

PATTERNS OF DRAFTING ERRORS IN THE UNIFORM COMMERCIAL CODE AND HOW COURTS SHOULD RESPOND TO THEM

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The following article, developed from the personal notes of Professor Gregory E. Maggs, identifies eight recurring patterns of drafting in the Uniform Commercial Code (UCC). For each of these patterns, and for other idiosyncratic errors, the article recommends specific judicial responses. These responses take advantage of many of the UCC's unique characteristics. While the problem of drafting errors in the UCC may seem minor in light of the model code's high overall quality, the suggested responses can lead to a more efficient and effective application of the statute.

I. INTRODUCTION

Fifty years ago, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) accomplished one of the greatest legislative feats in the history of the United States. They published the first official version of the Uniform Commercial Code (UCC),¹ a massive model statute designed “to simplify, clarify and modernize the law governing commercial transactions.”² Now adopted in over fifty jurisdictions,³ the UCC governs billions of consumer and business transactions each year.⁴ Its provisions doubtlessly

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1. The first official version of the UCC, known as the “1952 Official Text,” was published in 1951 and first adopted by Pennsylvania in 1953. See 1 WILLIAM D. HAWKLAND, HAWKLAND UNIFORM COMMERCIAL CODE SERIES § 1-101:1 (2000).

2. U.C.C. § 1-102(2)(a) (2001).

3. See 1 HAWKLAND, *supra* note 1, § 1-101:1.

4. Articles 3 and 4 alone govern the more than 65 billion checks written each year. See Lucinda Harper, *Americans Won't Stop Writing Checks—Electronic Payments Are Viewed as Too Complicated*, WALL ST. J., Nov. 24, 1998, at A2 (providing statistics on check use). Other articles of the UCC govern sales and leases of goods, funds transfers, letters of credit, and other very common commercial subjects.

will continue to set standards for commercial practices well into the twenty-first century.⁵

Over the course of the UCC's long existence, the ALI and NCCUSL constantly have sought to improve it.⁶ During the past fifteen years alone, they have added new articles on leases of goods and funds transfers, and revised the articles on negotiable instruments, check collection, letters of credit, bulk transfers, investment securities, and secured transactions.⁷ More revisions may appear soon.⁸

Despite all of their efforts, however, the ALI and NCCUSL have not eradicated one of the UCC's most intractable difficulties, namely, its numerous drafting errors.⁹ As this article will show, the UCC's provisions often do not say either what the drafters intended or what they probably would have intended if they had foreseen all of the issues that might arise. Accordingly, courts often face considerable difficulty in applying the UCC's rules and avoiding insensible results.

Several years ago, I began keeping notes on problematic UCC sections.¹⁰ Although I initially kept my list of drafting errors merely for reference purposes, my interest in the various mistakes expanded as the list grew larger. Eventually, I started thinking about the possibility of draw-

5. See Neil B. Cohen & Barry L. Zaretsky, *Drafting Commercial Law for the New Millennium: Will the Current Process Suffice?*, 26 LOY. L.A. L. REV. 551, 553 (1993) (discussing the future of the UCC).

6. See Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 712–17 (1998) (describing the UCC revision process).

7. These recent revisions began in 1987 when the ALI and NCCUSL added a new Article 2A on leases of goods, see U.C.C. art. 2A (1987), 1B U.L.A. 647 (1989), and revised Article 6, see *id.* at art. 6 (1987), 2C U.L.A. 5 (1991). In 1989, they added a new Article 4A on funds transfers, see *id.* art. 4A (1989), 2B U.L.A. 455 (1991), and again revised Article 6, this time recommending its elimination, see *id.* art. 6 (1989), 2C U.L.A. 7 (1991). In 1990, they completely revised Article 3 on negotiable instruments, see *id.* art. 3 (1990), 2 U.L.A. 5 (1991), and substantially amended Article 4 on bank deposits and collections, see *id.* art. 4 (1990), 2B U.L.A. 5 (1991). In the same year, they also revised the new Article 2A on leases of goods. See *id.* art. 2A (1990), 1B U.L.A. 207 (Supp. 2001). In 1994, they revised Article 8 on investment securities. See *id.* art. 8 (1994), 2C U.L.A. 47 (Supp. 2000). In 1995, they revised Article 5 on letters of credit. See *id.* art. 5 (1995), 2B U.L.A. 154 (Supp. 2001). In 2000, they revised Article 9 on secured transactions. See *id.* art. 9 (2000), 3 U.L.A. 5 (2000) (effective July 1, 2001).

8. The ALI and NCCUSL are revising Articles 1, 2, and 2A. See *State Law Commission Appoints New Group to Finish Drafting Work on Articles 2, 2A*, 68 U.S.L.W. 2120 (Aug. 31, 1999) (describing the status of the work). They also have formed committees to consider other articles. See UNIFORM LAW COMMISSIONERS: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, DRAFTING PROJECTS UNDERWAY, at <http://www.nccusl.org/uccusl/draftingprojects.asp> (last visited Sept. 4, 2001).

9. The term “drafting error” has no universally accepted definition. I use the term to refer to statutory language in the UCC that fails to produce the results that the drafters wanted or that produces unintended and unforeseen results. Professor John Copeland Nagle has suggested the alternative term “statutory mistakes” to describe at least in part what I mean by drafting errors. See John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1268 (1996). Professor Nagle elaborates: “What constitutes a ‘mistake,’ of course, is often in the eye of the beholder. Sometimes Congress writes statutes with language that produces unintended consequences, sometimes Congress fails to resolve an issue because of an oversight or a failure of will In the broadest sense, these are all statutory mistakes.” *Id.* at 1267–68.

10. These sections came to my attention from reading cases, providing advice to lawyers, answering student questions, or just attempting to decipher the rules myself.

ing conclusions about the nature of these drafting errors and about making general recommendations for handling them. This article presents some of my conclusions.

Although all legislation contains drafting errors, the UCC has two features that may make its drafting errors more problematic than similar errors in other statutes. First, the UCC addresses a very complex subject matter that puzzles courts even when its provisions contain no mistakes. Second, as explained more fully below, the UCC's status as a model law enacted separately in over fifty jurisdictions makes correcting errors by legislative amendment very difficult.

On the other hand, despite these difficulties, the UCC also appears to have three characteristics that may help courts deal with its drafting errors. First, most UCC drafting errors fall into a small set of recurring patterns. In particular, the following eight types of problems appear again and again:

- The UCC does not have a rule to cover all cases.
- The UCC does not treat special cases differently.
- The UCC uses undefined ambiguous terms.
- The UCC uses circular definitions or cross-references.
- The UCC uses words and phrases inconsistently.
- The UCC fails to indicate which rule applies when the elements of a provision are not satisfied.
- The UCC uses referents with unclear antecedents.
- The UCC contains rules that conflict with each other.

Fortunately, errors within each of these patterns often lend themselves to common judicial responses.

Second, the UCC affords courts various means of dealing with drafting errors that are not always possible with other kinds of legislation. In many instances, courts can find ways around drafting errors by supplementing the UCC with common-law rules.¹¹ At other times, courts may conclude that the parties have waived or altered the relevant UCC provisions by express or implied agreement.¹² In addition, nothing in the UCC bars courts from applying the UCC in cases where its scope is unclear.¹³

Third, the stakes generally are not great when courts interpret the UCC. Because the UCC mostly consists of default rules for private

11. See U.C.C. § 1-103 (2001) ("Unless displaced by the particular provisions of this Act, 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, or other validating or invalidating cause shall supplement its provisions.")

12. See *id.* § 1-102(3) ("The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement . . .").

13. See 1 HAWKLAND, *supra* note 1, § 1-102:10 & n.2 (discussing this practice); Daniel E. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447, 451 (1971) (discussing the same practice).

commercial contracts, parties usually can avoid the consequences of interpretations that they disfavor by contracting around them in the future.¹⁴ Accordingly, when confronting drafting errors, courts may focus more of their attention on easy issues like preserving uniformity,¹⁵ and less on more difficult questions about the substantive merits of the rules that their interpretations create.

Part II of this article provides an overview of the problem of drafting errors in the UCC.¹⁶ It first describes the UCC and its recent massive revisions. It then discusses the prevalence of drafting errors in the UCC, and how courts inevitably must address them. Part III discusses the eight recurring patterns of drafting problems in the UCC identified above.¹⁷ After providing examples of each pattern, the discussion proposes categorical ways that courts might deal with them. The recommendations all take advantage of the special relationship of the UCC to both the common law and to private agreements, allowing courts to remain faithful to the statutory language while minimizing unintended results. Part IV illustrates how considerations specific to the UCC may guide judges in dealing with drafting errors that do fall within the eight patterns addressed in Part III.¹⁸ Finally, Part V states a brief conclusion.¹⁹

II. OVERVIEW OF THE PROBLEM

A. *The Modern UCC*

Since its formation at the end of the nineteenth century,²⁰ the NCCUSL has sought to create model state laws and to urge state legislatures to enact them. During the first half of the twentieth century, much of the NCCUSL's efforts concerned commercial law. The organization, for example, promulgated and obtained widespread enactment of the Uniform Sales Act (USA) and the Uniform Negotiable Instruments Law (NIL).²¹

In the 1940s, the NCCUSL decided to build upon its success with the USA and the NIL by creating the UCC.²² The leaders of the project intended the UCC to modernize the USA and NIL, and correct numerous problems resulting from drafting errors and oversights in these

14. See U.C.C. § 1-102(3) (permitting the parties to vary provisions of the UCC by agreement).

15. See *id.* § 1-102(1), (2)(c) (directing courts to construe the UCC to promote its underlying purposes, which include making the law uniform).

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part IV.

19. See *infra* Part V.

20. See WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE—A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 17–18 (1991) (describing the movement for uniform state laws).

21. See 1 HAWKLAND, *supra* note 1, § 1-102:3.

22. See 1 *id.* § 1-101:1.

laws.²³ They also decided that the UCC should govern other commercial subjects, like bank collections, letters of credit, bulk transfers, documents of title, investment securities, and secured transactions.²⁴

With the assistance of the ALI, the NCCUSL completed the first official version of the UCC in 1951.²⁵ Over the next two decades, the NCCUSL and ALI revised the UCC in various ways. Because of their great efforts, every state (except Louisiana), the District of Columbia, and various federal territories and possessions have adopted the UCC in its entirety.²⁶ Most observers would agree that the UCC has greatly improved the commercial law and simplified the planning and resolution of commercial transactions.²⁷

Starting about fifteen years ago, the ALI and NCCUSL began an ambitious project to update and expand the UCC. This project produced new versions of the eight articles, described above.²⁸ In addition, the ALI and NCCUSL currently are working on other changes. For most of the past decade, they have been drafting a new version of Article 2 on sales.²⁹ They also are revising Article 2A on leases,³⁰ and planning to amend Article 1.³¹ When finished, they will have changed the entire UCC except for Article 7 on documents of title.

The additions to the UCC have done much good. Article 2A on leases of goods has freed courts from the difficult task of trying to apply Article 2's provisions on sales of goods by analogy to cases involving leases.³² Similarly, Article 4A has supplanted general common-law principles of contract and tort with a well-drafted set of rules to govern the trillions of dollars moved every day by funds transfers.³³

23. See 1 *id.*

24. See 1 *id.*

25. See 1 *id.*

26. See 1 *id.* Louisiana and Puerto Rico have adopted some of the UCC. See Christian Callens, Comment, *Louisiana Civil Law and the Uniform Commercial Code: Interpreting the New Louisiana U.C.C.-Inspired Sales Articles on Price*, 69 TUL. L. REV. 1649, 1650-51 (1995) (discussing the UCC in Louisiana); Negotiable Instruments and Banking Transactions Act, 1996 P.R. Laws Ann. tit. 19, § 401 (Supp. 1997) (adopting Articles 3, 4, and 4A in Puerto Rico).

27. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 8, at 21-22 (3d ed. 1988) (expressing this view).

28. See MILLER, *supra* note 6, at 712-17.

29. See UNIFORM LAW COMMISSIONERS: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, DRAFTING COMMITTEE TO REVISE UNIFORM COMMERCIAL CODE, ARTICLE 2, SALES AND ARTICLE 2A, LEASES, at <http://www.nccusl.org/nccusl/draftingprojects.asp> (last visited Aug. 21, 2001) (identifying committee members and providing links to drafts of the revisions).

