Llewellyn is best remembered for his work on the UCC, he was ambivalent about statutes. His writings reflect far greater interest in the case-law method than in statutes, and he wrote comparatively little on statutory interpretation. *See* Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 813-14 (1962); John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 343-44 (2000). At least in some moods he did not like statutes, as too cramping of the "Grand Style" of adjudication. Thus, he criticized Justices Cardozo and Frankfurter for "formal self-prostration before the legislative power," which caused them to "forfeit[] all intellectual contact with the Grand Tradition of case law." LLEWELLYN, *supra*, at 380. *See also* Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 632 & n.39 (1975); Peter Winship, *Jurisprudence and the Uniform Commercial Code: A "Commote,"* 31 SW. L.J. 843, 862-65 (1977). Yet Llewellyn spent much of his career drafting statutes. His work on the UCC was preceded by work on revising the Uniform Sales Act that eventually merged into the UCC project, unsuccessful efforts to amend the NIL, and service as the principal drafter of the Uniform Trust Receipts Act (1933) and the Uniform Chattel Mortgage Act (1926).

44. UNIF. REVISED SALES ACT § 1(1) & cmt. (Proposed Final Draft No. 1, April 27, 1944), *reprinted in* 2 UCC DRAFTS 1, 13, 84-90. *See* Wiseman, *supra* note 8, at 498-503.

45. U.C.C. § 1-103 cmt. 1 para. 1 (2020), originally (with minor stylistic changes) U.C.C. § 1-102 cmt. 1 para. 2 (1952).

element of that strategy, however. Another was to draft substantive provisions of the UCC as principles rather than as hard-edged rules, and to incorporate into them such mutable standards as trade usage, good faith, and commercial reasonableness.

Grant Gilmore, co-reporter for original Article 9 (which deals with security interests in personal property) and reasonably described as its principal drafter,[46] was skeptical that this strategy would succeed.[47] As he gloomily acknowledged after Article 9 was amended extensively in 1972, he was right to be skeptical.[48] Article 2, Llewellyn's particular darling, was drafted with a high degree of built-in flexibility; moreover, almost all of its provisions can be varied by agreement. Article 2 has limped along without major amendment for more than half a century, albeit with overlay by other statutes and intrusive judicial decisions. Even so, a major revision project was ventured, but failed.[49] Other articles of the UCC, however, such as Article 9, are far more rule-bound, and many of their key provisions cannot be varied by agreement.[50] They have survived only because they have received, and the states have enacted, significant amendments more frequently than the interval of "at least thirty years,

46. Gilmore and Allison Dunham were the two Associate Reporters for original Article 9. Gilmore never claimed primacy, but while both were living (Gilmore died in 1982, Dunham in 1992) a colleague in the project referred to Gilmore as the "principal architect" of Article 9 "[i]f anyone is to be singled out." Peter F. Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1012 n.1 (1978). Similarly by another colleague in the project is Homer Kripke, *The Review Committee's Proposals to Amend the Fixture Provisions of the Uniform Commercial Code*, 25 BUS. LAW. 301, 302 n.1 (1969). The responsibility of Gilmore, Dunham, or both together should not be exaggerated. As with other uniform law projects (and unlike Restatements prepared by the ALI), Article 9 was the product of a committee. In the UCC the work of the committee for each article also was subject to the control of a central editorial board and drafting staff.

47. Grant Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 476 (1967).

48. GRANT GILMORE, THE AGES OF AMERICAN LAW 95-96 & n.56 (1977). Also, see *infra* at notes 237-239.

49. The failed project to amend Article 2 initially culminated in a draft of a comprehensive revision that the ULC declined to approve in 1999. The project was then rebooted, and a modest amendment package was issued in 2003. Those amendments attracted no legislative interest and were withdrawn in 2011. For reflections by three who played important roles in the project, see Henry Gabriel, *Uniform Commercial Code Article Two Revisions: The View of the Trenches*, 23 BARRY L. REV. 129 (2018), Fred H. Miller, *What Can We Learn From the Failed 2003-2005 Amendments to UCC Article 2?*, 52 S. TEX. L. REV. 471 (2011), and William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131 (2009).

50. Gilmore attributed the difference in drafting approach between the articles to the fact that practicing lawyers, who craved the certainty of rules, began to participate in the drafting project in numbers sufficient to give them strong influence only after the low-numbered articles had been put to bed. Gilmore, *supra* note 47, at 472-73; GILMORE, *supra* note 48, at 85. However, it is doubtful that a workable body of law on the subject of Article 9 could be written without hard-edged and immutable rules in key roles.

perhaps fifty, perhaps even longer" that Llewellyn seems to have expected.[51]

The UCC's directive for purposive interpretation was not novel.[52] No similarly-worded directive had appeared in any previous uniform act, but the New York study quoted a New York statute that included similar language and implied that there were others.[53] Moreover, a differently-worded statutory directive for purposive interpretation was commonplace. Many statutes had a provision requiring the statute to be "liberally construed," or stating that the statute is not subject to the rule requiring statutes in derogation of the common law to be "strictly construed," or both.[54] Several important uniform acts predating the UCC had such a provision.[55] As noted earlier, such a provision calls for purposive interpretation.[56]

The UCC's directive for purposive interpretation provoked no controversy in the literature when the UCC was under consideration,[57] and the often-censorious New York study viewed it benignly.[58] This contrasts with other fundamental provisions of Article 1 upon which criticisms were heaped. For instance, the original sponsor-approved version of the UCC provided that each rule enunciated by the UCC is mandatory and cannot be modified by agreement unless the rule expressly allows variation by agreement. After sharp criticism that provision was replaced in 1957 by the current provision that makes variation by agreement the rule rather than the exception.[59] Likewise, opposition to the basic choice of law provision in the original version nearly sank the UCC;

51. TWINING, *supra* note 41, at 305, presents the quoted language as Llewellyn's view, though it cites no source.

52. The contrary has been asserted, incorrectly. *E.g.*, TWINING, *supra* note 41, at 323.

53. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1955, at 136 (1955).

54. Writing in 1950, Fordham & Leach, *supra* note 32, at 449-50, stated that 41 states and three territories had such statutory directives, applicable to all or a broad part of the statutes of the state or territory. Individual acts also had such provisions. Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 COLUM. L. REV. 681, 695 (1951) and DAVID WIGDOR, ROSCOE POUND 174 (1974) assert that it became standard usage to include such provisions in statutes by the early twentieth century. However, Patterson cites no evidence to support that assertion, and the sources cited by Wigdor do not speak to the point.

55. *E.g.*, UNIF. DECLARATORY JUDGMENTS ACT § 12 (1922) ("is to be liberally construed"); UNIF. LTD. P'SHIP ACT § 28(1) (1916) ("The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act."); UNIF. P'SHIP ACT § 4(1) (1914) (identical).

56. *See supra* at note 34.

57. Review of law journals for hostile references to the UCC's directive on purposive interpretation during the period from the start of the UCC project through general enactment unearthed only a single passing swipe, made in the course of a comprehensive savaging of the UCC by its most vocal critic. Frederick K. Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROBS. 141, 163 (1951).

58. STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1956, at 22-23, 32-35 (1956); 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1955, at 131-41 (1955).

59. *See* Braucher, *supra* note 16, at 807-08; U.C.C. § 1-302 (2020) (current rule).

that provision was revised repeatedly and drastically until the current rule was devised in 1957.[60]

The success of the UCC inspired the inclusion of a directive for purposive interpretation patterned on the UCC's in many later uniform acts.[61] Moreover, every state has enacted a general code of rules for interpreting the statutes of the state. Many of those codes include directives applicable to broad classes of statutes that mandate liberal construction, repudiate strict construction, or explicitly require interpretation in accordance with purpose or intent.[62]

2. Section 1-103(a) and the New Textualism

The purposive interpretation directed by section 1-103(a) is familiar to American courts and is not an alien intrusion. A contrary impression can be received from some commentaries on interpretation of the UCC that draw an analogy between section 1-103(a) and the interpretative methodologies followed in civil law systems.[63] That can leave the reader with the mistaken impression that the purposive interpretation prescribed by section 1-103(a) is peculiar to civil law. Indeed, one commentator asserted flatly, and incorrectly, that section 1-103(a) was derived from civil law models.[64] To the contrary, the UCC's drafters explicitly repudiated civil law models, as we will see.[65]

The purposive approach to statutory interpretation has deep roots in Anglo-American law. Antecedents go back at least 400 years, to English courts that discerned "the equity of the statute"—the mischief that Parliament sought to deal with by enacting the statute—and then applied

60. *See* Kenneth C. Kettering, *Harmonizing Choice of Law in Article 9 with Emerging International Norms*, 46 GONZ. L. REV. 235, 244-47 (2010); U.C.C. § 1-301 (2020) (current rule).

61. *E.g.*, UNIF. PROB. CODE § 1-102 (1969); UNIF. CONSUMER CREDIT CODE § 1-102 (1974); UNIF. GUARDIANSHIP & PROTECTIVE PROCS. ACT § 1-102 (1982); UNIF. CONSTR. LIEN ACT § 101 (1987).

62. *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 356-57, 395-97, 399-402 (2010).

63. *See infra* Part II.B.4.

64. Steve Nickles published in three parts his J.S.D. dissertation on interpretative methodology for the UCC. It includes such statements as "Section 1-102(1) [now § 1-103(a)] derives from the civil law system of codified law." Nickles, *Part III*, *infra*, at 3. *See* Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part I: The Methodological Problem and The Civil Law Approach*, 31 ARK. L. REV. 1 (1977) [hereinafter Nickles, *Part I*]; Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part II: The English Approach and A Solution to the Methodological Problem*, 31 ARK. L. REV. 171 (1977) [hereinafter Nickles, *Part II*]; and Steve H. Nickles, *Rethinking Some U.C.C. Article 9 Problems—Subrogation; Equitable Liens; Actual Knowledge; Waiver of Security Interests; Secured Party Liability for Conversion Under Part 5*, 34 ARK. L. REV. 1 (1980) [hereinafter Nickles, *Part III*]. Most of Part III was folded into ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE (1985).

65. *See infra* Part II.B.4, at notes 168, 172 and 173.

the statute in a manner that would suppress that mischief with scant regard to textual fidelity.[66] In early English cases this approach was encouraged by the patchy and unprofessional way in which statutes then were drafted, and by a different conception of separation of powers. It persisted down the centuries, even in the spun-off United States with their different constitutional arrangements. Even in late nineteenth century America, an era during which statutory interpretation is often portrayed as being dominated by formalistic application of canons of interpretation, the U.S. Supreme Court decided a notorious case on the basis of purposive interpretation of an extreme kind.[67] Karl Llewellyn was prominent in the early twentieth-century backlash against formalism known as the "legal realist" movement, and purposive interpretation was a central theme of realists' approach to statutes.[68] In current discussion of statutory interpretation the purposive approach tends to be associated with the later "legal process" school of Henry Hart and Albert Sacks, who elaborated the idea in influential teaching materials they wrote in the 1950s.[69] Hart and Sacks' views on legislation differed in some ways from those of the realists, as expressed by Llewellyn, but both schools were united in their insistence on the necessity of purposive interpretation and the incoherence of any other interpretative approach.[70] Other influential commentators voiced compatible views.[71] This was no mere academic frolic, for the purposive approach to statutory interpretation was commonly followed by the U.S. Supreme Court during the mid- and late

66. Heydon's Case (1584) 76 Eng. Rep. 637. For histories of statutory interpretation in America, see William S. Blatt, *A History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985), John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001), and WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999).

67. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). That case is the *bête noire* of textualists. *See, e.g.*, SCALIA & GARNER, *supra* note 20, at 11-13.

68. For Llewellyn's views, see *supra* at notes 41-43. Max Radin wrote more on statutory interpretation than any other self-identified realist. *See, e.g.*, Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942).

69. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 145-50, 1374-80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Those materials led a samizdat-like existence for decades, with mimeographed copies of the "Tentative Edition, 1958" circulating widely before they were first printed in 1994.

70. For a comparison of the two schools' thinking on legislation, with particular reference to the UCC, see Danzig, *supra* note 43. As Grant Gilmore noted, however, Danzig's article treats Article 2 as an exemplar of the entire UCC and does not recognize that the later Articles are drafted much less flexibly than Article 2. GILMORE, *supra* note 48, at 140-41. Also, Danzig focuses on Llewellyn's thought, which is not necessarily identical to that of other self-identified legal realists. Legal realism has been said to be better described as a mood than as a school. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960, at 169 (1992).

71. Notable papers expressing compatible attitudes include Pound, *supra* note 32, James McCauley Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213 (Roscoe Pound ed. 1934), and Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

twentieth century.[72] Then Professor, later Judge Guido Calabresi wrote in 1982 that "we are all followers of Henry Hart and know the moves almost by instinct," and as a descriptive matter he was right.[73]

A tendency to interpret statutes by reference only to their text, and to eschew consideration of purpose unless the text is ambiguous, has had a recrudescence in the U.S. Supreme Court in recent decades. That approach has been called the "New Textualism."[74] The New Textualism should not properly have any effect upon interpretation of the UCC. In cases applying the New Textualism the U.S. Supreme Court has been interpreting federal statutes for which there is no statutory directive on interpretative methodology. By contrast, courts interpreting the UCC are bound to follow the UCC's directive for purposive interpretation in section 1-103(a), unless it is somehow unconstitutional. Scholars have speculated about whether some legislative directives on interpretative methodology might unconstitutionally infringe the separation of powers, but cases are few.[75] The long and untroubled existence of section 1-103(a), and the much longer history of purposive interpretation by judges even absent a statutory directive, make it reasonable to decline to speculate about constitutional arguments that might be contrived against section 1-103(a).

Moreover, quite apart from the command of section 1-103(a), the arguments that have been advanced in favor of textualism and against purposive interpretation as a general matter lose most if not all of their force as applied to the UCC.[76]

One set of arguments against purposive interpretation centers on the idea that it is difficult for judges to ascertain statutory purpose reliably or objectively. Divination of the purpose of a statutory provision generally entails a sophisticated evaluation of the provision in the context of the whole of the statute and other related law. It may also entail evaluation of

72. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113-14, 119-129.

73. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 87 (1982).

74. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

75. *See, e.g.*, Linda D. Jellum, "*Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009); SCALIA & GARNER, *supra* note 20, at 243-46. *See generally* Jarrod Shobe, *Congressional Rules of Interpretation*, 63 WM. & MARY L. REV. 1997, 2010-14 (2022). Evans v. State, 872 A.2d 539 (Del. 2005), held unconstitutional on separation-of-powers grounds a Delaware bill decreeing that courts may not "interpret or construe statutes . . . when the text [is] clear and unambiguous," but the main point of the bill was its other provisions that purported to annul the opinion of the Delaware Supreme Court in a pending criminal case. The court held the bill unconstitutional on multiple grounds.

