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## Modeling the Uniform Law "Process": A Comment on Scott's *Rise and Fall of Article 2*

Charles W. Mooney, Jr.\*

### I. INTRODUCTION

I was honored by the invitation to offer oral and written comments on Robert Scott's essay<sup>1</sup> at the recent symposium on the unification of commercial law sponsored by the *Louisiana Law Review* and the Louisiana State University's Paul M. Hebert Law Center.<sup>2</sup> This was an especially rewarding opportunity. Not only was the symposium an excellent academic conference but also several of the most respected commercial law scholars presented papers and offered comments at the symposium. Moreover, the symposium was an appropriate and well deserved tribute to my friend and fellow reform-minded academic, Chancellor *Emeritus* William D. Hawkland.

In his characteristically careful and thoughtful essay, Professor Scott examines the process that so far has failed to produce a revision of Uniform Commercial Code ("U.C.C.")<sup>3</sup> Article 2 (Sales). He considers the process from two perspectives. First, he explains that the prevailing deadlock was predictable as indicated by the prediction in his earlier article (writing with Alan Schwartz) dealing with private legislatures such as the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and The American Law Institute ("ALI") (the co-sponsors of the U.C.C.).<sup>4</sup> Second, he examines the

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\* Professor of Law, University of Pennsylvania Law School. I wish to thank Raha Ramezani, J.D. 2002, University of Pennsylvania Law School, for valuable research assistance. Errors that remain are mine.

1. Robert E. Scott, *The Rise and Fall of Article 2*, 62 La. L. Rev. 1009 (2002) [hereinafter "*Article 2*"].

2. Symposium, *Unifying Commercial Law in the Twentieth Century: Understanding the Impulse and Assessing the Effort*, 62 La. L. Rev. 991 (2002).

3. U.C.C. (West 2002).

4. Scott, *Article 2*, *supra* note 1, at 1010-11, citing Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595, 607-37 (1995) [hereinafter "*Political Economy*"]. At the time this article was initially submitted to the *Louisiana Law Review*, in April 2001, the future of the ongoing process to revise U.C.C. Article 2 was quite uncertain. In the meantime, at its 2002 Annual Meeting, NCCUSL approved the proposed amendments to Article 2. See U.C.C. Article 2 amendments, available at <http://www.law.upenn.edu/bll/ulc/ucc2/2002act.htm>. The amendments will be considered by the ALI in May 2003. If the ALI approves the amendments, the deadlock that Professors Schwartz and Scott predicted may be broken. On the other hand, unlike many earlier drafts of revisions to Article 2, these amendments are

original drafting process for Article 2 in the shadow of the normative foundations of contract law and the role and influence of Karl Llewellyn in the process.<sup>5</sup> Along the way, Scott (also characteristically) has much to say about the substance and theory of contract law and Article 2, in particular the proper domain for gap-filling rules applicable to incomplete contracts.<sup>6</sup> He concludes that "the flaws in the Article 2 project were present from its inception," reasoning that "it is unlikely that any set of 'uniform' rules that are promulgated for adoption in every state can both efficiently complete the gaps in commercial contracts as well as optimally police consumer transactions."<sup>7</sup> He suggests that the ordinary political and legislative processes may be more successful than the prevailing private legislative process that has addressed Article 2.<sup>8</sup> But in the end, Scott holds little optimism, observing that the premises and methodology underlying Article 2 are "no longer widely shared."<sup>9</sup> Indeed, Scott is of the view that "Article 2 has become largely irrelevant."<sup>10</sup>

The comments in this brief essay are considerably more modest in scope than Scott's project. In large part I am sympathetic to Scott's conclusions about Article 2. But I shall focus here primarily on the Schwartz-Scott political economy model of private legislatures. And on that topic, I wish to join with others in expressing skepticism.

Part II of this essay offers a brief overview of the Schwartz-Scott model, including its principal predictions and the authors' efforts to test its predictions. Part III then summarizes earlier critiques of the model and offers some additional observations. Part IV outlines competing explanations for observable results in the uniform law process and questions the predictive value of the model. Part V concludes the essay.

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quite modest in scope. As Scott notes, the deadlock over substance persists.

The effort to sanitize the Article 2 revisions developed because industry and consumer interests squared off against one another to produce deadlock on key substantive recommendations. Thus, even if the ALI and NCCUSL are eventually able to overcome their current differences, this deadlock over substantive issues represents the likely end of the fifteen year effort to revise substantively the law of sales as embodied in Article 2.

Scott, *Article 2*, *supra* note 1, at 1010.

5. Scott, *Article 2*, *supra* note 1, *passim*.

6. *Id.* at 1019-22.

