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THE ROLE OF RESTRAINT IN READING THE U.C.C.

Stephen C. Veltri*

Legal scholars have often quoted a line from a sermon delivered by the Bishop of London before the King in 1715. The Bishop reminded the monarch, "[W]hoever hath an absolute Authority to interpret any written, or spoken Laws; it is He, who is truly the Law-giver, to all Intents and Purposes; and not the Person who first wrote, or spoke them." Such distinguished legal scholars as Felix Frankfurter and John Chipman Gray undoubtedly remembered the Bishop's sermon because the sermon states the dilemma courts face in their approach to statutes.² Shouldn't there be marked constraints on a judge's ability to "legislate" in the guise of legislative interpretation? On the other hand, if we absolutely eliminated a judge's authority to interpret legislation won't our statutes soon become rigid lifeless things?

These and related questions long have absorbed the finest legal minds and this article makes no attempt to recover that ground.³ Rather, I seek

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1. Hoadley, The Nature of the Kingdom or Church of Christ 12 (1717).


to explain how the drafters of the Uniform Commercial Code hoped to resolve these questions. The Code, when read as the drafters intended, strikes a workable balance between the principle of judicial restraint in reading statutes and the need for adaptability in the law.

By "judicial restraint," I mean the judge's sense of the limits of his or her office. Our society divides the function of public law-making among judicial, legislative, and administrative bodies. Each of these bodies has institutional advantages over the others in addressing our society's needs for law-making. Some law-making is done better judicially rather than legislatively, but the reverse is also true.

When a judge interprets a statute the judge is law-making, as the good Bishop said, and the judge is doing so with a considerable amount of discretion. Among the principles which do, or at least should, limit the judge's discretion is the principle of judicial restraint. A judge should always consider the institutional competence of the court to render the decision called for when he or she decides a case. When the judge questions the competence of the court, he or she should defer to another law-making agency better equipped to rule on the question raised. The first part of this article will summarize recent efforts to describe the salient qualities of each law-making institution in our society and to assess the types of decisions each institution is best suited to make.

The second part of this article turns to the Uniform Commercial Code. The Code is an unusual statute in many ways germane to the subject of judicial interpretation. In particular, the Code posits its purposes and policies as law, and then directs the judge to interpret its provisions considering those purposes and policies. 4

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4. One of the first sections of the Uniform Commercial Code states: (2) 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. U.C.C. § 1-102(2) (1987).

5. U.C.C. § 1-102(1) (1987) ("This Act shall be liberally construed and applied to promote its underlying purposes and policies."). The original drafts of the Code also referred courts to the Official Comments of the Conference of Commissioners on Uniform State Laws. The Code had its genesis in Karl Llewellyn's proposed revision of the Uniform Sales Act. Section 1A of Llewellyn's second draft of that Act declared the statute was "adopted for the purposes and with the intent set forth in the official Comments . . . ." 1 UNIFORM COMMERCIAL CODE DRAFTS 327 (E. Kelly ed. 1984) [hereinafter cited as 1 U.C.C. DRAFTS]. By 1941, the reference to the Comments was permissive only. The Act simply stated a court "may consult" the Comments "to determine the underlying reasons, purposes and policies" of the Act. 2 UNIFORM COMMERCIAL CODE DRAFTS 13 (E. Kelly ed. 1984). Later versions of the Code dropped all reference to the comments in the text, however, and section 1-102(2) is the major statement of policy in the current version of the Code.
This clear statement of policy helps balance the principle of judicial restraint with the need for adaptability in the law. One stated purpose of the Code is the modernization of commercial law by focusing on advances in mercantile practices and customs. With this focus, the Code permits innovation within a sphere where courts can make competent decisions. Courts are well suited, institutionally, to take evidence of customs and practices and make reasoned judgments on the basis of that evidence. Courts are also able to make some normative decisions on the basis of that evidence. They are not, however, equipped to make judgments on larger questions of distributive justice like what will better the lot of consumers, or the poor, or what amount of social resources groups like these need. Questions of this nature are best left to the other law-making institutions in our society and the Code directs the courts to avoid making new law to serve policy concerns like these.

To illustrate the balance struck by the Code, the final part of this article will discuss several judicial decisions under the Code. In some of these decisions the courts have been unduly reticent about making far-reaching decisions. They have refused unnecessarily to undertake a change in the law, waiting for the legislature to act. These courts ignored their mandate under the Code, to recognize and encourage the expansion of commercial practice. In the other decisions, which this article will discuss, the courts have made judgments inappropriately. Policies alien to the Code drove the decisions, which are open to criticism because they ignore the principle of judicial restraint implicit in the Code's policy statements.

I. THE INSTITUTIONAL STRENGTHS AND WEAKNESSES OF THE COURTS

In the past decade many commentators have tried to assess the institutional capability of the courts. Their studies have concentrated on identifying those types of decisions the judicial system can make. As a result of these efforts, a task force of twenty-six eminent judges, lawyers, and scholars convened in 1978 under the auspices of the United States Department of Justice. This task force, the Council on the Role of the Courts ("CORC"), studied what courts can and cannot do effectively and issued a final report in 1984. The Council was bipartisan. Its members were Sylvia Bacon, Richard J. Bartlett, John Cratsley, Alice Daniel, Jane Frank Harman, Marvin E. Frankel, Lawrence M. Friedman,


While the results of these studies are not unanimous, they do reveal a rough consensus on the strengths and weaknesses of adjudication when compared to other forms of social ordering. The studies draw considerably on the work of Lon Fuller, who understood that different legal institutions serve distinct purposes. The process of adjudication as it has evolved in our legal tradition has adapted itself well to resolving disputes but not to other tasks. Legislatures, administrative bodies, or individuals better perform many of these tasks. A comparison between adjudication and legislation will help define the principle of judicial restraint, which is implicit in the Uniform Commercial Code.

Both the CORC report and many of the other recent studies of the advantages and disadvantages of adjudication over legislation have compared the degree of participation in each process by the people affected by the determination at issue. One hallmark of law-making through adjudication is a high degree of participation in the process by relatively few people, the parties to the suit. The legislative process, on the other hand, is law-making which involves many people with limited participation. These people are the electorate who affect the outcome of legislation by their votes, lobbying efforts, and the like.

In adjudication, the parties before the court control the information presented to the judge by way of evidence and reasoned arguments. The parties, indeed, "select" the dispute that they will present to the court. To Lon Fuller, "the distinguishing feature of adjudication lies in the mode of participation which it accords to the party affected by the decision." The degree of participation accorded to the litigants carries substantial benefits. Every trial lawyer has seen the cathartic effect adjudication often has on the parties. Litigants are often grateful that "they've had their say." American law certainly has gained enormously from the self-selecting process of adjudication. Who would deny, for example, that we are a better society as a result of the NAACP's litigation efforts?

This self-selecting process, controlled in many respects by the parties, can, however, skew the policy decisions made through adjudication. There


8. Id. at 95-100.
9. Id. at 88-89; D. Horowitz, supra note 6, at 38-39; see also Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978).
10. Fuller, supra note 9, at 364.
is no way, for example, for the system to assure that the first case brought in the courts is representative. The first case may present particularly appealing or unappealing facts for a policy change even though it rests on exceptional facts. Courts long have had misgivings about this limitation on adjudication for making policy. For instance, it is a canon of judicial decision that a court's holding extends no further than the facts presented. This limitation helps assure that wholly unique cases do not shape policy.

Adjudication assures the litigants that they will have a say in "making" the law that will determine their dispute. The narrow focus the parties necessarily impart to the process, however, hinders the ability of the court to assess the third-party effects of its decisions. Legislative bodies, on the other hand, are more broadly representative. They are constituted in a way that responds to the concerns of their constituents affected by a decision. They, thus, have an institutional advantage in seeing third-party effects. By the nature of the office, a legislator must consider how proposed legislation will affect any number of groups in the legislator's constituency. Moreover, the pace of the legislative process usually allows these groups to make their views known. The control a constituent exercises over legislative decision making is, undoubtedly, much weaker than the hold a litigant has on the judicial process. The legislative process, however, is more likely to consider all the ramifications of a policy change. The sharp focus of a limited number of parties does not blind the process.

12. Judge Friendly has expressed concern that "[w]hile courts are, or should be, aware of the effects of their decisions beyond the case sub judice, their response is often triggered by outrageous facts that may not be at all representative." Friendly, The Courts and Social Policy: Substance and Procedure, 33 U. MIAMI L. REV. 21, 22-23 (1978). Judge Friendly cited In re Gault, 387 U.S. 1 (1967), in which the Supreme Court refashioned the juvenile justice system. The facts before the Court were particularly shocking and undoubtedly atypical. A juvenile court had sentenced a fifteen year old to six years of detention for making obscene phone calls. Friendly, supra, at 22 n.6. For a more extended discussion of this case, see D. Horowitz, supra note 6, at 171-219.

13. John Marshall gave a classic statement of this principle: It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. Cohens v. Virginia, 19 U.S. 264, 399 (1821).

14. CORC REPORT, supra note 7, at 89; D. Horowitz, supra note 6, at 38-51. Justice Frankfurter wrote that because courts lack representative character, "[t]hey are not ... a good reflex of a democratic society." Dennis v. United States, 341 U.S. 494, 525 (1951).
Another attribute of adjudication is that a proper judicial decision is an impartial, rational result. Rational arguments of the parties before the court shape the judge's decision, resulting in a reasoned opinion. Nevertheless, this aspect of the process does not lend itself to some types of decisions. For example, courts often have difficulty fashioning per se rules that draw clear lines. Line drawing is arbitrary, not rational. No reasoned basis exists, for example, for deciding that filing a financing statement within ten days as opposed to fourteen days perfects a purchase money security interest. Many judicial attempts at fashioning per se rules have failed when the facts of a later case pressured the court to shift its line or abandon it altogether.

Lon Fuller grasped a more subtle result of the resort to reasoned argument that characterizes the judicial process. Litigants must present their positions as principled arguments, therefore, every issue presented to the courts necessarily develops into a claim of right. This reasoned approach dictates a final result stated as an entitlement. Professor Fuller illustrated how the process of adjudication or arbitration converts a cause into a claim of right with the following example:

We may see this process of conversion in the case of an employee who desires an increase in pay. If he asks his boss for a raise, he may, of course, claim "a right" to the raise. He may argue the fairness of the principle of equal treatment and call attention to the fact that Joe, who is no better than he, recently got a raise. But he does not have to rest his plea on any ground of this sort. He may merely beg for generosity, urging the needs of his family. Or he may propose an exchange, offering to take on extra duties if he gets the raise. If, however, he takes his case to an arbitrator he cannot, explicitly at least, support his case by an appeal to charity or by proposing a bargain. He will have to support his demand by a principle of some kind, and a demand supported by principle is the same thing as a claim of right. So, when he asks his boss for a raise, he may or may not make a claim of right; when he presents his demand to an arbitrator he must make a claim of right.