76. The textualist case against purposive interpretation is discussed at length in the literature referred to *supra* note 20. For a restatement of the arguments by a textualist-oriented scholar, see Manning, *supra* note 66, at 9-27. Kevin Stack has argued that regulations issued by federal administrative agencies should be interpreted by reference to their purposes, and his arguments are in part analogous to the arguments made here about uniform acts. Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 401-06 (2012).

legislative history. Reliance upon legislative history in the form of legislative committee reports or floor statements can be dubious because such statements may represent a lobbyist's wish list that was never meaningfully considered, much less approved, by the legislature as a whole, or may represent the views of the side that lost in legislative wrangling over the bill; moreover, such sources may contain conflicting indications that a judge might cherry-pick to taste. Furthermore, evaluation of purpose may invite manipulation to suit a judge's personal preferences, both because of the complexity of the exercise when honestly pursued and because a judge might declare the purpose of a statute at such a high level of generality that any outcome the judge likes can be said to be in furtherance of that purpose.

Such arguments lose force as applied to the UCC. The UCC was drafted with purposive evaluation very much in mind and so makes the ascertainment of purpose simpler and more reliable than is the case with statutes not so drafted. As previously noted, Llewellyn's top drafting policy for the UCC was that the purpose of every provision should be apparent. Occasionally the text of the UCC contains an express statement of purpose.[77] The main source of guidance on purpose is the comments, which were written for just this reason and have no parallel in statutes that are not products of the uniform law drafting process. The comments state the views of the drafters of the statutory text on its meaning and purposes. They are written by the chair and reporter of the drafting committee itself, with such consultation with the full drafting committee and its observers and advisors as is feasible.[78] Lucid and explicit comments both simplify the task of evaluating purpose and constrain judges from deviating from the drafters' purposes to suit their own preferences.

Another set of arguments against purposive interpretation centers on the idea that a statute may have no coherent purpose beyond what it says in its text. Hart and Sacks' espousal of purposive interpretation rested on their assumption that, as a rule, "the legislature was made of reasonable persons pursuing reasonable purposes reasonably."[79] Readiness to make that benign assumption has eroded since their day. The public choice approach to political science has since matured, and with it has come the perception that members of a legislature may have different reasons to support a given bill, and so it may lack any agreed-upon purpose. The bill nevertheless may be enacted due to aspects of the legislative process not related to the bill's substance, such as logrolling.

77. *E.g.*, U.C.C. § 4-108(a) (2020).

78. The current enunciation of this longstanding policy is in paragraph 1 of Policy on Revisions to the Comments of the Uniform Commercial Code (approved by the ALI and the ULC May 23, 1997).

79. HART & SACKS, *supra* note 69, at 1378.

These arguments too have little force as applied to the UCC. Concern that the legislative product might lack a coherent purpose is unjustified for products of the uniform law drafting process. Unlike a legislature, which has a continuing flow of business in which legislators are repeat players, each uniform law drafting project is unique. The players in each project have no influence over what happens in any other or future project, so there is no opportunity for logrolling. Nor is there any incentive for the players in a project to issue a vague or incoherent product simply to show activity, as legislators might. There is an extensive literature critical of particular products of the uniform law process, and of the process itself, but its products have rarely if ever been criticized as being incoherent in purpose.[80] The usual tenor of criticism rather is that the purposes of a given uniform act are all too evident and disliked by the critic.

Finally, the central textualist criticism of purposive interpretation does not apply to the use of purposive interpretation in determining the extent to which the UCC displaces common law doctrines that would alter outcomes mandated by the UCC. The central claim of textualism is that in interpreting statutes a court must act as the faithful agent of the legislature, and that a non-textualist approach to interpretation undermines legislative supremacy. Such concerns do not apply to displacement of common law, which by definition is in the domain of the courts. To state the point in another way, the main concern of textualism is that courts should obey the legislative instruction and not evade it in the guise of loyalty to its alleged purpose. Even committed textualists agree that courts should consult statutory purpose when that does not thwart legislative instruction, as when purpose is consulted to choose between two textually permissible readings of a statute.[81] Displacement of common law as a result of purposive interpretation of the statutory text does not involve a court's deviation from legislative instruction in the name of loyalty to its purpose. Rather, it involves ascertaining how courts should apply their own common law consistently with legislative instructions. Examination of purpose in that setting must be at least as legitimate as it is when construing statutory language that is ambiguous.

3. Are Courts Following the Statutory Directive?

Courts are obliged to follow the UCC's directive to employ purposive interpretation. But what a court should do and what it does may differ.

80. Citations to much of the copious literature critical of or defending the uniform law process are gathered in Gabriel, *supra* note 49, at 133 n.23, David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 383 nn.35-37 (2003) and Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 708 n.5 (1998).

81. *See* Manning, *supra* note 66, at 3 n.3; SCALIA & GARNER, *supra* note 20, at 56-58.

Certainly there have been cases, from the UCC's early days to current times, in which courts have clung to "plain meaning" tropes when applying the UCC, and indeed seem to have taken a positive delight in construing its provisions so as to thwart the statutory purpose.[82] (Llewellyn wrote scathingly of that style of interpretation: "'We must accept what is written . . . we have no *power* to add' [means] 'Thank God, we can whittle [the legislative policy] down to frustration.'")[83] To assess whether disobedience of the statutory directive has been widespread enough to be troubling requires systematic study, and no satisfactory study appears to exist.[84] Such a study would be laborious, because the interpretative methodologies employed by courts cannot be ascertained by database searches. That requires reading the opinions, and with care.

We leave that labor for another day, and turn to a less taxing question: Why might a court not follow the directive for purposive interpretation? One possibility is conscious choice. Courts have sometimes evaded or openly rejected statutorily-prescribed rules of interpretation that they dislike.[85] There are plausible reasons why judges might either like or dislike purposive interpretation of the UCC. The late Justice Scalia

82. An egregious example from the UCC's early days is *West Side Bank v. Marine Nat'l Exch. Bank*, 155 N.W.2d 587 (Wis. 1968) (relating to what it means for a bank to complete the process of posting a check under U.C.C. §§ 4-109, 4-213(1)(c) (1962)). An egregious current example is *Monticello Banking Co. v. Flener (In re Alexander)*, No. 11-5054, 2011 WL 9961118 (6th Cir. Dec. 14, 2011), *aff'g* No. 1:10-CV-121-R, 2010 WL 5158989 (W.D. Ky. Dec. 14, 2010) (relating to the sufficiency of a security agreement's description of a security entitlement under U.C.C. § 9-108 (1998)).

83. Karl N. Llewellyn, *On the Current Recapture of the Grand Tradition*, 9 U. CHI. L. SCH. REC, 6, 22 (1960), *reprinted in* KARL N. LLEWELLYN, JURISPRUDENCE 215, 227-28 (1962).

84. Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 425-30 (1997), reports that the authors read over 300 cases in 1995, which apparently included every case to date printed in the UCC Reporting Service that cited the predecessor of today's § 1-103(a). However, they did not attempt to quantify the number of cases that applied a purposive methodology. Their study instead focused on assessment of what courts were making of the airy statements in that provision of the purposes of the UCC as whole. Not surprisingly the authors concluded that those statements do not offer much practical guidance to courts. *See supra* at note 26. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 570-71 (2000), reports that searches of the Westlaw database disclosed that cases cited the predecessor of § 1-103(a) 135 times between 1980 and 1995, but only 14 times between 1995 and 2000. The author concluded from this that courts "have moved away from purposive interpretation." The data do not warrant that conclusion. A citation to that provision does not mean that the court applied a purposive methodology to a problem of interpretation, and a court may apply such a methodology without citing that provision. Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978), discusses cases that failed to apply purposive interpretation, but makes no attempt to quantify the extent to which courts were so behaving.

85. An interesting study is Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010). Among other things, it details the refusal by Texas courts to follow a statutory rule permitting the use of legislative history whether or not a statute is considered ambiguous on its face, and the evasion by Connecticut courts of a statutory rule forbidding the use of legislative history in the absence of statutory ambiguity, a rule enacted in direct response to what the legislature perceived to be a judicial power grab. *Id.* at 1785-97.

suggested that liberation from the statutory text is attractive to judges, and that purposivism is more attractive to judges than textualism for that reason.[86] On the other hand, a "plain language" methodology might appeal to judges who are lazy or uninterested in the case before them, because it is probably easier to apply a "plain language" methodology, at least in a simplistic way, than it is to apply a purposive methodology. The latter point may not have occurred to Justice Scalia, who was nothing if not intellectually energetic himself, but that is no reason to dismiss it.

A court might fail to apply the UCC's purposive methodology, without consciously defying it, if the court is accustomed to applying a different interpretative methodology to other statutes. What methodology is a court likely to use as a general matter—that is, in the absence of a statutory directive on methodology? The answer depends upon the court.

The debate about methodologies for statutory interpretation in recent decades usually has focused, explicitly or implicitly, on interpretation by federal courts and, in particular, by the U.S. Supreme Court. State courts have begun to receive distinct attention only in recent years. An early revelation has been that state courts, or at least the courts of the states whose output has been studied, differ from the federal courts in following a consistent methodology to interpret statutes. A study of the opinions by the highest courts of five states during the first decade of this century showed that some flavor of textualism was the dominant interpretative methodology in four of the five.[87]

By contrast, federal courts have not applied any interpretative methodology consistently to federal statutes (which is one reason why the debate over methodology has persisted).[88] Yet several commentators have observed, usually with regret, that federal courts have been inclined to apply a textualist methodology to the Bankruptcy Code.[89] Issues under UCC Article 9 often arise in bankruptcy cases, and it is easy to imagine that a court deciding a bankruptcy case may be apt to carry over textualist methodology inappropriately to Article 9.

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86. SCALIA & GARNER, *supra* note 20, at 9-12.

87. *See* Gluck, *supra* note 85, at 1771-1810.

88. A good deal of scholarly attention has been given recently to suggestions that a consistent methodology for interpreting federal statutes should be imposed on the courts, either by the Supreme Court selecting a methodology and declaring it to be a matter to which stare decisis applies and so binding itself in the future, or by enactment of a federal code of interpretative rules comparable to the codes that have been enacted by states. For an essay opposing such efforts, see Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014).

89. *See, e.g.*, Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887 (2000); Robert M. Lawless, *Legisprudence through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1 (1996). According to Bussel, *supra*, at 909, Congress overruled a majority of cases in which the courts used a textualist or primarily textualist interpretation of the Bankruptcy Code.

Furthermore, the UCC is a state statute, and a 2011 study showed that federal courts interpreting a state statute have not generally felt bound to follow the interpretative methodology applied by courts of the state.[90] That failure is, of course, contrary to the principle of *Erie*.[91] Many of the cases in the study involved principles of interpretation that were not enacted, and the federal court might not even have recognized that the interpretative methodology it used might differ from that followed by the courts of the relevant state. However, the study also noted that some federal courts consciously declined to follow an enacted rule of interpretation, if the court believed that the highest court of the relevant state would not follow the enacted rule.[92] Such cases involved enacted rules of general applicability, rather than a rule built into a substantive statute in the manner of section 1-103(a). Still, such cases add to the disquiet about whether courts apply section 1-103(a) as it is written.

As noted at the beginning of this Section 3, a satisfactory study of the extent to which courts are complying with the purposive methodology directed by section 1-103(a) remains to be performed. Hence discussion of possible reasons for noncompliance is speculation about the reasons for a condition that may not exist to a worrisome degree. What is unquestionable, however, is that courts are duty-bound to comply with the directive of section 1-103(a).

B. Coordination of the UCC with Non-UCC Law and Section 1-103(b)

Section 1-103(b) speaks to coordination of the UCC with non-UCC law. When read in conjunction with section 1-103(a) its meaning is straightforward. Provisions of the UCC are to be construed liberally in accordance with their purposes and policies and the purposes and policies of the UCC as a whole, as directed by section 1-103(a). Common law is necessarily superseded (or, in the language of section 1-103(b), "displaced") to that extent, as recognized by section 1-103(b). The foregoing has always been reasonably clear from the statutory language, and the 2001 revision of Article 1 added a comment restating this point

90. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1924-39 (2011). *But see* Aaron-Andrew P. Bruhl, *Interpreting State Statutes in Federal Court*, 98 NOTRE DAME L. REV. 61 (2022).

91. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

92. Gluck, *supra* note 90, at 1934-36, notes federal cases that have overtly or silently followed the interpretative practice of the state supreme court, rather than a different rule of interpretation enacted by the state that relates to a matter such as use of legislative history, adherence to "plain meaning," and the inapplicability to statutes of the state of the canon that statutes in derogation of the common law are to be strictly construed.

with reasonable clarity.[93] The 2001 revision also redesignated the two provisions that now appear in section 1-103 from their previous locations in separate sections in order to make their interplay more obvious.[94]

Nonetheless, section 1-103(b) has been prone to misinterpretation, and those misinterpretations have been of wildly differing kinds. In this Part II.B, Section 1 analyzes section 1-103(b), Section 2 examines predecessor provisions in earlier acts, and Sections 3, 4 and 5 consider its misinterpretations.

1. Analyzing Section 1-103(b)

As noted earlier, the language of section 1-103(b) has changed only trivially and insubstantially since the UCC was first issued in 1951, though the provision was designated differently before the 2001 revision of Article 1.[95] It reads as follows:

> (b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.[96]

The clause beginning with "including" is an illustrative list of some "principles of law and equity" that might be relevant to a given situation. That the list is merely illustrative and not exclusive is plain, and the comments have always so emphasized.[97] The meaning of the provision therefore does not change if that clause is omitted:

> (b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity supplement its provisions.

Section 1-103(b) is by no means original to the UCC. As will be detailed in Section 2, a substantially identical provision, with or without the superfluous "including" clause, appeared in pre-UCC uniform acts of all kinds, including the first significant uniform act, the NIL. Among the pre-UCC uniform acts that included such a provision were five direct predecessors of the UCC. The provision originally was copied from

93. U.C.C. § 1-103 cmt. 2 (2020).

94. On the redesignation of these provisions in 2001, see *supra* following note 18. On the motivation for the redesignation, see U.C.C. § 1-103, "Change from former law" (2020) and Kathleen Patchel & Boris Auerbach, *The Article 1 Revision Process*, 54 SMU L. REV. 603, 605-07 (2001). Such a redesignation was proposed at least as early as Nickles, *Part II*, *supra* note 64, at 230.

95. *See supra* following note 18.

96. U.C.C. § 1-103(b) (2020). Before 2001 this provision, with trivial stylistic changes, was designated § 1-103.

97. U.C.C. § 1-103 cmt. 4 (2020), originally U.C.C. § 1-103 cmt. 4 (1952).

British acts on which the first two significant uniform acts were modelled, and it was recopied in later uniform acts with little apparent thought.

