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## Comment: More in Defense of U.C.C. Methodology

Robert A. Hillman\*

As James Bowers notes in his interesting and insightful contribution to this symposium,<sup>1</sup> the Uniform Commercial Code ("U.C.C." or "Code") methodology has recently come under attack on many fronts.<sup>2</sup> For example, Robert Scott, in a thoughtful and provocative series of articles, challenges the strategy of attempting to achieve substantive uniformity by codifying commercial law, particularly in the manner prescribed by Karl Llewellyn for Article 2 on sales.<sup>3</sup> Another line of criticism questions whether certain contextual aids, such as trade custom, actually exist.<sup>4</sup> A third source of complaints focuses on the negative incentives on the parties created by specific contextual sources of interpretation. For example, a prominent claim is that Article 2's reliance on the parties' course of performance makes the parties more rigid and inflexible in their dealings.<sup>5</sup>

Bowers focuses much of his defense of the U.C.C. on rebutting Scott's plain-meaning rule orientation. In Part I of this comment, I briefly summarize each writer's position and then add a few of thoughts of my own. In Part II, I respond to the claim that the Code's invocation of course of performance evidence creates perverse incentives.<sup>6</sup>

### I. SCOTT AND BOWERS

Although U.C.C. Article 2 is "formally uniform," having been adopted in at least substantial part in all fifty states,<sup>7</sup> Scott asserts that,

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1. James W. Bowers, *Incomplete Law: On the Inevitable Inadequacies of Codes, Civil and Commercial*, 62 La. L. Rev. 1229 (2002) [hereinafter "Bowers"].

2. On "true Code methodology," see William Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. Ill. L. F. 291, 292-99.

3. I focus here on Robert E. Scott, *The Uniformity Norm in Commercial Law*, in *The Jurisprudential Foundations of Corporate and Commercial Law* 149 (Jody S. Kraus & Steven D. Walt, eds. 2000) [hereinafter "Scott"].

4. Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. Chi. L. Rev. 710, 713 (1999).

5. Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. Chi. L. Rev. 781, 784 (1999) [hereinafter "Ben-Shahar"]. See also Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. Pa. L. Rev. 1697, 1724 (1996).

6. For a critique of the "nonexistence" thesis, see Jody S. Kraus & Steven D. Walt, *In Defense of the Incorporation Strategy*, in *The Jurisprudential Foundations of Corporate and Commercial Law* 200-07 (Jody S. Kraus & Steven D. Walt, eds. 2000) [hereinafter "Kraus & Walt"].

7. Editor's Note: Louisiana has not adopted the uniform version of the U.C.C. Article 2 in whole, but has revised the Louisiana Civil Code law of Sales to parallel

because of its methodology, the U.C.C. is "substantively" non-uniform, meaning that decisions applying it are inconsistent over time and in different jurisdictions.<sup>8</sup> The problem, according to Scott, is that the U.C.C.'s "incorporation strategy" of directing courts to incorporate contextual evidence when they interpret and fill gaps in contracts produces inconsistent, non-uniform judicial decisions,<sup>9</sup> and decreases the supply of reliable standardized gap-filling terms.<sup>10</sup> In contrast, Scott claims that the common law's "plain meaning" rule, which resists "the implications of contextualization" and "invoke[s] the primacy" of express terms,<sup>11</sup> has been more successful in achieving "a fairly uniform menu of standardized terms . . . and a stable (i.e., uniform) interpretation of express terms."<sup>12</sup>

Scott relies on empirical, albeit derived from "casual observation,"<sup>13</sup> proof of the superiority of the "plain meaning" approach in achieving uniform results. Scott asserts that reported cases show that "the risk of unpredictable interpretation has greatly increased for commercial parties under the Code."<sup>14</sup> Although Scott acknowledges that the Code includes several admonitions to disregard extrinsic evidence that contradicts the written contract,<sup>15</sup> he argues that "courts have frequently abandoned this principle on the grounds that there is almost always some contextual argument upon which seemingly inconsistent terms can be rationalized."<sup>16</sup> Moreover, Scott maintains that parties who wish to protect their written contract terms from contextual attacks have a "considerable additional burden."<sup>17</sup>

According to Scott, not only is contract interpretation unpredictable, Article 2's contextual approach also "undermines the ability of courts to increase the supply" of standard, express gap-filling terms.<sup>18</sup> This is because "[t]he abandonment by the Code of the plain-meaning rule has resulted in decisions that strip terms of their meanings and thus erode the reliability of standardized express terms."<sup>19</sup> For example, suppose a court holds that evidence that a buyer has repeatedly paid for unloading and storage of goods

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U.C.C. Article 2. See James W. Bowers, *Incomplete Law*, *supra* note 1, at 1231 n.12 and n.13.