7. *Id.* at 1014.

8. *Id.*

9. *Id.* at 1059.

10. *Id.* at 1013.

## II. OVERVIEW OF THE SCHWARTZ-SCOTT MODEL: PREDICTIONS AND TESTS

Schwartz and Scott stated the purpose of their political economy article as follows: "[O]ur purpose in this Article is to advance a . . . modest claim: whatever the relative merits of private and public legislative bodies, the complacency that has heretofore marked the academic attitude toward the private law-making groups is not warranted."<sup>11</sup> However, one might question the existence of the academic complacency of which they complain. As they acknowledge, other academic critics preceded them.<sup>12</sup> But Schwartz and Scott were the first to develop a "primarily positive" formal model.<sup>13</sup> Much of the intellectual insight that underlies the model must be credited primarily to Professor Scott's original work.<sup>14</sup>

Using "structure-induced equilibrium" theory and applying it to groups such as NCCUSL and the ALI, Schwartz and Scott concluded that:

the institution (a) has a strong status quo bias that induces it to reject significant reform; (b) frequently produces highly abstract rules that delegate substantial discretion to courts; and (c) produces clear, bright-line rules that confine judicial discretion commonly when and because dominant interest groups influence the process. The bright-line rules ordinarily advance the interest group's agenda.<sup>15</sup>

They also contend that, contrary to popular belief, politics do influence the ALI and NCCUSL.<sup>16</sup>

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11. Schwartz & Scott, *Political Economy*, *supra* note 4, at 651.

12. *Id.* at n.5 (citing Larry E. Ribstein & Bruce H. Kobayashi, *A Theory of Uniform Laws* 7-10, 26-29 (Jan. 30, 1994) (unpublished manuscript) and Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 Minn. L. Rev. 83, 98 (1993). The Ribstein-Kobayashi manuscript eventually was published. Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform Laws*, 25 J. Legal Stud. 131 (1996). In addition, Professor Edward Rubin had leveled strong criticism toward the uniform law process in a particular context. See Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising U.C.C. Articles 3 and 4*, 26 Loy. L.A. L. Rev. 743 (1993); Edward L. Rubin, *Efficiency, Equity and the Proposed Revisions of Articles 3 and 4*, 42 Ala. L. Rev. 551 (1991).

13. See Schwartz & Scott, *Political Economy*, *supra* note 4, at 599.

14. Robert E. Scott, *The Politics of Article 9*, 80 Va. L. Rev. 1783 (1994).

15. See Schwartz & Scott, *Political Economy*, *supra* note 4, at 597. Schwartz and Scott call the "clear, bright-line rules" Model 1 rules and they label the "abstract" rules that "delegate substantial discretion to courts" as Model 2 rules. *Id.* at 604-05.

16. *Id.* at 598, 611.

Schwartz and Scott claim that when powerful interest groups compete in the uniform law process they will block their opponents but will fail to achieve their own goals as well; a private legislature will reject reforms and favor the status quo.<sup>17</sup> Also central to their analysis is the Schwartz and Scott claim that the decisions of private legislatures to use Model 1 rules (bright line rules) or Model 2 standards (abstract rules) are not necessarily grounded on which approach would best implement the policy in question.<sup>18</sup> Instead, in their model as applied to NCCUSL and the ALI, the "output is much more a function of the structural features of these organizations than it is a conscious policy choice."<sup>19</sup> Schwartz and Scott suggest that the Model 1 rules result from a dominant interest group acting to solidify its success in the process because these rules limit discretion in their application.<sup>20</sup> It is this dynamic which they see giving rise to Model 1 rules, not the "intrinsic virtues [of the rules] for social control."<sup>21</sup> On the other hand, Model 2 rules result when reformers are unable to achieve adoption of Model 1 rules, and instead settle for Model 2 rules.<sup>22</sup>

Schwartz and Scott offer preliminary tests of their model by examining and comparing some outcomes of actual, historical uniform law projects in light of predictions generated by the model. For example, the academic, reformer-influenced, original Article 2 process, largely bypassed by dominant interest groups, resulted in abstract and general Model 2 rules as the model would predict.<sup>23</sup> They contrast the recent Article 2 revision process and results with both the original Article 2 project as well as recent revisions of Articles 3, 4, and 9.<sup>24</sup> The latter projects resulted in bright line and detailed Model 1 rules, which Schwartz and Scott explain resulted from the dominant influence of banks and secured financiers.<sup>25</sup> With this background, in *The Rise and Fall of Article 2* Scott explains that

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17. *Id.* at 636.

18. *Id.* at 598.

