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## 2-207 and Company (For Richard A. Hausler)

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# ARTICLE

## 2-207 and Company (For Richard A. Hausler)

PATRICK O. GUDRIDGE\*

Richard Hausler possessed—or was possessed by—a distinctive intelligence. He was often characterized as theatrical (the recessionist at his funeral was “There’s No Business Like Show Business”). But this label is too straightforward. Hausler’s mind worked with extraordinary facility within conventions, within overtly artificial points of view. His thought pushed quickly and elaborately to the limit of his chosen conceit or stance, and demanded that those who would engage him proceed likewise. Hausler knew as well—seemed to grasp immediately in any particular setting—the power that conventions confer on transitions. Moving outside until-then confining formulas imparts a force, an urgency, a sense of the real and the authentic, to what is said next. Richard Hausler was able—remarkably often—to conjoin the theatrical and the moral (a distinctive accomplishment).

I will try to write for Richard Hausler. My subject (his, not ordinarily mine) will be contracts and the Uniform Commercial Code. My point of departure will be an essay by Richard Hyland, at one time also a member of the University of Miami faculty. (Familiar Miami figures stir in the background—Soia Mentschikoff and Daniel Murray.) In particular, I will discuss section 2-207 and associated sections of the proposed revisions of Articles 1 and 2 of the Uniform Commercial Code. It is not clear, at this point, that revised Articles 1 and 2 will clear all the necessary hurdles. The provisions that I read are not much in controversy—or so I understand. They are, however, jurisprudentially provocative—or so I will argue.

### A.

Richard Hyland’s essay *Draft*, published in 1997,<sup>1</sup> intersperses two accounts. The first and longer is a discussion of some problems occa-

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\* Professor, University of Miami School of Law. Thanks to Michael Fischl for guidance, Terry Anderson and Bob Hillman for helpfully incisive readings, and participants in a Law School faculty seminar (especially for their instructive appreciation of the work of Richard Hyland). Errors and oddities, of course, are mine.

1. Richard Hyland, *Draft*, 97 COL. L. REV. 1343 (1997).

sioned by section 2-207 of the Uniform Commercial Code—the famous “Battle of the Forms” provision—that Hyland believed were not satisfactorily resolved by then-current draft language proposed as part of the on-going reformulation of Article 2.<sup>2</sup> The second—presented in fragments breaking up the U.C.C. exploration—describes the setting within which Hyland was writing and the events unfolding while he was writing. “I am sitting cross-legged on a plastic picnic mat in one of the wide expanses of soft, close-cropped grass dispersed throughout Shinjuku Park.”<sup>3</sup>

There might be several reasons why Professor Hyland wrote his essay in this way. The personal interludes offer readers an opportunity to break free momentarily from a highly concentrated argument and refresh their attention. The suggestion that the essay was written all at once, in one sitting, indeed out of doors in Tokyo, also works to reduce the reader’s demand for supporting materials. Hyland included no footnotes, no quotations in full of either section 2-207 or its would-be replacement, no discussions of cases. We are presented with only Hyland’s argument, stated only in his own terms (it is only this, presumably, that Hyland wanted us to consider). Here, however, I want to explore another hypothesis. I propose that we read Richard Hyland as inserting a kind of allegory into his essay, an oblique commentary or specification of expectations. Hyland’s naturalism may be entirely false. He may not have written the essay all at once, and the setting within which he actually wrote may have been much less pastoral. Its personal interludes might be fictions for all we know. But fictions, we also know, are often useful.

This is the narrative that Professor Hyland provides us once we put it all together.

*TW sits in a Tokyo park. While writing, he watches his very young daughter play with two older children—strangers. His wife has gone to get food. She returns. TW stops writing. His wife feeds the child small rice balls encased in fried tofu. TW waits to eat until the child is finished (out of deference to his wife’s concern about the child’s eating habits). The child’s diaper needs changing. Although this is ordinarily TW’s responsibility, his wife takes charge of the task and TW resumes writing. The sun begins to set and TW’s wife prepares to leave the park. She packs up their belongings (this is also ordinarily TW’s responsibility). TW continues to write. The sun sets and the park officially closes. A park police officer allows TW to*

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2. This revision is a joint effort by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

3. Hyland, *supra* note 1.

*finish writing before leaving the park.*<sup>4</sup>

An idyll of opportunism, of advantage-taking *and* consensus: TW is almost always able to do what *he* wants—write—because *others* adjust their conduct to complement his aims. Sometimes this just happens. The two children play with his daughter. But more often, it seems, others recognize that there is no reason not to accommodate TW. The police officer waits. TW's wife is prepared, in these circumstances at least, to change the diaper and pack up. TW reciprocates. He recognizes that it is important for his wife that their daughter eat first, even though he himself thinks it doesn't matter so much, and thus he waits to eat. There is no real conflict in Hyland's narrative. Individuals are able to do what they want to do because other individuals have no reason not to defer.