8. Scott, *supra* note 3, at 153.

9. *Id.* at 164.

10. *Id.* at 165.

11. *Id.* at 167.

12. *Id.* at 150-51.

13. Scott, *supra* note 3, at 164.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 165.

18. *Id.*

19. Scott, *supra* note 3, at 165.

overrides an express standardized term (F.A.S.) that allocates unloading and storage expenses to the seller. Scott asserts that such a decision undermines the reliability of the F.A.S. term and creates disincentives for parties to use the term in future contracts.<sup>20</sup>

Scott mentions several reasons for judicial confusion in applying the U.C.C.'s "incorporation strategy." He doubts that courts are equipped to incorporate a commercial subgroup's practices and experiences in an efficient manner.<sup>21</sup> In addition, courts fail because of "the fact-specific nature" of commercial disputes, which discourages generalization.<sup>22</sup> Moreover, Scott believes that Article 2's solution to the fact-specificity hurdle, namely the invocation of the "supereminent norm of commercial reasonableness," also disappoints because, in applying it, courts do not "incorporate commercial norms," but instead "make deductive speculations" based on internal Code policy.<sup>23</sup>

In contrast to the morass of Code interpretation and gap-filling, Scott asserts the relative certainty of common law results. Scott claims that "a strong majority of jurisdictions . . . rigorous[ly] adhere[] to the plain-meaning rule," and have been "unwilling to accept the implications of contextualization."<sup>24</sup> Under the plain meaning approach, according to Scott, parties have the incentive to choose "clear, standardized" terms.<sup>25</sup> As a result, the common law approach is more likely to generate "a menu of standard form invocations," written by the parties and approved by the courts.<sup>26</sup> Next, Scott contends that under the common law "trade organizations and other private intermediaries," have supplied contract terms "that have been subject to remarkably uniform interpretation by state courts."<sup>27</sup> On the other hand, the code has been much slower in developing similar standardized options.<sup>28</sup> In short, Scott finds empirical proof that the common law has produced clearer and more certain understandings of contract terms and superior sources of filling gaps than has Article 2.

In response to Scott, Bowers argues, not that the Code's contextual orientation has been successful in achieving uniform interpretation of terms (except in the sense that courts uniformly

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20. *Id.*

21. *Id.* at 161.

22. *Id.* at 166.

23. *Id.*

24. Scott, *supra* note 3, at 167.

25. *Id.* at 162.

26. *Id.*

27. *Id.* at 168. Scott does not cite cases.

28. *Id.* at 168. *See also id.* at 150 ("Under Article 2, there has been very little production of standardized default rules and other standard form prototypes.").

incorporate sources outside of written contracts) or reliable standardized express provisions, but that the Code's methodology is nonetheless inevitable and desirable if Article 2's goal is to enforce as closely as possible the parties' intentions.<sup>29</sup> Bowers finds Scott's "plain meaning" orientation unpersuasive<sup>30</sup> and relies on legal realism's insights, including that legal decisions are a function of the "values taken on" by the facts of the case,<sup>31</sup> that no two cases are factually alike,<sup>32</sup> that words are meaningless out of context<sup>33</sup> or devoid of evidence of their purpose,<sup>34</sup> and that, by virtue of their nature as commitments projected onto an uncertain future, contracts inevitably are incomplete.<sup>35</sup> More than that, Bowers emphasizes the costs parties will incur in accommodating to dictionary definitions. Specifically, he argues that parties "are likely to be frequently trapped with inaccurate dictionary definitions of words which they efficiently use in all the rest of their dealings in a lexicographically deviant sense."<sup>36</sup>

Because of Bowers' focus on legal realism, however, he mostly fails to challenge Scott's empirical comparisons of Article 2 and

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29. Bowers, *supra* note 1, at 1234-35, 1239-40.