30. See *id.*

31. See UNIFORM LAW COMMISSIONERS: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, DRAFTING COMMITTEE TO REVISE UNIFORM COMMERCIAL CODE ARTICLE 1, GENERAL PROVISIONS, at <http://www.nccusl.org/nccusl/draftingprojects.asp> (last visited Aug. 21, 2001) (identifying the drafting committee and providing links to drafts of the revision).

32. See, e.g., *Barco Auto Leasing Corp. v. PSI Cosmetics, Inc.*, 478 N.Y.S.2d 505, 509-11 (N.Y. City Civ. Ct. 1984) (providing an example of this technique and explaining how other courts have used it).

33. See 6A HAWKLAND, *supra* note 1, § 4A-101:01.

The revisions also have improved previously existing portions of the UCC. Some of the changes have made the UCC more compatible with modern business practices. For example, the revised version of Article 3 now allows negotiable instruments to have variable interest rates,³⁴ and also permits the electronic presentation of negotiable instruments.³⁵ Other changes have established rules to govern situations that courts previously dealt with on a common-law basis. The revised version of Article 4, for instance, establishes encoding warranties for use in connection with automatic check processing.³⁶

All but a very few of the states have adopted, or are in the process of adopting, the revisions discussed.³⁷ The ambitious nature of the amendments and additions makes this accomplishment very impressive. The credit certainly belongs to the careful and professional drafting by the NCCUSL and ALI.

B. *The Problem of Drafting Errors*

Despite the great success that the UCC and its revisions have had in obtaining legislative approval, no one considers them perfect. In some instances, the UCC has fallen behind developments in the law or in commercial practices. For example, despite its recent enactment in 1987 and amendment in 1990, Article 2A on leases of goods does not contain an exception to the statute of frauds for electronic transactions.³⁸

In other situations, critics have charged that the UCC has perpetuated antiquated legal doctrines. For example, prior to its revision, numerous writers questioned whether Article 3 on negotiable instruments should retain the holder in due course doctrine.³⁹ The 1990 revision, however, did not change the historic rules.⁴⁰ Some writers have expressed great anguish over the UCC's resistance to fundamental revision.⁴¹

34. See U.C.C. § 3-112(b) (1990).

35. See *id.* § 3-501(b)(1).

36. See *id.* § 4-209.

37. See THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, INTRODUCTIONS & ADOPTION OF UNIFORM ACTS, at http://www.nccusl.org/uniformacts_subjectmatter.asp (last visited Sep. 4, 2001) (providing current information about adoptions of the UCC revisions).

38. See, e.g., U.C.C. § 2A-201(1)(b) (2001) (requiring a signed writing for leases of goods where total payments exceed \$1000).

39. See, e.g., Albert J. Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375, 401 (1971) (concluding that “today, negotiability, and specifically the protections of holders in due course, are not necessary or even helpful in fostering the flow of commerce”); Vern Countryman, *The Holder in Due Course and Other Anachronisms in Consumer Credit*, 52 TEX. L. REV. 1, 2–11 (1973) (providing a similar critique); Ralph J. Rohner, *Holder in Due Course in Consumer Transactions: Requiem, Revival, or Reformation*, 60 CORNELL L. REV. 503, 515 (1975) (providing another critique).

40. See U.C.C. §§ 3-305(b), 3-306 (2001) (allowing holders in due course to take negotiable instruments free of most defenses, claims in recoupment, and competing claims of ownership).

41. See, e.g., Edward L. Rubin, *Learning from Lord Mansfield: Toward a Transferability Law for Modern Commercial Practice*, 31 IDAHO L. REV. 775, 788 (1995).

This article, however, focuses on the problem of drafting errors. As used here, the term drafting error refers only to inadvertent mistakes or omissions in the phrasing of UCC provisions that tend to obscure the meaning of its rules or tend to prevent them from having their intended effects. The term does not refer to erroneous policy choices or failures to foresee future developments.

The revisions to the UCC inadvertently introduced scores of serious drafting errors. Their existence has not remained secret. Scholars have complained sharply about them.⁴² The ALI and NCCUSL even formed a committee specifically to address drafting problems in Articles 3, 4, and 4A.⁴³

Some drafting errors probably were inevitable. The UCC contains hundreds of pages of complex rules. No matter how carefully the drafters and revisers checked and rechecked their work, they could not foresee every situation that might arise or eliminate every ambiguity their provisions might create.⁴⁴ In addition, the drafters may not have had clear incentives to avoid drafting errors.⁴⁵ The question considered here is what to do about the problem.

Legislatures can amend statutes to correct any drafting errors. If they take this action, they improve the clarity and often the substance of the law. They also spare judges the difficulty of deciding how to respond to ambiguities that might affect the cases before them.

Unfortunately, legislatures almost certainly will not correct the vast majority of drafting errors in the UCC. In addition to the usual difficulties involved in passing legislation,⁴⁶ lawmakers know that unless they act at the specific recommendation of the NCCUSL, they risk reducing the uniformity of the statute. If each state passes its own amendments to deal with drafting errors, many would choose different solutions. While correcting individual drafting errors, they would create conflicts among the jurisdictions.

42. Sarah Howard Jenkins, *Revised Article 3: "[Revise] It Again, Sam"*, 36 HOUS. L. REV. 883, 884-85 (1999) (complaining of "traps for the unwary" and "serious omissions").

43. See UNIFORM LAW COMMISSIONERS: NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, DRAFTING COMMITTEE TO PREPARE AMENDMENTS TO THE UNIFORM COMMERCIAL CODE, ARTICLE 3, NEGOTIABLE INSTRUMENTS, ARTICLE 4, BANK DEPOSITS AND COLLECTION, AND ARTICLE 4A, FUNDS TRANSFERS, at <http://www.nccusl.org/draftingprojects.asp> (last visited Sept. 17, 2001).

44. *But see* Steven L. Schwarz, *A Fundamental Inquiry into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 928-45 (1995) (suggesting constraints that might improve the drafting of the UCC and other uniform statutes); Steven O. Weise, *"Plain English" Will Set the UCC Free*, 28 LOY. L.A. L. REV. 371, 371-73 (1994) (arguing that better drafting could reduce erroneous decisions under the UCC).

45. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 616 (1995) (noting that drafters of model laws may have an incentive to create ambiguity because they may want attorneys to turn to them for expert advice in the future).

46. Passing legislation generally requires the coordinated efforts of numerous politicians. They are unlikely to expend this effort often to fix mistakes in areas of commercial law unless their constituents or campaign supporters have strong reasons for caring about the changes.

The NCCUSL and ALI certainly may suggest and lobby for uniform amendments for correcting drafting problems in the UCC. This process has occurred in the past, but in general, rather infrequently. These bodies have other important work to accomplish. They also may hesitate to recommend changes to the UCC without having confidence that every jurisdiction will pass them.⁴⁷

Courts, therefore, inevitably have to deal with most drafting errors in the UCC. This task is not easy. As noted above, the UCC addresses a difficult subject matter unfamiliar to many judges.⁴⁸ To make matters worse, no court can establish a definitive interpretation for all of the jurisdictions that have adopted the UCC. The state supreme courts can determine the meaning of the UCC as enacted only in their own states. They cannot determine the meaning that courts in other jurisdictions must give it.⁴⁹

The ALI and NCCUSL have attempted to address these problems in part by establishing a committee of commercial law experts known as the Permanent Editorial Board (PEB).⁵⁰ The PEB acts by issuing “commentary” on UCC issues.⁵¹ These commentaries serve to resolve ambiguities and correct judicial misinterpretations.⁵² They generally follow a

47. See William J. Woodward, Jr., *Private Legislation in the United States—How the Uniform Commercial Code Becomes Law*, 72 TEMP. L. REV. 451, 459–60 (1999) (discussing NCCUSL’s reluctance to propose changes to the UCC that might not be adopted and other problems).

48. The drafters of the UCC attempted to address this problem by making the UCC straightforward and easy to understand. See *Taylor v. Roeder*, 360 S.E.2d 191, 195 (Va. 1987) (“The UCC introduced a degree of clarity into the law of commercial transactions which permits it to be applied by laymen daily to countless transactions without resort to judicial interpretation.”). This effort, however, never fully succeeded. In many instances, a reader can understand the UCC only if he or she already knows what it is trying to say. See, e.g., James S. Rogers, *Policy Perspectives on Revised UCC Article 8*, 43 UCLA L. REV. 1431, 1448 (1996) (discussing an example from Article 8 on investment securities). Indeed, some observers have called for completely rethinking the format of the UCC. Professor Lary Lawrence, for example, has pleaded for what he calls a “user-friendly” statute. See Lary Lawrence, *What Would Be Wrong with a User-Friendly Code?: The Drafting of Revised Articles 3 and 4 of the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 659 (1993). He asserts:

A commercial code must be intelligible to lawyers who are not well-versed in commercial practices or in the history of commercial law. . . . Judicial opinions in this area often reflect a judge’s lack of understanding The drafters should assist the courts in interpreting the Code by clearly and comprehensively stating all the applicable rules.

Id. at 671.

49. See 1 HAWKLAND, *supra* note 1, § 1-102:08 (explaining that cases from other jurisdictions have only persuasive authority). Because the UCC is state law, moreover, the U.S. Supreme Court has no power to establish its meaning. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 724–28 (1979) (contrasting UCC state law with federal common law, the latter of which may govern the rights of the United States in certain commercial transactions).

50. See PERMANENT EDITORIAL BD., PEB RESOLUTION ON PURPOSES, STANDARDS AND PROCEDURES FOR PEB COMMENTARY TO THE UCC, 3B U.L.A. 600 (1992).

51. See *id.*

52. The PEB commentaries described their purposes as follows:

(1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with UCC § 1-102(2)(b), to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it

standard format of presenting an issue, a discussion, and conclusion. The discussion describes the statutory scheme, the interpretative problem that it presents, and the various cases that have attempted to resolve the issue.

The idea of having expert members of the PEB provide guidance about problems in the UCC is certainly sound. The PEB, moreover, has done excellent work. The commentaries are thorough and well researched. In general, their recommendations have strong arguments in their favor. Although courts have no obligation to follow the PEB commentaries, they generally should give them great weight.

Despite their theoretical appeal, the PEB commentaries have two major practical shortcomings as a solution to the problem of drafting errors in the UCC. First, the PEB does not issue a sufficient number of commentaries to resolve the vast majority of ambiguities that arise. Since 1987, it has promulgated a total of only fifteen commentaries.⁵³ Yet, the revisions to the UCC alone have introduced scores of new drafting errors. Second, the PEB commentaries to date have not caught the attention of the courts. A recent computer search found a total of only twenty-five reported cases that have cited the PEB's commentary.⁵⁴ As a result, the PEB commentary has not had a large impact on the UCC.

In sum, the revisions to the UCC have introduced numerous drafting errors. State legislatures are not going to correct most of these errors. PEB commentary is going to provide guidance on only a handful of topics. As result, courts inevitably will have to deal with most of the ambiguities themselves. This article seeks to provide some guidance.

C. A Methodological Note

Before getting into the details of my recommendations about how courts should address drafting errors, one preliminary methodological point requires mention. In suggesting ways that courts might deal with drafting errors in the UCC, I have assumed that courts may not simply ignore or reject applicable statutory language.⁵⁵ Accordingly, the rec-

relates to other statutes (such as the Bankruptcy Code and various federal and state consumer protection statutes) and general principles of law and equity pursuant to UCC §1-103; or (6) to otherwise improve the operation of the UCC.

Id. PEB commentary are published in a variety of sources and also are available on the WESTLAW database. To find the commentary on Westlaw, search for "PR('PEB COMMENTARY)" in the "ULA" database.

53. See PERMANENT EDITORIAL BD., PEB COMMENTARIES ON THE UCC NOS. 1-9, 3B U.L.A. 599-644 (1992); *id.* NOS. 10-15 3B U.L.A. 127-72 (Supp. 2001).

54. Search for (PEB "PERMANENT EDITORIAL BOARD" "P.E.B.") W/3 COMMENTARY in WESTLAW's UCC-CS database. The reason that only a small number of cases have cited the PEB remains unclear. One strong possibility is that judges and litigants simply lack familiarity with the PEB commentary as an important source of persuasive authority.

55. Put another way, this article takes for granted the principle of "legislative supremacy," which is the principle that legislation binds courts. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283-94 (1989) (defining and discussing legislative

ommendations pay careful attention to what the UCC says, even when inaptly written. If courts for whatever reason do not feel bound by the enacted text of statutes,⁵⁶ then drafting errors will present them with much less difficulty, and many of the details of these recommendations will seem irrelevant.