Demands on the legislative process need not be, and often are not, cast in rights or principles. Indeed, an understanding of the legislative

15. Fuller, supra note 9, at 365-69.
17. Fuller, supra note 9, at 365-69.
18. Id. at 369.
19. See Easter R.R. v. Noerr Motor Freight Inc., 65 U.S. 127 (1961), where the court stated: The right of the people to inform their representative in government of

http://scholarship.law.missouri.edu/mlr/vol54/iss4/3
process begins with the recognition that it is a forum for the resolution of the interests of many different interest groups. The resolution often depends upon compromise or the "making of a deal," which would be misleading if characterized as "principled" in any way. Concern for potential lack of principle in the legislative process may be the best reason for constitutional restrictions on bills of attainder. The problem remains vivid for anyone who has seen a videotape of Senator Joe McCarthy conducting a legislative hearing.

Nevertheless, because adjudication ultimately results in conflicting claims of right, it is less appropriate for resolving certain problems than other social ordering mechanisms. Every practicing lawyer knows this. When a complainant files a complaint, settlement discussions become less flexible, positions more fixed, and compromise more difficult. In particular, the room for "deals" in the legislative process makes it a better forum for social policy decisions affecting several groups with different goals. In legislatures, a group seeking a policy change may get the "half of loaf" which does not unduly alienate the other contending groups. Legislatures also have much more flexibility than courts in fashioning solutions to social problems. Courts, once they have upheld a litigant's claim of right, must fashion a judgment or decree which is fundamentally coercive. Conversely, legislatures can mold behavior through tax incentives, grant programs and a host of other measures much more flexible than a broad proscription of conduct.

Nearly all the recent efforts to evaluate the limits of adjudication have focused on the limited fact-finding ability of the courts partly because of the control the litigants have over the fact-finding process. Other aspects of the process, however, limit the courts' ability to find certain facts that

their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Id. at 139.


21. R. POSNER, supra note 3, at 269; Fuller, supra note 9, at 400.


23. See CORC REPORT, supra note 7, at 104; D. HOROWITZ, supra note 6, at 35; Fuller, supra note 9, at 400.

24. See D. HOROWITZ, supra note 6, at 35.

25. CORC REPORT, supra note 7, at 105-08; D. HOROWITZ, supra note 6, at 45-51; Friendly, supra note 12, at 23.
have a major bearing on social policy decisions. The discovery process, rules of evidence, and the trial process all are designed to frame issues and find facts involving past events or present circumstances. The courts did not design these processes to evaluate socio-economic data or to find means of regulating future behavior. One leading scholar has characterized aptly the types of facts courts handle well. These are "historic" facts; the ones that create problems for the courts are "social" and "consequential" facts.

The judicial process has adapted itself well to find specific, historical facts of incredible detail. Was it raining on a day in question? What did the defendant say? Is the witness lying? The process also can make fine judgments about behavior within the realm of common experience. Did the defendant act like a reasonably prudent person under the circumstances? Was the misstatement "material" in its effect on the judgment of an ordinary investor? Courts, through expert witnesses, even can make well-informed judgments on questions directed to the behavior of the parties and witnesses in court. Did the doctor perform to the standards of the

26. This is a major conclusion of CORC REPORT, supra note 7, at 105-08. Several excellent articles have addressed judicial limitations in finding the facts that inform social policy decisions often criticizing the courts for procedural improprieties in their consideration of such facts. See Davis, Facts in Lawmaking, 80 COLUM. L. REV. 931 (1980); Miller & Barron, The Supreme Court, the Adversary System and the Flow of Information to the Justices; A Preliminary Inquiry, 61 VA. L. REV. 1187 (1975).

27. Consider, for example, an age discrimination case in which a bus company refused to hire drivers over forty years old. The company defended on the ground age was a bona fide occupational qualification. Thus, the court was presented with a rather simple social science question—are younger drivers safer drivers—yet, it found the process of adjudication ill-suited to arriving at an answer. On appeal the court of appeals noted:

This record illustrates the relative inadequacy of the traditional adversary Court record procedure against the greater latitude of an administrative hearing. Along with the deposition of its expert witness, the government sought to introduce 28 various and assorted publications by eminent authorities on the effects of aging upon functional abilities. Although many of these articles contain the results of many scientific studies and analyses which were relevant and had a direct bearing on the questions under consideration, the trial judge felt compelled under prevailing evidentiary rules to sustain such objections as to the admission of 18 of the documents.

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 243 n.50 (5th Cir. 1976).


medical profession? Was the defendant insane? Courts usually handle questions like these quite capably.

The courts, however, have difficulty handling the larger, behavioral questions that inform social policy decisions. A leading analysis published by the Brookings Institution succinctly describes the problem:

The increasing involvement of the courts in social policy questions has increased the number and importance of social fact questions in litigation. As the courts move into new, specialized, unfamiliar policy areas, they are confronted by a plethora of questions about human behavior that are beyond their ability to answer on the basis of common experience or the usual modicum of expert testimony.

Obtaining answers to such behavioral questions has become exigent, and not only because the interstices in which courts make fresh policy keep expanding. If a judge or a jury makes a mistake of fact relating only to the case before it, "the effects of the mistake are quarantined." But if the factual materials form the foundation for a general policy, the consequences cannot be so confined.

Traditionally, the courts have been modest about their competence to ascertain social facts and have tried to leave this function primarily to other agencies. They have shielded themselves by applying doctrines that have the effect of deferring to the fact-finding abilities of legislatures and administrative bodies, to avoid having to establish social facts in the course of litigation.

The reasons for this general modesty are well grounded. There is tension between two different judicial responsibilities: deciding the particular case and formulating a general policy. Two different kinds of fact-finding processes are required for these two different functions. The adversary system of presentation and the rules of evidence were both developed for the former, and they leave much to be desired for the latter.

Even proponents of an expansive judicial role in shaping social policy recognize that the traditional process of adjudication limits the courts' ability to find social facts. Proponents for an expanded judicial role inevitably call for institutional innovations to remedy the deficiencies, such as the increased use of special masters or court-appointed experts. Some of the proposed innovations would result in a process that bears little

33. D. Horowitz, supra note 6, at 46-47.
34. See Miller & Barron, supra note 26, at 1233-45; Tribe, supra note 20, at 52-53. Critics of the view that courts are ill-suited for social policy decisions have argued the courts have already made significant changes in their processes to fit themselves for such decisions. Cavanagh & Sarat, Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence, 14 Law & Soc. Rev. 371 (1980); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).
resemblance to the way the nation's courts currently conduct the process of adjudication. For example, one commentator has suggested judges might adopt notice and comment procedures similar to those employed in administrative rule-making. Other commentators have suggested that appellate courts retain a resident panel of social scientists. That commentators have even suggested such major changes shows that many deeply feel the institutional limitation of the courts.

The inability of the courts to monitor the consequences of their decisions is another weakness of adjudication which impairs the ability of the courts to fashion sound social policy. Judges have no institutional means to follow up on their decisions. Unlike courts, an administrative agency can require compliance reports; a legislature can check the results through the complaints of constituent groups, or the use of oversight hearings and reports.

One final point of comparison is, once again, both a great strength and weakness of adjudication. Adjudication is piecemeal—"the supreme example of incremental decision-making." In its traditional form, litigation finally resolves only the dispute presented by the parties. The court's ruling in the adjudication affects only the most narrow question necessary to the decision. The result is binding in a subsequent case only under the doctrine of stare decisis. In a later decision, the court can limit its holding to the special circumstances of the prior case and, thus, have little influence on policy.

This type of incremental decision-making has several disadvantages. It is often unclear, for example, what "sweep" a judicial decision will have. Lawyers often ponder over precedent in planning transactions and evaluating claims. Judicial decisions can be ambiguous in that later courts might read any given precedent narrowly or broadly.

Legislative enactments, on the other hand, can impart certainty. They do so, however, at a cost. Legislation, that is a sharply defined proscription of general application, can be an unwieldy and rigid instrument of social control. To paraphrase a classic example, legislation cannot inalterably set

35. Tribe, supra note 20, at 53.
36. Miller & Barron, supra note 26, at 1240-42.
37. D. Horowitz, supra note 6, at 51.
38. Id. at 35.
40. See Freeman v. Hewitt, 329 U.S. 249, 252, reh'g denied, 329 U.S. 832 (1946) (regarding its commerce clause decisions) ("especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts").
41. A classic lecture to law students advised them to read each case "from the angle as its maximum value as a precedent" and then "for its minimum value ... to set against the maximum." K. Llewellyn, The Bramble Bush 69 (1960).
an effective speeding law at 55 miles per hour. Such a law would not allow for bad weather. So, the state invariably qualifies their speeding laws with language which requires drivers to operate their cars in a “reasonable and prudent” manner notwithstanding any posted limit. This qualification enables the courts applying the statute to recognize special circumstances.

Here, the piecemeal nature of adjudication is a great strength. When a court interprets this type of statutory qualification, it is acting within an area in which it is uniquely competent. It will be making a fact specific inquiry which focuses on the conduct of the parties before the court. Over time judicial interpretations of the qualification will yield evolving standards of “reasonable and prudent” driving. The great advantage to law-making through adjudication is that it permits flexible application and changing standards that are not a sharp break with the past. In Dean Calebresi’s phrase, adjudication, because of its “incremental nature,” allows for both “continuity and change.” The common law evolves slowly to be sure; it nevertheless adapts to a changing world. Legislation is simply much less adaptable.

To summarize, courts perform some tasks very well. When they make law in their incremental fashion, they can impart an important ingredient of adaptability into the law. They are well adapted to make specific inquiries into past events or present circumstances affecting the parties before the court. They must justify their rulings with reasons. This makes courts well-equipped to make decisions grounded upon claims of right.

What legislatures do better than courts, however, is tackle problems arising from what Lon Fuller has called “polycentric” situations:

We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a “polycentric” situation because it is “many centered”—each crossing of stands is a distinct center for distributing tensions.

According to Fuller, administrative or legislative handling of polycentric problems is often better than handling them judicially. One example chosen by Fuller concerns the assignment of players to a football team. It would

42. The example is from H. Hart & A. Sacks, supra note 3, at 131-32, 138-41.
44. G. Calebresi, supra note 3, at 3-4.
45. Fuller, supra note 9, at 395.
be unwise to assign the quarterback position by having the contending players litigate:

Other players on the team are necessarily affected. It is not merely a matter of eleven different men being possibly affected; each shift of any one player might have a different set of repercussions on the remaining players: putting Jones in as quarterback would have one set of carry over effects, putting him in as left end, another. Here, again, we are dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of adjudication.46

Courts cannot adequately address a polycentric problem because only the parties to the suit before the court contribute to the judge’s understanding of the problem. Third parties affected by the “pull” of the decision have virtually no access to the adjudicative process. Moreover, the court has virtually no way, apart from a subsequent case, to monitor the “pull” of its decision. Finally, as Fuller and others have suggested, adjudication works best when one party is right and the other wrong. It can also balance competing claims of right among few parties. It cannot, however, effectively order multiple claims of right and other preferences.

Fuller notes that all social problems have polycentric features. With some decisions, however, these features predominate and Fuller believes that administrative or legislative resolution of these problems is better. In particular, Fuller concludes, as have many others, that courts are poorly equipped to assign economic resources. Decisions of this nature, involving redistribution of resources throughout society, are too polycentric for effective adjudication.47

This review of recent literature on the attributes of courts and legislation gives meaning to the principle of judicial restraint—the subject of the remainder of this article. Simply stated, the principle would oblige a judge faced with a “polycentric” problem to be cautious in making new law, to rest his or her decision on the narrowest ground possible, and to defer to legislative or administrative bodies on any proposed policy change. When a problem resting on specific, historic facts implicating most directly the rights of the litigants alone faces a court, the court can and should be more confident about its ability to tackle the problem. It should not be unduly deferential to other law making agencies. In this instance, the courts can confidently shape the law in an evolving tradition.