30. See also Kraus and Walt, *supra* note 6, at 234 ("[W]e suspect that very few terms have a precise and unambiguous 'plain meaning.' When meaning seems clear, it is usually because context makes it so.").

31. Bowers, *supra* note 1, at 1240.

32. *Id.* at 1242-43.

33. *Id.* at 1240-42.

34. *Id.* at 1273.

35. *Id.* at 1238-39, 1244.

36. Bowers, *supra* note 1, at 1239. Scott is well aware of costs associated with the plain-meaning rule. Under the plain meaning approach, "contracting parties will be required to incur the costs of developing standard form specifications for the many customary understandings that might otherwise have been incorporated by default." Scott, *supra* note 3, at 162. Scott simply believes the costs of the Code incorporation strategy is higher.

Bowers' most powerful example of the benefits of a contextual orientation is in his section on "distributional dissent." Bowers points out that in their specifications building contractors promise "to provide perfection," but that parties contracting with respect to such specifications "understand them to be subject to some trade customs which grant tolerances from perfection." Bowers, *supra* note 1, at 1272. As Bowers points out, the "plain meaning" approach, taken literally, precludes consideration of the trade customs. Moreover, it may be too costly for the parties, *ex ante*, to define with precision the degree of perfection required.

To illustrate to my class the importance of context, I often present an example from the world of sports. Two of my favorite former New York Knicks players, Walt Frazier and Earl Monroe, began their careers as rivals on different teams. I remember listening to a radio broadcast in which the announcer said, "Frazier and Monroe are trading elbows." Because of the context, no one listening wondered whether my heroes were undergoing limb transplant operations.

common law.<sup>37</sup> With respect to this set of issues, Scott recognizes that more work needs to be done: "It is clear that more analysis, both theoretical and empirical, is required before anyone can safely call for radical reform."<sup>38</sup> Scott therefore challenges defenders of the Code to further investigate his tentative conclusions.

Indeed, consider some of the issues of an empirical nature raised by Scott's analysis: Do decisions under the Code create a large burden on parties who seek to protect their written terms? Look at the wording of the Code. Under section 1-205(1), a course of dealing arises only when the "sequence of previous conduct . . . fairly . . . establishe[s] a common basis of understanding." Under section 1-205(2), a usage of trade arises only when a practice "justif[ies] an expectation that it will be observed." Under Section 1-205 (4), express terms trump usage of trade and course of dealing evidence when the evidence is inconsistent with the express language. Under section 2-208(1), a course of performance requires "repeated occasions for performance." Under the same section, the party losing express contract rights must have "knowledge of the nature of the performance" *and* an opportunity to object. Moreover, "knowledge" is defined in section 1-201(25) to mean "actual knowledge," a subjective test. Finally, section 2-208(2) provides that express terms prevail over a conflicting course of dealing. Without a thorough analysis of a large group of cases, why should we believe that courts are systematically ignoring or misapplying these clear and direct commands?<sup>39</sup> Not only is the language clear enough to predict judicial compliance, I suggest in the second part of this comment that there is good reason to believe, at least with respect to incorporation of evidence from course of performance,<sup>40</sup> that courts generally follow the Code admonitions and allow such evidence to modify express terms only when the evidence strongly suggests the parties intended that result.<sup>41</sup>

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37. "The dream of 'substantive uniformity' which Scott berates the Code for failing to achieve is a straw man." Bowers, *supra* note 1, at 1239.

38. Scott, *supra* note 3, at 175.

39. "[T]here is no reason to believe that Article 2 itself frequently incorporates informal norms." Kraus & Walt, *supra* note 6, at 209.

40. Critics of the U.C.C. are not always careful to distinguish among the various components of the incorporation strategy, as if trade custom, course of dealing, and course of performance always work in the same fashion to defeat expectations or to create negative incentives. See, e.g., Ben-Shahar, *supra* note 5, at 787 n.26 (referring to both course of dealing and course of performance as "past practices"). See also *id.* at 789-90. The issues presented by incorporating one type of evidence, however, may be very different from the problems presented by incorporating another. For example, a court may honor a contract term barring evidence of an existing trade custom, but may strike a term barring evidence of a subsequent course of performance on the theory that the parties *ex post* conduct shows their intention to disregard the written term. See *id.* at 791.