III. RECOMMENDATIONS FOR RECURRING DRAFTING ERRORS

In keeping track of drafting errors encountered in the UCC, I have observed that most of them appear to fall into eight recurring patterns. The following discussion describes these patterns and provides numerous examples. It also recommends categorical approaches that judges might use to address them. Although courts certainly can and should rely on all of their usual techniques for interpreting statutes, my recommendations attempt to take advantage of various special features of the UCC. These features may ease the task confronting courts.

A. *The UCC Does Not Have a Rule to Cover All Cases*

Drafters of legislation sometimes state rules that accidentally fail to address certain possible situations that may arise. This type of error tends to occur when the drafters focus their attention on the most common fact patterns, and forget about those that occur less frequently. Eventually litigation may cause a court to confront a type of case that the drafters overlooked.

1. *Examples*

The most famous example of this type of drafting error appears in section 2-207,⁵⁷ which creates an exception to the common law's mirror image rule.⁵⁸ Section 2-207(1) states that a purported acceptance of an offer may suffice to form a contract even if it contains additional or different terms.⁵⁹ Section 2-207(2) then states how courts should treat any

supremacy). According to the principle of legislature supremacy, courts must follow statutory commands, even if they disagree with them as a matter of policy. See Frank H. Easterbrook, *The Supreme Court 1983 Term, Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) ("Judges must be honest agents of the political branches. They carry out decisions they do not make.").

56. See Michael S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV. 589, 590 (2000) (noting that throughout history many courts have refused to follow obvious errors in statutory language); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1033-40 (1998) (describing and commending instances in which courts have declined to adopt the textual meaning of statutes when considerations of context have pointed them in other directions).

57. See U.C.C. § 2-207 (2001).

58. The mirror image rule says that an attempted acceptance of an offer is not an acceptance if it differs from the offer. See RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.").

59. See U.C.C. § 2-207(1). The Code states:

additional terms contained in the offer.⁶⁰ The section, however, notoriously fails to specify how courts should treat *different* terms.⁶¹ Courts, for many years, have struggled to resolve the question.⁶²

A second example of this type of drafting error appears in revised section 3-404(b). Section 3-404(b) states that, when a person issues a negotiable instrument to an impostor, anyone may negotiate the instrument by indorsing it in the name of the impostor.⁶³ In focusing on impostors who take instruments from issuers, however, the drafters overlooked the possibility that impostors also might take instruments by transfer or negotiation. For example, suppose that Mansfield issues a check to Llewellyn, who specially indorses the check to make it payable to Gilmore. An impostor might pretend to be Gilmore and induce Llewellyn to deliver the check to him.⁶⁴ Section 3-404(b), however, does not cover this situation because it only addresses instruments *issued* to impostors, not instruments negotiated or transferred to them.⁶⁵

A third example appears in section 4A-207(a), which concerns misdescription of a payment order's beneficiary. Section 4A-207(a) says, "[i]f, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur."⁶⁶ In writing this section, the drafters evidently were thinking of a situation in which a payment order would contain only one identification of any existing beneficiary (such as either a name or an account number). They

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

60. *See id.* § 2-207(2). The Code states:

The additional terms are to be construed as proposals for additions to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

61. *See id.*

62. *See, e.g., Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578-80 (10th Cir. 1984) (discussing various approaches to the problem).

63. *See* U.C.C. § 3-404(b). The Code states:

If (i) a person whose intent determines to whom an instrument is payable (Section 3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special endorsement:

- (1) Any person in possession of the instrument is its holder.
- (2) An endorsement by any person in the name of the payee stated in the instrument is effective as the endorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

Id.

64. *Cf. Cohen v. Lincoln Sav. Bank of Brooklyn*, 10 N.E.2d 457 (N.Y. 1937) (payee negotiated rather than issued check to impostor).

65. *See* U.C.C. § 3-404(b).

66. *See id.* § 4A-207(a).

overlooked the possibility that a payment order might state the name of the beneficiary correctly but refer to a nonexistent account number.⁶⁷ The UCC contains many similar examples of cases inadvertently not covered by any particular rule.⁶⁸

2. *Recommended Judicial Response*

How should courts deal with UCC provisions that for one reason or another fail to address certain cases because of drafting oversights? Some courts might be tempted not to deal with them at all. They might assert that, as judges, they have a duty to interpret legislation as written; if a legislature makes an omission in drafting a statute, courts have neither the responsibility nor the power to correct it.

In *Corfan Banco Asuncion Paraguay v. Ocean Bank*,⁶⁹ a court took this position when interpreting section 4A-207(a). The court recognized that the section contained the oversight discussed above. Indeed, the court even quoted a leading treatise which explained that “it does not appear that this anomaly in section 4A-207(a) was intended.”⁷⁰ The court nonetheless refused to apply the section to a payment order that correctly identified the beneficiary by name but referred to a nonexistent account.⁷¹ Justifying its decision, the court quoted a case called *Weber v. Dobbins*, which said:

The reason for the rule that courts must give statutes their plain and ordinary meaning is that only one branch of government may write

67. See 64 WILLIAM D. HAWKLAND & RICHARD D. MORENO, HAWKLAND UNIFORM COMMERCIAL CODE SERIES § 4A-207:01 (1999) (“It does not appear that this anomaly in subsection 4A-207(a) was intended”); ROBERT L. JORDAN ET AL., NEGOTIABLE INSTRUMENTS, PAYMENTS AND CREDITS 277 (5th ed. 2000) (“Section 4A-207(b) contains a drafting error and should be amended.”). The drafters did anticipate the possibility that the payment order would state the beneficiary’s name correctly but refer to an existing account of another person. See U.C.C. § 4A-207(b).

68. For instance, Section 3-201(b) indicates the manner of negotiation for an instrument payable to “an identified person,” but does not say how an instrument is negotiated when it is payable to more than one identified person, although Section 3-110(d) makes clear that instruments payable to more than one identified person may be negotiated. See U.C.C. §§ 3-201(b), -110(d). Similarly, Section 3-303(b) establishes lack of consideration and failure of consideration as defenses that the maker or drawer of an instrument may assert, but does not state whether indorsers may assert lack of consideration or failure of consideration as a defenses. See *id.* § 3-303(b); *id.* § 3-305(a)(2) (noting that the right to enforce an instrument is subject to ordinary defense on a contract); *cf. id.* § 3-419(b) (stating that an accommodation party, which would include an anomalous indorser, may not raise lack of consideration as defense). Likewise, Section 3-301 indicates that holders and persons who have lost their instruments may enforce, that transferees of holders may enforce, not whether transferees of persons who have lost their instruments may enforce. See *id.* § 3-301 (““Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 [i.e., a loser].”); see also *Bobby D. Assocs. v. DiMarcantonio*, 751 A.2d 673 (Pa. Super. 2000) (considering whether the assignee of right to enforce lost note may enforce).

69. 715 So. 2d 967, 969–70 (Fla. Dist. Ct. App. 1998), *rev’d dismissed*, 728 So. 2d 203 (1998).

70. *Id.* (quoting WILLIAM D. HAWKLAND & RICHARD MORENO, UNIFORM COMMERCIAL CODE SERIES § 4A-207:01 (1993)).

71. See *id.* at 968.

laws. Just as a governor who chooses to veto a bill may not substitute a preferable enactment in its place, courts may not twist the plain wording of statutes in order to achieve particular results. Even when courts believe the legislature intended a result different from that compelled by the unambiguous wording of a statute, they must enforce the law according to its terms.⁷²

This statement expresses the basic philosophy of the “textualist” school of statutory interpretation, which has become prevalent in recent years.⁷³ Similar statements and reasoning appear in the recent decisions of numerous state and federal courts. Adherents to this view (including the author⁷⁴) recognize that following the text of a statute sometimes will not produce optimal results in particular cases, but believe that any other approach lacks legitimacy and will have worse overall effects on the legal system. Accordingly, if a textualist court came across an oversight in the Bankruptcy Code or an unintended loophole in the Internal Revenue Code, it generally would not attempt to correct the problem. On the contrary, like the court in *Corfan*, it would apply the statute as written.⁷⁵ The court would leave it to Congress to remedy the drafting error.

In deciding UCC cases, however, courts should not necessarily adhere to the textualist approach exhibited in *Corfan*. Regardless of what judges think of textualism in general, they should recognize that the UCC differs from other statutes because of its peculiar relationship to the common law. In particular, as explained below, courts often legitimately can create common-law rules to cover the situations that the UCC does not.

a. Authority to Create and Apply New Common-Law Rules

The UCC addresses subjects that the common-law traditionally covered. For example, the common law of sales contracts previously governed what Article 2 now addresses.⁷⁶ Similarly, the common law of bills and notes formerly specified rules of the kind now found in Article 3.⁷⁷ Before the UCC’s enactment, judges had the primary authority for developing these common-law rules.

72. *Id.* at 970 (quoting *Weber v. Dobbins*, 616 So. 2d 956 (Fla. 1993)).

73. See Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine*, 28 CONN. L. REV. 393, 396–98 (1996) (describing textualism).

74. See *id.* (defending Justice Scalia’s use of textualism).

75. See, e.g., *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644–45 (1992) (refusing to read into Section 522(l) of the Bankruptcy Code a requirement of “good faith”).

76. The UCC replaces the Uniform Sales Act, which previously replaced the common law. The common law treated contracts for the sale of goods differently from other contracts in several ways. See E. ALLAN FARNSWORTH, *CONTRACTS* § 1.9, at 29–30 (2d ed. 1990) (briefly describing this history).

77. Article 3 replaces the Uniform Negotiable Instruments Law, which replaces the earlier common law. See 4 WILLIAM D. HAWKLAND & LARY LAWRENCE, *HAWKLAND UNIFORM COMMERCIAL CODE SERIES* § 3-101:01 (2000) (briefly describing this history).

Passage of the UCC did not fully supplant the common-law rules in these areas. On the contrary, with few exceptions, the drafters did not intend the UCC to serve as exclusive legislation. The drafters ensured the continuing existence of common-law rules by adding section 1-103, which states:

Unless displaced by the particular provisions of this Act, 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, or other validating or invalidating cause shall supplement its provisions.⁷⁸

The UCC's lack of exclusivity distinguishes it from other civil codes, which at least in theory serve as the sole body of law on a subject. In an early law review article on the UCC, Professor Grant Gilmore explained this point. "Surely the principal function of a Code is to abolish the past," he said.⁷⁹ "From the date of the Code's enactment, the pre-Code law is no longer available as a source of law."⁸⁰ But, Professor Gilmore explained:

The Uniform Commercial Code, so-called, is not that sort of Code—even in theory. . . . We shall do better to think of it as a big statute—or a collection of statutes bound together in the same book—which goes as far as it goes but no further. It assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, which it displaces to the least possible extent, and without which it could not survive.⁸¹

Professor Gilmore believed that the common law would fill in the gaps left by the UCC. In his words, "[t]he solid stuff of the pre-Code law will furnish the rationale of decision quite as often as the Code's own gossamer substance."⁸²

Accordingly, if a court encounters a situation not fully covered by the UCC, it does not have to stop like the court did in *Corfan*. On the contrary, it should turn to supplementary principles of law, including common law. If a court encounters a gap in the UCC, and no common-law rule exists to address the issue, a court generally may create a new common-law rule.⁸³ Although courts cannot rewrite statutes—as the court in *Corfan* correctly said—they may create and apply common-law rules because the UCC directs courts to employ supplemental general principles of law and equity. Indeed, supplemental general principles could address each of the examples of oversights identified above.

78. U.C.C. § 1-103 (2001).

79. Grant Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285–86 (1966).

80. *Id.*

81. *Id.*

82. *Id.* at 286.

83. *E.g.*, *Girard Bank v. Mount Holly State Bank*, 474 F. Supp. 1225, 1239 (D.N.J. 1979) (noting that courts may improvise new common-law rights to supplement the Code). *But cf.* 1 HAWKLAND, *supra* note 1, § 1-103:2 (observing that the absence of a well-defined common law often persuades courts to stay within the Code).

b. What Kinds of Common-Law Rules Should Courts Create?

Saying that courts may create new common-law rules to address oversights in the UCC's rules only answers half the question that courts face. The other question is exactly what common-law rules the courts should create. Often, when a court confronts a situation not covered by the UCC, it will have a pretty good idea of what the drafters of the UCC would have wanted. For example, in the *Corfan* case discussed above, the court and commentators both recognized that the drafters probably would have wanted the approach of section 4A-207(a) to apply if the funds transfer correctly identified the beneficiary regardless of whether the funds transfer erroneously referred to an existing or nonexisting account. In these kinds of cases, a court generally should create a common-law rule that accomplishes the result apparently intended but not accomplished by the UCC's drafters. This approach will insure the full application of whatever policy the drafters of the UCC intended. It will also reduce the harm caused by unintended oversights.