19. *Id.*

20. *Id.* at 651.

21. Schwartz & Scott, *Political Economy*, *supra* note 4, at 651.

22. *Id.* Schwartz and Scott also identify Model 3 rules: "A Model 3 rule attempts to find a middle ground between the first two. Such a rule both includes and then purports to illuminate the underlying norm that is set out in a Model 2 rule." *Id.* at 605. However, they explain that "Model 3 rules . . . will be as imprecise as Model 2 rules whenever the listed factors nearly exhaust the relevant possibilities and the rule maker does not attach weights to these factors or otherwise specify the relationship among them." *Id.* at 606. For this reason their analysis conflates Model 2 rules and Model 3 rules. *Id.*

23. *Id.* at 646-48.

24. *Id.* at 638-46.

25. *Id.*

the current efforts to revise Article 2 involve strong disagreements among involved and influential competing interest groups, such as consumer advocates, sellers of goods, and those who deal in information and intellectual property.<sup>26</sup> The breakdown of the project and the failure to promulgate revisions, Scott argues, fits the Schwartz-Scott model's prediction that in the face of competing interest groups a private legislature will opt for the status quo.<sup>27</sup> Then Scott sets out to solve another puzzle:

What explains why the initial drafting process of Article 2 appears to track the first prediction (a reformer-dominated process that produced many vague and open-ended rules), while the Article 2 revision process is consistent with the second prediction (a process dominated by competing interest groups that retains the status quo)?<sup>28</sup>

Scott's intriguing question will be examined in Part IV.

### III. CRITIQUES OF THE SCHWARTZ-SCOTT MODEL

This essay need not provide a detailed and comprehensive critique of the Schwartz-Scott model. Professors Peter Alces and David Frisch have done so and I am largely in sympathy with their points.<sup>29</sup> Alces and Frisch focus primarily on Professor Scott's political economy analysis of the Article 9 review and revision process, but because Scott's analysis is at the core of the Schwartz-Scott model, their critique is equally as trenchant when applied to pertinent aspects of the model.

Alces and Frisch argue that Scott's claim that private legislatures are inferior to public legislatures is not convincing. For example, they question Scott's approval of "logrolling" as well as his claim that it does not take place in the private legislative context.<sup>30</sup> They also take issue with Scott's assertion that drafting committee members are selected solely for their expertise as opposed to considerations of balance and geographic diversity.<sup>31</sup> Alces and Frisch recognize the information asymmetry that exists between various interest groups, but disagree with Scott's suggestion that public legislatures would

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26. Scott, *Article 2*, *supra* note 1, at 1012, 1050-52.

27. *Id.* at 1050.

28. *Id.* at 1012.

29. Peter A. Alces & David Frisch, *On the U.C.C. Revision Process: A Reply to Dean Scott*, 37 *Wm. & Mary L. Rev.* 1217 (1996) [hereinafter "*U.C.C. Revision Process*"].

30. *Id.* at 1219-22.

31. *Id.* at 1222-23.

have any advantages in that respect.<sup>32</sup> Similarly, they question Scott's claims based on perceived information asymmetries between drafting committees and study groups, on the one hand, and the members of private legislatures at large, on the other.<sup>33</sup> In rebuttal to Scott's arguments, Alces and Frisch point out that members in general are not necessarily at the mercy of committee "experts," and that, contrary to Scott's claim that members have no incentive to become educated, the membership takes part in much debate and considers position papers that are distributed.<sup>34</sup> Alces and Frisch also respond to Scott's claim that committee experts have stronger preferences for revision than the median member of a private legislature.<sup>35</sup> They note the absence of evidence for Scott's claim that committee members represent interest groups favoring revision and explain that one plausible reason committee members may favor revision is simply the desire to improve the legal system.<sup>36</sup> They also point out that academics in the process do not necessarily favor revision in order to have something to write about because they could just as well write about problems under current law.<sup>37</sup> Alces and Frisch criticize Scott's claims that interest group dominance produces precise (Model 1) rules and that the absence of dominant interest groups produces vague and general (Model 2) rules.<sup>38</sup> Finally, much of the Frisch and Alces article addresses and rebuts Scott's claim that the substance and attributes of the Article 9 Study Group's Report<sup>39</sup> support his claims about the uniform law process.<sup>40</sup>

I would add a few additional comments to the Alces and Frisch critique. First, the Schwartz and Scott model suggests a level of homogeneity and behavioral predictability of private legislature participants that does not match even the most casual observations of the behavior of the actual participants themselves. Second, the argument that public legislatures are better at creating laws—especially commercial laws—also is remarkably counterintuitive.<sup>41</sup> Third, consider the relatively small number of

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32. *Id.* at 1224.

