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Surreptitious and Not-So-Surreptitious Adjustment of the U.C.C.: An Introductory Essay

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SURREPTITIOUS AND NOT-SO-SURREPTITIOUS
ADJUSTMENT OF THE UCC: AN INTRODUCTORY ESSAY

Peter A. Alces*

I. INTRODUCTION

Legal paradigms are slow to shift, and it is often some time before the contributions of legal scholars are recognized as crucial. Although those concerned with commercial law can look to the drafting of the Uniform Commercial Code (UCC)\(^1\) and appreciate the UCC’s importance, contemporary developments seldom have a similar impact.\(^2\) Every so often, however, there is a development of manifest significance. New UCC Article 2A—Leases is such a development. This symposium issue of the Alabama Law Review

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1. The Code project began in earnest in the 1940s and continued through the 1950s. See General Comment of Nat’l Conf. of Comm’rs on Uniform State Laws and the ALI, Uniform Commercial Code: 1978 Official Text with Comments.

2. For example, consider the Uniform New Payments Code (UNPC) which was to be a comprehensive and preemptive statute that would treat comparable payment media similarly. It was sponsored by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Only a few years after its initiation, however, the project was abandoned by the sponsors. See American Law Institute, 1958 Annual Report 15-16.
places Article 2A in its historical context\textsuperscript{3} and begins the scholarly perusal of the new law.

Although several portions of the Code have been amended,\textsuperscript{4} Article 2A is important because it represents the first successful effort to bring another body of commercial law within the scope of the UCC. It may mark the beginning of the recodification of commercial law in the United States.\textsuperscript{5} The fact that Article 2A may become law in the next few years\textsuperscript{6} indicates that something important is happening now, something which will change the way of thinking about commercial laws.

Substantial adjustment of existing portions of the UCC as well as the promulgation of whole new Articles of the Code currently preoccupy commercial transactors. In the course of the next few years, virtually every substantive Article of the UCC will be subject to either pervasive amendment or complete redrafting.\textsuperscript{7} The commercial community’s increasing uneasiness with a good deal of existing sales law is evidenced by the fact that several provisions of Article 2A change the formulation of their Article 2 analogues for reasons independent of essential differences between sales and lease transactions. Article 3 of the UCC is currently the subject of an extensive review process which likely will culminate in extensive amendments recasting the jurisprudential foundations of commer-

\begin{footnotesize}
\begin{enumerate}
  \item See Boss, The History of Article 2A: A Lesson for Practitioner and Scholar Alike, 39 Ala. L. Rev. 575 (1988).
  \item Article 9 of the UCC was substantially amended in 1972, at which time minor adjustments were also made to §§ 1-105, 1-201, 2-107, and 5-116. See General Comments on the Approach of the Review Committee for Article 9, 1972 Official Text Showing Changes Made in Former Text of Article 9, Secured Transactions, and of Related Sections and Reasons for Changes. In 1977 Article 8 was also revised. Conforming adjustments were also made to §§ 9-103, 9-105, 9-203, 9-302, 9-304, 9-305, 9-309, 9-312, 1-201, and 5-114. See Reporter’s Introductory Comment, 1977 Official Text of Article 8, Investment Securities and of Related Sections and Reasons for Changes.
  \item The theory of the proposed [UCC] is that we must keep our statutes up to date. If the project is successfully carried through, we should understand that we have probably committed ourselves to basic revisions at fairly short time intervals. However excellent the new Code may be, it will no doubt be necessary, in another twenty-five years or so, to revise the revisions. Gilmore, On the Difficulties of Codifying Commercial Law, 57 Yale L.J. 1341, 1359 (1948); see also G. Gilmore, The Ages of American Law 95-98 (1977).
  \item However, at the time of this writing, South Carolina, Louisiana, and Vermont still have not adopted the 1972 amendments to Article 9.
  \item Article 9 may be safe in light of its fairly recent amendment in 1972. See supra note 4.
\end{enumerate}
\end{footnotesize}
cial paper law. The Federal Reserve Board has adopted regulations that will significantly alter the law governing the check collection process while the process of amending Article 4 continues.