In some instances, courts will confront more difficult situations. For example, suppose a court encounters a UCC section containing a general rule and some exceptions. Suppose further that neither the general rule nor the exceptions literally apply to the issue before the court, and the court does not know which one should apply as a policy matter. In a situation like this, where the court has nothing else to rely on, it probably should apply the general rule on the theory that the drafters generally favored its application over the exceptions.

B. The UCC Does Not Treat Special Cases Differently

Although the UCC's provisions sometimes fail to address situations that may arise, in other instances they have the opposite problem. The rules occasionally do not include exceptions for special cases. Courts must respond in a different way to this type of problem.

1. Examples

Revised Article 3 of the UCC has several sections that inadvertently omit exceptions for special cases. One example is revised section 3-418(c),⁸⁴ which attempts to codify Lord Mansfield's famous decision in *Price v. Neal*.⁸⁵ Sections 3-418(a) and (b) say that a person who pays an instrument by mistake may obtain restitution.⁸⁶ Revised section 3-418(c),

84. See U.C.C. § 3-418(c) (2001) ("The remedies provided by subsection (a) or (b) [i.e., restitution] may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by Section 3-417 or 4-407.")

85. 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762).

86. U.C.C. § 3-418(a)-(b).

however, creates an exception to this rule, saying that a person paying an instrument may not obtain restitution from a person “who in good faith changed position in reliance on the payment.”⁸⁷ This exception is too general. It ought to say that a person paying an instrument cannot recover in restitution *to the extent* that the person who has received payment has changed position in reliance. That way, if someone received a \$1000 payment, but spent only \$1 in reliance, the person paying the instrument still could recover the remaining \$999.⁸⁸

A similar error appears in section 3-405(b),⁸⁹ which creates a special rule for indorsements forged by an employee entrusted with responsibility for checks, such as a corporate treasurer. The section says that if the employee forges an indorsement, the indorsement “is effective as the payee’s.”⁹⁰ This rule also seems too broad; indorsements forged by employees should be effective for some purposes but not others. For instance, suppose that Llewellyn issues a check to a supplier. His trusted employee, Gilmore, steals the check and forges the supplier’s indorsement. Section 3-405(b) says that the indorsement is “effective” as the supplier’s indorsement. This language carries out the drafters’ apparent intention of allowing the drawee bank to pay the instrument upon its presentment and to charge Llewellyn’s account.⁹¹ But suppose that Gilmore negotiates the check to Mansfield instead of presenting it for payment, and that when Mansfield presents the check, it bounces. If Gilmore’s indorsement is “effective” as the supplier’s indorsement, then the supplier would be liable to Mansfield.⁹² This result makes no sense because the supplier had no involvement in the transaction. The drafters apparently overlooked this possible consequence of the general rule that they stated in revised section 3-405(b).

A third example of this type of error appears in revised section 3-416(b), which specifies the damages available for breach of transfer warranty.⁹³ The section says: “A person . . . may recover from the warrantor as damages for breach of warranty *an amount equal to the loss suffered as a result of the breach*, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.”⁹⁴ The section, unfortunately, fails to contain an exception preventing re-

87. *Id.* § 3-418(c).

88. *Cf.* RESTATEMENT OF THE LAW OF RESTITUTION § 69 (1937) (making a change in position on reliance either a complete or a partial defense, depending on the extent of the reliance).

89. *See* U.C.C. § 3-405(b).

90. *Id.*

91. *See id.* § 4-401(a) (permitting a bank to charge a customer’s account for an authorized check). In the absence of the exception created by Section 3-405(b), if the bank paid Llewellyn, it could not charge Llewellyn.

92. *See id.* § 3-415(a).

93. *See id.* § 3-416(b).

94. *Id.* (emphasis added).

covery of avoidable damages.⁹⁵ For instance, suppose that a thief steals a checkbook and issues a check to Gilmore, forging the drawer's signature. Gilmore negotiates the check for consideration to Llewellyn. Llewellyn deposits the check in Mansfield Bank. Mansfield Bank presents the check to the payor bank, which returns it unpaid. Although Mansfield Bank could avoid damages simply by revoking any credit given to Llewellyn,⁹⁶ it decides to sue Gilmore for breach of warranty instead.⁹⁷ Read literally, section 3-416(b) would still allow Mansfield Bank to recover from Gilmore the full amount of the check as damages for breach of warranty, even though these damages could have been avoided. The drafters should have considered this possibility. The UCC contains other examples of this type of problem.⁹⁸

2. *Recommended Judicial Response*

Where the drafters of the UCC inadvertently have failed to create exceptions to general rules, courts find themselves in a difficult position. Although judges almost always can create common-law rules to fill gaps in the coverage of legislation,⁹⁹ they generally cannot create common-law exceptions to statutes. The principle of legislative supremacy establishes that legislative enactments take precedence over judge-made law that might attempt to address special cases.¹⁰⁰

For example, although a court may believe that the drafters would have wanted an exception in section 3-416(b) for damages that could have been avoided, it cannot establish a common-law rule having that effect. The language of section 3-416(b) expresses the rule that courts must follow in cases involving breach of warranty damages. Any attempt to fashion a common-law exception would be illegitimate because it would conflict with the text of the statute.

In many instances, however, courts may have an alternative to fashioning a common-law exception. In particular, as the following discussion will explain, they may be able to find that the parties themselves

95. Cf. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 350 (1981) (providing that parties generally cannot recover avoidable damages in breach of contract actions).

96. See U.C.C. § 4-214(a) (depository bank may revoke credit given for a check later dishonored).

97. See *id.* § 3-416(a)(2) (transferor of a check warrants that all signatures are authentic and authorized).

98. Section 3-201(b) is another example. It says: "Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder." See *id.* § 3-201(b). The drafters should have made the exception in § 3-201(b) broader to include not only remitters, but also transferees from remitters. See *Michaud v. Cmty. Sav. Bank*, No. CV 92-05160245, 1994 WL 146371 (Conn. Supr. Ct. Apr. 6, 1994) (remitter transferred instrument to person who then sought to negotiate it to the payee).

99. See *supra* Part III.A.2.a.

100. Section 1-103 implements the principle of legislative supremacy by directing courts to rely on supplemental general principles of law "[u]nless displaced" by particular provisions of the UCC. See U.C.C. § 1-103.

have created an exception to the applicable rule by express or implied agreement. Within limits, this approach would not violate any principle of legislative supremacy.

Most of the rules in the UCC merely set default terms that apply unless the parties agree to different rules. If the parties want different rules, they generally have the power to change them.¹⁰¹ Section 1-102(3) provides:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.¹⁰²

In fact, the UCC not only permits, but also encourages courts to allow parties to change the rules by contract. Section 1-102(2)(b) identifies “the continued expansion of commercial practices through custom, usage and agreement of the parties” as one of the “[u]nderlying purposes and policies” of the UCC.¹⁰³ Courts thus should not consider private modification of UCC’s default rules as something suspect or exceptional.

In most instances in which general rules in the UCC fail to establish exceptions for special cases, the parties could create the exceptions by agreement. For example, consider how the parties in theory might address the oversight in section 3-418(c), discussed above, concerning restitution of checks paid by mistake. Before paying a check, a bank might say to the person presenting the check: “Under current law, if it later turns out that we have paid this check by mistake, we may recover only if you have not relied on the payment. But we think this rule contains a drafting error.” The bank then might ask the person presenting the check: “Would you agree to change the default rule, allowing us to recover not only if you have not relied at all, but also *to the extent* that you have not relied?” If the person presenting the check agreed, then a court could enforce their modification of the existing default rule.¹⁰⁴

Experience suggests that parties to commercial transactions rarely, if ever, will make this kind of agreement explicitly. They usually do not say anything about the rules in the UCC and the exceptions that the drafters may have forgotten to include. In fact, most people do not

101. See, e.g., Gregory E. Maggs, *The Holder in Due Course Doctrine as a Default Rule*, 32 GA. L. REV. 783, 798–805 (1998) (discussing how parties may create alternatives to the holder in due course doctrine applicable to negotiable instruments).

102. See U.C.C. § 1-102(3).

103. See *id.* § 1-102(2)(b).

104. Lack of consideration under the preexisting duty rule is not an issue because the drawee of a check has no duty to pay the holder. See *id.* § 3-408 (“the drawee is not liable on the instrument until the drawee accepts it”).

present checks directly to the payor bank but instead deposit them, allowing the depositary bank or an intermediary bank to present them.

Nothing in section 1-103(2), however, suggests that parties may change the default rules only by express agreement. Accordingly, courts should consider whether the facts of the particular transaction suggest that the parties implicitly agreed to create an exception. Even if the parties do not say anything, their past course of dealing and the usage of the trade may show an agreement. Section 1-205(3) says: “A course of dealing between the parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.”¹⁰⁵ Pursuant to this provision, courts may consider evidence of the parties’ previous conduct and the prevailing business customs.

Consider the following example. Suppose that Mansfield wants to buy a car from Llewellyn. Worried that a personal check from Mansfield may bounce, Llewellyn tells Mansfield to pay for the car with a cashier’s check. Mansfield buys a cashier’s check payable to Llewellyn and transfers it to Llewellyn in exchange for the car.

When Mansfield transferred the check to Llewellyn, he made a variety of implied warranties. Under section 3-416(a)(1), he warranted that he was a person entitled to enforce the instrument.¹⁰⁶ Most courts, however, take the position that remitters¹⁰⁷—like Mansfield—are not entitled to enforce instruments.¹⁰⁸ If that is correct, then the drafters should have created an exception in section 3-416(a)(1) for remitters, because otherwise remitters always will breach the transfer warranty when they use an instrument to buy something. Although Mansfield probably would not suffer any easily calculated damages because of this breach of warranty, if he wanted to get out of the sale, he theoretically might be able to assert the breach of warranty as a basis for rescinding the transaction.

A court cannot create a common-law exception to section 3-416(a) because of the principle of legislative supremacy. A court, however, easily could find an implicit agreement preventing Llewellyn from canceling the contract based on the breach of warranty in section 3-416(a)(1).¹⁰⁹ Llewellyn surely did not desire the warranty from Mansfield; merchants take cashier’s checks from customers precisely because they do not want

105. *Id.* § 1-205(3).

106. *See* U.C.C. § 3-416(a)(1) (1990).

107. A remitter is a “person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.” *Id.* § 3-103(a)(11).

108. *See, e.g.,* Perrino v. Salem, Inc., 243 B.R. 550, 557 (D. Me. 1999) (remitter not entitled to enforce); *see also* Gregory E. Maggs, *Determining the Rights and Liabilities of the Remitter of a Negotiable Instrument: A Theory Applied to Some Unsettled Questions*, 36 B.C. L. REV. 619, 639–50 (1995) (discussing this issue and arguing that perhaps remitters should have the right to enforce).

109. The implicit agreement would be that breach of warranty would not justify canceling the contract. Concluding that Mansfield never made the warranty would be more difficult because § 3-417(e) says that the implied warranties “cannot be disclaimed with respect to checks.”

to have to enforce the checks against them. Llewellyn, moreover, expressly instructed Mansfield on how to structure the transaction.

Some courts may hesitate to use the approach of finding exceptions based on implied agreements because they may see it as a trick designed to thwart the principle of legislative supremacy. They may think that finding an implicit agreement not to follow a rule in the UCC effectively creates a judicial exception to a statute. If carried far enough, the approach could justify ignoring the UCC altogether.

This concern warrants two responses. First, as noted immediately above, the UCC expressly recognizes that parties may alter its rules by agreement and that course of dealing and usage of trade may create implied agreements. The principle of legislative supremacy also requires courts to follow these aspects of the UCC. Courts thus must consider the possibility that parties have created exceptions to the UCC's rules by contract.

Second, the suggested approach in fact does have limits. A court must consider the actual circumstances of the particular transaction at issue before concluding the parties have made an implicit agreement. A court could not hold, for example, that a person presenting a check for payment always implicitly agrees to allow restitution to the extent that the person has not relied on the payment. A *per se* rule like that would violate legislative supremacy because it would negate part of section 3-418(c)'s text.

This last point leads to the question of when courts should find that parties have made implicit agreements creating exceptions in improperly drafted provisions of the UCC. This question has no easy answer. Certainly, the party seeking the exception will have the burden of raising the issue and proving the facts showing the agreement. At a minimum, though, courts should keep the possibility of implied agreements in mind before applying a rule to an exceptional case that the drafters apparently overlooked.