33. *Id.* at 1224-25.

34. *Id.* at 1225-27.

35. Alces & Feisch, *U.C.C. Revision Process*, *supra* note 29, at 1227-28.

36. *Id.*

37. *Id.*

38. *Id.* at 1229-37.

39. See PEB Study Group, *Uniform Commercial Code Article 9, Report* (Dec. 1, 1992).

40. Alces & Frisch, *U.C.C. Revision Process*, *supra* note 29, at 1244-59.

41. Most who have observed both legislative hearings (in person or on C-Span) and the deliberations of private legislatures would have to agree. Donald Rapson, a veteran of many drafting committees and a member of the Permanent Editorial

projects when compared with the matters and proposals addressed by public legislatures. The sample of uniform law projects is insufficient to test, in a meaningful way, the Schwartz-Scott hypotheses and model.

Finally, uniform law projects are enormously varied and diverse and the influence of particular individuals cannot be reliably predicted or modeled. As I have observed elsewhere:

My first hypothesis is that roles played by individuals (each with an agenda of one sort or another, but an agenda nonetheless) in the uniform law process can provide a much more significant and outcome determinative influence than the "process." And these roles are so varied and idiosyncratic that attempts to model the process in ways that would provide useful predictive value are largely futile,

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Board for the U.C.C., provides an illuminating and amusing anecdote from New Jersey:

I had helped the Office of Legislative Services put the [1972 Article 9] amendments in Bill form in the hope of getting early enactment in NJ. Unfortunately, the Bill languished for several years without any movement. Then, early in September . . . [1981], while in Washington, I got an urgent call from the Office of Legislative Services to appear the next day before an Assembly Committee because the 1972 amendments had been suddenly "moved." It seems that a young law professor at Seton Hall had told his Secured Transactions class that they would have to study both the old and new Article 9 because "some day" NJ would enact the new Article 9. [Many years later I learned that the professor was Neil Cohen.] In any event, this so upset a young man in the class that he went home and told his father, a NJ Assemblyman [who wasn't a lawyer] and persuaded his father to "move" the Bill. The father, who chaired the Assembly Labor Committee, acted extraordinarily quickly and brought the Bill up before his Committee—none of whom were lawyers. On very short notice, I had prepared a short explanatory statement about the Bill, but was instructed by the Chairman to just read the Bill out loud until I was told to stop. I responded that the first part of the Bill was just definitions but was told to proceed. Thus, I read the Bill for about 1-1/2 hours, while the 5 or 6 Committee members went about their own business, reading letters, speaking on the phone etc.—and paying no attention whatsoever to me or asking any questions. Suddenly after 1-1/2 hours, the Chairman told me to stop and he moved approval of the Amendments—which was unanimously agreed to. I was excused. The Bill was approved by some Senate Committee (without any hearing) that afternoon and passed both houses of the Legislature the next day. A few days later it was signed by Governor Brendan Byrne at a ceremony to which I went. And that's how NJ finally enacted the 1972 Amendments. P.S. It turns out that the son and his father were also responsible for NJ adopting Springsteen's "Born to Run" as the State song.

Donald J. Rapson, email message to Charles W. Mooney, Jr. (Apr. 12, 2002) (on file with author). Of course, I do not claim that this anecdote typifies the legislative process as a whole. But the story is worth telling.



even if interesting. -The uniform law "process" is not a potted plant.<sup>42</sup>

I went on to conclude, in part:

Only with more detailed and rich inquiries into the history of a project can one obtain a sufficiently deep understanding to test available theories or models . . . . I also join in [Professor Facciolo's] . . . exhortation for additional donations to the ALI and NCCUSL archives maintained by the University of Pennsylvania Law School's Biddle Law Library. These archival materials will empower future researchers to reach deeper and wider into both substance and process.<sup>43</sup>

To put the point in the present context, it is plausible that the Uniform Computer Information Transactions Act ("UCITA")<sup>44</sup> was promulgated in spite of enormous controversy, while the Article 2 process stalled precisely because of differences in the influence, political skills, judgment, and power of a few individual participants in the process.<sup>45</sup> These are not individuals who are necessarily on one side or the other of the "median PL participant."<sup>46</sup> These are

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42. Charles W. Mooney, Jr., *The Roles of Individuals in U.C.C. Reform: Is The Uniform Law Process a Potted Plant? The Case of Revised U.C.C. Article 8*, 27 Okla. City Univ. L. Rev. Issue 2 (forthcoming 2002) [hereinafter "Mooney, Roles of Individuals"]. In that essay I responded to Professor Francis Facciolo's critique of the process that culminated in the promulgation of the 1994 revision of U.C.C. Article 8. See Francis J. Facciolo, *Father Knows Best: Revised Article 8 and the Individual Investor*, 27 Fla. St. U. L. Rev. 615, 703 n.488 (2000).