The next part of this article will describe how the Uniform Commercial Code embodies the principle of judicial restraint, understood in this fashion.

II. THE DESIGN OF THE UNIFORM COMMERCIAL CODE

Any discussion of the interpretation of the Uniform Commercial Code (UCC) must begin with a caveat. The provisions of the Code vary so

46. Id.
47. Id. at 400; see also Frug, The Judicial Power of the Purse, 126 U. Pa. L. Rev. 315 (1978)
widely in style, purpose, and effect that no general description of the Code’s nature as a legislative enactment is possible. Some commentators, for example, have sought to describe the UCC as a “true Code,” essentially a codification of principle.48 Others, on the other hand, have found the UCC a loose collection of unrelated statutes.49

Both observations include elements of truth. Indeed, the debate is much like the controversy among the blind men of Hindustan examining an elephant.50

50. It was six men of Indostan
   To learning much inclined,
   Who went to see the Elephant
   (Though all of them were blind),
   That each by observation
   Might satisfy his mind.
   The First approached the Elephant,
   And happening to fall
   Against his broad and sturdy side,
   At once began to bawl:
   “God bless me!—but the Elephant
   Is very like a wall!”
   The Second, feeling of the tusk,
   Cried: “Ho!—what have we here
   So very round and smooth and sharp?
   To me ’t is mighty clear
   This wonder of an Elephant
   Is very like a spear!”
   The Third approached the animal,
   And happening to take
   The squirming trunk within his hands,
   Thus bodily up and spake:
   “I see,” quoth he, “the Elephant
   Is very like a snake!”
   The Fourth reached out his eager hand,
   And felt about the knee.
   “What most this wondrous beast is like
   Is mighty plain, quoth he;
   ‘T is clear enough the Elephant
   Is very like a tree!”
   The Fifth, who chanced to tough the ear,
   Said: “E’en the blindest man
   Can tell what this resembles most;
   Deny the fact who can,
   This marvel of an Elephant
   Is very like a fan!”
   The Sixth no sooner had begun
   About the beast to grope,
   Than, seizing on the swinging tail
Some parts of the Code do look like codifications of principle. These provisions are laden with open-textured terms which invite judicial law-making. For example, a party to a sales contract has the right to “adequate assurance of due performance” from the other party when “reasonable grounds for insecurity arise.” A party to a negotiable instrument whose “own negligence substantially contributes to a material alteration of the instrument” cannot raise the alteration as a defense against a payor acting in “good faith and in accordance with . . . reasonable commercial standards.” In markedly “unstatutory” language, the section of the Code that purports to define the scope of Article 5 openly invites judge made law:

This Article deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to this act or may hereafter develop. The fact that this Article states a rule does not by itself require, imply or negate application of the same or a converse

That fell within his scope,
“I see,” quoth he, “the Elephant
Is very like a rope!”
And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right,
And all were in the wrong!


51. Some of the “unifying” principles of the Code are so variously defined that one must question the internal consistency of the codification. For example, the principle of “good faith” is defined subjectively in Article 1 (General Provision). U.C.C. § 1-201(19) (1987) (“honesty in fact in the conduct or transaction concerned”). However, in Article 2 (Sales), the term good faith has an objective component when applied to merchants. U.C.C. § 2-103(b) (1987) (“honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”). In Articles 3 (Commercial Paper), 4 (Bank Deposits-Collection), 6 (Bulk Transfers), 7 (Documents of Title) and 9 (Secured Transactions), we return to the subjective definition despite the fact we are often dealing with persons of considerable expertise like banks, warehousemen, and merchants, whose conduct could be measured by objective, commercial standards. See, e.g., U.C.C. §§ 3-302, 4-108, 6-107, 7-209, 9-206 (1987) (all require the subjective measure of good faith). Finally, in Article 8 (Investment Securities), “good faith” is defined both objectively and subjectively. The good faith purchaser of Article 8 is expected to act honestly in fact. U.C.C. § 8-302 (1987). Professional agents and brokers of securities, though, must observe reasonable commercial standards. U.C.C. § 8-318 (1987). Most confusingly, trustees, transfer agents, and registrars seem to be held to the subjective standard when one reads the text of section 8-406 but the objective standard when one looks at the Official Comments. See U.C.C. § 8-406 comment 3 (1987). Article 5 (Letters of Credit) also goes both ways. Compare U.C.C. § 5-108 (1987) (subjective) with U.C.C. § 5-109 (1987) (objective).


rule to a situation not provided for or to a person not specified by this Article.  

The Code, indeed, is replete with common law terms like "reasonableness," "wrongful," "proximate," "diligence," "ordinary care," "good faith," and "breach of the peace." Many provisions of the Code, however, are rather formal, in the sense that they draw clear lines calling for mechanical application by the courts. Thus, a secured party must file a financing statement for a purchase money security interest within ten days to maintain continuous perfection. The Code sets out in detail the formal requisites of negotiable instruments, financing statements, notices of bulk sales, and security agreements. Even Article 2 on Sales, commonly viewed as the most open-textured of the Code, has several sharply defined provisions. For example, a merchant must object in writing within ten days to any confirmation of sale. Firm offers are irrevocable for no more than 90 days.

It is important to remember the function of these "hard and fast" rules when one thinks about interpretation of the Code. These rules impart certainty to the Code and tend to predominate in provisions on the documentation of transactions. They, therefore, allow for certain counseling and predictable business planning. Unlike the open-textured provisions of the Code, courts generally apply these rules in a straight-forward fashion. They operate like the 55 mph speed limit in drawing a clear line. This article, as most of the commentary on the Code, concentrates on the Code's open-textured provisions. The formal rules, however, do limit judicial interpretation. If the Code says "ten days," a court should not, and

55. See, e.g., U.C.C. §§ 2-306(1), 2-309(1), 2-311(1), 2-704(2), 3-419(37), 4-403, 4-108(2), 4-202(1), 4-402, 7-204, 7-309, 7-404, 8-405, 9-503, 9-504(3) (1987).
62. An outstanding article on the interpretation of the Code demonstrates how one's view of the Code can be distorted by viewing only the open-textured provisions. Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621 (1975). Looking only at the most open-textured provisions of Article 2, Professor Danzig writes that central value decisions were left for judicial decision and describes the Code as "a renunciation of legislative responsibility and power." Id. at 622. Professor Danzig's view may have been tempered by a different focus, which included some of the more formal rules where "legislative" lines are drawn around some value laden issues. For example, Section 9-204 has always limited a secured creditor's ability to obtain a security interest in a consumer's after-acquired property to that property acquired by the consumer within ten days of the creditor's disbursement of funds. U.C.C. § 9-204 (1987). To cite an example from Article 2, the Code invalidates any limitation of liability for personal injuries arising from a consumer transaction. U.C.C. § 2-719(3) (1987).
usually will not, hold the legislature meant "fifteen days" under any theory of interpretation.

The Code's principal authors designed it to perform two separate tasks which are seemingly difficult to reconcile. The drafters of the Code wished to impart certainty to the law with a Code they hoped would be adaptable. They tried to accomplish these goals, in part, with the dichotomy of rules. Drafting documents and counseling clients on form is relatively certain under the Code's mechanistic rules. They also attempt to accomplish their objectives by codifying a method of interpreting the Code which would, in Dean Calabresi's words, impart a measure of both continuity and change.

The Code contains a number of provisions in its first article which the drafters hoped would guide the manner in which the Code would be read. Karl Llewellyn hoped to recreate what he called a "Grand Style" of judicial decision-making. Llewellyn viewed the methods of several leading eighteenth and nineteenth century common law judges as paradigms. He sought to recapture what he perceived as the style of decision employed by Lord Mansfield, Cowen and Kent of New York, and others. To Llewellyn, the greatness of these judges' decisions lay in their clear articulation of the guiding principle of decision applicable to the factual setting at issue. The great decisions did not rest on slavish devotion to precedent. Nevertheless, they imparted certainty in the law, by a clear statement of the policy the great judges sought to serve.

Llewellyn believed these judges arrived at the principles that informed their decisions by not drawing their "eye off the commercial issues in a commercial cause." If courts concentrate on the policy of facilitating


65. In the Forward to the Report and Second Draft of the Revised Uniform Sales Act (one of the first "drafts" of the UCC), William A. Schnader, President of the National Conference on Uniform State Law, phrased the goal as a "commercial code both flexible and calculable of result, both lasting and adjustable." 1 U.C.C. DRAFTS, supra note 5, at 273.

66. G. CALEBRESE, supra note 3, at 3.


69. K. LLEWELLYN, supra note 68, at 35-69.

70. Id. at 412.
commercial interchange and state that policy clearly, judicial decisions will be predictable.\textsuperscript{71}

A few quotations from Lord Mansfield's decisions ably illustrate the Grand Style.\textsuperscript{72} Lord Mansfield first articulated the need for certainty emanating from a common sense rule well adapted to the commercial transaction at hand:

The property of merchants should not depend upon subtle niceties and speculative refinements drawn from the Roman \textit{jus postliminii}, but upon plain reason. We desire it may be understood, that the only point now determined is, that on a valued policy a plaintiff cannot recover more than actual loss which has happened, at the time when he chooses to abandon.\textsuperscript{73}

How does one master the facts that will lead to the common sense principle and develop what Llewellyn called the "life-reason" of a rule?\textsuperscript{74} Mansfield, again, had a clear answer. The court should rely heavily on the customs of merchants, the course of trade, and evidence of commercial practices.\textsuperscript{75} How does the judge inform himself about these practices? Mansfield did not simply rely upon evidence adduced by the parties; he impaneled merchant juries to advise him on commercial usage.\textsuperscript{76} Does this mean he blindly followed commercial practices? No, he recognized at least two important exceptions. When prior decisions had arrived at a firm and certain result that made commercial sense, he would not alter the rule of decision through evidence of commercial usage. In a leading case, he reversed himself on admitting the opinion of a merchant on blank endorsements when two prior adjudications had resolved the question contrary to the merchant's opinion. Mansfield chastised himself for admitting the evidence because the legal question was settled and "no particular usage" ought to "weigh against it." Admitting the evidence ran the risk of sending "everything to sea again." Mansfield's second exception to the reception of merchant practices was that he would not countenance sharp practice or dishonesty. Good faith animated the best commercial practice. Mansfield saw bad faith as a lack of full disclosure or concealment. His focus, thus,

\begin{itemize}
  \item \textsuperscript{71} 1 U.C.C. DRAFTS, \textit{ supra} note 5, at 308-09.
  \item \textsuperscript{72}  Grant Gilmore, a protege of Llewellyn's and one of the Code's principal draftsmen, once wrote: "As a general rule, anything . . . which was good enough for Lord Mansfield was good enough for Llewellyn." Gilmore, \textit{Formalism and the Law of Negotiable Instruments}, 13 CREIGHTON L. REV. 441, 460-61 (1979).
  \item \textsuperscript{73}  Hamilton v. Mendez, 96 Eng. Rep. 154, 156 (1761).
  \item \textsuperscript{74}  K. LLEWELLYN, \textit{ supra} note 68, at 404.
  \item \textsuperscript{75}  \textit{See, e.g.}, Miller v. Race, 97 Eng. Rep. 398, 401 (1758) (where Mansfield, upon resolving a question of commercial law, reached the result dictated by "the general course of business").
  \item \textsuperscript{77}  Edie & Laird v. East India Co., 96 Eng. Rep. 166, 167 (1761).
\end{itemize}
was on how the parties to a contract entered their agreement. He undertook a fact-specific inquiry, concentrating on the unique circumstances of the case before him. Mansfield would upset an agreement for lack of good faith only if his examination, using the process of adjudication in a task to which it is well-suited, convinced him that the litigant had a flawed bargain.\footnote{78}