41. See *infra* notes 62-68, and accompanying text.

Are court interpretations of contracts and gap filling under the Code generally unpredictable so that they "strip [contract] terms of their meaning?"<sup>42</sup> This certainly did not appear to be the position of businesses participating in the Article 2 revision process that devoted lots of time and effort to defending (in business to business transactions) existing Article 2.<sup>43</sup> Businesses almost uniformly worried that proposed revisions undermined the relative certainty of transacting under existing Article 2. Moreover, I am unaware of any effort by business to overturn the Code's use of trade custom, course of dealing, and course of performance.

Are case decisions interpreting contracts under the common law more consistent and, for that matter, is the common law still so wedded to "plain meaning" jurisprudence?<sup>44</sup> As to the former question, Scott's position invites a systematic analysis and comparison of Article 2 and common law cases. Without more investigation, Bowers points out that it is not self evident why courts would be more consistent and accurate if the source of interpretation is a dictionary rather than a trade manual or practice.<sup>45</sup>

As to whether the common law follows the plain-meaning rule, many common-law cases look to the U.C.C. for guidance by analogy.<sup>46</sup> Moreover, the Restatement Second of Contracts has taken up the U.C.C.'s contextual approach.<sup>47</sup> In addition, common law

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42. Scott, *supra* note 3, at 165.

43. From late 1994 until 2000 I attended the Article 2 revision committee meetings as a consultant for the American Automobile Manufacturers Association (AAMA) and its successor, the Alliance of Automobile Manufacturers. We often met with most of the other businesses participating in the drafting committee meetings. A primary business concern throughout (evidenced by their letters to the drafting committee) was whether the proposed revisions, such as to the statute of frauds and parol evidence rule, would decrease the reliability of business-to-business written contracts (in the case of AAMA, for example, with its suppliers of components). Businesses believed that their written contracts were relatively insulated from attack under existing Article 2. Obviously, this is not the kind of empiricism I call for in the text, but I mention these observations because others, including both Bowers and Scott, also have drawn lessons from the U.C.C. revision process. See, e.g., Bowers, *supra* note 1, at 1265-66; Scott, *supra* note 3, at 179 n.27.

44. Scott, *supra* note 3, at 162-64.

45. Bowers, *supra* note 1, at 1238 (referring to this as an "empirical question"). See also *id.* at 1255 ("formalistic techniques" may be a "source of error."); Kraus & Walt, *supra* note 6, at 194 ("[I]n many cases, the commercial norm and 'plain-meaning' candidates will be somewhat vague and ambiguous.").

46. See, e.g., *R & L Acoustics v. Liberty Mut. Ins. Co.*, 2001 Conn. Super. LEXIS 2854 at 18.

47. Scott acknowledges this, but does not believe that courts have followed the Restatement's lead, at least not with the fervor of Article 2 courts. Scott, *supra* note 3, at 163-64 ("[T]he tide of expansive incorporation has not swept away the restrained approach of the common law tradition."). But see, e.g., *Eskimo Pie Corp.*

waiver rules often create the same kind of issues with respect to the superiority of written terms as do Code sources of evidence such as course of performance.<sup>48</sup> Although it is probably true that common law courts, on the basis of the parol evidence and “plain meaning” rules, generally still preclude evidence of *prior negotiations* that contradict a writing,<sup>49</sup> I would wager that a rigorous empirical survey of common law cases would show that, on the whole, courts are quite receptive to evidence of custom and the parties’ course of dealing. For that matter, the common law parol evidence rule is so riddled with exceptions that I doubt that it contributes very much at all towards enhancing the certainty of written contracts.<sup>50</sup> Furthermore, the Code’s parol evidence rule would also bar evidence of prior negotiations in much the same way as common law courts.<sup>51</sup> In general, my hunch is that the Code and the common law are not as distinct as Scott believes.

Finally, has the common law, more than the Code, inspired more “standardized options” generated by private organizations and, if so, what is the significance of this? As with his other observations, Scott sets the empirical agenda for those investigating U.C.C. methodology.<sup>52</sup> If the U.C.C. is less successful in breeding standardized terms, then we must ask whether this should be attributed to Code methodology, the nature of contracts for the sale of goods, the nature of the parties, or to something else.

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v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 993 (S.D.N.Y. 1968) (summarizing pre-Code “objective” interpretation rules in New York and stating, “the meaning to be attributed to the language . . . is that which a reasonably intelligent person acquainted with general usage, custom and the surrounding circumstances would attribute to it.”).