C. The UCC Uses Undefined Ambiguous Terms

The drafters of the UCC decided to use a large number of special terms when writing its various provisions. They defined many of these special terms in different places throughout the code. Section 1-201, for instance, specifies the meanings of forty-six words and phrases used in all of the articles.¹¹⁰ Articles 2 through 9 also includes additional definitions that apply to their specific rules.¹¹¹ Unfortunately, in some instances, the drafters failed to define key terms. This oversight, needless to say, can make the UCC difficult to interpret.

110. See U.C.C. § 1-201 (2001).

111. See, e.g., *id.* §§ 4A-103 to 4A-105; *id.* § 5-102.

1. *Examples*

Two simple but important examples of undefined terms appear in a central provision of Article 2, which governs contracts for the sale of goods. Section 2-105(1) says that goods includes “things” that are “movable” at the time of identification to the contract.¹¹² Nothing in the UCC, however, defines the words “things” or “movable.” These terms may be sufficiently clear to exclude certain subjects, like services¹¹³ (which are not things) and real estate¹¹⁴ (which is not movable). Providing definitions of these terms, however, might have helped to resolve ambiguity about their application to other items, like electricity¹¹⁵ or computer software.¹¹⁶

Another example of an undefined term appears in the revised version of Article 3 on negotiable instruments. Revised Article 3 uses the term “payee” in ten sections but does not define it.¹¹⁷ One recurring issue is whether the term payee refers only to the person to whom the instrument is initially payable or whether it also can refer to someone to whom the instrument is made payable by special indorsement.¹¹⁸

2. *Recommended Judicial Response*

By tradition, when courts come across an undefined term in a statute, they take it upon themselves to assign a meaning.¹¹⁹ They may choose to follow the ordinary usage of the term in standard English.¹²⁰

112. *See id.* § 2-105(1).

113. *See* J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., Inc., 683 So. 2d 396, 400 (Miss. 1996) (stating services are not goods).

114. *See* White v. Peabody Constr. Co., Inc., 434 N.E.2d 1015, 1021–22 (Mass. 1982) (stating real estate is not a good).

115. *Compare* Cincinnati Gas & Elec. Co. v. Goebel, 28 Ohio Misc. 2d 4 (1986) (holding electricity is a good), *with* New Balance Athletic Shoe, Inc. v. Boston Edison Co., 29 U.C.C. Rep. Serv. 2d (DBC) 397 (Mass. Super. Ct. 1996) (holding electricity is not a good).

116. *See* Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) (stating a computer program is a good if subsumed in a tangible medium like a computer disk).

117. *See* U.C.C. §§ 3-106(d), -109(a)(2), -110(a) & (b), -116(a), -305(a)(3), -307(b)(4), -312(a)(3) & (b), -404(a)–(c), -405(a), -420(a) (2001).

118. The rule with respect to fictitious payees provides an example. Section 3-404(b) says: “If . . . the person identified as payee of an instrument is a fictitious person, . . . [a]n indorsement by any person in the name of the payee . . . is effective . . . in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.” *Id.* § 3-404(b). Accordingly, if Llewellyn makes a check payable to Karl Gilmore, a fictitious person, then anyone can indorse the check in Karl Gilmore’s name. But suppose Llewellyn makes a check payable to Mansfield, who in turn makes it payable to Karl Gilmore by special indorsement. Is Karl Gilmore the “payee” within the meaning of section 3-404(b)?

119. There are exceptions. For example, a court may determine that undefined terms in a statute regulating speech cause vagueness that violates the First Amendment and therefore the court may invalidate the statute instead of interpreting it. *See, e.g.,* Reno v. ACLU, 521 U.S. 844, 870–79 (1997) (striking down the Communications Decency Act in part because of its use of vague undefined terms). This exception does not appear to apply to any provision of the UCC.

120. *See* Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”); FDIC v. Meyer, 510 U.S. 471, 476 (1994) (stating similar idea).

Or they may pick some specialized meaning, based on context, legislative history, or some other factor.¹²¹ They do not simply refuse to address the issue.

The same general principle holds true in UCC cases. Courts must assign meanings to undefined words and phrases, like “thing” or “movable” or “payee.” The UCC, however, differs from other statutes in two respects. First, as noted above, section 1-103 specifically directs courts to refer to supplemental general principles of law when applying its provisions.¹²² Courts therefore must look to the common law and other statutes for guidance in interpreting undefined phrases in the UCC.

The term “consideration” illustrates this idea. Section 2-205 specifies an instance in which a promise to keep an offer open does not require “consideration.”¹²³ Section 2-209(1), in addition, says that modifications to contracts for the sale of goods do not require “consideration” to be binding.¹²⁴ Although Article 2 does not define “consideration,”¹²⁵ this omission does not prevent courts from applying these sections. Under section 1-103, courts should follow the common-law definition.¹²⁶

Second, when the common law does not supply a clear answer, the UCC gives courts another important directive concerning its interpretation. In particular, section 1-102(1) mandates: “This Act shall be liberally construed and applied to promote its underlying purposes”¹²⁷ Section 1-102(2) then states:

121. See *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (indicating that words grouped together should have a related meaning); *Massachusetts v. Morash*, 490 U.S. 107, 114–15 (1989) (stating similar idea); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (“[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”). Sometimes undefined terms have a plain meaning in ordinary usage, but appear to have a different meaning in the context of the UCC, suggesting that the drafters intended a special definition. The word “nonconforming” in U.C.C. § 2-206(1)(b) provides an example. Section 2-206(1) says that a seller accepts a buyer’s offer by shipping “nonconforming goods.” U.C.C. § 2-206(1)(b) (2001). This section is designed to prevent sellers from using the so-called unilateral contract trick of arguing that they are not liable for nonconformities in their shipments because they never promised to ship conforming goods. See 1 HAWKLAND, *supra* note 1, § 2-206:3. But suppose a buyer orders books, would a shipment of tomatoes count as “nonconforming” goods? Certainly tomatoes are not books, but a nonconformity of this magnitude suggests that the seller actually may not have been attempting to accept, and therefore the goal of preventing the unilateral contract trick would not be served by finding a contract. The problem, as Professor Williston noted, is that nothing in the section explains how great the nonconformity might be. See Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 577 (1950).

122. See *supra* Part III.A.2.a.

123. U.C.C. § 2-205(b).

124. *Id.* § 2-209(1).

125. The UCC defines the term “consideration” as used in Article 3 to mean “any consideration sufficient to support a simple contract.” *Id.* § 3-303(b).

126. The common-law definition of consideration may vary from state to state. Most states, however, now subscribe to the so-called bargain theory. See E. ALLAN FARNSWORTH, *CONTRACTS* § 2.2 (2d ed. 1990).

127. U.C.C. § 1-102(1).

Underlying purposes and policies of this Act are

- (a) to simplify, clarify and modernize the law governing commercial transactions;
- (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- (c) to make uniform the law among the various jurisdictions.¹²⁸

When courts confront undefined terms, which have no specific common-law meaning, they should use these factors to choose an appropriate definition. Factor (c) probably has the most importance;¹²⁹ it implies that courts generally should follow precedent from other jurisdictions when selecting the meaning of undefined terms. A court in California thus should adopt the meaning given by a court in New York to a term like “payee,”¹³⁰ unless it considers the decision plainly wrong.¹³¹ The UCC makes uniformity a priority because parties often must plan transactions that involve the laws of more than one state. Conflicting interpretations destroy the intended uniformity of the statute and are difficult to correct. Although the NCCUSL does propose amendments to the UCC from time to time,¹³² the great burden of persuading each jurisdiction in the United States to adopt the amendments prevents NCCUSL from devising amendments that will correct every conflict that arises.

D. *The UCC Uses Circular Definitions or Cross-References*

The UCC relies heavily on definitions and cross-references. Applying one section often requires looking up terms and rules in several other sections.¹³³ In general, cross-references have the advantage of promoting consistency throughout the statute. When the drafters have acted with great care, all of the various provisions fit together. Unfortunately, in

128. *Id.* § 1-102(2).

129. Although factors (a) and (b) provide some guidance, few courts would want to complicate the law or inhibit commercial development even if such factors were expressly stated in § 1-102(2).

130. *See* *ABM Escrow Closing & Consulting, Inc. v. Matanuska Maid, Inc.*, 659 P.2d 1170, 1172 (Alaska 1983) (“Although precedent from other jurisdictions is, of course, not binding upon us, we nonetheless are mindful of the fact that a basic objective of the Uniform Commercial Code is to promote national uniformity in the commercial arena and that this objective would be undermined should we decline to follow the stated intent of the Code’s drafters and the reasoned decisions of a number of other jurisdictions.”); *In re Fed. Wholesale Meats & Frozen Foods, Inc.*, 168 N.W.2d 70, 73 (Wis. 1969) (“[S]imilar judicial construction of identical provisions in the uniform code serve the purpose of the legislation: uniformity.”).

131. *See* *Ditch Witch Trenching Co. of Ky., Inc. v. C & S Carpentry Servs., Inc.*, 812 S.W.2d 171, 172 (Ky. App. 1991) (stating that despite commentators’ recommendation that courts “follow the majority rule,” it is “more important . . . to reach a correct result than mechanically adopt the majority position.”); 1 HAWKLAND, *supra* note 1, § 1-102:8 (arguing that while courts should not follow decisions from other jurisdictions that they consider wrong, they should follow decisions that they consider right even if they are not the “best” possible interpretations).

132. *See supra* Part II.B.

133. The official comments to Article 2 list cross-references for each section. *See, e.g.*, U.C.C. § 2-611 cmt. (2001) (listing cross references to §§ 2-609, 1-201, and 2-106).

some instances, the cross-references seem to have gotten out of hand. Instead of providing answers, they merely lead in circles.¹³⁴

1. *Examples*

Section 1-201(9) contains perhaps the simplest example of circularity. The provision vaguely defines a “buyer in the ordinary course” as “a person who . . . buys in the ordinary course”¹³⁵ A similar example of circularity appears in the pre-2001 version of Article 9’s provision on the perfection of security interests. Section 9-303(1) states: “A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken.”¹³⁶ Section 9-303(1) is circular because determining whether “all of the applicable steps” have occurred requires looking at section 9-303(1).¹³⁷

Revised Article 3 contains another example of circularity in one of its most fundamental provisions. In an effort to make the Article clearer, the drafters made a list in revised section 3-301 of the persons entitled to enforce negotiable instruments.¹³⁸ The first two types of people listed are (i) holders and (ii) nonholders in possession with the rights of holders.¹³⁹ The problem with this section is that to determine whether a nonholder has “the rights of holder,” it is necessary to determine whether the nonholder is entitled to enforce because the right to enforce is one of the rights of a holder. Yet, the only section that answers that question is section 3-301 itself.¹⁴⁰ Other sections in the UCC contain additional examples of circularity.¹⁴¹

134. The term “circular,” in the field of logic, describes “reasoning that uses in the argument or proof a conclusion to be proved or one of its unproved consequences.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 207 (10th ed. 1993). In legislation, the circularity does not involve reasoning, but instead the expression of legal rules. Statutory sections are circular if they state legal rules by referring in whole or in part to the legal rules that they are seeking to express.

135. See *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 208 A.2d 290, 292 (Pa. Super. 1965) (noting this circularity).

136. U.C.C. § 9-303(a) (1999).

137. See *In re Long Chevrolet, Inc.*, 79 B.R. 759, 766 (N.D. Ill. 1987) (noting this ambiguity); see also David Gray Carlson, *The Rotten Foundations of Securitization*, 39 WM. & MARY L. REV. 1055, 1085 n.185 (1998) (noting similar problem of circularity in UCC § 9-301).

138. See U.C.C. § 3-301 (2001).

139. See *id.* § 3-301(i)–(ii).

140. For example, suppose Britton purchases a cashier’s check from a bank, making it payable to Mansfield. In this situation, Britton is a remitter. See *id.* § 3-103(a)(11). Can Britton enforce the cashier’s check if he decides not to negotiate it to Mansfield? Under Section 3-301(i) and (ii), he could enforce if he were a “holder” or a “non-holder in possession with the rights of a holder.” Britton is a not a holder because the instrument is payable to Mansfield. So the question arises whether he is a non-holder in possession with the rights of a holder. Here the problem of circularity arises. To answer the question of whether Britton, as a remitter, has the rights of a holder, a court needs to consider what the rights of a holder are. One right of a holder—perhaps the most important—is the right to enforce the instrument. Accordingly, Section 3-301 effectively says that (1) a remitter can enforce if the remitter has the rights of holder; and (2) a remitter has the rights of holder only if the remitter can enforce.