There are small differences between the wording of this provision in the UCC and in the five predecessor acts just mentioned, as we will see, but no difference in meaning was intended or perceived. The comments to this provision in the UCC identified those earlier provisions as its prototypes.[98] The comments noted the small differences in wording, but ascribed no substantive significance to them.[99] Grant Gilmore, principal drafter of Article 9, viewed the provisions as substantively identical, as did other commentators.[100] The New York study, which examined everything in the UCC with a searching and critical eye, concluded without fuss that the UCC provision is substantively identical to its prototypes.[101]

It is convenient to refer to those prototypes as "proto-1-103(b)" provisions. They are examined further in the following Section 2.

It has been said, erroneously, that section 1-103(b) "is probably the most important single provision in the Code."[102] In fact it is the least important. It is surplusage. It merely tells courts to do what they would be bound to do if it did not exist: namely, apply the provisions of the UCC (construed liberally in accordance with their purposes and policies per

98. The five provisions listed in the 1952 comments to § 1-103(b) (then designated § 1-103) as "Prior Uniform Statutory Provisions" are as follows: (i) Negotiable Instruments Law § 196 (1896), (ii) Uniform Sales Act §§ 2, 73 (1906), (iii) Uniform Warehouse Receipts Act § 56 (1906), (iv) Uniform Bills of Lading Act § 51 (1909), and (v) Uniform Stock Transfer Act § 18 (1909). For no apparent reason the 1972 Official Text added a reference to Uniform Trust Receipts Act § 17 (1933). That belated addition is merely cumulative. The list of "Prior Uniform Statutory Provisions" was removed in the 2001 revision of Article 1, presumably as housecleaning of matter considered to be of historical interest only (similar to the 1998 housecleaning of the comments to Article 9). *See* U.C.C. § 9-101 cmt. 1 (2020).

99. The 1952 comment on "Prior Uniform Statutory Provisions" referred to in the previous footnote stated as follows: "Changes: Rephrased, the references to 'estoppel' and 'validating' being new." Comments 1 and 2 also noted the addition of references to "validating" cause and "capacity to contract" to the illustrative list carried forward from previous uniform acts.

100. "In what has now become the American tradition of codification, the Code incorporates the same form of common law saving clause which was included in the earlier statutes." Gilmore, *supra* note 47, at 472 (citing former § 1-103, now § 1-103(b)). Similarly, see E. Allan Farnsworth, *A General Survey of Article 3 and an Examination of Two Aspects of Codification*, 44 TEX. L. REV. 645, 656 (1966) ("continuing to provide, as have the uniform laws that preceded it").

101. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1955, at 167-68 (1955) ("These multiple but substantially identical provisions of the present statutes are all brought together in Section 1-103 [the then-designation of § 1-103(b)] . . . . The few words added by the [UCC] do not seem to be very significant.").

102. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 5, at 19 (3d ed. 1988). This influential treatise is now in its sixth edition (2012), which no longer contains the quoted language. For further discussion of Summers's views on section 1-103(b), see *infra* at notes 197-201, 211 and 214. *Accord*, THOMAS M. QUINN & BRYAN D. HULL, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 1-103(a)(1) (Rev. 3d ed. 2020) (referring to the provision now designated section 1-103(b) as "one of the most important sections of the Code.").

section 1-103(a)) as far as they reach, and apply other law to issues to which they do not reach.

Although section 1-103(b) is surplusage, there is a reason for its inclusion in the UCC. It alerts the novice to the fact that the UCC does not purport to govern the whole universe of legal issues that might apply to a transaction to which the UCC applies. That function is mere advertising; it is not substantive. The UCC's meaning would not change if section 1-103(b) did not exist. The UCC would not then govern the whole universe of legal issues applicable to transactions to which it applies. It nowhere claims that it does. As Grant Gilmore wrote with characteristic panache, "If the Code had described itself as the exclusive source of law, we may doubt that the description would have been taken seriously, even for literary purposes. But it does not."[103]

That section 1-103(b)'s substantially identical prototypes are surplusage was recognized when they were fresh and new, before the practice of including such a provision in uniform acts became customary and dulled reflection. An edition of the California Civil Code published soon after California enacted the NIL included a note to the act's proto-1-103(b) provision observing that it was "probably superfluous."[104] Kentucky omitted the proto-1-103(b) provision from its enactment of the NIL.[105] The omission provoked no controversy in the law journals; nor did it raise any difficulty in the courts, for not a single reported case ever had occasion to mention it.

Though section 1-103(b) is surplusage, there is nothing improper about its inclusion in the UCC. Interpretation of statutory language as surplusage is disfavored by a canon to the effect that every provision of a statute should, if possible, be given an interpretation that does not cause it to duplicate another provision or to have no consequence.[106] That canon implements the sensible idea that the drafter should be presumed to have had a reason for including every provision. Section 1-103(b) is surplusage because its omission would not change the meaning of the statute. But it is surplusage only in a weak sense, because there is nonetheless a reason

103. Gilmore, *supra* note 47, at 472. *Accord*, 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY viii (1965).

104. California enacted the NIL in 1917. In 2 CAL. CIV. CODE § 3266d, at p. 3177 (annot. James M. Kerr, 2nd ed. 1920), California's enactment of the NIL's proto-§ 1-103(b) provision was annotated as follows:

> Editorial Note: The original Act submitted by the American Bar Association (§ 196), provided as follows: "In any case not provided for in this act, the rules of the law-merchant shall govern." But this section is probably superfluous, for the reason that the Act does not repeal the law-merchant, except in so far as the law-merchant is covered by the Act, and in cases not provided for in the Act the rules of the law-merchant will govern without this express declaration on the part of the legislature.

105. 1904 Ky. Acts 213, 252.

106. *See* SCALIA & GARNER, *supra* note 20, at 174-79.

for its inclusion in the statute: namely, to serve the advertising function just noted. It is not surplusage in the strong sense of duplicating some other provision of the same statute, which is what raises judicial hackles.[107]

Provisions that are surplusage in the same weak sense as section 1-103(b) are common in the UCC and no doubt also in other statutes. For instance, several provisions of the UCC state, in effect, that federal law might preempt a particular rule of the UCC.[108] The UCC would have the same meaning if such provisions were omitted, because federal law preempts a conflicting state statute whether or not the state statute acknowledges the federal law. Yet such a provision can be a useful advertisement, and merit inclusion for that reason.

Grant Gilmore, with his gift for the felicitous phrase, referred to section 1-103(b) as an "amiable truism."[109] That is exactly right.

2. The Provenance of Section 1-103(b)

The provenance of section 1-103(b) began with the first codifications of British private law. The itch to codify took hold in Britain in late Victorian times, inspired partly by success with codification in imperial India earlier in the century.[110] The first codification of any part of British private law was the Bills of Exchange Act of 1882.[111] That act was drafted by Mackenzie Chalmers, a barrister who led a distinguished career as civil servant and judge and was eventually knighted. The ensuing wave of British codifications continued for a quarter-century and included three other major acts, two of which, the Sale of Goods Act of 1893[112] and the Marine Insurance Act of 1906,[113] were also drafted by Chalmers; the third, the Partnership Act of 1890,[114] was drafted by Frederick Pollock.

107. *See, e.g.*, Marx v. General Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme").

108. An example is U.C.C. § 9-109(c)(1) (2020), which states: "This article does not apply to the extent that . . . a statute, regulation or treaty of the United States preempts this article." Another provision that is surplusage in its entirety for the same reason is *id.* § 9-311(a)(1). Provisions that are surplusage in part for that reason include *id.* §§ 3-102(c), 4A-107 and 7-103(a).

109. Grant Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1399 (1963).

110. *See* Alan Rodger, *The Codification of Commercial Law in Victorian Britain*, 108 L.Q. REV. 570 (1992); Mary Arden, *Time for an English Commercial Code?*, 56 CAMBRIDGE L.J. 516, 518-23 (1997).

111. Bills of Exchange Act 1882, 45 & 46 Vict. c. 61 (U.K.). The act, as amended, remains in force today.

112. Sale of Goods Act 1893, 56 & 57 Vict. c. 71 (U.K.). The act has since been repealed and replaced by the Sale of Goods Act 1979, c. 54 (U.K.), and for consumer transactions by the Consumer Rights Act 2015, c. 15 (U.K.).

113. Marine Insurance Act 1906, 6 Edw. 7 c. 41 (U.K.).

114. Partnership Act 1890, 53 & 54 Vict. c. 39 (U.K.).

Chalmers's Bills of Exchange Act and Sale of Goods Act are of interest for purposes of this paper because they were the models for the first significant uniform acts in America, which also happened to be direct ancestors of the UCC.

A basic difference between those two British acts and modern American uniform acts is that the British acts were not intended to improve the substance of the law. They were intended merely to codify then-existing common law on their subjects, and in fact they did not change the rules established by existing English cases except in a few small details.[115] The Bills of Exchange Act was inspired by Chalmers's writing of a comprehensive analytical digest of the cases on the subject, from which he copied extensively when he later drafted the act; and Chalmers later wrote a similar analytical digest of cases on sales before his bill on that subject was enacted.[116] In writing and lecturing on codification Chalmers urged the merit of the humble approach taken by the two British acts. In his view codification of a well-developed body of common law is valuable because it improves certainty and clarity; a body of common law that is not well developed should not be codified. Yet he was acutely attuned to the difficulty of procuring enactment of any legislation. So he preached the wisdom of presenting to the legislature a bill that will be uncontroversial because it does no more than track existing law, leaving it to the legislature to amend the bill to improve the law if it so chooses.[117]

Each of the four early British codifying acts contained a proto-1-103(b) provision. In the earliest, Chalmers's Bills of Exchange Act, it read as follows:

115. [MACKENZIE D.] CHALMERS, A DIGEST OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES & CHEQUES iii-iv (3d ed. 1887) [hereinafter CHALMERS, BILLS] ("For the most part the propositions of the Act have been taken word for word from the propositions of [this] Digest . . . . In the notes to the Act I have carefully pointed out the few provisions which were deliberately intended to alter the law."); [MACKENZIE D.] CHALMERS, THE SALE OF GOODS ACT, 1893, at iv-v (1894) ("The Bill, in its original form, was drafted on the same lines as the Bills of Exchange Bill. . . . [I]t endeavoured to reproduce as exactly as possible the existing law, leaving any amendment that might seem desirable to be introduced in Committee on the authority of the Legislature. So far as England is concerned, the conscious changes effected in the law have been very slight."). The bill to enact the Sale of Goods Act originally ran only to England and Wales, but as enacted it was adapted to run to Scotland as well.

116. The two treatises cited *supra* note 115 are the editions first published after the related acts were enacted. Pre-enactment editions were first published in 1878 and 1890, respectively, the latter entitled THE SALE OF GOODS.

117. M. D. Chalmers, *Codification of Mercantile Law*, 19 L.Q. REV. 10, 10-14 (1903); M. D. Chalmers, *An Experiment in Codification*, 2 L.Q. REV. 125, 126-29, 131-33 (1886); CHALMERS, BILLS, *supra* note 115, at xxxv-xl. Chalmers delivered a shorter version of the 1903 paper at the ULC's annual meeting as *Codification of Commercial Law*, ULC 1902 HANDBOOK 41.

> The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.[118]

In the Sale of Goods Act, the spirit moved Chalmers to add the illustrative list of doctrines that might be relevant that has been handed down to section 1-103(b):

> The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.[119]

The other two early British acts had similar provisions, neither of which included the illustrative list that appeared in the Sale of Goods Act.[120]

Each of the ULC's first two significant uniform acts was consciously modeled on its British predecessor. The ULC was organized in 1892 and its first significant uniform act was the NIL, issued in 1896. The newly-hatched ULC had no experience with major drafting projects, nor did it have the respect it has since earned in the legal community. The committee charged with drafting the NIL was directed to base it on the Bills of Exchange Act, though the committee was allowed to consult other sources.[121] The person engaged by the committee to hold the pen, John J. Crawford, was a practitioner about whom Grant Gilmore later wrote, "so far as we know anything about [him], there is good reason to believe that he was both unimaginative and incompetent."[122] The NIL was drafted very speedily, being completed and approved by the ULC only a year after the project began.[123] It was indeed largely copied from the British act, though it was not a mirror image.[124] Among the provisions that the NIL

118. Bills of Exchange Act 1882, 45 & 46 Vict. c. 61, § 97(2) (U.K.).

119. Sale of Goods Act 1893, 56 & 57 Vict. c. 71, § 61(2) (U.K.).

120. Partnership Act 1890, 53 & 54 Vict. c. 39, § 46 (U.K.); Marine Insurance Act 1906, 6 Edw. 7 c. 41, § 91(2) (U.K.).

121. ULC 1895 HANDBOOK 13-14.

122. Gilmore, *supra* note 47, at 469. Crawford promptly wrote a book about the NIL that tends to confirm Gilmore's assessment of its author. JOHN J. CRAWFORD, THE NEGOTIABLE INSTRUMENTS LAW (1897).

123. ULC 1896 HANDBOOK 7-8, 21-52.

124. *See* BEUTEL, *supra* note 25, at 74-79. One difference is that the NIL's organization was drawn largely from the California Civil Code, not the British act. Perhaps that was done to create an optically impressive but non-substantive difference from its British model. The success of the NIL, and perhaps of the fledgling ULC, depended upon states enacting the NIL, and legislatures might have looked askance at an act billed as a British import. At the ULC's 1899 annual meeting its president took pains to declare that "It is an American, rather than an 'Americanized' Act, on negotiable instruments." Lyman D. Brewster, *Uniform State Laws*, 21 A.B.A. ANN. REP. 315, 322 (1898), *reprinted in* ULC 1899 HANDBOOK 47, 51. A second difference is that the British act was limited to notes, checks, and bills of exchange,

carried over from the British act was the proto-1-103(b) provision. In the NIL as originally promulgated it read as follows (though as we will see shortly it was amended in 1910):

> Sect. 196. In any case not provided for in this act the rules of the law merchant shall govern.[125]

As noted at the outset of this paper, the NIL was a great success in state legislatures. From that triumph the ULC proceeded to produce four more uniform acts that, like the NIL, were direct ancestors of the UCC. Two were issued in 1906: the Uniform Sales Act and the Uniform Warehouse Receipts Act. The other two were issued in 1909: the Uniform Stock Transfer Act and the Uniform Bills of Lading Act. All four were drafted by Samuel Williston, professor at Harvard Law School.[126] The whole of the Uniform Sales Act generally followed the British Sale of Goods Act both in substance and in wording.[127] In particular, the Uniform Sales Act followed fairly closely the wording of the proto-1-103(b) provision of the British act. In the Uniform Sales Act it read as follows:

> Section 73.—[Rule for Cases not Provided for by this Act.] In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.[128]

By copying Chalmers, Williston here inaugurated the practice of including in American prototypes of 1-103(b) an illustrative list of legal doctrines that might be relevant. Williston here also inaugurated the occasional practice of playing with that list, in this case by adding "bankruptcy" to Chalmers's list. Like the other listed doctrines, the reference to "bankruptcy" is superfluous. Uniquely, it is all but meaningless. A state law cannot supersede federal law. So the reference

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while the NIL applied to all claims of negotiability. This overly broad scope plagued the NIL throughout its life. *See supra* notes 3 and 10.