48. See, e.g., E. A. Farnsworth, *Contracts* 540-42 (3d ed. 1999).

49. *Id.* at 478-80.

50. See, e.g., *Hield v. Thyberg*, 347 N.W.2d 503, 507 (S.Ct. Minn. 1984) (“The sometimes harsh effect of [the parol evidence] rule is . . . ameliorated by a host of exceptions.”); R. Summers & R. Hillman, *Contract and Related Obligation* 663 (4th ed. 2001).

51. See U.C.C. § 2-202 (2002).

52. Scott’s evidence that the U.C.C. has been unsuccessful in producing standardized terms is limited. He notes that the National Grain and Feed Association has “opt[ed] out of the Code entirely.” *Id.* at 168. However, as Kraus and Walt point out “the superiority of the NGFA for NGFA members has no bearing on the merits of Article 2’s incorporation strategy. . . . The ability of NGFA members to opt out of the Code’s regime in part vindicates, rather refutes, the design of Article 2 by demonstrating the efficacy of its opt-out provisions.” Kraus & Walt, *supra* note 6, at 216.

To the extent that the Code turns out to be less predictable than common law, an argument can be made that parties engaged in a U.C.C. transaction might want to draft even clearer terms to try to escape the imbroglio of the Code, just as parties seek to settle disputes to avoid the uncertainties of jury verdicts. See, e.g., Stewart Macaulay, *An Empirical View of Contract*, 1985 Wis. L. Rev. 465, 476.

Resolution of all of these questions and more<sup>53</sup> awaits additional empirical research, including field studies and case analysis. Until this work is done, we must defer reaching a definitive conclusion on which approach, plain meaning or incorporation, is superior.

## II. INCENTIVES CREATED BY ALLOWING EVIDENCE OF COURSE OF PERFORMANCE

I want to devote my last few pages to the criticism that the Code's incorporation methodology creates negative incentives. Specifically, I shall look at the incentives created by incorporating evidence of the parties' course of performance in interpreting a contract.<sup>54</sup>

Critics claim that this approach makes the parties inflexible and uncooperative.<sup>55</sup> These critics reason that acting flexibly costs parties the right, in the future, to insist on performance according to the express contract terms. By accepting a late performance, for example, a party loses both the immediate benefits of performance on time and also the right to insist on timely future performances.<sup>56</sup> A legal order that enforced the written terms regardless of a party's acquiescence in late performance would have no effect on later installments. Therefore, to avoid losing rights as to future performances, parties must be more rigid under Article 2 than under law that ignores the course of performance.<sup>57</sup>

It is very unlikely that the U.C.C.'s incorporation of course of performance evidence leads to party rigidity. The costs of rigidity are likely to be high—consider, for example, the costs associated with the other party's reaction to inflexibility, namely to become uncooperative, inflexible, and perhaps to look for a new contracting

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53. I leave for another day a discussion of the alleged failure of judicial application of the "supereminent norm of commercial reasonableness." Scott, *supra* note 3, at 166.

54. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1812-14 (1996) [hereinafter "Bernstein"]; Ben-Shahar, *supra* note 5, at 782-85.

55. Ben-Shahar, *supra* note 5, at 784; Bernstein, *supra* note 54, at 1812-13.

56. "The Code's course of performance provision . . . increases the cost of agreeing to forgiving adjustments. It creates a significant risk that a series of such adjustments will be found to constitute a course of performance. . . ." Bernstein, *supra* note 54, at 1812.

57. Bernstein, *supra* note 54. In several pages, Ben-Shahar constructs an interesting model that challenges the rigidity thesis but, after relaxing many of the assumptions of the model, he ultimately tentatively supports the thesis in part because he believes the Code increases the need for and costs of monitoring and of protecting one's rights. Ben-Shahar, *supra* note 5, at 796-805. I discuss these concerns in the text that follows.

partner in the future. Moreover, a low-cost alternative to rigidity exists for those parties who do not want to lose rights,<sup>58</sup> namely reserving those rights.<sup>59</sup>

Parties who reserve rights may themselves signal a lack of trust;<sup>60</sup> but certainly reserving rights should cause the other party less consternation than refusing to deal at all and, therefore, should cost the party reserving rights less than if that party refused to deal. Parties who reserve rights also incur the cost of providing notice and the cost of judicial error in ascertaining their intentions, but these costs are likely to be low. For example, a party accepting a late performance can easily reserve her rights to performance on time in the future—a verbal protest should do.<sup>61</sup>