43. Mooney, *Roles of Individuals*, *supra* note 42, at x. (footnotes omitted).

44. Unif. Computer Info. Transactions Act, U.L.A. UCITA § 101 et seq. See also Scott, *Article 2*, *supra* note 1, at 1047-48.

45. Of course, that is not to say that UCITA has been successful when measured by enactments, which number only two—Maryland and Virginia. See <http://www.nccusl.org/nccusl/uniformact/factsheets/uniformacts-fa-ucita.asp>. But the Schwartz-Scott model addresses the products that will emerge from the "process" as they see it, not the ultimate success in the political world of enactments.

46. See Schwartz & Scott, *Political Economy*, *supra* note 4, at 614:

Voting in the ALI and NCCUSL is by majority rule. This and the assumption of single peakedness imply that the equilibrium outcome of a PL vote will correspond to the preferences of the median PL participant. Thus, we follow standard political science practice in modeling a unicameral legislature in which only the preferences of the median legislator are considered.

Critics of this public choice analysis point out, *inter alia*, its failure to take account of the complexity of the legislative process. See, e.g., William N. Eskridge, Jr., et al., *Cases and Materials on Legislation* 60-65 (3d ed. 2001) (collecting and describing commentaries).

individuals with names and, in particular, personal agendas.<sup>47</sup> This intuition suggests that disparate projects are a part of the same "process" in name only. There have been, are, and will be as many processes as there are projects

Others also have criticized Scott's thesis and, by implication, the Schwartz-Scott model. Barry Adler has "question[ed] whether there are identifiable special interests as Scott contends, and, assuming such special interests exist, whether the political process could work to their benefit in the way that Scott describes."<sup>48</sup> And George Triantis has concluded that "concerns about inefficiencies caused by the dominance of financial institutions in the drafting and revisions of the Uniform Commercial Code may be largely unwarranted."<sup>49</sup> But the goal, here, is not to question the utility the Schwartz-Scott model and its ilk as one means of exploring how law comes to be what it is in the uniform law process. It is to cast a skeptical eye on whether such a model will produce, or materially encourage, a persuasive policy proposal for concrete "reform" of law or the uniform law process.

It is worth noting that commentators on the uniform law process share a good bit of common ground. No one doubts that the products of the process, at least in the commercial law field, have had a significant impact on the legal landscape in the United States. Consensus also exists as to the need for and benefits of the academic study of the process, and that this examination should continue.<sup>50</sup>

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Using somewhat simplified models is justified . . . because it focuses attention on the interdependence of actions, the role of all players, including non-legislative ones, in the formation of policy, and the effect of anticipated responses. As we use this perspective, however, it is important to remember that it does not fully capture the complex and intricate world of the legislative process, and it should be used as a complement to the other theories to generate more accurate descriptions and predictions.

*Id.* at 75.

47. See, e.g., Mooney, *Roles of Individuals*, *supra* note 42, *passim* (discussing my personal agenda as it related to the legal framework for securities transfers).

48. Barry E. Adler, *Limits on Politics in Competitive Credit Markets*, 80 Va. L. Rev. 1879 (1994).

49. George G. Triantis, *Private Law-Making and the Uniform Commercial Code*, in 3 *The New Palgrave Dictionary of Economics and the Law* 117, 118-20 (Peter Newman ed., 1998) (noting limited incentives for special interest groups to lobby for inefficient terms and persuasive efficiency justifications for the Article 9 provisions that Scott believes resulted from special interest lobbying).

50. See, e.g., Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the U.C.C.*, 39 S. Tex. L. Rev. 707, 734 (1998) (expressing hope that "discussions [of the uniform law process] will continue so as to leave even greater guidance for what is to come").

## IV. COMPETING EXPLANATIONS FOR OBSERVABLE RESULTS IN THE UNIFORM LAW PROCESS

Although I am skeptical of the Schwartz-Scott model as a positive explanation of results in the uniform law process, certainly I agree with much of what Schwartz and Scott have to say about those results. To take the most striking examples, Article 2 is indeed a somewhat vague standard-based statute and Article 9 is an aggregation of comparatively detailed rules.<sup>51</sup> And, to be sure, the efforts to revise Article 2 do appear to have been derailed by strong and active conflicting interest groups. In this part of the essay, I offer some plausible and obvious competing explanations for these results.