141. See, e.g., *id.* § 2-501(1)(a) (“identification” of goods occurs when the contract is made if the goods are “identified”).

2. *Recommended Judicial Response*

When confronted with problems of circularity in the UCC, courts should recognize that circular provisions effectively have no meaning. To the extent that section 1-203(9) defines a buyer in the ordinary course as a person who buys in the ordinary course, the provision really is not saying anything. Because circular provisions have no meaning, they leave gaps in the UCC's rules.

Courts generally can fill gaps in the UCC by applying existing common-law rules or by creating new common-law rules which become applicable as supplemental general principles.¹⁴² Nothing prevents courts from extending this practice to gaps created by the circular definitions or cross-references. As an illustration, consider again the example of section 3-301. If confronted with the issue of whether a particular nonholder can enforce negotiable instruments, a court should conclude that section 3-301 simply provides no answer. Although it purports to list the persons who can enforce a negotiable instrument, it has no meaning with respect to nonholders. A court thus must decide the issue using an existing or a new common-law rule.

E. The UCC Uses Words and Phrases Inconsistently

Another statutory drafting problem that complicates interpretation is that the UCC sometimes appears to use specialized terminology in inconsistent ways.

1. *Examples*

One example of an inconsistent use of terms concerns variations of the word "obligate." In general, when the UCC says a person is "obligated" or has an "obligation," it means that the person has a duty to make a payment or render another performance. For instance, a person obligated on a note has a duty to pay it.¹⁴³ Section 9-102(a)(3), however, uses the term in a different way when it defines "account debtor" to mean "the person who is obligated on an account, chattel paper, or general intangible."¹⁴⁴ As a leading UCC treatise points out, the owner of a general intangible subject to a security interest may have no duty to pay money or do anything else.¹⁴⁵ The treatise conjectures that the drafters

142. See *supra* Part I.A.

143. See U.C.C. § 3-412.

144. *Id.* § 9-105(1).

145. 8 HAWKLAND, *supra* note 1, § 9-105:2.

If the general intangible is in the nature of a patent, trademark or copyright and the collateral is the right to receive royalties under the intangible, presumably the account debtor is the entity obligated to pay the royalty. With other types of intangibles, however, such as goodwill or a stock exchange seat, the term account debtor seems to have little or no meaning.

Id.

“were so intent upon making the term general intangibles sufficiently broad to cover every situation that they could not ensure a perfect fit with other definitions.”¹⁴⁶

Another example of inconsistent usage concerns the term “accepted check.” Revised section 3-409(a) defines acceptance as the drawee’s signed agreement to pay a draft.¹⁴⁷ Under this definition, a certified check is an accepted check,¹⁴⁸ but what is a cashier’s check?¹⁴⁹ A cashier’s check would appear to be an accepted check because the drawee is the same bank as the drawer, and as the drawer, the bank signs the check.¹⁵⁰ Yet, the UCC distinguishes certified checks from cashier’s checks in various provisions.¹⁵¹

A third possible example of inconsistent usage concerns the term “forged” in revised Article 3. In general, a person forges a signature by creating a counterfeit signature and passing it off as genuine.¹⁵² In section 3-406(a), however, the drafters apparently intended the term to apply to other kinds of signatures.¹⁵³ An official comment to section 3-406(a) contains this hypothetical example:

An insurance company draws a check to the order of Sarah Smith in payment of a claim of a policyholder, Sarah Smith, who lives in Alabama. The insurance company also has a policyholder with the same name who lives in Illinois. By mistake, the insurance company mails the check to the Illinois Sarah Smith who indorses the check and obtains payment. Because the payee of the check is the Alabama Sarah Smith, the endorsement by the Illinois Sarah Smith is a *forged* endorsement.¹⁵⁴

As Professor Ada Long-Croom has pointed out, if the comment reflects what the drafters intended, then the drafters did not use the term “forged” in section 3-406(a) as they did elsewhere.¹⁵⁵ Sarah Smith’s signature was not a forgery as the term generally is used because the signa-

146. *Id.*

147. *See* U.C.C. § 3-409(a).

148. *See id.* § 3-409(d).

149. *See id.* § 3-104(g) (“‘Cashier’s check’ means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.”).

150. *See id.*

151. *See, e.g., id.* §§ 3-310(a), -312(a)(1).

152. *See, e.g., id.* § 3-405(b) (addressing such forgeries by employees entrusted with responsibility).

153. *See id.* § 3-406(a)

A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

154. *Id.* § 3-406 cmt. 3, illus. 3 (emphasis added).

155. *See* Ada Long-Croom, *What You See Is What You Get—Or Is it? Permitting the Issuer’s Subjective Intent to Determine the Payee’s Identity on a Negotiable Instrument*, 41 HOW. L.J. 125, 133 (1997).

ture genuinely was hers. The signature was not counterfeit, and it may be difficult to conclude that she passed it off as anyone else's signature.¹⁵⁶

2. *Recommended Judicial Response*

As with the other problems discussed in this article, more careful drafting could eliminate the difficulties posed by inconsistent usage of terminology. For example, the drafters in section 3-406(a) should not have used the term "forged." Instead, they should have said something like: "A person whose failure to exercise ordinary care substantially contributes to the payment of an instrument to an unintended person is precluded from challenging the payment as unauthorized."¹⁵⁷ Courts, however, do not have the luxury of rewriting statutes to eliminate inconsistent usages, but must interpret the language enacted by the legislature.

The UCC's special characteristics again may simplify the interpretative task before the courts. Suppose that a court is confronted with two UCC sections, *A* and *B*, both of which use the undefined term *X*. If *X* is susceptible to more than one meaning, a court must decide what meaning to give to *X*. The court also must decide whether the *X* should have the same meaning in both sections *A* and *B*.

When interpreting statutes other than the UCC, most courts would strive for consistency in interpreting the two sections.¹⁵⁸ They would assume that the term *X* should have the same meaning in both section *A* and section *B*. Accordingly, they would look for a meaning that appears to make the most sense for *X* in both contexts, and then apply it uniformly. This traditional desire for consistency, however, can lead to problems. The best meaning for *X* in section *A* might produce an undesired result in section *B*, or vice versa. If the court seeks consistency, then it may have to pick a meaning that is less than ideal for one section or the other (or possibly both).

As an alternative, a court might simply say that *X* has one meaning for section *A*, and another meaning for section *B*. For instance, to refer to the example discussed above, the court might conclude that the term "forged" has a different meaning in section 3-406(a) from the meaning that it has in other provisions. In particular, the court could say that in section 3-406(a), the term covers situations in which a person signs his or

156. Whether the term "forged signature" includes signatures of this type makes a difference. If Sarah Smith's signature is a "forged signature," then Section 3-406(a) would allow the drawee to charge the insurance company's account because the company's negligence substantially contributed to the making of a forged signature. *See* U.C.C. § 3-406(a). But if it is not a forged signature, then it is merely an additional indorsement by a person other than the payee. The bank could not charge the insurance company's account because it lacks the signature of the intended Sarah Smith. *See id.* § 4-401(a) (permitting a bank to charge a customer's account for an authorized check).

157. *Cf. id.* § 4-401(a) (defining proper payment).

158. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (citing the canon of statutory construction requiring courts to give a term a "consistent meaning throughout the Act.").

her own name but causes another to pay the instrument by mistake. This approach limits the harm caused by choosing one meaning for a term, and then applying the term consistently throughout the UCC. The approach allows courts to follow the drafters' intentions for each section.

Holding that a single term has different meanings when used in different sections of the same statute may strike some courts as confusing at best, and illegitimate at worst. Three factors, however, reduce this concern in the context of the UCC. First, as noted above, if a term in the UCC does not have a definition, a court may supply one.¹⁵⁹ Any definition added becomes applicable as a supplemental general principle of law.¹⁶⁰ Nothing prevents courts from adding varying definitions. Second, the UCC is a generally well-drafted statute. Although it contains inconsistencies in some instances, it generally uses words and phrases in a coherent manner. Thus, this approach would affect only a small number of cases. Third, because the UCC was never intended to serve as an exclusive body of law,¹⁶¹ judges and lawyers who want to know what it means can never simply read it. Regardless of its apparent clarity, they must look to the common law and other statutes for supplemental general principles. Consequently, having case law that specifies the meanings of a term for different sections would not impose substantial additional burdens.

This approach also comports with the apparent intentions of the drafters not to create a comprehensive code, but instead only to implement a number of separate rules for improving the common law. For example, Article 2 contains a number of sections that make minor changes to the common law of contracts that could have been enacted independently from the rest of the UCC.¹⁶² As Grant Gilmore stated, "[w]e shall do better to think of [the UCC] as . . . a collection[] of statutes bound together in the same book . . ." ¹⁶³ Similarly, courts might treat sections containing inconsistent terminology much like separate statutes, and not worry about trying to make them consistent.

F. The UCC Does Not Indicate Which Rule Should Apply If the Elements of a Provision Are Not Satisfied

Many statutory provisions in the UCC are stated in a conditional form. In other words, they specify rules that apply only under certain circumstances.¹⁶⁴ For example, section 5-108(a) requires a bank to pay a

159. See *supra* Part III.C.

160. See U.C.C. § 1-103.

161. See *supra* Part III.A.2.a.

162. See, e.g., U.C.C. § 2-209(1) (eliminating the common-law requirement of considerations for promises to modify prior agreements).

163. Gilmore, *supra* note 79, at 285–86.

164. The existence of conditions in the UCC is by no means unique. Most statutes contain rules that take effect only upon the satisfaction of certain elements.

letter of credit, but only upon the agreed documentary presentation.¹⁶⁵ Similarly, a bank must honor a stop payment order, but only if the bank receives the order in circumstances allowing it a reasonable time to act.¹⁶⁶

Experience suggests that to avoid confusion, when legislation includes conditional rules, it should state clearly not only what happens when the conditions occur, but also what should happen if they do not. Federal Rule of Evidence 402 is a good example. It contains two sentences, the first of which says that evidence is admissible if it is relevant and no exceptions apply: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."¹⁶⁷ The second sentence then gives the rule that applies if evidence is not relevant: "Evidence which is not relevant is not admissible."¹⁶⁸ The UCC, by contrast, often states rules that apply when certain conditions are met, but then does not state what rule applies when the conditions are not met. In some instances, this shortcoming may lead to confusion.

1. *Examples*

A simple example of this difficulty appears in one of Article 4's central provisions. Section 4-401(a) says that the bank may charge a customer's checking account if it pays a check that is properly payable (meaning authorized by the drawer).¹⁶⁹ Section 4-401(a), however, does not state the rights or liabilities of a bank in connection with a check that is not properly payable. For example, suppose Mansfield issues a check payable to Llewellyn. If Mansfield's bank pays Llewellyn, it may charge Mansfield's account. But suppose instead that Gilmore steals Mansfield's checkbook and forges Mansfield signature as the drawer. If Mansfield's bank pays the forged check, may it charge Mansfield's account for the check? Oddly, nothing in Article 4 expressly prohibits a bank from charging a customer's account for a check which is not properly payable. section 4-401(a) says when a bank may charge a customer's account, but not when the bank may not. In section 4-401(a), the drafters of the UCC should have followed the lead of the drafters of the Federal Rules of Evidence. They should have stated that a bank may charge a customer's account for a check that is properly payable, and then said that a bank may not charge a customer's account for a check that is not properly payable.

165. See U.C.C. § 5-108(a).

166. See *id.* § 4A-406(b).

167. FED. R. EVID. 402.

168. *Id.*

169. See U.C.C. § 4-401(a).

2. *Recommended Judicial Response*

The UCC fortunately affords courts an uncontroversial approach to addressing this problem. Section 1-103,¹⁷⁰ as noted above,¹⁷¹ allows courts to supplement the UCC's provisions with common-law principles. Generally, whenever the UCC does not indicate what rule should apply if its conditions are not satisfied, a court simply can find or create a common-law rule to address the situation. For instance, in the hypothetical involving Mansfield's stolen check, a court could look to the ordinary common-law rules on the discharge of debts to determine Mansfield's rights. In general, a debtor cannot discharge any portion of a debt through payment to a person other than the creditor, unless the creditor directs the debtor to make the payment.¹⁷² This common-law rule would prevent the bank from charging a customer's account, even though section 4-401(a) does not state this rule.