It is clear from the earliest drafts of the Code that its principal author, Karl Llewellyn, wished to codify Mansfield's methods.\footnote{79} The impetus for drafting the Code was a perception of pronounced "discrepancies between the doctrine of the [Uniform Sales] Act and current commercial needs."\footnote{80} To Llewellyn, sales law had become a "lawyer's law" foreign to the "very field of everyday business."\footnote{81} When Llewellyn began work on the Code, he felt the case law on sales exhibited an "unbelievable discrepancy" with "commercial needs."\footnote{82}

Llewellyn's report accompanying an early draft of the Code opined that the judiciary caused the discrepancy by losing touch with the Grand Style of decision with its focus on modern commercial practice:

The trouble has lain primarily in the failure of the case-law of Sales, since about 1850, to develop with any consistency a set of concepts and lines of legal analysis so built as to focus the issues that arose when the mercantile world moved out of the regime of marketing by factorage and into the regime of contracts to sell made between parties at a distance from each other. Unfocused issues mean blurred results and blurred rules difficult to foresee, even for a lawyer . . . .\footnote{83}

The answer for the drafters was a codification of common-law principles—provisions with a clear purpose and reason. By emulating the Grand

\footnotesize{78. Mansfield described his standard of good faith as follows: The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary . . . . This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favor of the party misled by his ignorance of the thing concealed . . . . The reason of the rule which obliges parties to disclose is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows and the other is ignorant of and has no reason to suspect. The question, therefore, must always be, "Whether there was, under all the circumstances, at the time the policy was underwritten, a fair representation or a concealment; fraudulent, if designed, or, though not designed, varying materially the object of the policy and changing the risk understood to be run." Carter v. Boehm, 97 Eng. Rep. 1162, 1164-65 (1766) (emphasis added).

79. 1 U.C.C. DRAFTS, supra note 5, at 294, 318; see also K. LLEWELLYN, supra note 68, at 404.

80. 1 U.C.C. DRAFTS, supra note 5, at 288.

81. Id. at 288-89.

82. Id. at 288.

83. Id. at 289.
Style of Mansfield and others, they hoped to achieve both certainty and adaptability in a semi-permanent code. The aim was to create a code that stated common law principle.84 Echoing the Grand Style, the authors of the Code worked on the basis of the "proposition that if the reason in life of a situation be clearly grasped and stated, and the reason of its solution be made clear to the courts, there results both immediately and over the long haul a more reckonable course of decision and a more reckonable body of interpretation than can be had by any other statutory device which is not to be overhauled and rebuilt every two years, or five."85

To inform judicial decisions of the "reason in life" in a flexible code, the drafters relied on the explicit recognition and accommodation of good merchant practices.86 They codified sound and lasting practices with their reasons explained in the official comments.87 Trade usage and customs would be the source for future law and interpretation of the Code's open ended provisions. The drafters based the Code on Llewellyn's study of Anglo-American commercial law since Mansfield. That study convinced Llewellyn that the best commercial code would single out certain commercial practices for explicit recognition and then, provide a mechanism to allow the law to adapt to new mercantile practices.88

Again, the drafters did not design the Code to countenance all practices of trade. The Code, like Mansfield, has, since its inception, required good faith from all parties.89 The courts must be the final arbiter of sound practices. The Code since its earliest drafts, however, has presumed reasonable any established trade usage. A lack of good faith will upset a practice under the Code only if it rises to the level of dishonesty and sharp practice condemned by Mansfield.90

84. Id. at 302-10.
85. Id. at 307.
86. Id. at 334-35.
87. Id. at 299, 305, 327, 329-30.
88. Llewellyn described the role of commercial practice in one of the Code's initial drafts:
[C]ertain mercantile practices have had great lasting power: the seller's responsibility for quality and condition, for example, has been mercantile practice for two centuries and a half, and has fought its way back into legal recognition despite the bad law made on the matter by the courts of the early 19th Century . . . . Where the Draft has picked out practices for explicit recognition, they are practices whose essential reason, in this perspective, seems to lie deep, seems to serve a real need of typical and lasting character, and seems to have already proved itself in that aspect. Practices which have not been affirmatively shown to have these characteristics are left to be drawn in under "mercantile usage" or the "usage of the trade" as it may from time to time shift. Id. at 309.
90. For example, the comments to the Code from its earlier drafts until
The need to have trade practices invigorate the law led Llewellyn in the early drafts of the Code to revive Mansfield's merchant jury. Llewellyn's 1941 draft of the Revised Sales Act established a procedure for impaneling a jury of disinterested merchant experts. The comments to that proposed section make very clear that Llewellyn distrusted the standard fact-finding processes of adjudication—judges, juries, and expert witnesses. "The need for speedy, reliable, and therefore reasonable and reckonable, determination of questions of mercantile fact underline all Sales law. The unspecialized character of our courts brings it about that few judges have specialized skill in such matters... and juries are notoriously out of touch." Most of the legal realists shared Llewellyn's concern for the limits of adjudication and this concern affected their views on how courts should interpret statutes. Jerome Frank, for example, suggested that judicial deference to legislative policy decisions was necessary because "conflicting interests" were represented in the legislature in a manner in which the narrow focus of adjudication simply did not permit. Frank had misgivings about the fact-finding ability of the courts when it came to social policy questions. Thus, when counsel argued before Judge Jerome Frank that he should construe a tax statute to read a "more just result," Frank decided:

Such a remaking of the legislation would require consideration of questions of legislative policy bearing on fiscal and economic matters and on administrative convenience; to discharge that task efficiently we would be obliged to hold a sort of Congressional Committee hearing, at which all interested persons would be heard, so as to be sure that our amendment would not entail unforeseen and undesirable results.

To the realists, the judiciary abused statutes by applying the formal maxims of interpretation to statutory language. The results often defied common today, have always indicated that a heavy burden weighs against any party wishing to challenge an established commercial practice as unconscionable. See U.C.C. § 1-205 comment 6 (1987).

The policy of this Act controlling explicit unconscionable contracts and clauses applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable." However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facia case that the usage is reasonable and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

*Id.*

91. 1 U.C.C. DRAFTS, supra note 5, at 531-37.
92. Id. at 531.
93. Frank, supra note 2, at 1266.
sense in the realists’ view and frustrated the purpose of much legislation. By focusing on legislative purpose to guide judicial interpretation, the courts would reduce the risk of a policy mistake caused by the narrow focus of adjudication.

The first substantive provision of the Code embodies the approach of Llewellyn and the realists:

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) 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 usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

The section emphasizes the need to look to commercial practice to keep the law up to date. Custom and commercial practice inform much of the law of the Code limited only by an overriding obligation of good faith.

The Code’s heavy reliance on merchant practice has always been a source of criticism. Indeed, Roscoe Pound criticizing Llewellyn’s jurisprudence a decade before the first drafts of the Code wrote:

[M]any of the new juristic realists conceive a law as a body of devices for the purposes of business instead of as a body of means toward general social ends. They put the whole emphasis on the exigencies of one phase of the economic order. To them the significant feature of law is as a body of devices for enabling business and industry to achieve certain purposes. They give us a juristic version of what I have called the entrepreneur attitude toward law.

One of the most perceptive commentaries on the Code echoes Pound’s criticism. To Professor Danzig, the Code represents “a renunciation of
legislative responsibility and power.' In Danzig's view, judges make critical ethical choices under the Code "as technical assessments" often with only the predominant "morals of the marketplace" to guide their decisions. Danzig cites the many open-textured terms in Article Two as instances in which judges substituted judicial law-making, on a case-by-case basis, for legislation. The Code's major shortcoming in Danzig's view was that it failed to exploit the legislature's superior capability for making ethical choices. The legislature, being more broadly representative, is a better institution for the normative judgments that the Code has left for the courts. Danzig also criticizes the Code for assigning these decisions to judges on standardless, open-ended terms inviting the "projection of a judge's values onto the scene before him."

While there is much to be said for these criticisms of Llewellyn and the Code, the critics have somewhat overstated their case. The Code does implicitly recognize the unique law-making ability of the courts and their limitations while striking a balance between flexibility and certainty. The open-textured provisions of the Code are not wholly standardless. On the contrary, the Code directs the court faced with such terms to an evidentiary inquiry as to commercial customs and practices. Indeed, as Llewellyn originally conceived the process, the court would have impanelled a special merchant's jury. Commercial standards do provide a benchmark which is not the judge's own preference. Moreover, they are ascertainable by the courts under the rules of evidence. Actually, reference to commercial standards is the kind of inquiry most commentators have agreed the courts do well. The court is asking about past practices or present circumstances. By focusing on commercial practices, the input of the parties is likely to be meaningful. They can inform the court about practices with which they presumably are familiar. Finally, by focusing on existing practice a court is far less likely to issue a decision that has a destructive and unpredictable "pull" on other societal relationships. The web of existing relationships is not disturbed. This focus, thus, limits the court from straying too far into major social policy decisions with polycentric implications.

All this is not to say, as Pound and Danzig suggest, that under the Code the courts must uncritically give their imprimatur to commercial

101. Id. at 630.
102. Id. at 629.
103. Id. at 634.
104. Id. at 635.
105. Id. at 629-30.
107. See supra note 91 and accompanying text.
standards. On the contrary, the standard of good faith pervades the Code. It defines good faith as "honesty in fact." In addition, the common law devices used to police commercial transactions supplement the Code's provisions. These devices would include the defenses of fraud, deceit, duress, and estoppel. With these defenses, as with the standard of good faith, a court can perform the independent regulatory function for which it is institutionally suited. With each defense, the court makes a fact-specific inquiry of past events. It directs each defense to the conduct of the parties before the court. Therefore, the court will be fully informed through the process of adjudication of the facts needed to make its determination. The courts can and should make ethical choices under the Code. The Code simply directs those choices to questions the courts can adequately address.

As for larger questions, ethical questions with polycentric features, there simply is nothing in the Code that prevents legislative action. Danzig's criticism that Llewellyn failed to exploit the legislature's moral force ignores the manner in which the states adopted the Code. It was proposed and adopted to make commercial law more uniform among the states and more consistent with commercial practice. The adoption of the Code, from its initial drafts by academic lawyers through its final presentation to the state legislatures as a finished statute, more closely resembled the drafting of a Restatement than the standard process of legislation.