125. N.I.L. § 196 (1896), *from* ULC 1896 HANDBOOK 52. For the 1910 amendment, see *infra* at note 139.

126. Barry Mohun, a practitioner associated with the warehouses' trade association, was appointed co-drafter of the Uniform Warehouse Receipts Act, but Williston controlled the draft. Williston described himself as the drafter, "assisted by" Mohun, SAMUEL WILLISTON, LIFE AND LAW 222 (1940), and it was Williston, not Mohun, who was reimbursed for printing expenses for the project. ULC 1906 HANDBOOK 41-42.

127. Williston later wrote, "Except in a few respects the American Sales Act followed the English statute both in substance and in the use of identical words. When the American Act was drafted it was thought to be of considerable advantage that the statute so closely resembled the English statute." Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 564 (1950) (footnote omitted).

128. UNIF. SALES ACT § 73 (1906), *from* ULC 1906 HANDBOOK 185.

to "bankruptcy" can have meaning only if there is such a thing as a state bankruptcy law that is not preempted by the federal bankruptcy power, which power has been implemented by comprehensive and permanent federal bankruptcy legislation since 1898. The existence of such a state bankruptcy law evidently did not seem as farfetched in 1906 as it does today.[129] This illustrates the fact that it makes no difference what legal doctrines are listed or omitted, for the list is merely illustrative and entirely superfluous.

Williston's other three uniform acts had no British models. The Uniform Warehouse Receipts Act, issued simultaneously with the Uniform Sales Act, included a proto-1-103(b) provision that is identical but for the caption and truncation of the concluding words. The truncation simply allows the provision to be copied verbatim into any later act:

> Section 56.—[When Rules of Common Law still Applicable.] In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause, shall govern.[130]

And indeed the Uniform Stock Transfer Act and Uniform Bills of Lading Act copied the foregoing practically verbatim, making only meaningless additions to the illustrative list of legal doctrines that might be relevant, and with the caption reading as in the Uniform Sales Act.[131] To enhance the mutual conformity, in 1910 the ULC revised the caption of this provision in the Uniform Warehouse Receipts Act to practically mirror the caption used in Williston's other three acts.[132]

No meaningful justification for including the proto-1-103(b) provision was given in the drafter's notes to any of these five acts. The NIL, earliest of the five, was published by the ULC without notes to its original text,

129. The drafters of the 2001 revision of Article 1 evidently recognized this, but a century of repetition in successive uniform acts gave the reference to "bankruptcy" an inertia so intimidating that, rather than delete it, the revisers declared it to mean something that it plainly does not: "the word 'bankruptcy' . . . should be understood . . . as a reference to general principles of insolvency . . . ." U.C.C. § 1-103 cmt. 4 (2020).

130. UNIF. WAREHOUSE RECEIPTS ACT § 56 (1906), *from* ULC 1906 HANDBOOK 213.

131. UNIF. STOCK TRANSFER ACT § 18 (1909) and UNIF. BILLS OF LADING ACT § 51 (1909) are identical to UNIF. WAREHOUSE RECEIPTS ACT § 56 (1906), quoted in the text, except as follows: (i) both add "executors, administrators and trustees" after "principal and agent," (ii) the Uniform Bills of Lading Act adds "accident" after "coercion," and (iii) trivial differences (e.g., omission or insertion of serial commas). The caption in the Uniform Stock Transfer Act is identical to that in the Uniform Sales Act, "Rule for Cases not Provided for by this Act." The caption in the Uniform Bills of Lading Act is identical except that it ends "in this Act" rather than "by this Act."

132. UNIF. WAREHOUSE RECEIPTS ACT § 56 (as amended 1910), *from* ACTS 1910, *supra* note 25, at 211. As changed in 1910, the caption read "Cases not Provided for in Act." This caption change, like the 1910 amendments to the NIL, was adopted somewhat informally. *See infra* note 137.

but the ULC did publish notes to the other four.[133] The proto-1-103(b) provision of the Uniform Sales Act more or less copied its British model, and Williston's note to it said only (with dry humor?): "This provision seems obviously desirable."[134] The other three acts were not modeled on British prototypes, but Williston (who wrote the notes to those acts as well as the Uniform Sales Act) felt no need to justify the provision in those acts, either.[135] The notes to the provision in those acts say only: "A similar provision is commonly inserted when an attempt is made to reduce to statutory form any topic of the law," with citations to the earlier uniform acts.[136]

So began a tradition of rote copying that has continued to the present day.

The copying was not completely mindless, however. In 1910 the ULC published a new edition of the NIL that amended slightly the original 1896 text.[137] One change altered the name of the act from "Negotiable Instruments Law" to "Uniform Negotiable Instruments Act," conforming to the style the ULC developed for its creations after the salad days of the NIL.[138] In the same spirit, the NIL's proto-1-103(b) provision was edited

133. The ULC evidently prepared an early text of the NIL that included "foot notes of the draftsman," but the ULC did not include those notes in widely disseminated publications such as ACTS 1910, *supra* note 25, at 136, and CHARLES THADDEUS TERRY, UNIFORM STATE LAWS IN THE UNITED STATES (1920) ("edited and published under the auspices and for the purposes of" the ULC, per its title page). Nor did those notes appear in Uniform Laws Annotated from its first edition in 1922 through at least 1943. An important treatise on the NIL began only in its sixth edition (1938) to publish what it styled as "commissioners' notes," but those were assembled from unofficial or unpublished sources. BEUTEL, *supra* note 25, at iii, 110 n.1. The slightly revised version of the NIL issued by the ULC in 1910 was accompanied by notes to the revisions only, and those notes were widely disseminated. *See infra* at notes 137, 139.

134. ULC 1906 HANDBOOK 185, *reprinted in* ACTS 1910, *supra* note 25, at 116.

135. The ULC designated Williston to write the notes to the Uniform Sales Act, Uniform Stock Transfer Act and Uniform Bills of Lading Act, and designated Williston and Mohun to write the notes to the Uniform Warehouse Receipts Act. ULC 1906 HANDBOOK 35-36, 39; ULC 1909 HANDBOOK 33, 50. The proceedings in regard to the two later acts do not refer expressly to the notes, but are plainly to that effect.

136. Quoted from the note to the proto-1-103(b) provision of the Uniform Bills of Lading Act, in ACTS 1910, *supra* note 25, at 254. The notes to the earlier Uniform Warehouse Receipts Act and the contemporaneous Uniform Stock Transfer Act differ trivially. ULC 1906 HANDBOOK 214, *reprinted in* ACTS 1910, at 211; ACTS 1910, at 130. The Uniform Bills of Lading Act and the Uniform Stock Transfer Act, promulgated in 1909, were not printed in the ULC 1909 HANDBOOK.

137. The NIL with these changes appears in ACTS 1910, *supra* note 25, the title page of which states that the acts therein were "Prepared Under the Direction of and Recommended by" the ULC. Hence the changes undoubtedly amend the NIL These amendments seem to have been effected somewhat informally. No public record has been found of the ULC's full conference formally approving these amendments. On different occasions the ULC's commercial law committee was directed to publish some or all of the ULC's commercial acts, sometimes with "appropriate annotations," but no public record has been found giving it authority to amend them. *See, e.g.*, ULC 1907 HANDBOOK 26; ULC 1910 HANDBOOK 143. The ULC was young then.

138. N.I.L. § 190 (as amended 1910), *from* ACTS 1910, *supra* note 25, at 181.

to follow more closely the wording used in the later acts. As amended, the NIL's provision reads as follows:

> Section 196.—[Cases Not Provided For In Act.] In any case not provided for in this act the rules of [law and equity including] the law merchant shall govern.[139]

Some states that later enacted the NIL evidently did not learn of this change and so did not enact the amended language.[140] Others did (and indeed some enacted even the brackets).[141]

Proto-1-103(b) provisions substantially identical to the foregoing also appeared in three later uniform acts that covered territory now occupied by the UCC.[142] Substantially identical provisions also appeared in many pre-UCC uniform acts having nothing to do with the subjects of the UCC. These included important and widely-enacted acts,[143] as well as some of the ULC's less successful creations.[144] At least thirty post-UCC uniform acts have provisions substantially identical to section 1-103(b), and the subject matter of those acts is diverse.[145]

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139. N.I.L. § 196 (as amended 1910) (brackets in original), *from* ACTS 1910, *supra* note 25, at 184. This change was accompanied by the following note:

> Section 196 as drafted reads "In any case not provided for in this Act the rules of the law merchant shall govern." The words in brackets [law and equity including] were inserted to bring this section into harmony with the Uniform Sales Act (Section 73), the Uniform Warehouse Receipts Act (Section 56), the Uniform Transfer of Stock Act (Section 18) and the Uniform Bills of Lading Act (Section 51). The object of sections, such as these, is to clearly point out that no one of these acts pretends to be a complete codification of the whole law upon each topic but that there are cases not provided for in each of these acts. Another purpose is to leave room for the growth of new usages and customs so that none of these acts should put the law merchant in a straight jacket and thus prevent the further expansion of the law merchant.

ACTS 1910, at 184. ACTS 1910 does not identify the author of this note. Presumably it was written by the ULC's commercial law committee. *See supra* note 137.

140. *E.g.*, 1913 Ind. Laws, ch. 63, at 120, 150 (enacting the NIL without "law and equity" in § 196). The ULC has not always enjoyed the respectful attention that it usually receives today. An important treatise, Brannan's Negotiable Instruments Law Annotated, did not mention the 1910 change to NIL § 196 in editions from the second (1911) through the fifth (1932); the first mention appeared in the sixth (1938). Likewise, James Barr Ames, dean of Harvard Law School and doyen of negotiable instruments scholars of his day, claimed not to have seen the NIL until after it had been enacted by four states. James Barr Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241, 242 n.1 (1900). Ames' failure to notice the NIL was not the ULC's fault, for the NIL was publicized reasonably well. *See* Amasa M. Eaton, *The Negotiable Instruments Law: Its History and Its Practical Application*, 2 MICH. L. REV. 260, 268 (1904); Lyman D. Brewster, *The Promotion of Uniform Legislation*, 6 YALE L.J. 132, 133-34 (1897).

141. *E.g.*, 26 Del. Laws, ch. 191, at 399, 438 (1911) (enacting the NIL with "law and equity" in § 196); 1917 Me. Acts, ch. 257, at 286, 311 (enacting the NIL with "[law and equity]" in § 196).

142. UNIF. CONDITIONAL SALES ACT § 29 (1918); UNIF. CHATTEL MORTG. ACT § 75 (1926); UNIF. TRUST RECEIPTS ACT § 17 (1933).

143. *E.g.*, UNIF. P'SHIP ACT § 5 (1914); UNIF. LTD. P'SHIP ACT § 29 (1916); UNIF. FRAUDULENT CONVEYANCE ACT § 11 (1918); UNIF. FIDUCIARIES ACT § 12 (1922).

144. *E.g.*, UNIF. REAL ESTATE MORTG. ACT § 40 (1927).

145. *E.g.*, UNIF. RESID'L LANDLORD & TENANT ACT § 1.103 (1972); UNIF. CONSUMER CREDIT

Some of the small wording differences in the prototypes of section 1-103(b) raise questions that are interesting, at least to some tastes, but of no significance today. Thus, after the NIL was issued some antiquarians argued that the "law merchant," to which the NIL's original proto-1-103(b) provision referred exclusively, differs from "common law."[146] The addition of the phrase "law and equity" in 1910 mooted such arguments. Another quirk, of no significance to American practice, is that the British provisions refer only to "common law," not "law and equity" as in the American provisions. British commentators have little doubt that British courts would interpret "common law" to include principles of equity.[147]

Two details of wording will be discussed later.[148] The first is that none of the American provisions uses the word "express," which both British prototypes used in allowing the common law to apply unless "inconsistent with the *express* provisions of this Act."[149] The deletion of "express" was by far the most significant change made to this provision by the two earliest American acts from their British prototypes.[150] The second is that in the UCC, section 1-103(b) begins: "Unless displaced by the *particular* provisions of [the Uniform Commercial Code] . . . ."[151] The word "particular" appeared in the UCC out of thin air. None of the prototypes, American or British, said anything comparable.

The main point established by this history is that it gives no reason to question the understanding of section 1-103(b) and its prototypes as surplusage, the only purpose of which is to advertise the fact that the substantive provisions of the act to which it belongs do not purport to cover the universe of legal doctrines that might apply to a transaction to which the act applies.

That understanding is evident in the treatise that Samuel Williston

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CODE § 1.103 (1974); UNIF. GUARDIANSHIP & PROTECTIVE PROCS. ACT § 1-103 (1982); UNIF. MARITAL PROP. ACT § 20 (1983); UNIF. FRAUDULENT TRANSFER ACT § 10 (1984); UNIF. LTD. LIAB. P'SHIP ACT § 104(a) (1996); UNIF. POWER OF ATT'Y ACT § 121 (2006); UNIF. MFD. HOUS. ACT § 9(b) (2012).

146. *Compare, e.g.*, ULC 1914 HANDBOOK 244, 261-62 (Report of Committee on Uniformity of Judicial Decisions in Cases Arising under Uniform Laws, arguing that suretyship principles do not apply to a negotiable instrument because those principles are not part of the "law merchant") *with* JOSEPH DODDRIDGE BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED § 196, at 416 (3d ed. 1920) ("[T]he law merchant is not today a separate branch of the law, but is merely a convenient term for describing the origin of that part of the law which in large part grew up from recognition by the courts of the usages and customs of merchants.").

147. *See* BENJAMIN'S SALE OF GOODS ¶¶ 1-008-1-009 (M. Bridge ed. 9th ed. 2014); GOODE ON COMMERCIAL LAW 209 (Ewan McKendrick ed. 4th ed. 2010).

148. *See infra* Part II.B.5, at notes 202-214.

149. *Supra* at notes 118, 119 (italics added).

150. The difference between the NIL's original phrase "law merchant" and the phrase "common law, including the law merchant" in its British prototype might have been interpreted to be significant (see *supra* at note 146), but the 1910 amendment to the NIL eliminated that difference.

151. U.C.C. § 1-103(b) (2020) (italics added).

wrote on the Uniform Sales Act that he had drafted. In that treatise of over 1,300 pages, the proto-1-103(b) provision was given six lines. Those lines state only that the provision "makes it clear that the Sales Act does not attempt to deal with certain matters which are, however, of great importance in the law of sales."[152] The anonymous authors of the 1910 note to the NIL described its proto-1-103(b) provision similarly: "The object of sections, such as these, is to clearly point out that no one of these acts pretends to be a complete codification of the whole law upon each topic . . . ."[153] Neither Williston nor the anonymous annotators ascribed an active role to the proto-1-103(b) provision. Rather, it merely serves to advertise a fact that would be true even if it were not included.[154]

A final point worth notice is that the caption used (with minor variations) in the prototype provisions, "Rule for Cases not provided for by this Act," is more informative than the caption used in the UCC.[155] Before 2001, when section 1-103(b) was designated 1-103, it had its own caption, "Supplementary General Principles of Law Applicable." In 2001, former 1-103 and former 1-102(1), (2) became subsections of revised 1-103, which was given a long joint caption that incorporated that of former 1-103: "Construction of [Uniform Commercial Code] to Promote

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152. Williston's full discussion of the proto-1-103(b) provision of the Uniform Sales Act, § 73, is as follows:

> Section 73 is based upon section 61(2) of the English act with some change in wording, however. This section makes it clear that the Sales Act does not attempt to deal with certain matters which are, however, of great importance in the law of sales. As to these matters the common law governs and the rules of the common law are discussed hereafter.