In the near future a new Article 4A may govern wire transfers. While wire transfers move more value than any other payment medium, they are currently governed only by common-law principles, private agreements, and less than comprehensive federal regulations. Article 4A, then, insofar as it endeavors to fill that void is certainly conceived in the spirit of Article 2A, which, as promulgated, addresses many unresolved issues. Article 5 is also currently the subject of an extensive review that may result in a readjustment of the law governing letters of credit. Furthermore, a new version of Article 6 may soon surface that could very well change the status quo in the bulk sales law. Article 6, “Bulk Transfers,” has been the subject of a review committee’s attention for almost a decade, and the preliminary proposals coming out of that committee suggest that that portion of the Code may be reformulated in ways that profoundly will affect the bulk sales calculus and its relationship to the law of fraudulent dispositions.


10. Author’s telephone interview with John F. Dolan, Professor of Law, Wayne State University (Jan. 20, 1987).


12. Also, as of this writing, the recently promulgated Uniform Fraudulent Transfer Act, in less than two years, has become law in sixteen states. See Alces, Generic Fraud and the Uniform Fraudulent Transfer Act, 9 Cardozo L. Rev. 743, 745 n.8 (1987) (listing states
Another significant, and perhaps more problematic, development is the creeping "federalization" of commercial law. Grant Gilmore saw it coming years ago. A recent example of federalization is the Food Security Act’s effective repeal of the farm products exception in section 9-307, and proposed Federal Reserve Board Regulation CC, which would displace a great deal of Article 4 to accommodate more expeditious funds availability. The federal government’s efforts to draft commercial law have not proven unassailable. Any student of the commercial law can recognize the difference between UCC formulations and provisions of the Bankruptcy Reform Act of 1978 or the Federal Food Security Act. So these are exciting times, as commercial law goes, and the Article 2A project, as well as the contributions to this Symposium, should be read as a barometer of the change in perspective concerning state codification of uniform commercial law.

It is necessary that practitioners and academicians develop a frame of reference to facilitate their understanding and appraisal of commercial law developments. Amendments to existing provisions of the UCC, both those promulgated by the Permanent Editorial Board as well as those passed by several states on a nonuniform basis, do not present the same challenges to commercial sensibilities as does the advent of Article 2A. To accommodate a focus on the big picture, this short introductory essay suggests an approach for the commercial community’s evaluation of the Article 2A project. This introduction will emphasize the academic perspective. The focus here is on the jurisprudential significance of Article 2A from the view of those who only grudgingly give up on the idea and statutory citations). If experience with that legislation provides a reliable indicator, new uniform commercial statutes may receive expeditious consideration by state legislatures after their promulgation by the sponsoring organizations.

13. See G. GILMORE, supra note 5, at 92-96.
17. It would seem that the very same results effected by the federal regulation, which runs several pages in length, could have been accomplished by simply deleting the words "other than a person buying farm products from a person engaged in farming operations" from current § 9-307(1).
that there is, or at least could be, some fundamental and consistently applied method of elucidating the UCC. How, in short, does Article 2A affect that idea, and how do the articles in this Symposium shed light on that crucial inquiry?

Donald Rapson, General Counsel of the C.I.T. Corporation, member of the Permanent Editorial Board of the Uniform Commercial Code, and distinguished academician, recognized the significant development represented by Article 2A. Two years ago he expressed concern that this first new Article of the UCC could very well become law without ever being exposed to the type of scholarly examination generally afforded important legal developments. The Article 2A project has progressed steadily over the last several years without attracting the attention that, for example, the Uniform New Payments Code (UNPC) attracted. That is a particularly curious circumstance insofar as the UNPC never really came close to becoming law while Article 2A was assured promulgation virtually from its inception.

This Symposium was conceived from Donald Rapson’s observation and suggestion that the journals would do well to bring Article 2A to the attention of the commercial community. Because the Symposium project began before all of the Text and Comments to Article 2A were completed, the contributors have been updating their manuscripts during the course of the last eighteen months or so to reflect the drafting committee’s adjustments to Article 2A.

The articles collected here uncover traps for the unwary in Article 2A and otherwise provide a primer to the operation of the new Article. As will be seen, the contributors have not been reluctant to expose a glitch or two that may be significant in the course of litigation or during the transaction-negotiation process. In that


19. But preliminary indications are that amendments to Article 3 of UCC may be getting quite close to formulations that first appeared in the UNPC. See Reporter’s Explanatory Draft of Article 3 (Nov. 4, 1987).

20. Ronald DeKoven, the Reporter of Article 2A, wrote the Comments to Article 2A throughout most of 1987, and the last draft was not available until the early fall of 1987.
regard, it would be appropriate to consider this Symposium a jurisprudential undertaking, in the most practical sense, that is.