Experience has shown that the Code operates much like the Restatement, serving as a framework for case law development which in no way impedes legislatures and administrative agencies from making fundamental changes in commercial law. In recent years, the legislatures and administrative agencies of our society have repeatedly shown they are prepared to make these changes, turning aside commercial practice in the interest of serving
other social policy concerns. Indeed, most commercial statutes and administrative regulations of the past twenty years address consumer issues invariably changing the legal regime to one more favorable to consumers rather than businesses. For example, most states have passed comprehensive consumer protection legislation.114 The federal government has adopted measures eliminating the holder in due course doctrine from consumer sales,115 controlling "high-pressure" door to door sales,116 and protecting consumer sureties.117 Congress has adopted legislation regulating the terms of credit,118 limiting the "float" available to depository banks,119 improving warranty protection120 and protecting consumers from loss in unauthorized electronic funds transfers121 and credit card transactions,122 restricting wage assignments,123 and forbidding abusive collection practices.124

Most commercial lawyers would agree that the changes wrought by these measures have been worthwhile. Certainly, it was better to make the changes legislatively rather than judicially. Many provisions of these measures draw the sharp lines that courts find difficult to draw but which legislatures or administrative agencies can mark off.125 As a rule, these measures reflect a degree of compromise balancing competing interests in


117. 16 C.F.R. § 444.3 (1988).
the manner that is the hallmark of legislative processes. Moreover, because many of these measures are federal, they supply a degree of uniformity impossible to achieve with case law under the Code.

In short, the Code creates a backdrop for a system of shared flexible law-making in which each law-making institution in our society can do its best work. The Code's focus on modern commercial practice to guide law-making enables the courts to fashion an evolving commercial law. The process of adjudication can find customs and practices to inform the law. The Code balances judicial acceptance of those customs and practices with the inquiry on good faith. This inquiry, as it was for Mansfield and as it is for the common law defenses to contract, will be a fact specific inquiry one can expect the courts to do well. If a larger reordering is necessary involving facts and parties beyond those involved in any given adjudication, judicial restraint, implicit in the Code, would suggest the court defer to other law-making bodies.

A proper inquiry into commercial practice will inform a judge's discretion in deciding to defer to other law-making agencies. Thus, the Code's focus on commercial practice provides both a measure of flexibility and restraint.

To demonstrate this, the remainder of this article will consider two sets of judicial decisions interpreting provisions of the Code. The Code provisions at issue in the first group of cases are those setting forth the formal requisites of negotiability for promissory notes, drafts, checks and certificates of deposit. These provisions are among the most formal of the Code. Nevertheless, the drafters designed them to provide sufficient flexibility to accommodate new commercial practices. Unfortunately, the courts have not always appreciated this flexibility. Recent decisions holding variable rate notes non-negotiable show that if the courts ignore commercial practices they will render the statute unduly rigid.

A court's disregard of commercial practice can also lead the court to fail to appreciate the limits of adjudication. To demonstrate this, the second group of cases discussed below will consider judicial treatment of the Code's provision on unconscionable contracts or clauses. Here, the drafters of the Code hoped an inquiry into commercial practice would moderate a judge's inclination to hold a clause unconscionable and, thus, unenforceable. This article will examine the price unconscionability decisions and recent cases holding unenforceable limitation of damages clauses in contracts to print the telephone yellow pages. By failing to conduct an adequate inquiry into commercial practice, the courts in these cases issued decisions with far-reaching polycentric implications.

III. VARIABLE RATE NOTES: THE PROBLEM OF NEGOTIABILITY

Recent decisions involving variable rate notes illustrate why courts must be sensitive to commercial practice to prevent the ossification of our commercial law. In these decisions, the courts have held non-negotiable promissory notes bearing interest rates that vary according to a specified formula. For example, the mortgage note involved in Taylor v. Roeder carried interest at three points above the prime rate at Chase Manhattan Bank. Mortgage holders widely employ notes of this nature. Indeed, many loans extended in recent years bear interest at variable rates.

The determination of whether a note is negotiable can be crucial to a transferee of the note. A note must be negotiable for a transferee to have the status of a holder in due course, one of the law’s genuine favorites. A holder in due course will take the note free from all claims and virtually all defenses good against his or her transferor. A transferee who is not a holder in due course takes subject to these claims and defenses. In addition, any person obligated on a negotiable note can only satisfy that indebtedness by paying the holder of the instrument. On the other hand, if a note is non-negotiable, the common law rule of assignment of contracts applies. Until notified of an assignment, the obligor on a non-negotiable note can satisfy the indebtedness evidenced by the note by paying the original payee.


128. Taylor, 234 Va. at 101, 360 S.E.2d at 192.


The case of *Taylor v. Roeder* presented the Supreme Court of Virginia with the negotiability problem. In that case, a mortgage finance company borrowed from investors pledging as security the notes it had acquired in its mortgage lending. After this pledge, several individuals paid large sums to the mortgage company to satisfy the debts evidenced by several of these notes. These individuals never received the cancelled notes as the mortgage finance company had already pledged them to the investors. When the mortgage finance company failed, the investors claimed they were holders in due course of the notes they had received as security. The investors argued they took free of the defense of prior payment on the notes to the mortgage company. Because the investors contended they were holders of negotiable notes, they insisted only payment to them could satisfy the indebtedness. The individuals who had attempted to satisfy their mortgage debt by paying the mortgage company naturally argued the notes were non-negotiable. They argued, under the law of assignments, that their payment to the mortgage company discharged the indebtedness as the investors never notified them of any assignment of the right to payment.

The case involved an important question of policy affecting the mortgage markets, thus, the Federal Home Loan Mortgage Corporation ("Freddie Mac") filed an *amicus* brief urging the court to hold the notes negotiable. The brief argued:

Without the ability to rely on negotiability of adjustable-rate mortgage notes Freddie Mac would be concerned with borrower defenses related to the enforceability of adjustable-rate notes on grounds such as failure of consideration, borrower set-offs, and in some instances, defenses which arise in connection with faulty disclosure by mortgage loan originators, state usury law restrictions and state and federal truth-in-lending requirements.

Notwithstanding the arguments of Freddie Mac and the investors, the Supreme Court of Virginia held the notes non-negotiable. The question was purely one of form to the court. The Code specifies the formal requisites of negotiability. To be negotiable, a note must promise repayment of a "sum certain." The comments suggest this meant a sum ascertainable from the four corners of the note itself "without reference to any outside

135. *Id.*
136. *Id.* at 101, 360 S.E.2d at 193.
137. *Id.* at 102, 360 S.E.2d at 193.
138. *Id.* at 102-04, 360 S.E.2d at 193-94.
139. *Id.*
140. *Id.*
source . . . ." Thus, the court felt bound by the Code and it stated any change in the law regarding these notes "should be made by statutory amendment, not through litigation and judicial interpretation."144

At first blush, the court's decision seems a model of restraint. The court's method, however, is not the method of the Code. Indeed, the court's emphasis on form and the inflexibility of the Code, could not be further from the Grand Style envisioned by Llewellyn. The section setting forth the formal requisites of negotiability expressly limits its applicability to instruments "within Article Three."145 The comments to that section make clear, the drafters included this limiting language to afford a degree of flexibility to the Code. The drafters intended that "some writings may be made negotiable . . . by judicial decision. The same is true as to any new type of paper which commercial practice may develop in the future."146

Thus, commercial practice could establish new forms of negotiable instruments outside Article Three. While commonly criticized as the most antiquarian of the Code's Articles,147 the drafters never intended Article Three to be immutable. They designed it, like most of the Code, to change with the times.

The statutory predecessor to the Code, the Negotiable Instruments Law, had no similar "play in its joints."148 Cardozo lamented this lack of adaptability in an opinion concerning certificates enjoying wide commercial acceptance but, nevertheless, were non-negotiable under the Negotiable Instruments Law.149 Addressing the argument that commercial practice should supersede a formal legalism, Cardozo wrote:

We do not underrate the importance of permitting business to originate for itself the methods and instrumentalities that may be found by experience to be helpful to its free development . . . . There is force in the argument that wider freedom of choice through the spontaneous flowerings of custom would work a social gain. One of the debit items to be charged against codifying statutes is the possibility of interference with evolutionary growth. It is the ancient conflict between flexibility and certainty. So far as the Negotiable Instruments Law is concerned, the remedy for the evil, if it be one, is an amendment of the statute that will add to the negotiable instruments there enumerated or described such other classes as the law merchant or the custom of the market may from time to time establish. Until such an amendment shall be adopted, the courts in their decisions must take for granted that the Legislature is content with the law as it is written.150

144. Taylor, 234 Va. at 105, 360 S.E.2d at 195.
146. U.C.C. § 3-104 comment 1 (1987).
147. Gilmore, Formalism and the Law of Negotiable Instruments, 13 CREIGHTON L. REV. 441, 461 (1979) (calling Article 3 "a museum of antiquities").
148. UNIF. NEGOTIABLE INSTRUMENTS LAW, §§ 1, 5, 10, 126, 184, 185.
150. Id. at 52, 150 N.E. at 598-99 (citations omitted).
Llewellyn did not want his Uniform Code to serve as a straight-jacket for so fine a common law judge as Benjamin Cardozo. On the contrary, his initial draft of the general provisions of the Code (Article One) directed the courts to treat the Uniform Law in the Grand Style of the common law. To illustrate the method Llewellyn chose a negotiable document case. Llewellyn entirely approved of:

the growing body of influential judicial decision which has properly and wisely viewed the principles of Uniform Commercial Acts as warranting development and extension by analogy in the same manner in which judicially stated common law principles are developed and extended. Instances are Commercial National Bank v. Canal Louisiana Bank . . . where the Supreme Court applied the principles of negotiable documents to a document which was plainly within the policy, but no less plainly outside the language of the Sales Act.

The case, cited so approvingly by Llewellyn, still stands in the commentary to the General Provisions of the Code as a shining example of the way the courts should decide commercial cases. It simply was not the method of the Virginia Supreme Court in Taylor v. Roeder.

The dispute before the Virginia Supreme Court undoubtedly presented a polycentric problem. Certainly, it attracted formidable amicus curie. The policy implications of the decision are momentous. Indeed, a thorough treatment of the policy questions involved seem well beyond the institutional competence of a court. A policy-maker might well ask whether making variable rate notes non-negotiable would in fact chill their use. It might not, of course, as buyers of mortgage notes might rather risk an occasional valid defense in a collection action than the damage caused to an entire portfolio by old mortgage notes bought at rates well below the prevailing market. The case involves other difficult policy questions. If the secondary market for non-negotiable mortgage notes constricts, will new or lower income home owners be deprived of the best opportunity for buying a home? Will it affect housing starts? What impact will the decision have on the general economy? These are formidable questions demanding serious empirical study. They seem well beyond the capability of the courts. Indeed, a legislature or administrative agency would find these questions daunting despite their ability to garner more information than any amicus brief could provide.

151. Section 1-A of Llewellyn's Revised Sales Act reads as follows:
(1) In the construction of this Act, it shall be deemed to state the common law principles of sales and of contracts to sell; and its provisions may be applied, developed or limited as in the application, development or limitation of common law principles by judicial decisions; and construction by courts of other jurisdictions shall be given the weight due them in view of the dominant purpose of the Act to make uniform the law of those jurisdictions which enact it.

