

Perspectives on the Uniform Commercial Code

Second Edition

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Douglas E. Litowitz

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Preface

This book is a supplemental reader for courses on the Uniform Commercial Code (the “Code”). It supplies a great deal of background material that is surprisingly absent from most law school courses on the Code.

For reasons that are not entirely clear, most professors of commercial law tend to eschew outside readings that might raise broader ethical and conceptual questions about the Code. Students oscillate between a casebook and a statutory supplement, and little or no attention is devoted to the history and controversies that surround the Code. The results have been predictable: students treat the Code precisely as they find it presented in the classroom—a static and apolitical monolith that is not worthy of outside discussion. Indeed, our students typically emerge from courses in commercial law with a grudging respect for the Code but with little understanding of its place within the larger framework of American law. The readings in this book should provide a broader jurisprudential backdrop for the Code, allowing students to see that commercial law—just like constitutional law and administrative law—raises important theoretical questions. At the very least, students will understand that the Code is an ongoing construction that mediates between competing social, political, and economic interests. In other words, the Code is alive, interesting, controversial, and important.

The readings in this book are deliberately short because they are meant to supplement—but not *supplant*—the assignments in a typical course on commercial law. The original texts have been edited mercilessly to focus attention on one or two key issues at the expense of all the other issues addressed by the authors, so readers are encouraged to consult the full articles for a more complete treatment. In addition to editing for content, I have omitted footnotes and greatly reduced the number of ellipses, which hopefully provides greater readability without injuring the vanity of the authors, who were chosen for their superior contributions to scholarship on commercial transactions. To ensure that the book remains a supplemental teaching tool and does not dominate class sessions, I provided only a single discussion question following each reading.

This book can be integrated into the standard commercial law course without much difficulty. I suggest that professors assign the Introduction for Law Students and the first two chapters as background reading prior to the first day of class, to give students a conceptual and historical overview of the Code. Once the course has begun, I suggest that every other class session, one or more students should be assigned to present a selection of this reader to the class, capping the presentation by answering the discussion question following the selection. My experience suggests that a mere ten-minute discussion during alternating class periods will suffice to instill a more comprehensive understanding of the Code without making the book seem like an intrusion into traditional Code pedagogy. Alternatively, this book can be used as a device for assigning extra credit to students who take the time to prepare short opinion pieces assessing the selections.

Karl Llewellyn, the principal architect of the Code, asserted that the Code stood a good chance of adoption by the various state legislatures because its subject matter (namely, transactions involving personal property and payments) was “very largely non-political in character.” This claim was untrue when it was made, and has become even less credible over time, especially in an intellectual climate where legal scholars rightfully view every area of law as an inherently contested and political arena. To the extent that law shapes social ontology and constrains legal actors by allocating benefits and burdens, every arrangement of law is an active choice among many possible worlds, each with its own moral, political, and economic landscape. That is to say, the Code does not hover above a preexisting world of commercial practices, but represents a commitment to bring a particular commercial world into existence. As the default architecture for commercial practices, the Code is infinitely contestable in theory and subject to constant adjustment in practice. If our students do not realize this, then the fault lies not with them but with our method of instruction, which treats the Code as a closed text that could not assume any other form. Therefore, we need to guard against reifying the Code as a final, totalizing document, and instead see it as a social construction that can be deconstructed in the interests of justice. This book is intended as an initial step toward creating a generation of law students who are not content with merely working within the Code, but who are capable of thinking critically about it.

Douglas Litowitz
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April 2007

Introduction for Law Students

You are probably reading this book because you are a law student in a course on the Uniform Commercial Code (the “Code”). If so, this will be one of three books assigned by your professor—the other two books are a casebook and a statutory supplement. The casebook will introduce you to various concepts in commercial law and it will set forth hypothetical legal disputes that can be addressed by the Code. The statutory supplement contains the text of the Code and related materials from which you will formulate answers to the hypotheticals in the casebook. The purpose of the book that you are holding is to give you a broader understanding of the history, evolution, and overall philosophy of the Code. Toward that end, this Introduction will get you started with a very brief guide to the Code, a picture that will become clearer throughout the semester. Let’s start with each of the words in the phrase *Uniform Commercial Code*.