Moreover, little case support appears to exist for the notion that courts make lots of mistakes in determining whether a party has reserved rights.<sup>62</sup> In fact, the principal case support supplied by proponents of the rigidity theory tends to show that courts establish a course of performance only after repeated and clear performances, just as the U.C.C. directs.<sup>63</sup> Professor Ben-Shahar, the author of a leading piece on the rigidity theory, asserts that course of performance evidence “will *often* be allowed to vary and trump the express terms,”<sup>64</sup> as if contract terms were somehow generally at risk.<sup>65</sup> But most of Ben-Shahar’s case support involves a party’s *repeated* performances inconsistent with the written terms, without protest,

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58. Many parties may be willing to lose rights because they will recover their costs and then some when the other party cooperates in the future.

59. “[T]he cost of verbal objections—may often be trivial.” Ben-Shahar, *supra* note 5, at 808. Under U.C.C. § 2-208(1), the course of performance must be “accepted or acquiesced in *without objection*.” (emphasis supplied). See *supra* notes 37-38, and accompanying text.

60. Ben-Shahar, *supra* note 5, at 816.

61. See U.C.C. § 2-208(1) (2002) (“any course of performance accepted or acquiesced in *without objection* shall be relevant to determine the meaning of the agreement”).

62. “Courts have . . . consistently held that rights are waived only when the breached-against party did not protest the violation.” Ben-Shahar, *supra* note 5, at 808. But see Jason Scott Johnston, *Should the Law Ignore Commercial Norms? A Comment on the Bernstein Conjecture and Its Relevance for Contract Law Theory and Reform*, 99 Mich. L. Rev. 1791, 1803 (2001) (“[T]here is much too high a probability that courts will err in determining what the parties have actually done or said in their prior dealings.”); Bernstein, *supra* note 54, at 1813 (it will be “difficult” for parties to “negate the influence” of their conduct on how courts interpret contracts).

63. See *infra* notes 65-68 and accompanying text.

64. Ben-Shahar, *supra* note 5, at 787 (emphasis supplied).

65. See also Bernstein, *supra* note 54, at 1813 (“In practice . . . it is difficult for transactors to completely and reliably negate the influence of actions and adjustments on the interpretive process.”).

from the other party. In *Margolin v. Franklin*,<sup>66</sup> for example, an automobile seller agreed to and accepted installment payments at least eight days late for seven months, without protest, then repossessed the car the next month after the purchasers failed to pay for eight days after the contract time for performance.<sup>67</sup> In *Oregon Bank v. Nautilus Crane & Equipment Corporation*,<sup>68</sup> despite a warranty disclaimer in the contract, the seller authorized repairs and assured the buyer that its account would be credited for the cost of repairs. The parties met three times per week, on average, for over a year without the seller asserting the warranty disclaimer. Even with these facts, the court did not decide the disclaimer was unenforceable, it merely denied summary judgment for the seller. The evidence supplied by both of these cases is persuasive in demonstrating that the party forfeiting contract rights intended to agree to new terms or, at least, had lulled the other party into reasonably believing that intention.<sup>69</sup>

Does the Code increase the costs of monitoring to alert a party to the prospect of losing rights through a course of performance? If courts establish a course of performance only after "repeated occasions for performance" and if the party seeking to enforce the written contract loses rights only if she has "actual knowledge of the nature of the performance *and* an opportunity to object,"<sup>70</sup> the Code incorporation approach should not create incentives to invest too heavily in monitoring. In short, a party would be charged with a course of performance only when she knew about the other party's deviant performance and failed to reserve rights. Accordingly, there is little need to monitor closely to avoid losing rights. In fact, perhaps parties would have an incentive not to monitor in order to avoid gaining "actual" knowledge of a deviant performance.<sup>71</sup>

The overall costs of Code incorporation of course of performance evidence should therefore be low. Let us compare the results in a regime that ignored course of performance in favor of the plain

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66. 270 N.E.2d 140 (1971).