1 U.C.C. DRAFTS, supra note 5, at 326.
152. Id. at 327-28.
The beauty of the Code solution, however, is that it does not require the court to answer or even ask these questions. It provides a surrogate inquiry. The Code simply asks the court to focus on commercial practice.\textsuperscript{153} Under the Code, no formal legal doctrine should create an impediment to a new commercial practice. In the market for mortgage loans, no legalism should affect the consumer's range of choice.\textsuperscript{154} The question the Code posits is: "Are variable rate notes in widespread commercial use?" In the Grand Style of Mansfield and Llewellyn the very currency of a class of instruments triggers judicial recognition of their negotiability.\textsuperscript{155} The courts are institutionally equipped to conduct this inquiry. Indeed, it was an easy job in the \textit{Taylor} case. The parties did not dispute the ubiquity of the variable rates note in contemporary lending.

Is the inquiry to commercial practice a perfect substitute for serious study of the policy questions raised by the use of variable rate notes? Of course not. Should the legislature address these policy questions? Perhaps, but we cannot wait for legislation on all our problems.\textsuperscript{156} The focus on commercial practice enables the courts to do their best work in our system of shared law-making. The courts are marvelous institutions for finding facts like customs or commercial practices. The drafters of the Code hoped facts like these would decide cases—that commercial practice would be a source of law. The focus on commercial practice allows a measure of flexibility in our commercial law while limiting the risk of a policy mistake. The Code does not ask the court to make policy in any active sense but rather to follow the existing practices. A method of deciding cases on the basis of commercial practice allows commercial law to adapt in the Grand Style Llewellyn envisioned.

\textsuperscript{153} U.C.C. § 3-104 comment 1 (1987). The inquiry is "to any new type of paper commercial practice may develop in the future." \textit{Id.}  
\textsuperscript{154} U.C.C. § 1-102 comment 1 (1987) ("This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices.").  
\textsuperscript{156} The decision in \textit{Taylor v. Roeder} forced the Virginia legislature to amend its Uniform Commercial Code to make variable rate notes negotiable. VA. CODE ANN. § 8.3-106(2) (1965 & Supp. 1989). Arizona, Iowa, Mississippi, Missouri, Nevada, New York, North Dakota, Tennessee, Washington, and West Virginia have also adopted statutes making variable rate notes negotiable. ARIZ. REV. STAT. ANN. § 47-3106(B) (Supp. 1989); IOWA CODE ANN. § 554.3106(1)(f) (1989); MISS. CODE ANN. § 75-3-106(2) (Supp. 1989); MO. REV. STAT. § 400.3-106(2) (Supp. 1988); NEV. REV. STAT. § 104.3106(2) (Michie 1989); N.Y. U.C.C. LAW § 3-106(2) (McKinney Supp. 1990); N.D. CENT. CODE § 41-03-06(f), (g) (Supp. 1989); TENN. CODE ANN. § 47-3-106(F), (G) (Supp. 1989); WASH. REV. CODE § 62A.3-106(2) (Supp. 1989); W. VA. CODE § 46-3-106(f)-(h) (Supp. 1989).
IV. PRICE UNCONSCIONABILITY AND THE CURRENT CONTROVERSY OVER THE YELLOW PAGES

The way an inquiry into commercial practice limits the risk of a policy mistake can best be seen by taking up a few decisions based upon the unconscionability provision of Article Two. Here, the courts have on occasion forgotten their institutional limitations in making policy. Very often, this lack of any sense of restraint resulted from the court’s failure to take account of commercial practice as the drafters had in mind.

Section 2-302, on unconscionable contracts, is one of the most open-textured provisions of the Code. The section never defines “unconscionability.” It leads critics to charge that the section invites litigation, unpredictable results, and damaging judicial interference in a market economy grounded upon freedom of contract. Others, on the other hand, have praised section 2-302 as an important safeguard, preserving the element of “mutual free consent” which lies at the heart of any free market. Again, a focus on commercial practice to guide interpretation of this section goes a long way toward resolving this debate. Considering its purpose, the unconscionability provision is a useful safeguard. When courts ignore the section’s purpose, it is every bit the rogue its critics fear.

Karl Llewellyn intended section 2-302 to free the courts from the need to manipulate doctrine to avoid enforcing an oppressive agreement. Faced with a harsh contract, the courts, in Llewellyn’s view, felt considerable pressure to distort legal doctrines to avoid enforcing the agreement. Courts were prone to stretch doctrines like duress, mistake, deceit, and offer and acceptance to find a lack of mutual assent. Probably worse to Llewellyn, the courts often would interpret contract language in a way that avoided an offensive result even though the party drafting the contract intended that result. This led drafters of contracts to try again, spelling out more explicitly, the unfair provision. To Llewellyn this was a disaster, leading to “precedent after precedent in which language is held not to mean what it says and indeed what its plain purpose was, and that upsets everything for everybody in all future litigation.” It was far better, in Llewellyn’s mind, to permit the courts to police contract clauses “in the open” using the doctrine of unconscionability.

160. 1 STATE OF NEW YORK LAW REVISION COMMISSION REPORT: HEARINGS ON THE UNIFORM COMMERCIAL CODE 178 (1954) (Statement of K. Llewellyn) [hereinafter NEW YORK LAW REVISION (1954)].
161. Id.
In response to critics who charged this gave far too much power to the courts, Llewellyn responded that section 2-302 provides two important checks on judicial discretion. First, Llewellyn emphasized the section made the question of unconscionability one of law, not of fact. Llewellyn believed this ensured that the courts would proceed in the incremental fashion of the common law creating precedent that would give an evolving meaning to a proper standard of fair dealing. The section forces the courts to announce their reasons for their decision—reasons that would inform courts and lawyers in the future. Second, in drafting the Code, Llewellyn struggled to find a mechanism for confining the courts to commercial standards in their search for the reasons behind a ruling on unconscionability. The faith Llewellyn had in commercial practice is clear in one of his initial drafts of the Code. In that draft, Llewellyn sought to regulate the problem of adhesion contracts with trade association rules. Llewellyn hoped to encourage trade associations to develop written expressions of trade usage that would guide the courts in policing one-sided agreements. Llewellyn hoped trade associations would draft form agreements for their industries. To many people today, far more sensitive as we are to consumer issues, this proposal must seem like letting the fox watch the chicken coop.

Llewellyn grounded his faith in trade usage on a conviction that commercial lawyers were more to blame for lopsided agreements than merchants. Llewellyn believed commercial lawyers "insisted on all kinds of things their clients [did not] . . . want at all." The clients, Llewellyn believed, were "satisfied in the main with reasonable business judgment . . . and [contracts that did not] . . . try to take more than 80 percent of the pie."

While Llewellyn's trade association rules (so reminiscent of the New Deal) never became part of the Code, the drafters in 1951, fundamentally arrived at the current language which emphasizes the role of commercial practice in defining unconscionability. The Code today directs a court to take evidence of the commercial context of an agreement before making a determination that a contract or clause is unconscionable. The Official Comment states:

The basic test is whether, in light of . . . the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable . . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.
Underscoring the point, the comments to the general provisions of the Code make clear that the courts should presume fair, not unconscionable, any established trade usage.\footnote{169. U.C.C. § 1-205 comment 6 (1987).}

The test set out in section 2-302 and its accompanying comments envisions a two step inquiry in any unconscionability challenge.\footnote{170. K. LLEWELLYN, supra note 68, at 367.} Llewellyn thought long and hard about adhesion contracts. The two step process he designed to police them is one the courts are institutionally equipped to undertake.\footnote{171. Llewellyn favored a judicial approach to adhesion contracts along the lines of this two-step analysis in a book review he wrote before the Code project ever got underway. See Llewellyn, Book Review, 52 HARV. L. REV. 700, 704-05 (1939).} The first step in the process is a determination of whether there was some flaw in the bargaining process that resulted in the disputed contract. The court should focus, as Llewellyn intended, on what was and was not bargained for in the agreement.\footnote{172. Id.; see also Llewellyn's lengthy quote from this book review in K. LLEWELLYN, supra note 68, at 367 (discussing U.C.C. § 2-302 (1987)).} Certainly, this is an inquiry ideally suited for the courts. It is this kind of fact specific inquiry, which primarily involves the parties before the court, that our judicial system handles very well. Indeed, this type of inquiry is similar to the process of making out the common law defenses of fraud, duress or mistake, which the law designed unconscionability to supplement. The second step of the process, however, is equally important. The drafters never intended a court to invalidate all unbargained for clauses. Rather, the drafters intended a court to examine the commercial setting of the agreement before declaring the unbargained for clause unconscionable.\footnote{173. U.C.C. § 2-302(3) (1987).} The drafters recognized of course that substantial efficiencies resulted from largely unbargained for standard form agreements.\footnote{174. Llewellyn remarked on the benefits of standard form agreements: [S]tandardized forms evidence a real need. 'The general law' is much too general. It needs tailoring to trades and to lines of trading. Nothing can approach in speed and sanity of readaptation the machinery of standard forms of a trade and for a line of trade, built to meet the particular needs of that trade. They save trouble in bargaining. They save time in bargaining. They infinitely simplify the task of internal administration of a business unit, of keeping tabs on transactions, of knowing where one is at, of arranging orderly expectation, orderly fulfillment, orderly planning. They ease administration by concentrating the need for discretion and decision in such personnel as can be trusted to be discreet. This reduces human wear and tear, it cheapens administration, it serves the ultimate consumer. Standardizing contracts is in this a counterpart of standardizing goods and production processes, as well as a device for adjustment of law to need. Llewellyn, supra note 171, at 701.} They did not want to toss them all out. On the contrary, the drafters hoped the courts would measure the reasonableness
of a challenged clause against evidence of prevailing commercial practice. A court could only strike a clause if, after taking evidence of commercial practice and making an appealable ruling of law, the court found the challenged contract unfair. This process, in the tradition of the common law, would give an evolving definition to unconscionability.

Judicial inquiry into the commercial setting of an agreement is a much more complex affair than an inquiry into whether certain notes are widely used. The questions involved, however, are not beyond the competence of courts. The inquiry will involve expert testimony in rather complicated present circumstances such as prevailing commercial practices and the reasons for them. This type of evidence, while difficult to assemble, is not beyond the reach of the litigants or the grasp of the court. It is crucial to remember when reading section 2-302 that the drafters intended the inquiry into commercial practice to check the courts from undoing too much of the contract. The New York Law Revision Commission reported that section 2-302 was designed in part to inform a court's sense of restraint because the section would "permit the court to hear evidence as to commercial practices and commercial experiences to aid it in determining unconscionableness, rather than to decide merely by the judge's experiences and moral intuitions." The drafters did not want the courts to stray too far afield in any attempt at social engineering when they hear an unconscionability challenge. Instead, the comments to section 2-302 expressly direct the court to avoid tackling major polycentric problems like that of adjusting the balance of risks in an agreement that resulted from disparate economic power.