The word *Uniform* signifies that the Code is a model law that was drafted by experts who sought to have the same set of provisions adopted in every state. Similar uniform acts would include the Uniform Probate Code and the Uniform Partnership Act. Like all uniform statutes, the version of the Code in your statutory supplement is not “the law” unless and until it gets enacted by a state legislature. Luckily, most states have enacted the entire model version of the Code without shocking deviations, so in large measure the Code lives up to the word *Uniform*: a given Code section is likely to be the same in Illinois, Florida, Texas, Kansas, and so forth. You should be aware, however, that some states made significant nonuniform changes to the Code before enacting it into law, a process that is discouraged because it destroys uniformity of the Code from state to state. It would perhaps be more accurate for law students to study the specific version of the Code enacted in the state where they intend to practice law, but since law professors have no way of knowing where students will end up, the safest tactic is to teach the model version of the Code, and to let students pick up the idiosyncratic state deviations when they begin practicing law. So when your professor refers to the Uniform Commercial Code, she is referencing the model statute contained in your statutory supplement, which may differ slightly from the version enacted in your state.

The word *Commercial* designates that the subject matter of the Code is commercial transactions, namely transactions dealing with personal (moveable) property and payments. Such transactions include the sale, lease, consignment, transport, storage, and granting of security interests in goods as collateral, as well as payments in the form of promissory notes, checks, and wire transfers (plus investment securities as well). The Code covers both merchants and nonmerchants alike, from gigantic department stores and national banks all the way down to door-to-door sales and rental car leases. To a greater extent than any other area of law, the Code covers transactions that affect your life on a daily basis, including the products and food that you buy, the car that you drive, the furniture that you buy on credit, the checks that you write, and the promissory note which you signed for your student loan, just to name a few transactions.

The word *Code* designates that the Code is a unified and coherent statute which was intended to cover the entire field of commercial law. Remember that a *code* is different from a *statute* in much the same way that a pair of pants is different from a patch sewn over one of the knees: while both are legislative enactments, a *code* is an internally consistent series of provisions that creates a total framework for an area of law, while a *statute* merely regulates one aspect of an area that is otherwise governed by common law. For example, a special law enacted to regulate the sale of health club memberships would be a patch or supplement to the general law of contracts, whereas the Code covers the entire territory of commercial law. Because a unified *code* has interlocking provisions designed to refer to other provisions, you will be spending lots of time moving from one Code provision to another, and spending less time on case decisions than you would in other courses.

To recap, the Code is *uniform* in that it is mostly consistent across the several states, it is *commercial* in that its subject matter is transactions in moveable property and payments, and it is a *code* in that it is an interlocking set of provisions that creates the framework for an entire area of law.

Now that you understand the term *Uniform Commercial Code*, you will need to understand the Code's place within the framework of American legal history.

* * *

The Code project is the most ambitious attempt at codification in American legal history. Drafting began in the 1940s and led to a final draft of the Code in the early 1950s, and finally to enactment in the 1960s. The Code project was a joint effort by two organizations that had long been trying to clarify and unify American law: the National Conference of Commissioners on

Uniform State Laws (NCCUSL) and the American Law Institute (ALI). Since the end of the nineteenth century, the NCCUSL has tried to create de facto uniformity among the law of several states by producing a series of uniform laws which—they hoped—each state would adopt. In the same spirit, the ALI produced the *Restatements of Law* as a way of bringing order and coherence to the common law. These organizations, and later the American Bar Association, came together to produce the Code. All of these organizations remain actively involved with the Code project to this day.