WILLISTON, *supra* note 24, § 617, at 1032 (footnotes omitted).

153. *See supra* note 139.

154. The same point was made in a 1933 paper that considered whether NIL § 196 as originally written (which referred to "law merchant" applying where the act did not) conflicted with a provision in the Louisiana constitution that prohibited the legislature from adopting "any system or code of laws by general reference to such system or code of laws." The author concluded that there was no conflict. That conclusion follows from recognition that § 196 is surplusage: "The kernel of the argument in favor of the constitutionality of Section 196 in Louisiana is that its effect is not to *adopt* the law merchant, but only to *indicate* that the law previously applicable to commercial instruments in Louisiana continues to remain applicable in cases unprovided-for in the N.I.L." Joseph McCloskey, Jr., Comment, *The Constitutionality of Section 196 of the Louisiana Negotiable Instruments Law*, 8 TUL. L. REV. 127, 136 n.64 (1933).

155. The UCC has always provided that section captions are part of the act. U.C.C. § 1-107 (2020), formerly U.C.C. § 1-109 (1952). The UCC was the first uniform act to so provide, though the non-UCC law of a state may have permitted or required a court construing a statute to take notice of section captions. Today, states' general statutory construction acts differ on whether section captions are to be considered in construing statutes of the state, but most provide that section captions should not be considered. *See* Scott, *supra* note 62, at 367-69, 416.

Section captions must be distinguished from subsection captions (which are referred to by the comments as "headings"). The UCC contained no subsection headings until they were added to Article 9 in its 1998 revision. Articles 12 and A, added in 2022, likewise contain subsection headings. Section 1-107 does not apply to subsection headings, and since 1998 the comments have stated that subsection headings should not be considered part of the act. U.C.C. § 1-107 cmt. (2020); *id.* § 9-101 cmt. 3; Uniform Commercial Code Amendments (2022) (draft of April 20, 2023) § 9-101 cmt. 2, § 12-101 cmt., § A-102 cmt.

its Purposes and Policies; Applicability of Supplemental Principles of Law." The pre-2001 caption, "Supplementary General Principles of Law Applicable," is not incorrect. But unlike the caption in the prototypes, it does not signal the limited circumstances in which reference to other law is proper—namely, when the provisions of the act do not apply. The less-informative caption perhaps contributed to misunderstanding of this provision in the UCC, as discussed later in Section 5.

3. Misinterpretation of Section 1-103(b): General Remarks

That the UCC does not supply the answers to all legal questions that might arise in a transaction to which the UCC applies is an important point. But that point is both easy and familiar—or at least it is today, after more than half a century of life with the UCC and more than a century of life with uniform acts that are similar in spirit if narrower in scope. The hard question is determining just how far common law applies to such a transaction. The answer to that question is found primarily in subsection (a) of section 1-103, not subsection (b). Pursuant to subsection (a), the provisions of the UCC are to be construed liberally in accordance with their respective policies and purposes and the policies and purposes of the UCC as a whole. Common law doctrines that conflict with the foregoing are necessarily superseded ("displaced"), per subsection (b).

This is straightforward enough. As previously noted, the 2001 revision of Article 1 added a comment stating this point with reasonable clarity.[156]

Yet section 1-103(b) has been prone to misinterpretation, and the previous discussion shows why. Section 1-103(b) is surplusage, included in the statute to advertise the fact that the UCC does not purport to govern all legal issues that might arise in a transaction to which the UCC applies. It advertises the answer to the easy question just noted, for readers too lazy to leaf through the UCC's substantive provisions and see that they do not purport to resolve all issues. But it has no bearing on the answer to the hard question.

The custom of including a proto-1-103(b) provision in codifying acts had established itself fifty years before the UCC was promulgated, a time as distant from the drafting of the UCC as that later event is to the present day. If that custom had not been established, and the UCC instead had been drafted on a blank slate, in all likelihood section 1-103(b) would not have been included. Instead the warning it advertises would have been given in a comment. The pre-UCC codifying acts included prototypes of section 1-103(b) because the institution of official comments did not then

156. *See supra* at note 93, citing U.C.C. § 1-103 cmt. 2 (2020).

exist; that institution was created by the UCC.[157] Moreover, the original American acts were drafted with the impulse to follow their British models on this point as in others. And official comments presumably were not available to Mackenzie Chalmers when he drafted those British acts.

The legal mind is not accustomed to surplusage. In the case of section 1-103(b) and most of its prototypes there is even surplusage within the surplusage, namely the illustrative list of doctrines that might be relevant set forth in the "including" clause. Because the legal mind is not used to surplusage, by instinct it gropes for a hidden meaning. Section 1-103(b) is a Rorschach blot for legally-trained readers, who are apt to invest it with meanings they bring to it.

The official comments have never recognized section 1-103(b) simply for the surplusage that it is. Nor have previous studies of the UCC's interpretative provisions. As a result, coordination of the UCC with non-UCC law has been discussed in terms that are more elaborate and less clear than those of this paper. That did not prevent the 2001 comments to section 1-103 from stating essentially the same conclusion as to the meaning of the UCC's interpretative provisions as is set forth in this paper. Moreover, some previous commentators enunciated interpretative methodologies for the UCC that, while needlessly elaborate, should lead to similar results. Robert Hillman is one.[158] Another is Steve Nickles.[159]

Other commentators, however, have gone off the rails, and in different directions. The most prominent misinterpretations incorrectly promote common law over the UCC. Those will be considered in Section 5. First, however, the following Section 4 considers misinterpretations of the opposite kind, that incorrectly promote the UCC over common law.

4. Misinterpretation of Section 1-103(b) that Promotes the UCC over Common Law

In early literature on the UCC some commentators advanced a line of thought that implies that the UCC should be interpreted to have a more

157. *See supra* at note 39.

158. Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 678-95 (1977).

159. Nickles, *Part II*, *supra* note 64, at 216-17, 225-30. Nickles presented his interpretative methodology as a revision of the language now designated § 1-103, but it is perfectly amenable to being treated as an elaboration of the meaning of the existing language. Nickles, *Part III*, *supra* note 64, at 4-7, tries to distinguish his methodology from Hillman's, but the suggested distinctions do not amount to much. *See* David Frisch, *Buyer's Remedies and Warranty Disclaimers: The Case for Mistake and the Indeterminacy of U.C.C. Section 1-103*, 43 ARK. L. REV. 291, 341 (1990) (similar evaluation). Hillman and Nickles later collaborated with Julian McDonnell on a book devoted to exploring common law intervention in transactions to which the UCC applies. The book includes only a very brief allusion to interpretative methodology, and that allusion is consistent with the views expressed in this paper and in the 2001 comments to § 1-103. HILLMAN ET AL., *supra* note 64, ¶ 1.04[2], at 6-7.

dominant role vis-à-vis non-UCC law than is described in this paper. The thought is that courts should deal with the UCC not as American courts ordinarily deal with a statute, but rather in the way that courts in civil law countries deal with their civil and commercial codes.

The differences between how common law courts and civil law courts treat legislation are difficult to describe concisely.[160] Apart from the diversity of the legal systems of different civil law countries, and the difficulty of distinguishing fact from folklore, the differences are not of mere mechanics but of ideology. The ideological difference pervades the whole of both legal systems, including such fundamentals as how judges are recruited. The commentators who espoused the application of civilian interpretative methodology to the UCC envisioned, with optimism or naiveté, that particular features of civilian life might be plucked out of their ideological context and applied to the UCC.

Importation of civilian methodology was urged in regard to pre-UCC uniform acts. An early advocate, perhaps the first, was Frederick Beutel, writing in 1931.[161] By the early 1930s the NIL had been enacted by every state, but experience had disappointed the early expectation that enactment nationwide would result in uniform law nationwide. The reasons are familiar today: nonuniform enactments by some states, a certain amount of judicial bungling in interpreting the uniform text in some states, and some differing interpretations that could not fairly be called bungling. Writing with reference to the NIL, Beutel despaired of courts being able to sift out error and preserve truth so long as they adhered to stare decisis. He therefore urged courts to turn to civilian methodology, specifically its lack of a concept of stare decisis, so that the text of the statute would be (at least in theory) the only source of law in each case.[162]

160. *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION (4th ed. 2018), especially *id.* at 20-56.

161. Frederick K. Beutel, *The Necessity of a New Technique of Interpreting The N.I.L.—The Civil Law Analogy*, 6 TUL. L. REV. 1 (1931). As to Beutel's predecessors, if any, his article cites previous commentaries for the proposition that the NIL "is an attempt to codify the law of Negotiable Instruments in the civil law sense of the term codification." *Id.* at 18 n.59. That is a considerable overstatement, if not a misstatement, as none of the cited commentaries suggested applying civilian methodology to the NIL.

162. *Id.* at 15-22. Civilian ideology does not allow judges to make law, hence its rejection of stare decisis. But civilian courts do use precedents in less forceful ways, or at least ways that are described in less forceful terms. Thus, the French doctrine of *jurisprudence constante* recognizes that a sufficiently long line of previous decisions is persuasive evidence of the proper interpretation of a civilian code. Moreover, lower courts in France are well aware that their decisions may be appealed, and so defer significantly to previous decisions by higher courts in fact, if not in legal theory. *See* Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 779-83, 787-92 (2005); MERRYMAN & PÉREZ-PERDOMO, *supra* note 160, at 46-47.

When the UCC appeared, Mitchell Franklin[163] and William Hawkland[164] picked up the theme of applying civilian interpretative methodology to it, though without alluding to Beutel's earlier sally. It is convenient to focus on Hawkland, who relied on Franklin's earlier work. The work of both on the subject in all probability would have been forgotten but for the fortuitous fact that Hawkland wrote what remains today, under later editors, an important treatise on the UCC, and his early paper on this subject, lightly edited, still constitutes the bulk of the discussion of section 1-103 in that treatise.[165]

Unlike Beutel, who was interested in promoting uniformity among enacting states, Hawkland was interested in how the UCC should be coordinated with non-UCC law. Hawkland rightly emphasized that the UCC's requirement of purposive interpretation means that it should be the source of law on some issues not governed explicitly by its text. But he took that thought much further. Concluding to his own satisfaction that the UCC is a "code" rather than a mere "statute,"[166] he asserted that purposive interpretation should be applied in a way analogous to the civilian technique of applying provisions of a civilian code by analogy, thereby allowing the UCC to be extended to fill any and every "gap." While alluding in passing to the possibility of applying non-UCC law, his emphasis was all on analogical extension of UCC provisions, and nowhere did he suggest any limit to that. His summation was unqualified: "Because the Uniform Commercial Code is a true code and states its own aims, courts construing it should . . . use analogy, rather than 'outside' law, to fill code gaps."[167]

The notion that the UCC should be construed by using civilian methodologies has vanished today, except for occasional references in the academic literature to this early literature. And rightly so. The simple fact is as Grant Gilmore remarked: "The Uniform Commercial Code, so-called, is not that sort of Code—even in theory. It derives from the

163. Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330 (1951). Franklin's civilian approach to the UCC is criticized in Nickles, *Part I*, *supra* note 64, at 48-52.

164. William D. Hawkland, *Uniform Commercial "Code" Methodology,* 1962 U. ILL. L.F. 291.

165. 1 WILLIAM D. HAWKLAND & FREDERICK H. MILLER, HAWKLAND'S UNIFORM COMMERCIAL CODE SERIES §§ 1-103:2-1-103:9 (Carl S. Bjerre ed. 2021) [hereinafter cited as HAWKLAND]. The source of this material is acknowledged in *id.* § 1-103:1 n.3.

166. Hawkland, *supra* note 164, at 292-93, 299-309; HAWKLAND, *supra* note 165, at §§ 1-103:1-1-103:5. The utility of Hawkland's classification of an item of legislation as either a "statute" or a "code" is doubtful, as the terms can only refer to arbitrary zones on a continuous spectrum of comprehensiveness. A frequently quoted definition of the two terms in Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1042-43 (1961), is wisely followed by: "Having proposed these definitions and distinctions to you, I must caution you against accepting them."

167. Hawkland, *supra* note 164, at 313. The same passage appears with trivial changes in HAWKLAND, *supra* note 165, at § 1-103:6.

common law, not the civil law, tradition."[168] Unlike European codes, it is not comprehensive. It advertises that fact prominently in section 1-103(b).[169] Courts are directed by section 1-103(a) to extend the substantive provisions of the UCC in accordance with the policies and purposes that underlie them—but no further than that. To extend UCC provisions by analogy to situations not justified by their policies and purposes not only is contrary to section 1-103(a), it would be just the sort of decision-by-formalistic-reasoning abhorrence of which inspired the legal realist movement in the first place.

Not only was the UCC not intended to be extended indefinitely, it is not written in a way suited to such use. Civilian codes are written largely in a style of broad generalization that facilitates free analogical application. As the drafters of the French Civil Code wrote:

> The function of the [codified] law (*loi*) is to fix, in broad outline, the general maxims of justice (*droit*), to establish principles rich in suggestiveness (*consequences*), and not to descend into the details of the questions that can arise in each subject.
>
> It is for the judge and the lawyer, embodied with the general spirit of the laws, to direct their application.[170]

By contrast, the UCC is relatively detailed and rule-bound, and so reads strangely to civilians.[171]

At the New York hearings on the proposed UCC Llewellyn gave short shrift to a criticism based on the misapprehension that the UCC is all-embracing, and repudiated analogy to European codes.[172] Homer Kripke,

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168. Grant Gilmore, *Article 9: What it Does for the Past*, 26 LA. L. REV. 285, 285 (1966).

169. For similar assessments, see Patterson & Schlesinger, *supra* note 6, at 67-68, 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1955, at 167 (1955), and MERRYMAN & PÉREZ-PERDOMO, *supra* note 160, at 33.

170. Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2205 (1991), quoting a translation of 1 J. DE LOCRÉ, LA LÉGISLATION DE LA FRANCE 258 (1827).

171. *See* Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125, 1125, 1166-67 (1982); Nickles, *Part I*, *supra* note 64, at 53-54.