G. *The UCC Uses Referents with Unclear Antecedents*

The English language permits writers to compose sentences with multiple phrases and clauses. Unfortunately, when one portion of a sentence refers to another, ambiguity may result. Consider for example the following sentence: "Price saw Neal on his way to the Bank of England." This sentence leaves ambiguous whether it was Price or Neal who was going to the bank.

This kind of ambiguity also can arise in statutes. As a general rule, the more complicated the subject matter of legislation, the longer and more complex the sentences used to state the applicable rules. As length and complexity increase, so too does the probability that ambiguous references will occur. It thus should come as no surprise that the UCC contains many ambiguous references.

1. *Examples*

A simple example of the problem of ambiguous references appears in section 2-107(2). The first sentence of this provision says: "A contract for the sale apart from land of growing crops or other things attached to realty and capable of severance *without material harm thereto* but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article"¹⁷³ Suppose that a seller enters a contract to sever a water heater from a house and sell it. Is this contract a con-

170. *See id.* § 1-103.

171. *See supra* Part III.A.2.

172. *See* RESTATEMENT (SECOND) OF CONTRACTS § 278 cmt. (1981) ("If the obligor offers a performance that differs from what is due in full or partial satisfaction of his duty the obligee need not accept it.").

173. U.C.C. § 2-107(2) (emphasis added).

tract for the sale of goods within the scope of Article 2? The water heater is a “thing[] attached to realty and capable of severance.”¹⁷⁴ But the phrase “without material harm thereto” creates an ambiguity;¹⁷⁵ it is unclear whether it refers to the realty or the thing to be severed.¹⁷⁶

The revised version of Article 3 contains another example of an ambiguous reference in its central provision creating the holder in due course doctrine. Section 3-305(a) says that the right to enforce an instrument is subject to: (1) real contract defenses (such as illegality, infancy, or discharge in bankruptcy); (2) ordinary contract defenses (such as lack of consideration or discharge by payment); and (3) claims in recoupment.¹⁷⁷ Section 3-305(b) then states a special rule with respect to holders in due course:

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.¹⁷⁸

The ambiguity is whether the phrase “against a person other than the holder” refers to both the defenses stated in (a)(2) and claims in recoupment stated in (a)(3), or instead whether the phrase refers just to the claims in recoupment stated in (a)(3). This ambiguity complicates the resolution of cases involving payees who have the status of a holder in due course.¹⁷⁹ As one of the leading commercial law casebooks states the issue: “If the ‘against’ clause at the end of the section applies to de-

174. *Id.* If the water heater were not attached to the realty, it would be a good as a movable thing under § 2-105(1). See *Worrell v. Barnes*, 484 P.2d 573, 576 (Nev. 1971) (noting water heater to be installed is a good).

175. In fact, this section contains additional ambiguities. One is whether the “material harm thereto” phrase applies only to “other things attached to realty” or instead whether it also applies to “growing crops.” Another is whether the phrase “not described in subsection (1)” excludes all structures or only structures severed by the buyer because subsection (1) defines structures severed by the seller as goods.

176. The drafters of the revised version of Article 2 have been working on this problem. Their July 1999 draft replaced the word “thereto” with “to the real property.” See UNIFORM LAW COMMISSIONERS: NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROPOSED REVISIONS OF UNIFORM COMMERCIAL CODE ARTICLE 2—SALES, at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc299am.htm> (last visited Sept. 4, 2001) (July 1999 Annual Meeting Draft). This progress, however, has not lasted. The July 2000 draft has restored the word “thereto,” recreating the ambiguity. See UNIFORM LAW COMMISSIONERS: NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROPOSED REVISIONS OF UNIFORM COMMERCIAL CODE ARTICLE 2—SALES, at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Sept. 4, 2001) (July 2000 Annual Meeting Draft).

177. See U.C.C. § 3-305(a)(1)–(3) (2001).

178. *Id.* § 3-305(b).

179. For example, suppose that a seller sells goods to a buyer on credit. The buyer then fraudulently induces a friend to pay the seller by check. Suppose further the seller qualifies as a holder in due course because the seller takes the check in good faith, for value (i.e., discharge of the debt), and without notice of any defense (i.e., the defense of fraud). May the seller enforce the check against the friend or may the friend assert the defense of fraudulent inducement? Although the buyer engaged in the fraud, could this defense be asserted against the seller? The answer turns on whether the final clause refers to both defenses and claims in recoupment, or just the latter.

fenses as well as recoupment, the implication is that even if the payee is a holder in due course that person cannot take free of the defenses that a maker or drawer has against the payee-holder.”¹⁸⁰ The casebook, however, points out that “nowhere do the voluminous comments to §§ 3-302 and 3-305 refer to the ‘against’ clause as applying in any case but recoupment.”¹⁸¹

2. *Recommended Judicial Responses*

In many ways, the problem of ambiguous references resembles the problem of undefined terms and the problem of circularity discussed above.¹⁸² In all three cases, the UCC has stated rules, but the rules are not sufficiently clear to apply as written. As explained above, when confronted with missing definitions or circularity, courts may supply a common-law rule pursuant to the UCC’s direction that they consider supplemental general principles of law.¹⁸³ The courts may assume that the drafters of the legislation wanted undefined terms to have common-law definitions or that common-law principles would specify a rule where a group of self-referential statutory provisions did not.

Ambiguous references, however, create a more difficult problem than missing definitions or circular reasoning. When confronted with ambiguous references, a court cannot simply retreat to the common law as though the UCC were silent. The term must refer to something in the statute, and the court must identify it. In deciding cases presenting this type of problem, courts first should consider whether—as a policy matter—the phrase in question ought to refer to both of the possible referents. For example, in construing section 2-107(2), a court first might consider whether the word “thereto” should refer to both the realty and to the thing attached. Similarly, in interpreting section 3-305(b), a court might consider whether the phrase “against a person other than the holder” should modify both defenses and claims in recoupment.

If the court thinks as a policy matter that the phrase should refer to both of the possible referents, it generally should conclude that it does. This decision will not run afoul of the statutory language. The drafters must have intended the phrase to refer to at least one of the referents. Through its ability to supplement the UCC with common-law rules, the court generally may hold that the phrase also applies to the other.¹⁸⁴ By contrast, if courts see evidence that the drafters wanted to include only

180. ROBERT L. JORDAN ET AL., *NEGOTIABLE INSTRUMENTS, PAYMENTS AND CREDITS* 70 (5th ed. 2000).

181. *Id.* at 70–71.

182. *See supra* Parts III.C.2., III.D.2.

183. *See id.*

184. *See* U.C.C. § 1-103 (2001).

one of the grammatically possible referents, then they should not create a common-law rule to include the other.¹⁸⁵

H. The UCC Contains Rules That Conflict with Each Other

Although the drafters of the UCC attempted to make all of its rules consistent, they did not succeed on a few occasions. Sometimes, two or more provisions in the UCC conflict with each other. Courts, accordingly, cannot apply each of the rules as written.

I. Examples

A well-known example of a conflict appears in Article 2. Suppose that the seller of goods repudiates a contract with a buyer. Section 2-610(a) permits the buyer to wait for a reasonable time before resorting to any remedies.¹⁸⁶ During this period, the buyer may attempt to persuade the seller to retract the repudiation.¹⁸⁷ Section 2-713(1), however, conflicts with section 2-610(a).¹⁸⁸ It addresses situations in which the buyer seeks damages for the seller's breach based on the difference between the contract price and the market price.¹⁸⁹ Section 2-713(1) requires a court to measure the difference in prices at the time "the buyer learned of the breach."¹⁹⁰ This provision prevents the buyer from getting more damages if the price continues to rise after the breach.¹⁹¹ Thus, although section 2-610(a) tells buyers that they may wait a reasonable time, section 2-713(1) ensures that they may not. If buyers do not resort to remedies immediately, then they may have to buy substitute goods at higher prices but will be stuck with recovering only damages measured at the time of the breach.¹⁹²

Some courts have seen another example of a conflict in the pre-2001 versions of section 9-306(2) and section 9-402(7).¹⁹³ Section 9-306(2) says that a security interest in property terminates when the secured party

185. For example, in Section 2-107(2), the term "thereto" probably refers only to the realty. Buyers rarely would want to purchase a thing attached to realty if detachment would cause material harm to the thing.

186. See U.C.C. § 2-610(a).

187. Cf. *id.* § 2-611(1) (permitting the repudiating party to retract the repudiation).

188. See *id.* § 2-713(1).

189. See *id.*

190. *Id.*

191. The price of the goods offered under the contract often rises after a breach because sellers tend to breach in situations when they can sell to other buyers for a higher price.

192. See, e.g., *Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064, 1072 (5th Cir. 1984) ("To interpret 2.713's 'learned of the breach' language to mean the time at which seller first communicates his anticipatory repudiation would undercut the time that 2.610 gives the aggrieved buyer to await performance.").

193. See, e.g., *In re Cohutta Mills, Inc.*, 108 B.R. 815, 818 (Bankr. N.D. Ga. 1989) (noting conflict and discussing possible resolutions).

permits the debtor to dispose of the property.¹⁹⁴ Section 9-402(7), however, says that a filed financing statement establishing a security interest remains effective if the debtor transfers property to another, even if the debtor has the secured party's knowledge and consent.¹⁹⁵ For example, suppose that a car dealer sells a car to a buyer on credit, retaining a security interest in the car and filing a financing statement to perfect the security interest. What happens if the buyer sells the car to a third party with the dealer's consent? Did the security interest terminate under section 9-306(2), or did it continue under section 9-402(7)? The two sections appear to state different rules.

2. *Recommended Judicial Response*

When courts confront conflicting sections in the UCC, they cannot apply both of them. Unless they can find some way to reconcile the two provisions (and thus conclude that no actual conflict exists), they must decide to ignore one or both of the provisions. Fortunately, unlike most other statutes, the UCC contains a number of provisions that establish a hierarchy among its rules. For instance, section 4-102(a) says: "If there is conflict, [Article 4] governs Article 3, but Article 8 governs this Article."¹⁹⁶ Section 9-110 similarly says: "A security interest arising under section 2-401, 2-505, 2-711(3), or 2A-508(5) is subject to this article."¹⁹⁷ If a court confronts a conflict between a provision in Article 3 and Article 4, or between Article 9 and one of the Article 2 provisions enumerated in section 9-110, the court simply has to follow the priority stated.

In situations where the UCC does not establish a hierarchy, courts have more difficulty. A customary canon of construction says that, when two provisions in a statute conflict, courts should apply the more specific provision.¹⁹⁸ This canon presumes that the legislature would have wanted the less general provision to apply because they specifically thought about the case that it concerns. Courts certainly can apply this canon if they find it helpful. In many instances, however, both of the conflicting provisions may appear about equally specific. In these cases, courts probably should refuse to recognize either section as binding. When two provisions conflict, then the statute really does not state a rule at all. The situation seems analogous to one in which the drafters have created circular rules. The court cannot follow the text of the statute because the

194. See U.C.C. § 9-306(1)(2) (1999). When the debtor disposes of the property, the security interest attaches to the proceeds. See 9 HAWKLAND, *supra* note 1, § 9-306:2 (noting, as an example, that a creditor might authorize a debtor to sell inventory subject to a security interest).

195. See U.C.C. § 9-402(7) (1999).

196. See U.C.C. § 4-102(a) (2001).

197. *Id.* § 9-110.

198. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 430 (1992) (discussing the canon that the specific controls the general).

text has no meaning.¹⁹⁹ As discussed previously, however, the court can choose its own common-law rule to resolve the case before it.²⁰⁰ The common-law rule may follow one or the other of the two conflicting provisions, but it need not.

IV. RECOMMENDATIONS FOR OTHER DRAFTING ERRORS

The previous part of this article suggested ways that courts might address eight recurring patterns of drafting errors in the UCC. Not all drafting errors in the UCC, however, fall within the patterns discussed. Some may fit into other kinds of patterns, which occur less commonly. Still others may be idiosyncratic in nature, not really belonging to any kind of recurring pattern at all.²⁰¹

A. *Examples of Other Drafting Errors*

Many parts of the UCC are intelligible only if you already know more or less what they are attempting to say.²⁰² Revised section 4-210(a)(1) provides one example. This section states a rule for when a bank obtains a security interest in a check or other item deposited for collection. The section says: “A collecting bank has a security interest in an item . . . : (1) in case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied”²⁰³ The language of Section 4-210(a)(1) is confusing because it lacks much of the detail necessary to understand it. Only experience with commercial law issues would enable a court to understand that the drafters were attempting to say: “A collecting bank has a security interest in an item . . . : (1) in case of an item deposited [*BY THE BANK’S CUSTOMER*] in an account, to the extent to which credit given [*TO THE CUSTOMER BY THE BANK*] for the item has been withdrawn [*BY THE CUSTOMER*]

199. Although courts may decide to ignore provisions when they conflict and create their own common rules, they should not treat the provisions as void for all purposes. In many instances, the rules may apply without conflicting. In these situations, the UCC does state a rule. The principle of legislative supremacy requires the courts to follow it.