The Code project began as an attempt to put in one place all of the relevant laws concerning commercial transactions and payments. To understand why this was thought to be a pressing need, remember that American law followed the common law tradition inherited from England, where precedent-setting decisions are built up like grains of sand until they form a coherent body of law. Like other areas of law such as contracts and torts, commercial law was largely non-statutory and was developing piecemeal from state to state. This proved deeply problematic for business enterprises (banks, corporations, finance companies, manufacturers) because it created a patchwork quilt of unstable law. For example, a national bank might use a standard form promissory note that was enforceable in one state but might be unenforceable in a neighboring state. This would require the bank to wade through the law of each state and adjust its standard forms accordingly, thereby raising legal costs that were passed to customers. So there were two key problems that the drafters of the Code wanted to fix. First, the law of commercial transactions was an uncertain mixture of case decisions and occasional statutes, and second, commercial law was not uniform from state to state. And on a more abstract level, there was a growing concern that the increasingly fast-paced world of commercial transactions in America could no longer be fettered by the common law and its old English rules of offer/acceptance, consideration, writing requirements, the “mailbox rule,” and so forth.

For a long time, the solution was thought to lie in convincing each state to adopt a predetermined package of uniform laws covering the same subareas within commercial law—one statute for sales, one for negotiable instruments, and so forth. This plan didn’t work. Another possible solution was enactment of a federal law governing commercial transactions, which would ensure uniformity by virtue of federal supremacy over state law. This didn’t work either. So as late as the middle of the twentieth century, the law of commercial transactions was piecemeal, fragmentary, and nonuniform among the states. This didn’t stop commercial transactions from taking place, but business persons were rightfully skittish since the law was inconsistent across state lines, and commercial law still reflected common law principles and formalities that were increasingly outdated.

Ultimately the Code was hit upon as the solution—a gigantic uniform law encompassing and supplanting all of the prior uniform commercial laws, to be adopted whole cloth by each state, thereby ensuring a modern formulation of commercial law uniform among jurisdictions, with all of the relevant laws in one location. And because the original drafters were legal realists who knew that law in action was different from law on the books, they sought to create a legal framework that could evolve to reflect changing commercial practices in the marketplace instead of conforming to the strictures and formalities of black letter contract law. The Code project sought to create something that was simultaneously comprehensive and capable of evolution. These aspirations are clearly stated in the text and comments to Revised Section 1-103 (Current Section 1-102) of the Code, which is worth reading at this juncture. After reading the essays in this book, you will have to judge for yourself—and there is no easy answer—whether the Code project has been a success or a failure.

* * *

Although the Code is often presented in law school (especially in the first year) as if it were written in stone, the truth is quite different: the Code is constantly being monitored for inefficiencies and contradictions, and amendments are always in the works. As a result, your statutory supplement contains not only the current text of the Code and the official comments for each section, but for the sake of completeness it also contains the proposed revisions that are currently being offered to state legislatures for adoption. Sometimes the answer to a question of commercial law will turn on whether your particular state is using the old version of the Code or a newer version.

As mentioned above, the original idea for the Code was to put in one location all relevant commercial laws. However laudable this goal was in the 1940s when the sheer volume of law was miniscule in comparison with today, it has since proven unworkable. Since the original enactment of the Code, lacunae have been discovered and a host of new laws have been proposed and enacted to essentially patch the holes (or perceived holes) in the Code. Therefore, your statutory supplement contains a long list of uniform acts, federal laws, and federal regulations that interact with the Code in complicated ways. For example, your statutory supplement probably contains the Uniform Consumer Credit Code, which has been enacted in a small number of states to provide greater consumer protection than the Code. It may also contain the Magnuson-Moss Warranty Act, a federal law that is stricter than the Code on the labeling of warranties. Most importantly, the Bankruptcy Code is a federal law that contains provisions which can trump the Code on the question

of how collateral is allocated among debtors and creditors. All of this material is supplemental to the Code but it is nevertheless important because it demonstrates that the Code is not the sole source of law for commercial transactions, which means that the diligent lawyer must also consult outside statutes. Rest assured that your course will focus primarily upon the text of the Code itself, passing to supplemental materials only when you are discussing Code provisions that have been affected by outside laws.

You are now ready to begin your journey into the Code. The next two chapters will give you some background into the genesis and the enactment of the Code.