II. A SUGGESTED PERSPECTIVE

Article 2A soon should have an impact upon commercial law casebooks, particularly those focusing solely or primarily on Article 2, and, in turn, should affect traditional sales courses, either the first-year contracts adjunct or the separate upper level elective. It now is no longer appropriate, if it ever was, to view Article 2 as an application of state of the art contract principles. Uniform statutory treatment of lease contracts, which are no less contracts than sales contracts, now exists, and Article 2A does not always follow the Article 2 formulations. Law students should now appreciate the Uniform Commercial Code differently. An introduction to Article 2, as a refinement or at least a modification of common-law contract principles, no longer tells the complete story. For instance, in deciding how much teaching time should be devoted to the battle of the forms provision, section 2-207, both in the contracts course and in the sales course, it would be inappropriate to ignore the fact that Article 2A contains no parallel provision.

Although the Official Comments to several Article 2A provisions that do not track their Article 2 analogues often explain the divergence by stating that the Article 2A provisions have been “revised to reflect leasing practices and terminology,” there is reason to be skeptical of that explanation. Certainly the terms “buyer” and “seller” must be changed to “lessor” and “lessee,” but it is not so clear that all of the departures from the statutory analogues were prompted by such benign considerations.

21. In a casebook to be published by Matthew Bender & Co., P. Alces & N. Hansford, Sales, Leases, and Bulk Transfers (forthcoming 1989), an attempt is made to expose students to Articles 2 and 2A in a way that will raise the important issues concerning the two Articles’ coexistence, as well as similarities and differences.
23. See, e.g., id. § 2A-220 comment (“rephrased and new material added to conform to leasing terminology and practice”); id. § 2A-221 comment (same); id. § 2A-308 comment (same); id. § 2A-309 comment (“revised to reflect leasing terminology and to add new material”).
24. For instance, the § 2A-201 statute of frauds does not follow its Article 2 analogue; the Article 2A provision contains no special rule for merchants such as that found in § 2-201(2). The drafters explain that the special merchant rule “was not included in this section
Law professors will have to decide how to divide Article 2A coverage between sales and secured transactions materials. Insofar as the new Article clearly owes a great deal to both Articles 2 and 9 and raises important issues concerning the relationship between Article 2A and Articles 25 and 9, it would be a mistake not to treat the leasing Article in both sales and secured transactions courses. That observation suggests a fundamental jurisprudential problem: because Article 2 was drafted from one perspective (primarily Karl Llewellyn's) and Article 9 was drafted from another (primarily Grant Gilmore's), is there reason to believe that the product of that statutory combination will be viable? Professor Harris's contribution to this Symposium suggests that in some instances the Article 2A formulation which emerges from a combination of the Article 2 and Article 9 statutory analogues is, at least, troublesome, or may prove so in certain circumstances.

Perhaps most notably, the revision to section 1-201(37) may have ramifications pertinent to both sales law and secured transactions law. The proposed revision of the definition of a security interest is a means of distinguishing a true lease from the so-called "security lease," a secured transaction disguised as a lease. Now that Articles 2 and 2A will co-exist as almost parallel enactments, it will be necessary to distinguish a sale from a lease in order to decide which Article of the UCC applies.29 Even though the economic perspective of revised section 1-201 does address the particular issues of concern in making the Article 9 versus Article 2A characterization, students of commercial law and, in time, the courts will be forced to confront a larger issue: whether a particular Article 2A formulation differing from its Article 2 analogue should provide the rule of decision or whether recourse should be made to the sales rule. The possibility that the analysis of that characterization will determine the outcome of any particular case is real. There also remains the question of what impact Article 2A will

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27. See id.
29. Section 2-106, defining "sale," will also pertain: "A 'sale' consists in the passing of title from the seller to a buyer for a price (Section 2-401)."
have on true “Code” methodology. In a salient article written over a quarter of a century ago, Chancellor Hawkland described the consequences of concluding that the UCC is a true “Code,” so far as applying its several Articles is concerned. 30 Article 2 introduces law students to argument by analogy and other devices of statutory interpretation. In cases which straddle both Article 2 and Article 2A but fall squarely within the scope of neither enactment, which of these Articles should provide the basis for argument by analogy? The drafters note in one of the first Comments to Article 2A that

[a] court may apply this Article by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods, taking into account the expressed intentions of the parties to the transaction and any differences between a lease of goods and a lease of other property. Such application has precedent as the provisions of the Article on Sales ... have been applied by analogy to leases of goods . . . . Whether such application would be appropriate for other bailments of personal property, gratuitous or for hire, should be determined by the facts of each case. 31

Because the efficacy of Code methodology is now more uncertain, it may be necessary to circumscribe severely the limits of reliance on some familiar approaches to the UCC.