172. In the New York hearings on the proposed UCC a trade association questioned § 1-305(a) (then designated § 1-106(1)), which provides, *inter alia*, that "neither consequential nor penal damages may be had except as specifically provided in this Act or by other rule of law." They stated: "It is not clear what is meant by 'other rule of law.' The purpose of the Code is to codify all of the law relating to the matters covered. § 2-715 relates to consequential damages. What other rule of law could apply?" 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1954, at 88, 91 (1954). Llewellyn submitted a memorandum responding to that and other questions, and his response to the foregoing began as follows (section references updated to the 2020 UCC):

> I do not know what comment to make on the remarks on page 5 regarding Section [1-305]. The suggestion is that the Code purports to codify all the law with reference to matters "covered"—*i.e.*, I assume, dealt with. Section [1-305], in referring to possible relevant *other* rules, shows that this is not so. Section [1-103(b)] on supplemental principles shows it is not so. Such a provision as Section [9-201] shows that it is not so. European experience has shown the dangers and evils of attempting to do universal coverage in a Code. So Section

who served on the Article 9 committee during the original drafting of the UCC and later was the principal drafter of the extensive 1972 amendments to Article 9, wrote to the same effect.[173] Mitchell Franklin, not associated with the drafting of the UCC, dreamed that the UCC would replace "the legal method of the Anglo-American common law with the legal method developed in Roman and modern Roman law,"[174] and expected that the UCC would be followed by a general civil code that would codify all the background law not contained in the UCC.[175] Of course that has not happened, and almost certainly never will.

Beutel's original reason for wanting to treat uniform acts like civilian codes was to deal with the fact that stare decisis may prevent a uniform act from being applied uniformly in the states that have enacted it. Neither the text of the UCC nor its comments attempt to modify stare decisis. Indeed, legislative power to interfere with judicial administration in that way seems a good deal more doubtful than legislative power to ordain rules of statutory interpretation.[176] The only thing that uniform acts have done in the direction of stare decisis is to ask courts to bear in mind that it is desirable for uniform acts to be interpreted uniformly; and as we have seen, that undemanding directive has been so congenial to courts that they have applied the same thought on their own when a uniform act has lacked it.[177] Even Hawkland had no stomach for upsetting stare decisis.[178] Stare decisis has not been a major irritant in the operation of the UCC, and if it were desired to do something about it, other approaches would be more profitable than picking a constitutional fight with the judiciary by attempting to abrogate it by statute.

[1-305] means what it says.

Id. at 106, 114.

173. Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 331 [hereinafter Kripke, *Principles*] ("It is fair to say that the draftsmen of the Code had an anticodification or antistatute predilection. . . . [C]ontinental codification is a misleading analogy. The draftsmen did not intend that the solution to problems within the ambit of the Code must be found in the confines of the statute."). Like Peter Coogan, Kripke participated in the drafting of original Article 9 from an early stage, and was formally appointed to the Article 9 subcommittee of the UCC's editorial board in 1954; both were highly regarded by Gilmore. Kripke was the Associate Reporter for the extensive 1972 amendments to Article 9 and in fact was their principal drafter. *See* 1 GILMORE, *supra* note 103, at xi; Homer Kripke, *Reflections of a Drafter*, 43 OHIO ST. L.J. 577, 577-82, 582 n.19 (1982).

174. Franklin, *supra* note 163, at 343.

175. *Id.*

176. *See supra* at note 75.

177. *See supra* at note 25. Some have speculated that Llewellyn, together perhaps with other drafters, hoped that stare decisis would fade as applied to the UCC. *See* Herman, *supra* note 171, at 1167-70. A flexible attitude toward precedent was part and parcel of the "Grand Style" of adjudication Llewellyn espoused. *See supra* note 43. Still, this is mere speculation.

178. Hawkland, *supra* note 164, at 313. 318-20; HAWKLAND, *supra* note 165, §§ 1-103:6, 1-103:8.

5. Misinterpretation of Section 1-103(b) that Promotes Common Law over the UCC

The misinterpretations of section 1-103(b) discussed in Section 4 give the UCC a more dominant role vis-à-vis non-UCC law than it should have. More serious are misinterpretations of section 1-103(b) that give non-UCC law a more dominant role vis-à-vis the UCC than it should have. Courts have been more prone to the latter error than the former error. That fact concerned each of the two study groups that proposed revisions to Articles 2 and 9, respectively, in the 1990s, and each suggested that something be done about it.[179] Moreover, the latter error can be more subtly fallacious than the former error.

The error of giving non-UCC law a more dominant role vis-à-vis the UCC than it should have comes in two flavors. The first treats section 1-103(b) as though it were a safety valve: that is, as an invitation to override the provisions of the UCC with non-UCC principles of equity whenever that might be thought necessary to avoid a harsh result. The second treats the UCC as superseding non-UCC law only to the extent that that the UCC says so expressly.

The first flavor, which treats section 1-103(b) as a safety value, is a plain misreading of section 1-103(b). The provision contemplates reference only to non-UCC law that is not superseded ("displaced") by the provisions of the UCC. The provision is not a safety valve in any sense. Rather, it states the truism that for matters not governed by the provisions of the UCC (interpreted liberally in accordance with their underlying policies and purposes per section 1-103(a)), one must refer to other law.

The proper reading is clear from the text, and history reinforces it. The proponents of the early uniform acts were not necessarily averse to including a safety valve provision. In 1898, two years after the NIL was issued, an American skeptic of codification published a book arguing that codification is suitable only for some subjects, and even then cannot be sufficiently nuanced to reach equitable results in all cases; hence any codifying act should include a safety valve provision.[180] In effect the book

179. As to the Article 2 revision, see *infra* at note 227; as to the Article 9 revision, see PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9: REPORT 91-93 (Dec. 1, 1992) [hereinafter PEB ARTICLE 9 REPORT].

180. R. FLOYD CLARKE, THE SCIENCE OF LAW AND LAWMAKING (1898). Clarke did not mention the recently-issued NIL, but was well aware of the British Bills of Exchange Act and Partnership Act and their proto-1-103(b) provisions, and observed that "[t]he error in them is that they do not expressly negative that rule of the Common Law, that a statute supplants the case law in all cases . . . ." *Id.* at 441. He suggested that every codifying act include the following safety valve provision:

> "The foregoing rule shall apply except in cases where the special facts of the case presented shall in the opinion of the court produce a result so inequitable as to require the establishment of an exception, and in ascertaining the application of the rule or the exception, the court

challenged the ULC's reason for being, which was and is to prepare codifying acts for consideration by state legislatures; and the ULC then was by no means firmly established. At the ULC's annual meeting later that year its president presented a paper largely devoted to beating down the book's argument, stating among other things that if the problem of insufficient nuance proved to be "real, and not fanciful," then a safety valve provision might be included in future uniform acts.[181] Both the president and the skeptic suggested texts for such a safety valve provision. The proto-1-103(b) provisions in the NIL and the British predecessor acts were not imagined to be a safety valve.

The idea of a safety valve has some appeal. Moreover, that misreading of section 1-103(b) has great appeal to any litigant who is in trouble under the UCC as written and is looking for a way out. The attraction of this error is therefore perennial. So it is not surprising that even writers who know better have sometimes referred to section 1-103(b) as if it were a safety valve.

An instance occurred in 1962, when Grant Gilmore, the principal drafter of Article 9, published an article that analyzed, among other things, its provisions on fixtures, which were badly awry in that early version. On one point—the fact that the 1962 rules gave priority to a purchase-money security interest in fixtures over the interest of a construction mortgagee, a result that Gilmore considered indefensible—he suggested that a court might use its equity powers to reverse the statutory result, citing section 1-103(b) under its then-designation.[182] However, when he incorporated that article into his treatise on Article 9 he thought better of that suggestion and deleted it, instead advancing an awkward textual argument to reach the desired result.[183] The point was rendered moot by the 1972 amendments to Article 9, which rewrote the fixture provisions. Gilmore's treatise displays little sympathy (though not zero sympathy) for common law intervention into Article 9 priorities in any circumstances.[184]

> shall be at liberty to follow out the reason of the rule and the reason for the exception on the lines of cases heretofore decided in the common law."

Id. at 440.

181. Brewster, *supra* note 124, at 323-26, *reprinted in* ULC 1899 HANDBOOK 47, 52-54. The safety valve provision Brewster suggested if the need arose was as follows: "When equities intervene, the reason of the law shall guide the court in all cases."

182. Gilmore, *supra* note 109, at 1398-1400.

183. 2 GILMORE, *supra* note 103, § 30.6, at 830-32.

184. On Gilmore's general lack of sympathy, see William F. Young, Jr., Book Review, 66 COLUM. L. REV. 1571, 1574, 1579 n.43 (1966) (reviewing GILMORE, *supra* note 103) and Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U.L. REV. 906, 929-30 (1978); for rare bursts of sympathy, see, e.g., 1 GILMORE, *supra* note 103, § 11.4, at 345-46, and § 15.3, at 476 n.7.

The official comments likewise early advanced and then retracted the safety valve thought. The comments originally issued to section 1-103(b) in 1952 included one that came close to declaring it to be a safety valve.[185] That comment was deleted in 1957, after the New York study and before states at large began to enact the UCC, and since then the comments have included no trace of that thought. Other respected commentators at times have referred to section 1-103(b) in loose terms that are at least suggestive of it being a safety valve, probably without much thought and with no opportunity for a correction like Gilmore's.[186]

Misreading of section 1-103(b) as a safety valve no doubt will recur for the reasons mentioned earlier. But at least its conflict with the statutory language is blatant. The second flavor of misreading section 1-103(b) is more insidious. That is to treat the UCC as superseding non-UCC law only to the extent that the UCC says so explicitly. That misreading would result in the application of non-UCC law independent of the policies and purposes of the UCC. If applied consistently, it would also be independent of any consideration of fairness or common sense.

This error has a pedigree dating to the earliest judicial encounters with the UCC. Massachusetts was the second state to enact the UCC, and its Supreme Judicial Court embraced this error in *French Lumber Co. v. Commercial Realty & Finance Co.*,[187] the second case in which that court was called upon to apply Article 9. Today the *Restatement (Third) of Restitution and Unjust Enrichment* in turn embraces *French Lumber* and gives the following illustration based on its facts and holding (to which bracketed language has been added by way of clarification):

> 19. Owner borrows $5000 successively from each of A, B, and C, giving each a security interest in the same automobile. The three security interests are properly perfected [by filed financing statements] in that order. C's loan to Owner is made for the purpose of refinancing Owner's debt to A and discharging A's lien, and the funds are in fact so applied. C is unaware of B's intervening interest and believes that its new lien has first priority. Owner defaults [on its debt to C]; the proceeds from the

185. U.C.C. § 1-103 cmt. 3 (1952) (deleted in 1957) read as follows:

> 3. In general this Act recognizes and furthers the application of equitable principles to commercial transactions. It is intended, subject to commercial standards, to reintroduce the general use of equitable principles into the law governing commercial transactions. Thus this Act considers "equity" in all of its aspects as an inherent part of "the law" in commercial cases. This major policy is intended to operate throughout even though no explicit mention of equitable principles is made in particular sections.

186. *E.g.*, PEB ARTICLE 9 REPORT, *supra* note 179, at 91 (stating that section 1-103(b) may "override otherwise applicable Article 9 priority rules"); Kripke, *Principles*, *supra* note 173, at 331 ("Finally, the general nonstatutory rules of law and equity, the law merchant, the doctrines of estoppel, fraud, misrepresentation, duress, coercion, mistake, etc., remain applicable to keep the statutory rules from operating mechanically.") (footnote omitted).

187. 195 N.E.2d 507 (Mass. 1964).

> [foreclosure] sale [by C] of the collateral are $8000. C is entitled to $5000 of the sale proceeds, via subrogation to A's [former] first-priority lien.[188]

Under the rules of Article 9 *B* has priority over *C*, because *B* filed before *C*.[189] But in *French Lumber* the court instead gave *C* priority over *B* by applying the non-UCC doctrine of subrogation, elevating *C*'s security interest to the priority of *A*'s former security interest.

Neither the court nor the parties in *French Lumber* were familiar with newly-minted Article 9, as shown by their collective misunderstanding of the consequences of the priority ranking. They all seem to have taken for granted that if *B* had priority over *C* in the car, then senior *B* would be entitled to the proceeds of junior *C*'s foreclosure sale.[190] But that is not so. It is clear and basic that junior *C*'s foreclosure sale does not discharge senior *B*'s security interest in the car.[191] Owner presumably being in default to *B* as well as to *C*, senior *B* has the right to enforce *B*'s continuing security interest in the car after *C*'s sale. That is senior *B*'s basic remedy. Whether senior *B* also has some right against junior *C*, such as a security interest in the funds received in *C*'s sale or a claim in conversion against *C*, is a different matter. Article 9's rule on distribution of proceeds of a foreclosure sale has never entitled a senior security party to any of the proceeds realized in a junior's foreclosure sale.[192] Indeed, to award a senior *B* such a right would multiply *B*'s collateral, for *B* then would have those proceeds as well as *B*'s continuing security interest in the car. To award senior *B* a right against junior *C* therefore requires both a theory that prevails over Article 9's clear statement that *B* is not entitled to any of the proceeds of *C*'s foreclosure sale, and a willingness to accept the resulting multiplication of *B*'s collateral. The drafters of the 1998 revision of Article 9 sought to clarify the consequences of the exercise of remedies by a junior secured party, and added a safe harbor provision that gives an unwitting junior *C* who acts in good faith the right to retain the proceeds of its foreclosure sale as against senior *B*.[193] Article 9 as constituted in

188. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 8 cmt. f, illus. 19 (AM. LAW INST. 2011) (identified by reporter's note f as based on *French Lumber*). The dollar amounts in the illustration differ from those of the case. Today a security interest in a motor vehicle ordinarily would be perfected by notation on its certificate of title, per U.C.C. § 9-311(a) (2020) and modern certificate-of-title statutes, but under Massachusetts law at the time of *French Lumber* perfection was by public recordation. That makes *C*'s lack of knowledge of *B*'s security interest at least explicable. Of course, *C*'s failure to search the public record and find *B*'s recordation does *C* no credit.

189. U.C.C. § 9-322(a)(1) (2020); similarly under the version of the UCC applied in *French Lumber*, U.C.C. § 9-312(5)(a) (1957).

190. 195 N.E.2d at 509.

191. U.C.C. § 9-617(a) (2020); similarly under U.C.C. § 9-504(4) (1957).

192. U.C.C. § 9-615(a), (d) (2020); similarly under U.C.C. § 9-504(1), (2) (1957).

193. U.C.C. § 9-615(g) (2020) (providing that a junior secured party that effects a foreclosure sale receives cash proceeds free of a senior security interest if the junior receives them "in good faith and without knowledge that the receipt violates the rights of the holder of [the senior] security interest").

French Lumber lacked that provision, and courts that recognized the issue before the 1998 revision came to differing conclusions as to whether some non-UCC theory may give a senior *B* a right to proceeds of a junior *C*'s foreclosure sale.[194] So far as its opinion shows, the *French Lumber* court was blissfully ignorant of all of this.