One such explanation for the divergent approaches taken in Articles 2 and 9 have much more to do with the respective subjects that they regulate than any structural features of the uniform law process. Consider first Article 2. This article covers sales of goods<sup>52</sup> in both the consumer and commercial contexts. The goods addressed by Article 2 are enormously varied in their characteristics and value. Some sales transactions are documented by elaborate and highly negotiated written agreements and others involve handing over cash in a store and placing the subject of the sale in a bag. Reflecting the fact that many sales are not subject to detailed agreements or negotiations, Article 2 is rife with off-the-rack, gap-filling, "default" provisions.<sup>53</sup> For these reasons it is not surprising that Article 2 takes the shape of a general, standard-based codification. Indeed, it is hard to imagine that it could be otherwise. Moreover, the same can be said of its intellectual predecessors, the Uniform Sales Act<sup>54</sup> and the English *Sale of Goods Act*. While this insight into one particular statutory construct does not categorically refute the Schwartz-Scott model, it strongly suggests that there may be reasons other than those inherent in the model (i.e., reform-minded academic influence and the absence of strong interest group influence) that account for the patterns of uniform laws.<sup>55</sup> Stated otherwise, an independent analysis

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51. That is not to say that Article 2 does not contain some bright lines. See, e.g., U.C.C. § 2-509(3) (2000) ("risk of loss passes to the buyer on receipt of the goods if the seller is a merchant"). Additionally, Article 9 contains some general, standard-based formulations. See, e.g., U.C.C. § 9-610(b) (2000) (disposition of collateral following default must be "commercially reasonable").

52. Actually, Article 2 "applies to transactions in goods," but its substantive provisions generally address sales, buyers, and sellers. U.C.C. § 2-102 (2000).

53. See, e.g., U.C.C. § 2-305 (2000) (default rules when price not specified); U.C.C. § 2-308 (2000) (default rules for place of delivery).

54. U.L.A. UCITA § 101 et seq.

55. See Schwartz & Scott, *Political Economy*, supra note 4, at 618 n.49:

Our formal model assumes that the costs of creating Model 1 and Model 2 rules are the same. This assumption sometimes is strong when a law is

that predicts the same result as the model at a minimum calls into question the model's predictive value.

Consider next Article 9, which regulates security interests in personal property. To be sure, Article 9, like Article 2, covers a huge variety of transactions. Examples include consumer credit secured by collateral ranging from investment securities to home appliances to automobiles to luxury yachts, large corporate transactions such as inventory and receivables financings, securitizations, and leveraged leases, and middle-market "all assets" secured financing. In part for this reason, Article 9, like Article 2, also contains examples of general, standard-based provisions.<sup>56</sup> Unlike Article 2, however, Article 9 is marked by many detailed, bright-line, and highly specialized rules. It contains a large definitional taxonomy designed to facilitate the application of its rules to many special transactional patterns.<sup>57</sup> This structure and substance of Article 9 is appropriate considering that the overarching goal of Article 9 is the facilitation of financing through *ex ante* certainty.<sup>58</sup> Certainty as to the status of a secured party's interest and priority as to collateral induces financiers to extend more credit at a lower cost and in many cases is an essential condition for the extension of any credit. For this reason it is likely that any codification of secured transactions law would follow a similar pattern. Like Article 2, as explained above, the shape of Article 9 reflects the context of the transactions that it regulates. This observation also raises questions about the Schwartz-Scott Model's

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broadly applicable. The more heterogenous the parties are to whom the law applies, and the greater the variety of contexts in which the law is to apply, the more convenient it is for the lawmaker to draft on a high level of abstraction. It is less costly for her to tell persons to behave "reasonably" than to draft clear, sensible rules for a large number of contexts. Because some uniform laws and restatements, such as U.C.C. Article 2 (Sales) and the Restatement of Contracts, are broadly applicable, one would expect them to contain at least some vague rules independently of the factors considered in the text. A richer model would explicitly include rule-creation costs in the players' utility functions.