At the risk of making too pat a generalization about many decisions, the courts seemingly have performed rather well the first task set out for them in section 2-302. They have policed the bargaining process fairly well, identifying what is known as procedural unconscionability. Nevertheless, they have not performed the second stage of inquiry well at all in several decisions (much of the blame for this undoubtedly lies with litigation


177. Id.


counsel). In far too many unconscionability cases little informed discussion has taken place regarding the commercial context of a challenged contract. It seems in these cases that counsel often has failed to present evidence on commercial practice. In the very worst of these cases, the courts have proceeded to invalidate forms in wide use without even considering their commercial context.

A brief review of a few “classic” unconscionability decisions may help illuminate how the courts have gone off the track in interpreting section 2-302. It is unfortunate in some respects that Williams v. Walker-Thomas Furniture\(^{181}\) is the most widely read unconscionability decision. While there is little wrong with the actual holding of that opinion, the procedural posture of the case obscured the role commercial practice should play in deciding an unconscionability challenge.

In Williams, two low income customers of a furniture store, challenged the cross-collateral clause in the store’s form installment sales contract.\(^{182}\) The clause gave the store a continuing security interest in all the items bought by these customers on credit until the customers paid for all the items purchased.\(^{183}\) Thus, the clause enabled the store, after a default, to replevy all the items purchased by one of the plaintiffs even though she had paid $1,400 on her outstanding account of $1,800.\(^{184}\) The amount this plaintiff had paid already was more than adequate to cover a number of her earliest purchases but the cross-collateral clause made that irrelevant.

The District of Columbia trial and appellate courts both decided for the store on common law principles of contract. They turned aside the customers’ challenge that the cross-collateral clause was void as against public policy because Congress never had enacted any legislation to remedy “sharp practice and irresponsible business dealings.”\(^{185}\)

Reversing these decisions on appeal, the United States Court of Appeals for the District of Columbia ruled that courts could find the doctrine of unconscionability, as codified in the Code, in the common law of the District of Columbia.\(^{186}\) The widely-read opinion of Judge J. Skelly Wright followed a line of reasoning that closely tracked the two-step analysis the drafters of section 2-302 had in mind. First, Judge Wright asked whether there was a flaw in the bargaining process which led to the parties’

181. 350 F.2d 445 (D.C. Cir. 1965).
183. Williams, 198 A.2d at 915.
184. Williams, 350 F.2d at 447 n.1.
185. Williams, 198 A.2d at 916. The Uniform Commercial Code was not yet enacted in the District of Columbia.
186. Williams, 350 F.2d at 448-49.
contract. 187 Here, clearly, the parties did not bargain for a cross-collateral clause. It was complex and buried in a form agreement used with apparently unsophisticated customers. 188 Karl Llewellyn would certainly have recognized this agreement as the kind of adhesion contract he wanted to regulate with section 2-302. 189 Due to the procedural posture of the case, however, Judge Wright did not undertake the second task the drafters of the Code intended in any unconscionability analysis. Judge Wright did not review or discuss any evidence to test whether the cross-collateral clause was unfair in its commercial context because the trial court had never received any evidence of commercial practice. Judge Wright correctly remanded the case with instructions that the trial court consider the cross-collateral clause in the context of commercial practice. 190 The legal standard Judge Wright set for the trial court to weigh the evidence would have satisfied the drafters of the Code. Quoting Corbin, Wright directed the trial court to consider whether the cross-collateral clause was "so extreme as to appear unconscionable according to the mores and business practices of the time and place." 191

After Judge Wright's remand, we have no further report of the proceedings in Williams. We do not know what evidence the trial court received of the commercial context of the parties' contract. At this stage, the trial court might have compared the furniture store's installment sales contract with those of other retailers. The court might have asked if there were any differences between the forms used by retailers catering primarily to low-income as opposed to upper-income customers. The court might, then, have compared the rates of default among these different retailers. In short, the court might have created a record to inform its discretion on whether or not to enforce the cross-collateral clause. An appellate court could, then, have reviewed the trial court's decision based on this evidence, creating precedent informed by commercial reason as Llewellyn had intended.

There is no doubt judicial decisions on unconscionability handled in this manner will tax the capability of the courts. Indeed, one might reasonably claim this kind of inquiry has polycentric implications not suited for judicial resolution. It is important to remember, however, that the drafters of the Code designed the inquiry into the commercial context of a challenged agreement to check the unbridled discretion of the court. The inquiry forces the court to see the polycentric implications of its decision.

187. Id. at 449.
188. Williams, 198 A.2d at 915.
189. See Llewellyn, supra note 171, at 704-05.
190. Williams, 350 F.2d at 450.
191. Id. (quoting 1 A. Corbin, Contracts § 128 (1963)). Llewellyn thought of Corbin as his mentor and the two were extremely close. Llewellyn addressed Corbin as "Dad." See Origins and Evolution: Drafters Reflect Upon the Uniform Commercial Code, 43 Ohio St. L.J. 535, 540 (1982) (remarks of Soia Mentschikoff).
To use Professor Fuller's metaphor, a person is far less likely to disturb a visible spider-web than one stumbled into in the dark. In unconscionability cases, the courts have on occasion stumbled into areas the drafters of the Code never intended to lie within the reach of section 2-302. Some prime examples are the widely-read opinions in which courts have found price terms unconscionable. Once again, these cases show a line of reasoning in which the courts have pursued only the first part of the analysis the drafters of 2-302 intended. In these cases, the courts invariably find a largely unbargained for agreement. For example, when the seller employs a complicated form contract in door to door sales with relatively unsophisticated buyers. Contracts of this kind deserve scrutiny. The drafters of the Code, however, intended judicial examination of these contracts to include evidence of commercial practice resulting in an opinion that reaches a reasoned result based upon that evidence. Too often, in the price unconscionability decisions, that searching examination and explanation were neither undertaken nor given. On the contrary, one court saw its mission under section 2-302 as one of protecting the "poorest members of the community" from "gross inequality of bargaining power" and accordingly reduced the price term in the parties' contract.

It is, of course, extremely difficult to know what policies will lessen the condition of the poor. It seems clear, however, that the process of adjudication is not a well-chosen means of arriving at the proper policy. Courts simply do not have the fact-finding ability, the means of monitoring their decisions, or any expertise in dealing with the problem that would impart confidence in their decisions. Indeed, the courts may have made major policy mistakes in declaring contract clauses unconscionable primarily because these clauses seemed to weigh most heavily on the poor. Professor Schwartz has argued that unconscionability decisions may have made it more difficult for the poor to obtain credit, goods, and services by eliminating incentives for providers at the low end of these markets.

194. See, e.g., Jones, 59 Misc. 2d at 190, 298 N.Y.S.2d at 265.
195. This is particularly true with Jones, 59 Misc. 2d at 189, 298 N.Y.S.2d at 264, and Frostifresh, 52 Misc. 2d at 26, N.Y.S.2d at 757.
196. Jones, 59 Misc. 2d at 190, 298 N.Y.S.2d at 265.
studies suggest Professor Schwartz is right. A 1968 Federal Trade Commission study, for example, found that retailers selling appliances to low-income customers at prices much higher than those charged by other retailers catering to a middle class clientele made no greater profit, after taxes, than the other retailers due, primarily, to their higher bad-debt and collection costs. This study suggests these markets do operate efficiently.

The drafters of the Code never intended section 2-302 to authorize social engineering by the judiciary. On the contrary, the section requires a court to hear and weigh evidence of commercial usage before striking down any contract or clause as unconscionable. Evidence of this kind was intended to stay the hand of the court; to inform its discretion and sense of restraint. As the New York State Law Revision Commission reported upon completion of its study of the Code, the drafters intended section 2-302:

to provide a basis on which contracts might be preserved from destruction on grounds of unconscionability. Thus, the section . . . [was] aimed at tendencies, observable in some decisions, to determine unconscionability without adequate information as to business factors in the light of which the assertions of unconscionability might be refuted . . . .

The drafters understood that courts are ill-suited for certain tasks, such as finding an appropriate price for a commodity. In a study commissioned by New York prior to its adoption of the Code, Professor Patterson of Columbia University responded to criticism that "woozy words" like "unconscionability" would encourage "wildcat" judicial decisions by stating:

[T]he way to limit such vague norms is not to reject them as wrong but to exclude them as for the present problem irrelevant. Thus if some distressed buyer of goods, under the proposed Code, argues that the contract for sale was "unconscionable" because the price that he agreed to pay was excessive, the court's answer might well be that Section 2-302 is irrelevant; a court is not authorized to engage in price-fixing without an explicit authorization.

The price unconscionability cases demonstrate that some courts applying section 2-302 have not had the same sense of judicial restraint as the


drafters. The decisions of these courts often resulted from their failure to take note of commercial practice.

A recurring problem concerning the yellow pages phone directory has tempted some courts to forget the limits of adjudication. Once again, these courts' decisions purport to rest on the doctrine of "unconscionability," but lack any informed discussion of the commercial context which the drafters intended to inform that doctrine. Unsurprisingly, in upsetting a contractual clause widely used in commercial practice, the courts in these cases may have reached decisions with undesirable effects.

The problem arises when a telephone company makes a mistake in printing the yellow page phone directory. Most telephone companies print and distribute yellow page directories. These companies will accept virtually any advertisement for publication in the directory in return for nominal fees. Indeed, single listings are often free of charge. Due to the number of listings, however, a small number of printing errors occur in the directories each year. These mistakes, of course, can adversely affect the business or practice of the advertisers. To reduce the risk of substantial damage recoveries by these advertisers, every telephone company conditions its acceptance of an ad on the advertiser's waiving any claim for consequential damages arising from a printing error.

Advertisers hurt by printing errors frequently have contested the validity of these waivers. Most courts have upheld the validity of the damage limitation clause in the contract. Recently, however, a few courts have

202. The rate of error does not seem to exceed one half of one percent. Id. at 12; see also Discount Fabric House of Racine, Inc. v. Wisconsin Tel. Co., 117 Wis. 2d 587, 599, 345 N.W.2d 417, 423 (1984) (the phone company argued its rate of was one to two per thousand).
203. A typical clause limiting damages is: The Telephone Company's liability on account of errors or omissions of such advertising shall in no event exceed the amount of charges for the advertising which was omitted or in which the error occurred in the then current directory issue and such liability shall be discharged by an abatement of the charges for the particular listing or advertisement in which the omission or error occurred.