67. Although the seller claimed to have sent "reminder notices," the court accepted one of the purchaser's testimony that the seller sent only one notice and then told the purchaser the notice was sent by mistake. *Id.* at 142. The court found that "the testimony and exhibits indicate a pattern of conduct on the part of [the seller] to accept payments from the [purchasers] on or before the 27th day of each month." *Id.*

68. 683 P.2d 95 (1984).

69. Ben-Shahar discusses only a few additional cases, but still asserts that course of performance has trumped express language "in a long line of cases" and "in a wide variety of circumstances." Ben Shahar, *supra* note 5, at 790.

70. See *supra* notes 37-38 and accompanying text.

71. There may be other reasons for monitoring, of course. In addition, if a party intentionally avoided monitoring perhaps a court would charge that party with the knowledge she should have had.

meaning of a contract. Parties would not have to reserve rights and incur the minor costs of doing so. However, to make legally enforceable alterations of their arrangement they would have to bear the costs of entering a formal modification agreement. Such costs might be significant. For example, consider the costs of planning and drafting a new express contract each time the parties sought to alter the time for performance by a few days. If the parties dispense with a written contract modification in situations that do not require a writing, consider the costs of judicial error concerning the parties' intentions, which, in this instance, may be significant. Without a writing or evidence of consideration, which is not necessary to modify a sales contract but which is a primary source of evidence of an intention to contract, courts may be prone to make mistakes determining whether the parties intended to enter an enforceable modification agreement.<sup>72</sup>

Finally, suppose for the sake of argument that the costs and benefits to the parties of incorporating course of performance evidence outlined above (the Code approach) were about equal to the costs and benefits to the parties of barring the evidence (the "plain meaning" strategy). To save transaction costs, the default rule should then depend on whether more parties are likely to want to make legally enforceable adjustments to their contracts or more parties want to preserve their initial contract rights, even if, as a matter of comity, they may accede to a defective performance.<sup>73</sup> As with the issues raised in Part I of this comment, the answer to this empirical question is not clear.<sup>74</sup> Some writers are beginning to produce impressive empirical research on related questions, focusing on particular industries<sup>75</sup> and perhaps someday we will have a definitive answer. In the meantime, the literature on relational contract offers a clue. The thrust of that school is that parties often voluntarily accede to a defective performance, in part because they believe that people

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72. Modification agreements do not require a writing, except when the Statute of Frauds applies, itself a complex and confusing doctrine, nor do modification agreements require consideration to support them. See U.C.C. § 2-209(1) and (3) (2002).

73. See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 Mich. L. Rev. 8, 52 (1993). Other default-rule approaches are possible. For example, the law could assign the default rule based on minimizing the cost of bargaining away from that rule. See *id.* Under this test, bargaining away from the complex Code approach to the simplicity of plain meaning should be cheaper than the other way around. *Id.* at 53.

74. "Some commercial practices are indicative of 'formal' norms, which parties intend to be given legal effect, while others indicate 'informal' norms, which parties intend not to be given effect." Kraus & Walt, *supra* note 6, at 207.

75. See, e.g., Bernstein, *supra* note 54.

*should* be flexible and cooperate<sup>76</sup> and in part because they believe that the benefits of being flexible (which include future accommodations of their own needs by the other party) outweigh the costs.<sup>77</sup> The norms arising from such ongoing relations do not suggest that parties intend to reserve the legal right to fall back on previous terms.<sup>78</sup> If a majority of Article 2 cases are relational, the Code therefore may supply the correct default rule even if the costs and benefits to the parties of law with and without course of performance are otherwise about equal.

#### CONCLUSION

Code critics have done an admirable job of raising important issues and focusing the debate on critical aspects of U.C.C. methodology. If the critics are correct, then the Code has been a colossal failure. James Bowers argues, however, that Code methodology ameliorates the problem of incompleteness and, hence, unpredictability in judicial interpretation. In this comment, I have sought to aid Bowers in manning the barricades in defense of Article 2 by calling for more empirical research before anyone reaches a final conclusion on the U.C.C.'s effectiveness.

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76. See Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 Cornell L. Rev. 717, 724-25 (2000).

77. Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 Duke L. J. 1, 5-6. See also Victor P. Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 Wis. L. Rev. 527, 532.

78. See Kraus & Walt, *supra* note 6, at 210 ("Our speculation is that observable patterns of commercial behavior more often than not reflect formal [which the parties intend to be enforceable] rather than informal norms [which the parties do not intend to be enforceable].").