56. See *supra* note 51 (citing U.C.C. § 9-610 (2000)).

57. See U.C.C. § 9-102 (2000).

58. See Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of U.C.C. Article 9?: Reflections of the Reporters*, 74 Chi.-Kent L. Rev. 1357, 1363 (1999):

These examples and many other provisions of Revised Article 9 reflect the Drafting Committee's effort to achieve more than merely "better," more "efficient," "equitable," or "reasonable" rules to govern secured transactions. An overarching goal of the revisions was to provide in the transactional context enhanced certainty and predictability from the inception of transactions. This certainty can facilitate transactions even though an understandable rule with predictable consequences may be normatively suboptimal.

prediction that Article 9's precise lines and sharp edges result from the influence of a dominant interest group, extenders of secured credit.<sup>59</sup>

The Schwartz-Scott Model also predicts that strong and active opposing interest group competition will block action by a private legislature, which will reflect its *status quo* bias by taking no action at all.<sup>60</sup> Scott explains that the current stalemate in the process to revise Article 2 exemplifies this prediction.<sup>61</sup> But once again a close look at the action on this ground raises questions about the model's reliability. It is difficult to imagine how, on a moment's reflection, one familiar with the processes of the ALI and NCCUSL, and the actual individuals whose work carries the load for these institutions, would perceive a *status quo* bias. These organizations are devoted to law reform. Their most influential members are highly motivated to make the legal landscape a better one—some to the point of being busybodies by anyone's standard. The existence of a *status quo* bias also seems inconsistent with NCCUSL's track record which involves the promulgation of a relatively large number of uniform laws.<sup>62</sup> Moreover, many of these revisions have met with limited success in the legislatures.<sup>63</sup> NCCUSL's experienced leadership presumably has good intuitions as to the likely legislative outcome for a given project. This suggests that in many instances NCCUSL has not been deterred from promulgating a uniform law by controversy or opposing interest groups.<sup>64</sup> In this respect, consider UCITA. NCCUSL promulgated UCITA notwithstanding enormous controversy on the part of organized interest groups.<sup>65</sup> Not surprisingly, it has not been widely adopted.<sup>66</sup> But, to return to Scott's question, why has the revision of Article 2 ground to a halt (or nearly so) and why has the pattern of the original drafting process not been repeated?<sup>67</sup>

I would venture some answers that are not based on any procedural bias in favor of the *status quo*. Some aspects of the process have indeed changed dramatically since Llewellyn's day. Drafts are widely circulated and debated.<sup>68</sup> Moreover, interest groups

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59. See *supra* notes 15, 20-21, and text accompanying notes 15, 20-21.

60. See *supra* note 17, and text accompanying note 17.

61. See *supra* notes 26-27 and text accompanying notes 26-27.

62. See Ribstein & Kobayashi, *Uniform Laws*, *supra* note 12 (analyzing 103 uniform laws proposed by NCCUSL).

63. *Id.* at 133-35.

64. Of course, some uniform laws may not be widely enacted because NCCUSL does not afford them a high priority in the enactment process.

65. See *supra* notes 44-45 and text accompanying notes 44-45.

66. See *supra* note 45.

67. See *supra* text accompanying note 28.

68. Drafts of projects in progress are posted on NCCUSL's website, *available*

have discovered that they are not only welcomed to be involved in the drafting process, but NCCUSL actually courts their participation. As a result the drafting process reacts directly to controversy and the absence of a substantial consensus. In effect, private legislatures now have become more like *public* legislatures. But what explains NCCUSL'S willingness to promulgate UCITA while being reticent about the revision of Article 2? I would submit that the controlling bias here is the NCCUSL leadership's fear of failure in the case of an important project, and in particular in the realm of the U.C.C.<sup>69</sup> The U.C.C. is the crown jewel of the uniform law process. For the most part, and especially in recent years, NCCUSL has been remarkably successful in obtaining widespread and nearly-uniform enactments.<sup>70</sup> Another related explanation may be that revisions to such an important and successful statute should be undertaken only when justified by a strong consensus, within and without the uniform law process.<sup>71</sup>

Inasmuch as NCCUSL failed to move forward with a revision of Article 2 over several years in the face of strong interest group controversy, the Schwartz-Scott model provides an accurate prediction.<sup>72</sup> But because it is not unusual for NCCUSL to promulgate a controversial uniform law that does not attract widespread support and enactment, the model is not consistently predictive. This undermines the model's utility and gives rise to skepticism.

What is capable of providing useful insights into the process, however, is a project-by-project examination of the particular individuals and groups involved. Scott's careful study and analysis of Llewellyn's involvement in the original Article 2 project and Llewellyn's scholarly writings makes the case well. The picture that

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at <http://www.nccusl.org/nccusl/default.asp>, and also may be accessed through the University of Pennsylvania Law School website, available at <http://www.law.upenn.edu/blilulc/>.

69. John McLaugherty, the immediate past president of NCCUSL, noted as much in responding to my question at a recent symposium held in Oklahoma City. See Symposium, *The Uniform Law Process: Lessons for a New Millennium*, 27 Okla. City L. Rev. Issue 2 (forthcoming 2002). He explained that promulgating a revision to the U.C.C. that was not widely enacted in essentially a uniform manner would cost the U.C.C.'s sponsors much in terms of credibility and prestige.