The Official Comments to several Article 2A provisions acknowledge that the drafters have departed from the Article 2 analogue in order to improve upon the uniform sales law. 32 To guide their decisions as to which provisions of Article 2 would be grafted onto the lease law “warts and all” and which provisions were sufficiently objectionable to require adjustment, the drafting committee utilized a subjective measure. 33 Reasonable people may


32. See, e.g., U.C.C. § 2A-214 comment (1987); id. § 2A-216 comment; id. § 2A-503 comment; id. § 2A-506 comment.

33. See Harris, supra note 26, at 816-17 n.48 (discussion of the “gag rule” in the drafting of Article 2A).
disagree with some of the choices made by the drafters and will wonder why some sales provisions were changed while others were left in their current deficient form.

Commentators will address the consequences of the drafters' choices, but the concern here is with the larger pedagogical question. When a court is faced with an issue arising under one of the imperfect Article 2 provisions that has been incorporated into Article 2A without amendment, is it appropriate for the court to conclude that the perhaps questionable interpretations of that deficient provision are confirmed by the drafters' failure to adjust the section in Article 2A, particularly when the drafters did depart from some dubious Article 2 formulations in the new lease Article? Essentially, the problem is one of which the parties involved in the Article 2A drafting process were well aware: their mandate was to write a uniform lease law, one which would draw upon Code analogues; they were not asked to amend Article 2 at the same time. The fact that the drafters were only doing what was asked of them does not obviate the quandary facing the commercial bar as new interpretive issues arise from both Article 2A and the "settled" sales law. It might very well have been better had the drafters of Article 2A not changed any of the Article 2 sections they chose to incorporate into the uniform lease law.

The articles in this Symposium by Amy Boss and Edwin Huddleson describe both the Article 2A project generally and the particular interests accommodated during the drafting process. They each explain the forces that brought the process to fruition and provide some insight into the inferences which may be drawn from the drafters' conclusions. Charles Mooney's piece also helps explain how the commercial landscape at the time Article 2A was drafted influenced the drafters' decision not to impose a filing requirement in lease cases. And that is a question worth treating in some depth, as Professor Mooney does. The articles remind readers that the new uniform lease law, like all statutes, is a product of its time and, necessarily, may be better appreciated if the status quo and preoccupations of the contemporary commercial world are

34. See, e.g., id. at 817 n.49, 834 n.119.
36. See Boss, supra note 3.
37. See Huddleson, supra note 35.
explored. To an extent, Article 2A was written and promulgated because of profound changes in the way commercial transactors conduct business. Financial considerations beyond the UCC have encouraged sophisticated commercial transactors to lease, rather than sell, personal property. As leasing has evolved, it has presented new challenges to the commercial bar. To the extent that the articles in this Symposium explain something about the drafting process and provide insight into the legal landscape at the instant the drafters of Article 2A were settling upon a particular rule, they facilitate interpretations of the new law.

Professor Mooney’s article does such a thorough job of responding to the Baird and Jackson ostensible ownership thesis\(^\text{38}\) that it prompts rethinking about public filing requirements. In that way another aspect of this Symposium’s contribution emerges: the discussion of the balance of interests struck by certain aspects of Article 2A encourages an appraisal of the assumptions underlying commercial law.\(^\text{39}\)

Professor Homer Kripke’s contribution questions the Article 2A drafters’ choice of statutory analogue\(^\text{40}\) and thereby invites critical reconsideration of the new Article’s foundations. Just as Frederick Beutel’s criticisms of the UCC project revealed many of the inadequacies of the Code still present today,\(^\text{41}\) Professor Kripke focuses attention on problems with Article 2A that may remain for some time to come.

In addition to the contributors’ treatment of the historical backdrop against which Article 2A was promulgated, their observations regarding the style and approach of Article 2A stimulate debate over the place of commercial law in the grand scheme of

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\(^{38}\) See Baird & Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 Stan. L. Rev. 175 (1983).