The significance of *French Lumber* lies not in the court's faulty understanding of the consequences of the priority ranking, however, but rather in the court's holding that subrogation is properly invoked on these facts to change the priority ranking prescribed by Article 9. Still more important than the bare holding was the court's reasoning. The court did no more than quote section 1-103(b) and state, "No provision of the Code purports to affect the fundamental equitable doctrine of subrogation."[195] In other words, in the court's view, subrogation applied simply because the UCC does not expressly state the contrary.

That is profoundly wrong. The UCC's provisions have preemptive force whether or not they say so expressly. Section 1-103(a) requires provisions of the UCC to be construed liberally to further the purposes and policies that underlie them. To apply non-UCC law unless the UCC expressly provides otherwise is contrary to the UCC's mandate of purposive interpretation. The proper approach in *French Lumber* is to ask: is subrogation of *C* to *A*'s former security interest on these facts consistent with the provisions of Article 9 and the policies and purposes that underlie them? If the answer is affirmative, then *C* may be entitled to be subrogated; otherwise not. To answer that question requires analysis of the policies and purposes that underlie the relevant priority rules. The court failed to do that; it did not even recognize the need to do it.[196]

Like the misinterpretation of section 1-103(b) described in Section 4, the opposite misinterpretations described in this Section 5 have as their champion the author of a leading treatise on the UCC. In this case the champion is the late Robert Summers, who wrote a paper on the subject

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Observe that this provision may protect a junior secured party even if the junior knows of the senior. For the concerns of the drafters of the 1998 revision in regard to exercise of remedies by a junior secured party, see PEB ARTICLE 9 REPORT, *supra* note 179, at 214-24.

194. *Compare, e.g.*, Cont'l Bank v. Krebs, 540 N.E.2d 1023, 1026 (Ill. App. Ct. 1989) (holding that a senior secured party has no right to proceeds of junior secured party's foreclosure sale) *with* Consol. Equip. Sales, Inc. v. First State Bank & Trust Co., 627 P.2d 432, 438 (Okla. 1981) (contra). Commentators on pre-1998 Article 9 commonly concluded that Article 9 did not give a senior the right to proceeds of a junior's foreclosure sale, though various theories have been suggested to deal with situations in which the junior's disposition frustrates the senior's ability to pursue the disposed-of property. *See, e.g.*, Cynthia Starnes, *U.C.C. Section 9-504 Sales by Junior Secured Parties: Is a Senior Secured Party Entitled to Notice and Proceeds?*, 52 U. PITT. L. REV. 563 (1991); HILLMAN ET AL., *supra* note 64, ¶ 25.02[4], at 68-79.

195. *French Lumber*, 195 N.E.2d at 510.

196. A forthcoming article will analyze various common law interventions into Article 9 priorities and will show that the employment of subrogation in *French Lumber* is not consistent with the policies and purposes of Article 9.

in 1978[197] the views of which were long reflected in the influential treatise he co-authored.[198] In his jurisprudential writings Summers argued that American judges should override statutes when the legislative intent is "just substantively bad."[199] His 1978 paper applied that freehanded perspective to the UCC. In it he argued that that section 1-103(b) should be interpreted to require application of principles of equity to modify the rules of the UCC unless the UCC prohibits that explicitly.[200] As we have seen, that argument is contrary to the purposive interpretation required by section 1-103(a). Summers missed this point. His paper makes no mention of the UCC's requirement of purposive interpretation.[201]

There used to be one bit of text in the UCC's comments that supported, and there still is a bit of equivocal text in the statute itself that has been argued to support, the proposition that the UCC displaces non-UCC law only to the extent the UCC says so explicitly. The first bit, now gone from the UCC's comments, was a sentence in the original 1952 comments to section 1-103(b) that began as follows: "While this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are *explicitly* displaced by this Act . . . ."[202] The word "explicitly" appeared only in passing, without elaboration, but it was there.

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197. Summers, *supra* note 184.

198. *See* WHITE & SUMMERS, *supra* note 102, § 5, at 19-20. The preceding citation is to the third edition, which was current for nearly two decades. The fourth edition deleted the introductory chapter devoted to the history of the UCC and Article 1, which included the aforementioned § 5. The fifth and sixth editions reinstated some of that matter, but not the matter in former § 5.

199. *See, e.g.*, P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 109 (1987) ("The usual American [attitude is] . . . that the judges must (where necessary) import their own political morality to resolve interpretative questions when the legislative intent is doubtful or (sometimes, and within limits) even when the legislative intent is just substantively bad.") (footnote omitted); Robert S. Summers, *How Law is Formal and Why it Matters*, 82 CORNELL L. REV. 1165, 1196 n.51 (1997).

200. *E.g.*, Summers, *supra* note 184, at 941 ("It is the very province of general equitable principles not merely to 'supplement' consistent Code rules, but also to carve exceptions from or otherwise modify 'inconsistent' Code rules. General equitable principles remain intact unless particularly displaced."). Likewise, see, e.g., WHITE & SUMMERS, *supra* note 102, § 5 at 19 ("[G]eneral equitable principles remain largely intact, for they are only rarely 'particularly displaced.' In a sense, then, they are the main occupants of the relevant field.").

201. The only mention of § 1-103(a) (then designated § 1-102(1), (2)) in Summers, *supra* note 184, appears at page 943, which mentions only that provision's reference to UCC's general goals of furthering uniform interpretation and modernization of the law. The paper ignores its directive on purposive interpretation.

202. The comment in full read as follows:

> 1. While this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are *explicitly* displaced by this Act, the principle has been stated in more detail and the phrasing enlarged to make it clear that the "validating", as well as the "invalidating" causes referred to in the prior uniform statutory provisions, are included here. "Validating" as used here in conjunction with "invalidating" is not intended as a narrow word confined to original validation, but extends to cover any

Even when the foregoing comment existed there were good reasons to ignore the word "explicitly." Commentators dismissed it as a mistake, noting its inconsistency with the purposive interpretation required by section 1-103(a) and also noting that the statutory text does not use the word.[203]

History supplies a further reason. The proto-1-103(b) provision in the two British prototype acts said that common law continues to apply unless displaced expressly by the act ("inconsistent with the *express* provisions of this Act").[204] By contrast, the American uniform acts modeled on those British acts did not carry forward the word "express." That was indeed the most significant change made by the American drafters to the language of the British provision.[205] The British acts tracked closely the British common law on their respective subjects, so in coordinating those acts with law outside those acts it hardly mattered where the line was drawn. By contrast, to the extent the American acts made changes in existing American law the same would not apply. So the American drafters' deletion of "express" in those early acts was not made thoughtlessly. It contemplated that courts would shape their common law at the edges to mesh sensibly with the act (albeit without an express directive for purposive interpretation in those early acts to drive the point home).

As we have seen, the proto-1-103(b) provisions in these early American uniform acts were understood to be substantively identical to section 1-103(b) of the UCC.[206] The history of those proto-1-103(b) provisions thus bears equally on section 1-103(b).

In any case, the 2001 revision of Article 1 deleted the 1952 comment quoted above. The revisers noted that its use of "explicitly" was inconsistent with the language of section 1-103.[207]

The equivocal bit of text that still remains in the UCC is the word "particular" near the beginning of section 1-103(b): "Unless displaced by the *particular* provisions of [the Uniform Commercial Code], the principles of law and equity . . . supplement its provisions."[208] What is a "particular provision," as opposed to a plain "provision"? None of the prototype provisions said anything comparable, and the comments have never referred to the word. "Particular" first appeared in a draft revision

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factor which at any time or in any manner renders or helps to render valid any right or transaction.

U.C.C. § 1-103 cmt. 1 (1952) (italics added) (deleted 2001).

203. *See* Hillman, *supra* note 158, at 683-84; HILLMAN ET AL., *supra* note 64, ¶ 1.04[2], at 6-7.

204. *See supra* at notes 118 and 119 (italics added).

205. *See supra* at notes 125, 128 and 130.

206. *See supra* at notes 98-101.

207. *See* U.C.C. § 1-103 cmt. 2 para. 2 (2020); Patchel & Auerbach, *supra* note 94, at 606-07.

208. U.C.C. § 1-103(b) (2020) (italics added).

of the Uniform Sales Act prepared by Karl Llewellyn that became the basis for Articles 1 and 2 when the UCC project later began. In one of the drafts Llewellyn reworded the beginning of the proto-1-103(b) provision from the language used in earlier uniform acts ("In any case not provided for in this act, the rules of law and equity . . . .") to "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . ."[209] The earliest draft with this rewording included a lengthy comment to the proto-1-103(b) provision, but the comment said nothing about this rewording.[210]

Polemical efforts by commentators from both extremes of the interpretative spectrum to make something of "particular" amount to nothing. Summers's writings often paraphrase section 1-103(b) incorrectly to give the false impression that "particular" has the force of requiring displacement of non-UCC law to be stated explicitly. (For example: "General equitable principles remain intact unless particularly displaced.")[211] That is not what section 1-103(b) says. "Particular" modifies "provisions," not "displaced." Section 1-103(b) does not say "Unless displaced with particularity by the provisions . . . ."

At the opposite extreme from Summers is Mitchell Franklin, who (as noted in Section 4 of this Part II.B) treated the UCC as if it were a product of civil law ideology and, as a result, concluded that non-UCC law should have a minimal or perhaps non-existent role in filling perceived gaps in the UCC.[212] In his analysis Franklin tentatively suggested an interpretation of "particular" in terms of civil law concepts that are completely alien to most American lawyers. However, Franklin no sooner made that suggestion than he discarded it himself.[213]

Given the generally recognized continuity between section 1-103(b) and its prototypes, which contained no similar word, the absence of anything in the comments attaching any significance to "particular," and the absence of any plausible distinction between a "particular provision" and a plain "provision," the word "particular" must be viewed as a mere

209. UNIF. REVISED SALES ACT § 2 (Proposed Final Draft No. 1, April 27, 1944), *reprinted in* 2 UCC DRAFTS 13-14. In earlier drafts Llewellyn used the wording of the previous uniform acts. *E.g.*, UNIF. SALES ACT, 1940 § 4, *reprinted in* 1 UCC DRAFTS 171, 181.

210. UNIF. REVISED SALES ACT § 2 cmt. (Proposed Final Draft No. 1, April 27, 1944), *reprinted in* 2 UCC DRAFTS 90-93.

211. Summers, *supra* note 184, at 941. For other examples of Summers's incorrect paraphrase, see *id.* at 937 ("The text says that the displacement must be 'particular.'"); WHITE & SUMMERS, *supra* note 102, § 5 at 19 ("[G]eneral equitable principles remain largely intact, for they are only rarely 'particularly displaced.'").

212. Franklin, *supra* note 163.

213. To be specific: As noted in Part II.B.4, civilian ideology contemplates that a "code" is to be extended by analogy. Franklin considered and rejected the idea that the word "particular" limits analogical extension of the UCC to a single text or provision (*Gesetzesanalogie*) as opposed to multiple texts or provisions (*Rechtsanalogie*). *Id.* at 338-39.

stylistic flourish. All of the reasons against giving weight to the former mention of "explicitly" in the comments apply equally against Summers's attempt to conscript "particular" in support of that argument. The revisers of Article 1 in 2001 rejected that argument as to "explicitly," and the same reasons apply to "particular."[214]

The directive that the UCC's provisions be construed purposively, and liberally to that end, was the very first substantive provision of the UCC when it was first written, following only the provision naming the UCC. Since 2001 it has occupied an honorable second position, having reasonably given place to a new provision stating the scope of Article 1. The mandate of purposive interpretation was located at the head of Article 1 to emphasize its role as the most important rule of Article 1. Recognizing the primacy of that mandate is essential to proper coordination of the UCC with non-UCC law.

III. IS SECTION 1-103 THE BEST WE CAN DO?

As we have seen, the surplusage that is section 1-103(b) was copied from act to act with little apparent thought for half a century before it was transcribed into the UCC. Originally it was copied by the first two significant uniform acts with only slight change from two British acts, in drafting projects that largely copied the substantive provisions of those British acts as well.

Lawyers like precedent. They like having a precedent to follow, and they like the comfort of following it. So this history is not surprising. Yet there are at least two reasons to question whether the approach to coordination with other law that was good enough for Mackenzie Chalmers when he drafted the original British acts in the 1880s and 1890s is the best approach for the UCC.

The first reason is that the original British acts were codifications of then-existing common law. For such an act it hardly matters what it says about coordination with common law. If the substantive rules provided by the act are identical to the rules of common law, it does not matter whether the provisions of the act or common law is declared to govern a particular point, because the rule will be the same.

By contrast, the UCC is not a codification of common law. Quite aside from the fact that the UCC is designed to be enacted by multiple jurisdictions whose common laws may differ, it was intended to change and improve existing law.

Moreover, the previous law on the subjects covered by the UCC was to a large extent statutory, not common law. The secured transactions

214. *See supra* at note 207.

governed by Article 9, for instance, historically were not countenanced by the common law (aside from pledges and, in some jurisdictions, a few other niches). So the bulk of pre-Article 9 law on secured transactions was statutory. Furthermore, Article 9 took pains to distance itself from previous law, to the point of coining a new vocabulary (e.g., "security interest") in order to emphasize the distancing.[215] Former statutory law on the subject was repealed when Article 9 was enacted, so that former statutory law is not a source of law for answering questions not addressed clearly by Article 9.

As a result, the divide between the rules of the UCC and the rules of non-UCC law is wider than the divide between the rules of the original British acts and the rules of common law that applied absent those acts.

A second reason for skepticism about section 1-103(b) is that the UCC is composed of separate Articles that, while coordinated, are drafted very differently. The contrast between Article 2 and Article 9, in particular, has often been remarked.[216] Article 2 favors standards; Article 9 is far more rule-bound. Almost all of the provisions of Article 2 may be varied by agreement of the parties; key rules of Article 9 are immutable (and must be so, as Article 9 is far more concerned with the interests of strangers to the transaction than is Article 2). One is entitled to question whether any single approach to the subject of coordination with other law is suitable for Articles that differ in such fundamental ways.

The approach that section 1-103(b) takes to coordination with other law, though beloved by American drafters for more than a century, is not compulsory. Consider the following three examples of different approaches taken by other statutes that codify a body of commercial law.

The first example derives from Canada's first codifying act. After the British enacted the Bills of Exchange Act in 1882, Canada enacted its own version in 1890, as federal legislation, not provincial legislation.[217] The Canadian version was close to a mirror image of the British act. However, the Canadians originally considered the proto-1-103(b) provision unnecessary and did not enact it.[218] A year later they amended their act to add a proto-1-103(b) provision, but with a twist: it provided that the rules

215. *See* U.C.C. § 9-105 cmt. 1 (1962) (deleted in 1998). The 1998 revision of Article 9 carried out a housecleaning in which many comments not disapproved of substantively were deleted because they were considered to be of historical interest only. *See* U.C.C. § 9-101 cmt. 1 (2020) ("[T]he Comments to [pre-1998] Article 9 will remain of substantial historical value and interest.").