70. Certainly a consensus emerged concerning the recent revision of U.C.C. Article 9, which now is in effect in fifty states and the District of Columbia. See [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-ucca9.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucca9.asp).

71. Even in the absence of consensus, however, it is interesting that more than 37% of the members voting at the 2001 NCCUSL Annual Meeting voted against a successful resolution not to approve Article 2 as the draft then existed. Scott, *Article 2*, *supra* note 1, at 1009.

72. For the current status of amendments to Article 2, see *supra* note 4.

emerges, however, is not a process dominated by reform-minded academics working in an environment largely free of controversy. In many instances the preferences of "conservative" members of the sponsoring organizations prevailed over Llewellyn's vision.<sup>73</sup> Indeed, Scott laments that having exorcized Llewellyn's insights for a new merchant's tribunal, Article 2 was left only with remnants of Llewellyn's plan and without the means to implement it adequately.<sup>74</sup> Scott's carefully told story illuminates the original Article 2 project in a way that a model could not.

The purpose of this essay is not to argue that the Schwartz-Scott model (or any other economic model) does not (or could not) offer insight and understanding, even if only to provide testable hypotheses and to encourage further study.<sup>75</sup> Rather, the goal is to express skepticism of the depth and breadth of any model of something as diverse and idiosyncratic as the processes that have created uniform laws. Attempts to create an adequately nuanced and detailed model are likely to fail. One must question whether efforts to model the behavior and norms (such as fear of failure) of a private legislature, in order to predict when it will back off and when it will go forward, could be successful. It is possible these efforts would succumb to Professor Scott's recent powerful critique of behavioral economics. Scott has leveled strong criticism on attempts "to graft the complex and highly individualized process by which values and preferences are created and modified onto a formal analytical framework."<sup>76</sup>

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73. See, e.g., Scott, *Article 2*, *supra* note 1. "The revisions that the academic reformers agreed to during the drafting process were those that they felt were necessary to secure the approval of the far more conservative lawyers and other legal professionals that dominated the two sponsoring private legislative bodies." *Id.* at 1031. "The merchant jury was too radical a proposal, however, and was soon abandoned in the face of objections from more conservative members of the private legislatures." *Id.* at 1034.

74. Scott, *Article 2*, *supra* note 1, at 1040:

By 1944, Llewellyn had abandoned this key device for discovering the relevant social norms, while still retaining the architecture of incorporation, including the -injunction that- parties conform their behavior to the supereminent norm of commercial reasonableness. Viewed in retrospect, eliminating the merchant jury while retaining the pervasive notion of commercial reasonableness was a drafting disaster.

*Id.*

75. See Schwartz & Scott, *Political Economy*, *supra* note 4, at 597 ("This Article is primarily positive; its goal is to understand how large private law-making groups such as the ALI work.").

76. Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 Va. L. Rev. 1603, 1647 (2000):

A more profitable approach, I have suggested, is to deploy rational choice analysis on its own terms, but retain (as part of the analyst's frame of judgment) the situational sense of context-specific knowledge as an

## V. CONCLUSION

Professor Robert Scott's *The Rise and Fall of Article 2* is an important contribution to the literature on contracts, U.C.C. Article 2, and the uniform law process. It is an interesting read for anyone interested in law, and in particular uniform commercial laws. Scott's telling of Karl Llewellyn's role in the process that led to the original Article 2 provides much insight on the process as well as a platform for his incisive substantive critique.

This essay has reflected chiefly on the uniform law process. I believe that Scott has correctly concluded that powerful opposing interests brought the current Article 2 revision process to a standstill. This is precisely as the Schwartz-Scott model predicted, although it now appears that the revision effort ultimately may be successful. I have explained that the model is insufficiently predictive and explanatory concerning the uniform law process and, for this reason, I have questioned its value, at least as it has been developed to date. But to the extent the Schwartz-Scott model was intended to begin a serious academic conversation about the process, it has been a great success.<sup>77</sup> As always, Professor Scott has moved the ball.

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antidote to inapposite analogies and generalizations. As legal scholars, we are in the uncomfortable middle ground between the general and the particular.

*Id.*

77. See Schwartz & Scott, *Political Economy*, *supra* note 4, at 651-52: There are two lessons to draw from this. The first is that academic attention should focus on inputs as well as outputs: there should be more theory and more evidence relating to how private law-making groups function. It may be possible (we are dubious but far from certain) that PLs such as the ALI can be reformed. The second lesson is that the ALI and NCCUSL, at least provisionally, should no longer be immune from critical investigation.

*Id.*