“matters legal.” Karl Llewellyn was the principal draftsman of the UCC, not just because he was a commercial law scholar, but because he was concerned with very fundamental and practical jurisprudential inquiries. Article 2 posits the jurisprudential issue of how much direction a statute need provide the courts in order to unburden commercial transactions and still render the best result in litigated cases. Just as the UCC originally was conceived as a means to give effect to transactor expectations and law merchant principles, Article 2A recognizes the benefits of drafting to accommodate the Grand Style of adjudication and relies on a “sense of the situation” to reveal the best result on the facts of a particular case. The contributors to this Symposium recognize this and provide insight into Article 2A’s relationship to the Llewellyn tradition. In particular, Professor Harris maintains a steady (and healthy) preoccupation with the underlying principles and policies that pervade the UCC. Those principles and policies are at least consistent with, if not in fact a product of, the Llewellynesque perspective.

For several reasons it is worthwhile to judge Article 2A by the standards established in Article 2. First, many Article 2A provisions obviously are based on Article 2 analogues. Second, by their own admission the drafters of 2A were trying to write law in the Llewellyn style—focus on the facts, provide the court with the contours of a rule, and do not impose artificial restrictions by the use of formalistic language. Third, even though Karl Llewellyn was an academic commercial law scholar, he immersed himself in

42. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 COLUM. L. REV. 431, 432 (1930) (“I have no desire to exclude anything from matters legal.”).
45. For a discussion and appraisal of Llewellyn’s legal realism in the commercial law, see Alces, Toward a Jurisprudence, supra note 8, at 1299 & n.92.
46. See, e.g., U.C.C. § 2A-518 comment (1987) (“Thus, the decision of whether the new lease agreement is substantially similar to the original will be determined case by case.”); id. § 2A-504 comment (“Whether the inclusion of these formulae will affect the classification of the transaction as a lease or a security interest is to be determined by the facts of each case.”).
47. See id. § 1-102.
48. See supra note 46.
49. See Alces, Toward a Jurisprudence, supra note 8, at 1324-27.
the practice of commercial law before presuming to write better sales law.\textsuperscript{50} Ronald DeKoven, the principal architect of Article 2A, is a distinguished practitioner who, like Llewellyn before him, recognized that a sense of the commercial dynamic is indispensable to drafting commercial law in a way that will accommodate adjudication in the Grand Style.\textsuperscript{51}

Consider, for example, the lessor’s remedial provision in Article 2A permitting the lessor to recover damages upon the lessee’s breach when the lessor has re-leased goods pursuant to a “substantially similar” lease.\textsuperscript{52} The pertinent Official Comment explains:

While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in a finding that a new lease agreement is substantially similar to the original. The various elements of the new lease agreement should be examined. Those elements include the term of the new lease (because the damages are calculated under subsection (2) as the difference between the total rent payable for the entire term of the new lease agreement and the remaining lease term of the original lease); the options to purchase or release; the lessor’s representations, warranties and covenants to the lessee as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of the factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently, as it is important that a sense of commercial judgment pervade the finding.\textsuperscript{53}

\textsuperscript{50} Karl Llewellyn practiced, for a time, with the Wall Street law firm of Shearman & Sterling. See W. Twining, Karl Llewellyn and the Realist Movement 101 (1973).

\textsuperscript{51} Ronald DeKoven is a partner with the firm of Shearman & Sterling.

\textsuperscript{52} U.C.C. § 2A-527(2) (1987) provides:

(2) . . . if the disposition is by lease agreement substantially similar to the original lease agreement and the lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (a) accrued and unpaid rent as of the date of default, (b) the present value as of the date of default of the difference between the total rent for the remaining lease term of the original lease agreement and the total rent for the lease term of the new lease agreement, and (c) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee’s default.

\textsuperscript{53} U.C.C. § 2A-527 comment (1987).
This section may prompt the same judicial and scholarly debate that has attended the Article 2 unconscionability provision.\textsuperscript{54} Professor Benfield's contribution to the Symposium treats in part the issues surrounding substantial similarity, and in so doing demonstrates what may be some of Article 2A's shortcomings.\textsuperscript{55} Do the drafters expect too much of the courts? While Llewellyn's approach to the law contemplated some lawmaking by a judge deciding a sales case\textsuperscript{56} in the Grand Style, he did draft Article 2, at most crucial points, to provide courts some guidance as to how to effect the proper balance of interests.\textsuperscript{57} Perhaps it will turn out that the drafters of Article 2A in their incorporation of the substantially similar lease concept have stopped a bit short of providing the courts sufficient guidance.