Southern Bell, 141 Ga. App. at 221 n.4, 233 S.E.2d at 13 n.4.
204. The rationale for each of these cases differs. See e.g., McTighe v. New England Tel. & Tel. Co., 216 F.2d 26, 30 (2d Cir. 1954) (construing Vermont law) ("In entering into the advertising contract, the telephone company ... was free to include in the contract a limitation of liability. . . ."); Vails v. Southwestern Bell Tel. Co., 504 F. Supp. 740, 743 (W.D. Okla. 1980) ("[T]his Court has relied on Oklahoma's Uniform Commercial Code as persuasive authority of the proper procedure in a case of this nature."); Wheeler Stuckey, Inc. v. Southwestern Bell Tel. Co., 279 F. Supp. 712, 715 (W.D. Okla. 1967) ("[T]he telephone company's liability, if any, arises from contract."); Georges v. Pacific Tel. & Tel. Co., 184 F. Supp. 571, 578 (D. Or. 1960) (construing Oregon law) ("[I]t may be that these
held the clause unconscionable, refused its enforcement, and permitted consequential damage recoveries against the telephone companies.205

These decisions emphasize the “take-it-or-leave-it” character of the bargain between the telephone company and the advertiser. They stress the telephone company’s “decisive advantage of bargaining strength.”206 One

parties ... cannot deal with each other at arm’s length ... But that ... is a matter for the Legislature and not the Court.”); Mendel v. Mountain States Tel. & Tel. Co., 117 Ariz. 491, 494, 573 P.2d 891, 894 (Ct. App. 1977) (holding that a refusal to enforce the clause “represents a departure from the majority view recognizing freedom to contract, is based upon faulty notions of the public interest, and is not in keeping with commercial realities”) (quoting Robinson Ins. & Real Estate, Inc. v. Southwestern Bell Tel. Co., 366 F. Supp. 307, 310 (W.D. Ark. 1973)); University Hills Beauty Academy, Inc. v. Mountain States Tel. & Tel. Co., 38 Colo. App. 194, 45, 554 P.2d 723, 726 (1976) (“[I]f we were to void this provision of the contract, it would make the telephone company an insurer against consequential damages by advertisers.”); Wilson v. Southern Bell Tel. & Tel. Co., 194 So. 2d 739, 741 (La. Ct. App. 1967) (“The parties may make their own contracts, and however unusual they may be ... they form the law between them.”) (quoting Leon v. Dupre, 144 So. 2d 667, 668 (La. Ct. App. 1962)); Baird v. Chesapeake & Potomac Tel. Co., 208 Md. 245, 254, 117 A.2d 873, 877 (1955) (“We do not deem this clause to be an escape clause which relieves a contractor from liability for violation of the contract. It merely limits liability.”); Mitchell v. Southwestern Bell Tel. Co., 298 S.W.2d 520, 523 (Mo. Ct. App. 1957) (“[T]he estimated loss was reached by estimate upon estimate, which left the whole matter in the realm of conjecture or speculation.”); State ex rel. Mountain States Tel. & Tel. Co. v. District Court, 160 Mont. 443, 450, 503 P.2d 526, 530 (1972) (“The mere fact of claimed unequal bargaining position does not render it so in today’s world of commerce, where situations of this nature are not uncommon.”); Federal Bldg. Serv. v. Mountain States Tel. & Tel. Co., 76 N.M. 524, 525, 417 P.2d 24, 25 (1966) (“Consequently the appellee was bound by its contract to be entitled to exactly nothing.”); Hamilton Employment Serv. v. New York Tel. Co., 235 N.Y. 468, 471, 171 N.E. 710, 711 (1930) (“[T]his court ... has gone on record to the effect that those who are not insurers 'have the power to limit their liability.'”); Gas House, Inc. v. Southwestern Bell Tel. & Tel. Co., 289 N.C. 175, 184, 221 S.E.2d 499, 505 (1967) (“There are many other modes of advertising to which the businessman may turn if the contract offered him by the telephone company is not attractive.”); Cunha v. Ohio Bell Tel. Co., 26 Ohio Misc. 267, 273, 271 N.E.2d 321, 324 (Ct. C.P. 1970) (citing McTighe v. New England Tel. & Tel. Co., 216 F.2d 26 (2d Cir. 1954)); Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 620, 138 S.E.2d 155, 157 (1964) (“In our opinion ... wholly a matter of private contract.”). See generally Annotation, Liability of Telephone Company for Mistakes in or Omissions from its Directory, 47 A.L.R. 3rd 882 (1986).


206. Discount Fabric House, 117 Wis. 2d at 593, 345 N.W.2d at 419-21.
court that found the clause unconscionable described the contest as one pitting "an individual versus a monopoly" involving a preprinted contract entered into "without any bargaining." In short, the opinions striking down these clauses usually emphasize the first line of an unconscionability analysis, an examination of the bargain. They tend, however, to ignore the second step. Disregarding the wide-spread use of these clauses in the trade, the courts striking them down do so with little or no discussion of the commercial context of the clause.

Virtually all the courts which have considered the wider commercial context of the yellow-pages agreement rule for the damage waiver. These courts have found that the limitation enables the companies to provide a convenient service at little cost. Courts upholding the clause generally have considered the telephone company's yellow pages as one of several alternative vehicles for advertising, not as a monopoly. Nevertheless, even these cases lack a thorough record on the commercial context of the agreement. They support the belief of the drafters of the Code, however, that judicial consideration of commercial factors tends to save contracts from invalidation for unconscionability.

One opinion in which a court struck down the clause after consideration of its commercial context highlights the weakness of adjudication in handling issues of this nature. In Discount Fabric House of Racine, Inc. v. Wisconsin Telephone Co., the Supreme Court of Wisconsin upheld a $9,000 negligence verdict for a fabric retailer against the telephone company. The courts upheld the verdict despite the contract between the parties, which limited the telephone company's liability to the cost of the retailer's ad. On appeal, the telephone company argued that the low cost of the ad was the quid pro quo for the limitation of liability. The Wisconsin Supreme Court perceived this argument as a "threat" that rates would rise if the court struck down the limitation on damages. Echoing an ancient maxim, the court refused to consider threatened consequences as a criteria for deciding the case. The court forgot the reason for this commendable principle of decision. The principle rests on the recognition that the courts have neither the fact-finding ability to predict nor the institutional means to monitor the consequences of their decisions. If courts limit their decrees

207. Rozeboom, 358 N.W.2d at 245.
208. Id. at 241.
211. Discount Fabric House, 117 Wis. 2d at 587, 345 N.W.2d at 417.
212. Id. at 598, 345 N.W.2d at 422.
213. Id. at 598, 345 N.W.2d at 422-23.
214. Id. The maxim would be fiat justia ruat coelum ("let right be done, though the heavens should fall"). BLACK'S LAW DICTIONARY 751 (4th ed. 1968).
to resolving disputes, the principle serves a laudable purpose: the court will focus only on the past events giving rise to the dispute and will ignore any future ill-effects. The principle has no place, however, if courts are trying to make social policy—arrange the future. After claiming to reject consequences as a criteria for deciding cases, the Wisconsin Supreme Court proceeded to act on its own intuitive sense of future effects. It opined that as the error rate in the yellow pages was small, the cost of the few mistakes each year could be spread among the phone companies subscribers so that “a true case of damages due to the company's neglect will not be an earth-shattering experience but rather one that is diluted many times.” The court may be right but what are the attributes of the court as an institution that would give us confidence in its “guess” of the most desirable manner of spreading risk? The other subscribers and rate-payers of the telephone company whose views were never presented to the court and yet whose telephone expenses will increase as a result of the courts decision might well question the court’s competence to pass on this issue.

Ironically, the Wisconsin Supreme Court refused to take notice in the case that the telephone company had filed with the State’s Public Service Commission a tariff limitation on its liability for error in phone directories. The court refused because the pleadings in the case had treated the dispute as “a matter for private contract.” The irony of course is that the supreme court proceeded to upset a central clause of that contract, the limitation of liability. The decision neatly presented a choice among three alternative social ordering mechanisms. The Wisconsin Supreme Court might have chosen, as most courts have, to let the parties’ own law govern, that is, to enforce the agreement entered into between the two commercial parties before the court. Alternatively, if the court felt the phone company’s publication of the directory was so cloaked with the public interest as to demand public regulation, it might have deferred to the Public Service Commission, an agency that reviews the phone company’s rates. The

215. Mansfield employed the maxim in an opinion emphasizing the principle of judicial restraint—respect for the policy making ability of other bodies: Unless we have been able to find an error which will bear us out to reverse [the decision below] it must be affirmed. The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say “fiat justia ruat coelum.” The constitution trusts the King with reasons of State and policy.


216. Discount Fabric House, 117 Wis. 2d at 599-600, 345 N.W.2d at 423.

217. Id. at 591, 345 N.W.2d at 419.

218. Id. at 592, 345 N.W.2d at 419.

219. See supra note 204.

220. For example, Judge Medina deferred to the judgment of the Vermont Public Service Commission in McTighe v. New England Tel. & Tel. Co., 216 F.2d 26, 29 (2d Cir. 1954).
court, however, chose the worst alternative from the standpoint of institutional competence. It decided to police the agreement on its own although it surely has neither the expertise nor understanding of the problem one might expect from the Public Service Commission or the parties.

We see then with unconscionability that the drafters intended every court faced with the issue to examine the commercial context of the disputed agreement or clause. The drafters intended this examination to inform the discretion section 2-302 confers upon the court.

V. Conclusion

In an area of law not involving the Constitution, the notion of judicial restraint is grounded upon an understanding of the role the courts play among other forms of social ordering. There is a fair degree of consensus among lawyers that the courts are ill-suited for certain tasks but extraordinarily well-adapted for others. As a mechanism for resolving disputes based upon claims of right and involving a careful examination of historic facts, few would question the unique competence of the courts. On the other hand, the courts have a number of institutional disadvantages in setting social policy which implicates the interests of persons not before the court. Social policy decisions generally require the evaluation of socio-economic predictions rather than facts. Such decisions are often best shaped by compromise rather than a "winner-take-all" claim of right, and benefit by future oversight and adjustment.

The drafters of the Code had genuine concerns over the institutional competence of the courts. Indeed, the principal draftsman of the Code, Karl Llewellyn, attempted in his earliest drafts to enhance the courts' ability to fashion what he perceived to be sound commercial law. As we have seen, Llewellyn proposed such innovations as merchant juries and systematic adoption of trade association rules. While these innovations were never adopted, Llewellyn's approach to commercial law was accepted. The Code is infused with the provisions directing the courts to respect commercial practice and see it as a source of law. Along with the Code's regard for private agreements, this approach guides a judge, who is sensitive to it, toward an informed sense of judicial restraint. The Code, in short, mandates respect for other forms of social ordering, that is, commercial customs and private contracts.

The Code's focus on commercial practice is important in another respect. The emphasis imparts an important measure of flexibility to the statute. It does so by relying on real strengths of adjudication—its piecemeal nature and its ability to find and evaluate historic facts. While courts have difficulty fashioning rules based upon predictions of future events, they can quite capably find customs. The rules of evidence and the judicial process are easily directed toward this kind of inquiry. As custom is received in the piecemeal fashion of the common law, our commercial law gains an evolving
flexibility often difficult to achieve in a statute. Llewellyn's Code was designed and is best seen as a framework for common law development informed by commercial practice.

We have seen that the Code and its official comments do not countenance a break with commercial practice except where the court is likely to be adequately equipped for the task. The invalidating provisions of the Code all hinge upon a fact specific inquiry involving primarily the parties before the court; fraud, bad faith, duress and unconscionability (at least as the drafters intended the doctrine to operate). Where a proposed break with commercial practice involves polycentric effects and persons not parties to the dispute before the court, the Code does not permit judicial action. The list of policies which inform the Code and which are to guide a judge in making law under the Code do not include protection of consumers or the redistribution of wealth. The Code wisely excludes these policies as judicial concerns because courts are unlikely to serve them very well. In general, the other law-making organs of our society are far better equipped to pass on questions involving these concerns. They have repeatedly done so in recent years with some success while judicial experiments along the same lines have often been ineffectual.

In short, the approach the Code requires of a judge interpreting its provisions involves an informed sense of restraint while preserving the adaptability of our commercial law.