200. See *supra* Part III.A.2.a.

201. See Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 140–42 (1992) (distinguishing recurring and idiosyncratic ambiguities).

202. See Lawrence, *supra* note 48, at 662.

[O]ne must understand the entire statutory scheme in order to find answers to basic questions. Although the drafters did a wonderful job of providing an analytically tight system, a researcher must either know where to look or search through the entire article to find the answer to a basic question.

Id.

203. See U.C.C. § 4-210(a)(1) (2001). This rule may determine whether a bank has the status of a holder in due course because a bank gives “value” for an item (one of the requirements for holder in due course status) to the extent that it acquires a security interest in the item. See *id.* § 4-211.

or applied [*BY THE BANK TO SET OFF AN EXISTING DEBT OWED BY THE CUSTOMER*].”²⁰⁴

Another well-known example appears in section 2-104(1), which defines the term “merchant.”²⁰⁵ This definition has great importance because Article 2 contains thirteen rules that apply only to merchants, and not to others who might buy or sell goods.²⁰⁶ Unfortunately, the definition in section 2-104(1) has a major shortcoming. Section 2-104 indicates three types of buyers or sellers of goods who might qualify as a merchant, including a person who “by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods . . . involved in the transaction.”²⁰⁷ Unfortunately the provision does not specify when knowledge or skill about *practices* is required or when knowledge or skill about the *goods* is needed.²⁰⁸

When the drafters have left important parts of rules in the UCC unstated, the special UCC interpretive solutions discussed above often offer little assistance. Courts, for example, generally cannot rely on supplemental general principles²⁰⁹ to add a new rule because the problem is not that a rule is missing, but rather that the words of the existing statute are difficult to interpret. Courts also may have trouble deciding that the parties agreed to change the rules by contract²¹⁰ because they do not know what the rules originally were supposed to be.

B. Principles for Addressing Other Drafting Errors

When courts encounter drafting errors that do not fall within the eight patterns described in Part III above, they usually must employ general methods of statutory interpretation. Many other sources discuss these methods.²¹¹ Individual courts, moreover, probably already have their own strongly held views on the subject. This article, therefore, will not address them. Instead, the following discussion identifies six principles about the UCC and the UCC’s subject matter that may offer more specific guidance to courts.

204. The italicized words are words that the drafters might have added to clarify their intended meaning. For a similar UCC section that leaves out words that would make its meaning clearer, see U.C.C. § 2-206(1)(b), which states that “an order . . . to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment,” when it should say that “an order . . . to buy goods for prompt or current shipment shall be construed as [AS AN OFFER] inviting acceptance either by a prompt promise to ship or by the prompt or current shipment.”

205. *Id.* § 2-104(1).

206. *See id.* § 2-104 cmt. 2 (discussing and citing these thirteen rules).

207. *Id.*

208. The official comments attempt to clarify this issue. *See id.* § 2-104 cmts. 1 & 2.

209. *See supra* Part III.A.2.a.

210. *See supra* Part III.B.2.

211. *See, e.g.*, WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW (2d ed. 1874).

1. *Purposive Interpretation*

A longstanding debate in the field of statutory interpretation has focused on the question whether courts should interpret statutes according to their purpose or instead to the objective meaning of their text.²¹² The UCC, for better or worse, eliminates the need for judges to enter this debate. Section 1-102(1)—the first substantive provision of the UCC—specifically directs: “This Act shall be liberally construed and applied to promote its underlying purposes and policies.”²¹³ In recent years, some courts have overlooked section 1-102(1) and used textualist methodology.²¹⁴ No matter how strong the arguments in favor of textualism, however, the principle of legislative supremacy requires that courts interpret statutes in the way the legislature directs.²¹⁵

2. *Presumption of Codification Not Revision*

The drafters of the UCC clearly wanted to improve upon the preexisting common law and statutes that governed the subjects that the UCC addresses. Section 1-102(2), in fact, lists several of the drafter’s goals.²¹⁶ They wanted to “simplify, clarify, and modernize” the law.²¹⁷ They also wanted to “permit the continued expansion of commercial practices.”²¹⁸ They further sought to make the law “uniform . . . among the various jurisdictions.”²¹⁹

Apart from these goals, however, the drafters did not intend to revolutionize the field of commercial law. Instead, in many instances, they simply wanted to codify existing rules. Articles 2 and 3, for instance, strived to eliminate some ambiguities in the earlier enacted Uniform Sales Act and Uniform Negotiable Instruments Act, but they generally sought to preserve most of their rules.²²⁰ Accordingly, when courts confront ambiguities in the UCC they often may find it useful to consult pre-

212. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 1–9 (2001) (discussing this debate).

213. U.C.C. § 1-102 (2001).

214. See, e.g., *Corfan Banco Asuncion Paraguay v. Ocean Bank*, 715 So. 2d 967, 970 (Fla. Dist. Ct. App. 1998); see also 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) (noting a dramatic decrease in citation of Section 1-102).

215. Courts often can determine the purpose of rules either from the text or from the official comments published with the UCC. See 1 HAWKLAND, *supra* note 1, § 1-102:10 (discussing these and other sources courts have relied on in determining the purpose of UCC provisions).

216. U.C.C. § 1-102(2).

217. *Id.* § 1-102(2)(a).

218. *Id.* § 1-102(2)(b).

219. *Id.* § 1-102(2)(c).

220. See 1 HAWKLAND, *supra* note 1, § 1-102:3 (discussing how the UCC sought to improve the Uniform Sales Act); 4 *id.* § 3-101:1 (discussing the UCC purpose with respect to replacing the Uniform Negotiable Instruments Law).

existing law.²²¹ The preexisting law might be an earlier version of the UCC, a prior statutory codification, or simply the common law. Unless something indicates otherwise, courts should presume the drafters intended only to preserve the previous rule.

3. *Mostly Default Rules*

The UCC, as noted previously,²²² specifically allows the parties by contract to change most of its rules. Section 1-102(3) states: “The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act”²²³ Only a few exceptions exist. For example, in general, parties may not waive or modify obligations to exercise diligence, reasonableness, good faith, or care.²²⁴ Otherwise, they may change most of the rules in the UCC. Accordingly, courts should view the UCC mostly as a collection of default rules.

The ability of parties to contract around most of the rules in the UCC should give courts some comfort when confronting gaps, conflicts, and ambiguities in the UCC. No matter what choices they make, their decisions may have only a limited effect on future cases. If parties in the future want a different rule, they generally can establish one in their contracts.²²⁵ With this idea in mind, courts often should have two goals when selecting the meaning of a UCC provision that they otherwise cannot interpret. First, courts should select the rule that most parties in the future will favor to save them the effort of having to contract around it.²²⁶ Second, courts should make clear what choice they have made so that parties in the future may revise the rule by agreement if they choose.

4. *Need for Uniformity*

In many instances, when a court confronts an ambiguity in the UCC, another court from another jurisdiction already will have consid-

221. The official comments often identify the preexisting law. See, e.g., U.C.C. § 2-201 cmt. (identifying Uniform Sales Act Section 4 as its predecessor).

222. See *supra* Part III.B.2.

223. U.C.C. § 1-102(3).

224. See *id.*

225. Although the parties may change a default rule, courts should realize that the choice of default rule does matter to some extent. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 666 (1998) (arguing on the basis of empirical evidence that parties making contracts tend to prefer whatever default rule is chosen).

226. See Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1182 (1981) (corporate law should supply “standard form ‘contracts’ of the sort shareholders would be likely to choose.”); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 361 (1988) (offering as default rule “the contract that most well-informed persons would have adopted if they were to bargain about the matter”). But see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97–101 (1989) (suggesting that in some instances the law should impose default rules that the parties do not want to encourage the parties to address the issue).

ered it. Although courts do not have to follow UCC precedents from other jurisdictions, they often should do that. Nonuniformity among jurisdictions may hinder the planning of interstate commercial transactions and increase the cost of resolving disputes.

Some courts may hesitate to follow precedent from other jurisdictions that they consider less than ideal. They may reason: “Uniformity is important, but legislative supremacy requires this court to interpret and apply statutes our legislature has passed. If this court thinks that a statute has a particular meaning, it should not ignore what it thinks is the legislative command and follow a different interpretation by a court in another jurisdiction.” This objection has some validity, but courts also should keep three points in mind before adopting it. First, their legislatures also have enacted section 1-102(2)(c).²²⁷ Section 1-102(2)(c), as noted above, specifically identifies the creation of uniformity as one of the underlying principles of the UCC.²²⁸ The principle of legislative supremacy also requires courts to follow this directive. Second, no court of last resort can resolve conflicts among jurisdictions.²²⁹ Accordingly, if they create ambiguities, the ambiguities will necessitate creating new uniform legislation. Judges should avoid imposing this burden. Third, as noted above, most of the rules in the UCC are default provisions.²³⁰ Parties generally can change them by contract if they desire. As a result, in many instances, courts should follow precedent from another jurisdiction even if they might have chosen a different result in the first instance. If parties disfavor the interpretation, they generally can agree in the future to a different rule by contract.

5. *Inclusive Approaches to Scope*

Many ambiguities in the UCC relate to its scope. For example, Article 2 by its terms applies only to transactions in “goods.”²³¹ Courts, however, may confront hybrid cases which involve both goods and services.²³² Similarly, courts may encounter contracts that resemble negotiable instruments, but that do not meet all of the formal requirements for a negotiable instrument.²³³

In these cases, if courts believe that the UCC’s rules should apply for policy reasons, then they generally may apply them. If the UCC does not apply to a transaction, then the common law usually applies.²³⁴

227. See U.C.C. § 1-102(2)(c).

228. See *id.*

229. See *supra* Part II.B.

230. See *supra* Part III.B.2.

231. See U.C.C. § 2-102 (“Unless the context otherwise requires, this Article applies to transactions in goods . . .”).

232. See 1 HAWKLAND, *supra* note 1, § 2-102:4 (2000) (discussing different approaches used by courts in treating cases involving combinations of goods and non-goods, like services).

233. See U.C.C. § 3-104(a) (listing the formal requirements of a negotiable instrument).

234. See *supra* Part III.A.2.a.

Courts remain free to create and reshape the common law and, in the process, they may look to the UCC for guidance. Indeed, many current contract rules that apply in common-law cases originated in the UCC.²³⁵ The drafters of the UCC identified transactions that the UCC must govern, but that does not mean that they wanted to bar its rules from applying in other contexts.²³⁶

V. CONCLUSION

This article concerns the problem of drafting errors in the UCC. Although the total number of drafting errors is great, the UCC's special characteristics make many patterns of drafting errors easier to address than comparable mistakes in other kinds of statutes. Most importantly, the UCC generally requires courts to consider supplemental general principles of law and private agreements. Accordingly, wherever the drafters of the UCC through inadvertence forgot to include something in the statutes, courts generally can fill in the gap with a common-law rule or determine if the parties have implicitly altered the rule by contract. This supplementation does not violate any principle of legislative supremacy.

Other kinds of drafting errors do not lend themselves to special solutions unique to the UCC. Instead, courts must resolve them using ordinary canons and principles of statutory interpretation. Several factors, however, simplify the task for courts, or at least reduce the stakes. The UCC directs courts to follow the purpose of the statute and to make the law uniform. In addition, it does not bar courts from applying the UCC in cases where its scope is unclear. In any event, because the UCC mostly concerns default rules, interpretations of the statute usually do not create insuperable obstacles for parties who want different rules to apply to future transactions.

The UCC has served the commercial law well for fifty years and will continue to do so for a long time in the future. Courts have come to treat it with respect and even admiration. The presence of drafting errors detracts only a little from its other great strengths. If courts can find ways of dealing with these errors, they can reduce their deleterious effects.

235. See, e.g., RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 208 reporter's note (1981) (noting § 208's rule on unconscionability originated in U.C.C. § 2-302).

236. See, e.g., U.C.C. § 3-104 cmt. 2 (2001) (suggesting "it may be appropriate, consistent with the principles stated in Section 1-102(2), for a court to apply one or more provisions of Article 3 to the writing by analogy, taking into account the expectations of the parties and the differences between the writing and an instrument governed by Article 3.>").