The articles by Professor Benfield, Professor Harris, and Donald Rapson also pose the larger and more difficult question: do the Official Comments to Article 2A provide merely a guide to construction and application of the statute, or do they attempt to make law beyond that contained in the provisions of the Article? It may be helpful to keep in mind when considering the issue that the Comments did undergo adjustment for some time after the drafting of the Article 2A provisions was completed.\textsuperscript{58}

Article 2A also confronts, and occasionally fails to confront, some of the fundamental issues of increasing concern to the commercial community. As noted above, the Mooney and Kripke pieces contain important remarks regarding the lack of a filing requirement in Article 2A and the consequent ostensible ownership problems, or lack of such problems (in Mooney's estimation). Mooney draws an important distinction between the assumptions underlying credit transactions and those considerations which gov-

\textsuperscript{54} See id. § 2-302.

\textsuperscript{55} Benfield, Lessor's Damages Under Article 2A After Default by the Lessee as to Accepted Goods, 39 ALA. L. REV. 915 (1988).

\textsuperscript{56} It could, however, reasonably be concluded that section 2-207, the "battle of the forms" provision, contemplates too much judicial lawmaking. See generally Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621 (1975).

\textsuperscript{57} See, e.g., U.C.C. § 2-201(2) (1987). Section 2-201(2) describes a procedure that merchants may utilize to avoid the unjust results often reached under the common law. That procedure permits the parties to a sales transaction to posture themselves in such a way that the equities clearly appear. See Alces, Toward a Jurisprudence, supra note 8, at 1325.

\textsuperscript{58} Letter from Donald J. Rapson to James S. Roberts, Coordinator, Article 2A Symposium (Aug. 13, 1987).
ern lease transactions—his remarks have relevance beyond the scope of the Article 2A debate.

Professor Miller's article addresses the Article 2A provisions that treat consumer protection issues.\(^5\) Notwithstanding the fact that the Sales Article includes scant consumer protection legislation, the fact that Article 2A follows that lead is curious. Although the consumer protection movement was virtually nonexistent at the time of the UCC's promulgation, the last quarter-century has seen a tremendous expansion in such legislation. Whole parallel bodies of payments law, governing credit cards and electronic funds transfers, have been passed by the states and the federal government that, in large measure, respond to the perceived anti-consumer bias of the law governing paper-based payment systems.\(^6\) Professor Miller's article explains the relationship between consumer protection principles and this newest Article of the UCC.

In considering Article 2A's treatment of consumer interests and the Article's place in relation to consumer protection legislation generally, the issue of the relationship between state and federal law comes into focus. Why is Article 2A state rather than federal law at a time when we are witnessing increasing federalization of commercial law? Will the law undergo substantial amendment in the states and therefore, in the course of the next few years, cease to be uniform at all? The California initiative suggests that the foregoing question may be more than idle speculation.\(^6\)

Related to consumer issues and the question of whether Article 2A is better cast as uniform state or federal law is the new lease law's reliance on freedom of contract principles. That reliance is characteristic of the Code, but not all that familiar in federal law. Also, the major limitations on freedom of contract principles in Article 2A are in consumer settings. For the most part the drafters trust the negotiation and drafting skills of the sophisticated transactors who are party to the more significant lease deals. Should a


statute only provide backstop law? To what limitations should the law be subject? The articles by Professors Harris and Benfield consider the limits of private agreements in the Article 2A scheme.

Finally, students and teachers of commercial law will have to appraise the success of Article 2A. Professor Kripke finds so many shortcomings in the promulgated draft of Article 2A that he would vote against the statute. Most of the other contributors to this Symposium, some of whom were either involved in the drafting process or are members of the Permanent Editorial Board, are generally favorable in their assessment of Article 2A’s provisions and qualify their criticisms with remarks praising the overall quality of the effort. Even in those articles that are the most favorable, the authors reveal “glitches” in the operation of some of the Article 2A provisions. Time will tell whether these glitches are minor annoyances or serious stumbling blocks for the courts and transactors.

III. Conclusion

Article 2A of the UCC is a commercial law development that will remain important for some time to come, even if all of the states do not immediately embrace the finished draft. This short introduction to the Symposium has endeavored to suggest the role this issue of the Alabama Law Review will play in the legal literature and in the development of commercial law. It is crucial that the commercial bar study and understand Article 2A, particularly because at the time of this writing debate in the state legislatures is beginning in earnest. In addition to suggesting the broader issues concerned, this essay represents something of an initial (albeit quite modest) effort to encourage commercial law teachers to think about Article 2A and its place in the law school curriculum. Perhaps more than any development since the initial promulgation of the UCC, Article 2A forces us to come to terms with the Llewellynesque jurisprudential perspective and its role in the contemporary commercial law pedagogy.