216. *See, e.g.*, Thomas H. Jackson & Ellen A. Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978).

217. The Bills of Exchange Act 1890, 53 Vict. c. 33 (1890) (Can.).

218. Sir John Thompson, who introduced the bill in the Canadian House of Commons, stated that the omission of this provision "will leave the matter [of issues not covered by the act] as it stands now, to be determined by the rules of the common law." OFFICIAL REPORT OF THE DEBATES OF THE HOUSE OF COMMONS OF THE DOMINION OF CANADA, 4th Sess., 6th Parliament, vol. XXX, at 4265 (May 1, 1890).

of the common law of *England* would apply to bills and notes on issues to which the Canadian act did not apply.[219] That language has been carried forward to the present day.[220]

Canada offers no other novel departures from section 1-103(b). Apart from the federal Bills of Exchange Act, three bodies of commercial law have been codified in common law Canada as provincial statutes: Sale of Goods Acts, derived from the Victorian-era British statute described earlier, and Securities Transfer Acts and Personal Property Security Acts, respectively derived from Articles 8 and 9 of the UCC.[221] Each of those provincial statutes has a provision similar to section 1-103(b), some even replicating distinctive quirks of its wording or style—which is not surprising, considering their common ancestry in the primordial British codifying acts.[222] None of these statutes contains a provision mandating purposive interpretation, as does section 1-103(a). However, the common law provinces have all followed the Canadian federal government in enacting general statutory rules of interpretation that include a mandate for purposive interpretation.[223] Omission of section 1-103(a) from the UCC would be a different matter.

A second departure from section 1-103(b) is found in the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), which has been in force in the United States since 1988. Its provision on coordination with non-CISG law is a compromise, agreed to near the end of the drafting process, between delegates who wanted the CISG to create a completely autonomous legal regime for international

219. An Act to amend "The Bills of Exchange Act, 1890," 54-55 Vict. c. 17, § 8 (1891) (Can.) (italics added). *See* J. J. MACLAREN, THE BILLS OF EXCHANGE ACT, 1890, CANADA, AND AMENDING ACTS 3-6 (2d ed. 1896).

220. Bills of Exchange Act, R.S.C. 1985, c. B-4, § 9 (Can.). Like its British ancestor and the Canadian provision enacted in 1891, this provision supersedes English law only to the extent inconsistent with the "express" provisions of the act.

221. *See* Roderick J. Wood, *The Codification of Commercial Law*, 79 SASK. L. REV. 178, 180-81 (2016).

222. In Ontario, for instance, section 72 of the Personal Property Security Act, R.S.O. 1990, c. P.10, reads as follows:

> Except in so far as they are inconsistent with the express provisions of this Act, the principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law, shall supplement this Act and shall continue to apply.

Common ancestry with section 1-103(b) is likewise manifest in Ontario's Sale of Goods Act, R.S.O. 1990, c. S.1, s. 57(1) and Securities Transfer Act, 2006, S.O. 2006, c. 8, s. 6. The provision in the Securities Transfer Act, unlike the provisions in the other two acts, omits the word "express."

223. In Ontario, Legislation Act, 2006, S.O. 2006, c. 21, Schedule F, s. 64(1) reads as follows:

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

The federal analogue is Interpretation Act, R.S.C. 1985, c. I-21, s. 12 (Can.).

sales and others who favored a role for domestic law. Typical of last-minute compromises, the result is opaque and its application depends upon the meaning ascribed to language that is highly elastic. The provision reads as follows:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[224]

It is by no means clear what matters not "expressly settled" by the CISG are nevertheless "governed by" it. Nor is it clear what are "the general principles on which [the CISG] is based."[225]

A third departure from section 1-103(b) resulted from the failed project to revise Article 2 of the UCC.[226] The study group report that launched the project suggested rethinking section 1-103, and further suggested that revised comments state a preference for the *Restatement (Second) of Contracts* as a source of contract law on issues not governed by Article 2.[227] The Article 2 drafting committee passed the baton to the Article 1 drafting committee when it was formed and did not itself propose changes to section 1-103. Yet the Uniform Computer Information Transactions Act ("UCITA"), spun off from the Article 2 project, did. UCITA contains its own provision modeled on section 1-103(b), but with an added sentence stating that various broadly-identified bodies of law, starting with trade secret laws and unfair competition laws, prevail over UCITA and are not displaced by it:

> Unless displaced by this [Act], principles of law and equity, including the law merchant and the common law of this State relative to capacity to contract, principal and agent, estoppel, duress, coercion, mistake, and other validating or invalidating cause, supplement this [Act]. Among the laws supplementing and not displaced by this [Act] are trade secret laws, unfair competition laws, and the law of fraud, misrepresentation, and unfair and deceptive practices, including application of such laws as they may deal with failure to disclose defects.[228]

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224. United Nations Convention on Contracts for the International Sale of Goods art. 7(2*), opened for signature* Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3.

225. *See* SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 132-42 (Ingeborg Schwenzer ed., 4th ed. 2016); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 125-33 (Harry M. Flechtner ed., 4th ed. 2009).

226. On the failed project to revise Article 2, see *supra* note 49.

227. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 22-24 (1990). No "final" report was issued.

228. UNIF. COMPUT. INFO. TRANSACTIONS ACT § 116(a) (2002).

So provisions addressing the subject of section 1-103(b) in ways that differ from it materially have been employed.

Hence there are at least plausible reasons to think afresh about the approach taken by section 1-103(b) to coordination of the UCC with other law. Could the UCC be improved by changing the present approach? The principal complaint that has been registered about it is that it makes outcomes difficult to predict. One commentator went so far as to assert that the UCC regime on coordination with other law amounts to "practical indeterminacy" that leaves courts "free to decide issues of displacement almost without restraint."[229]

While that is hyperbole, it is not sheer fantasy. The source of unpredictability is not section 1-103(b), however, for that provision merely implements the ordinary way common law courts coordinate a statute with common law. Rather, the source is section 1-103(a), which requires the provisions of the UCC to be given a purposive interpretation. Coordination of the UCC with other law therefore requires assessment of what the policies and purposes of the UCC require in a given setting. Doing that requires a sophisticated understanding of the UCC and its history and background, as well as of other laws that may bear on the given transaction. It also requires a sophisticated understanding of the settings and expectations under which the relevant parties operate. To apply those understandings wisely requires good judicial craftsmanship. Anxiety about predictability amounts to anxiety as to whether courts will be up to that task.

Amendment of section 1-103(b) alone, such as was done in UCITA, therefore could at best improve only marginally the predictability of the UCC's coordination with other law. Serious change would require a fundamentally different statute, one that abandons purposive interpretation.

This point is by no means unique to the UCC. Advocates of the textualist approach to statutory interpretation in the modern debate have argued that textualism leads to greater predictability and is more constraining of judges than the purposive approach.[230] A generation earlier, critics of the "Grand Style" of adjudication espoused by Llewellyn, to which purposive interpretation of both statutes and common law doctrines is central, made analogous objections.[231]

229. Frisch, *supra* note 159, at 341-42. For more measured assessments, which take for granted that purposive interpretation of the UCC decreases the predictability of outcomes but still do not despair, see McDonnell, *supra* note 84, at 846-53, and Alces & Frisch, *supra* note 84.

230. *E.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 63-64 (1994); SCALIA & GARNER, *supra* note 20, at 9-28.

231. *E.g.*, Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961) (reviewing LLEWELLYN, *supra* note 43).

Nonetheless, this point is especially pungent as applied to the UCC because commercial lawyers are peculiarly demanding of predictability. They would be frustrated by the UCC's commitment to purposive interpretation if they perceived it to mean that predictability is not the UCC's highest priority. Llewellyn once wrote that the UCC was not written "for dumbbell judges whom you are trying to corral."[232] Yet it was central to Llewellyn's jurisprudential view that purposive interpretation promotes predictability of outcome, and that textualism offers only an illusion of predictability.[233] Almost the only sustained exercise in statutory interpretation Llewellyn ever wrote was a celebrated article aimed at demonstrating the uncertainty of textual interpretation detached from purpose, by displaying an array of contradictory but equally legitimate canons of statutory interpretation.[234]

Whether a purposive methodology of statutory interpretation in fact provides greater predictability of outcome than a textualist methodology is a large question which this paper does not address. Moreover, as discussed in Section 3 of Part II.A, we do not know just how seriously courts have taken the UCC's directive that its provisions be interpreted with reference to their purposes. But experience during the half-century since the general enactment of the UCC has, in general, vindicated Llewellyn's faith in the American judiciary. Controversial decisions about the applicability of common law to a transaction subject to the UCC have been hearteningly few, when one reflects on the chaos that might have resulted. Only if the center ceases to hold as well as it has been holding would it be necessary to consider abandoning purposive interpretation, and so recasting the UCC, or some sad successor, into a statute aimed at corralling dumbbell judges.

A much better way of ameliorating uncertainties about coordination of the UCC with other law, given the UCC's commitment to purposive interpretation, would be through wise use of the official comments. The comments were invented in order to set forth the purposes of each provision. The PEB can and does amend the comments from time to time through its commentaries.[235] By doing so it can help to guide judges on issues of coordination in particular settings. Unlike a non-specialist court, the PEB has a sophisticated understanding of the text, history, and policies underlying the UCC, other bodies of law that apply to commercial transactions, and the settings in which commercial transactions take

232. Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 782 (1953).

233. K. N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 247-48 (1942); LLEWELLYN, *supra* note 43, at 37-40, 371-82.

234. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

235. *See supra* at notes 7-9.

place. Of course comments are soft law, not binding on courts, but by and large courts have gladly embraced the comments—as they should, so long as a comment amounts to an expert opinion about the meaning and purpose of the statutory text. As we have seen, the extent to which provisions of the UCC displace common law in a given setting depends upon the purposes and policies underlying those provisions.[236] In general an expert opinion on that subject implemented by a comment could not reasonably be viewed as be an improper amendment of the statutory text.

The best change that could be made to the statutory text of the UCC on the subject of coordination with other law would be to delete the surplusage that is section 1-103(b). That surplusage served a modestly useful advertising function in the early days of codification. But it has been a long time since American lawyers needed to be reminded that an American codifying statute does not purport to answer all questions that may arise in a transaction to which the statute applies. Section 1-103(b) is no more than such a reminder, and today the only result of its inclusion in the UCC is to evoke puzzlement and invite misreadings of the kinds discussed in Sections 3, 4, and 5 of Part II.B. Traditional wisdom is sound: surplusage in a statute is rarely good. Section 1-103(b), today, is no exception.

IV. CONCLUSION

Amendment of a uniform act, followed by enactment of the amendment by each enacting state, is a cumbrous, costly and uncertain process. Those who undertake the process can be sure only of the heavy investment of time and effort required; there can be no assurance that agreement will be reached on the text of an amendment, much less of ultimate enactment.

As we saw earlier, Karl Llewellyn, the UCC's intellectual father and chief reporter, seems to have envisioned that it would survive without amendment for "at least thirty years, perhaps fifty, perhaps even longer."[237] Grant Gilmore was less optimistic. Gilmore began his service as co-reporter for the UCC's article on secured transactions in 1946, and by the middle of 1948 he had in print an article with the discouraging title *On the Difficulties of Codifying Commercial Law* which ended as follows:

> The theory of the proposed Commercial Code is that we must keep our statutes up to date. If the project is successfully carried through, we should understand that we have probably committed ourselves to basic revisions at fairly short time intervals. However excellent the new Code may be it

236. This of course excludes the rare instances in which the statutory text of the UCC says explicitly that non-UCC law should or should not be applied. *See supra* at note 12.

237. *Supra* at note 51.

> will no doubt be necessary, in another twenty-five years or so, to revise the revisions.[238]

In 1967, when the UCC had been enacted by every state but Louisiana and just after the PEB established a committee to undertake what became major amendments to Article 9 issued in 1972, Gilmore shortened his prediction of time between amendments to zero:

> The Code in all probability will be the subject of a continual process of legislative tinkering—partly because the spirit of the times looks instinctively to a legislative solution, partly because the overspecificity of some Articles of the Code will make such a solution necessary.[239]

Gilmore was a better prophet than Llewellyn. Llewellyn's expectation of a long period between amendments surely was due at least in part to the central role that the law of sales played in Llewellyn's thinking.[240] The law of sales is amenable to being codified with a great deal of built-in flexibility that diminishes the need for amendments, as Llewellyn displayed when he drafted Article 2.[241] Gilmore, by contrast, dealt with the law of secured transactions, which requires many hard-edged and immutable rules because of its central concern for the rights of third parties who are strangers to the transaction.

When Gilmore wrote about amendments in 1948 he plainly was thinking of the whole UCC, not merely the secured transactions article. And he was thinking of amendments made necessary or desirable because of changes in the market—that is, changes in patterns of business behavior, of the kinds of transactions being done or the way they are done. Market-driven amendments to the UCC have been successful and relatively painless, even when complex and elaborate. One example is the 1994 revision of Article 8. That was market driven, for its root lay in the shift in securities holding patterns, beginning in the 1970s, to holding through central depositaries. Another example is the 1998 revision of Article 9. That did not have a single root, for it addressed many issues that had arisen since the last comprehensive revision in 1972. But many or most of its provisions were market driven, such as the many changes

238. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1359 (1948).

239. Gilmore, *supra* note 47, at 476.

240. Sales is the only area of the substantive law which Llewellyn ever studied intensively; his general theories of legal growth and development derived entirely from his reconstruction, based on an immensely detailed knowledge of the case law, of the course of sales law from the early nineteenth century to his own time.

Grant Gilmore, Book Review, 22 AM. J. COMP. L. 812, 815 (1974) (reviewing the first edition of TWINING, *supra* note 41).

241. *See supra* at notes 45-51.

responsive to the birth and growth of the financing pattern called securitization.

The subject of this paper is the boundary between the UCC and common law. If courts do not do a good job in demarcating that boundary, correction by statutory amendment may be difficult. An amendment to correct a court's view about the boundary between the UCC and common law is not market driven. Such a corrective amendment may well appear to be a zero-sum change, taking away from one set of players and giving to another without increasing overall wealth. A corrective amendment is also apt to be narrow and so may not have a significant constituency motivated to work for the change. By contrast, a market-driven amendment is (or at least appears to be) a non-zero-sum change, and is apt to have a significant constituency behind it.

A forthcoming paper will discuss coordination of the priority rules of Article 9 with common law doctrines that may alter those priorities. The drafters of the comprehensive 1998 revision of Article 9 were well aware of that subject. They also were aware that it could be addressed by comments targeting particular coordination issues. However, the comments they wrote on the subject were modest and the PEB has not since added to them significantly. No doubt that is because current litigation has not excited undue concern about such issues in the commercial law community. Nevertheless, the PEB would be well advised to address such issues by comment preemptively, before decisions are rendered and positions harden, for if that genie is released, nationwide statutory amendments may be the only way to force him, her, or it back into the bottle. This is a subject on which the proverbial ounce of prevention is conspicuously in order.