So?<sup>5</sup>

The conclusion that Professor Hyland draws from his discussion of section 2-207 and its proposed revision is that both the extant statutory formula and its would-be successor make matters worse in cases in which parties to a contract have not themselves unequivocally agreed in advance to terms relevant to a dispute. Either formula, he contends, will prescribe arbitrary results or define a moral hazard: invite strategic posturing by one or another party.<sup>6</sup> Hyland would abandon the effort. “[W]hy isn't the rule simply that the facts and circumstances of the case will determine whether the varying terms become part of the agreement[?]”<sup>7</sup> “[T]he determination of the terms of the contract” should be

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4. See *id.* at 1343-44, 1353-54, 1356, 1357-58, 1361-62. This is my summary—I condense Richard Hyland's own passages. Hyland writes in the first person. But because I treat what he is writing as a short story rather than an autobiographical fragment, I will refer to the essay's “I” as “TW” (the writer).

5. I do not mean by this question to suggest that the idea of opportunistic consensus—insofar as it is suggested by Richard Hyland's narrative—is uninteresting in general. The proposition that legal norms are put to use, in some circumstances, precisely for the purpose of negotiating changes in the norms, obviously has affinities with the familiar notion of “bargaining in the shadow of the law” and also with the equally familiar notion of bodies of law functioning as default rules. If the idea of opportunistic consensus adds anything, it is first an emphasis on improvisation—the adjustment occurs in real time, as it were, as the individuals involved grasp the situation, the implications of the legal norm, the alternatives, and their own stakes. Second, there is also the distinctive pattern of interested assertion and disinterested acquiescence. The immediacy of this exercise in micro-government, I think, and its conjunction of activity and passivity ultimately limit its relevance with regard to the sorts of arrangements addressed by Article 2. Self-government, a very different notion (I will argue), fits better here.

6. There are many discussions of present section 2-207 that criticize the provision. See, e.g., JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 47-48 (5<sup>th</sup> ed. 2000) [hereinafter *WHITE & SUMMERS*]; Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 *MICH. L. REV.* 2678 (2000) (referencing literature).

7. Hyland, *supra* note 1, at 1351.

“left entirely to the courts.”<sup>8</sup> What, then, will the courts do? This question does not interest Hyland. “There is simply no way to constrain a judge to decide a dispute in a way the judge believes to be improper.”<sup>9</sup> Judges will not act “against fairness” or “reach the wrong result” but will instead opt for a “good reason” suggested by what the judge believes to be the circumstances of the case.<sup>10</sup>

This conclusion is quite strong. Richard Hyland cannot be recommending that common law formulations replace statutory language. The problems that he identifies would then simply re-present themselves to judges as they try to word their opinions or summarize previous decisions. Hyland must want judges to try to decide and try to describe only what is in front of them—we should end up with an accumulation of individual cases and no generalizations. The question of the content of contract terms would be a matter for adjudication, and for legal process, but would not be an occasion for articulating substantive principles. Judges would, presumably, function something like arbiters, or jurors in negligence cases.

Of course, however admirably austere, this proposal is not especially useful for the judges who must decide the cases or the lawyers who argue them. But maybe this is the point at which Professor Hyland’s writerly narrative becomes pertinent. One version of a fair result, we might think, is suggested by the idea of opportunistic consensus implicit in Hyland’s account of his picnic in the park—if a particular outcome matters much for one party, and its opposite matters not at all or only a little for the other party, the right result is the one sought by the party with the greater concern. This proposition, perhaps, is enough to guide lawyers and judges in working through specific cases; it also should not, we may think, require much in the way of potentially troublesome elaboration (as opposed to application).

Or is this too easy?

## B.

What we think about this question may matter. The revisers of Article 2, by summer 2000, seemingly pretty much agreed with Richard Hyland.<sup>11</sup> This was the draft prepared then for the National Conference of Commissioners on Uniform State Laws (it remains the proposed

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8. *Id.* at 1359.

9. *Id.* at 1361.

10. *Id.* at 1361, 1358.

11. See Dennis Patterson, *The Limits of Empiricism: What Facts Tell Us*, 98 MICH. L. REV. 2738, 2742 n.19 (2000).

text):<sup>12</sup>

SECTION 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION.

If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to Section 2-202, are:

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and
- (c) terms supplied or incorporated under any provision of [the Uniform Commercial Code].

The “Preliminary Comments” of the revisers state:

By inviting a court to determine whether a party ‘agrees’ to the other party’s terms, the text recognizes the enormous variety of circumstances that may be presented to a court under this section, and the section gives the court greater discretion to include or exclude certain terms than original Section 2-207 did.<sup>13</sup>

Should attempted reconstruction of “opportunistic consensus” inform judicial exercise of “greater discretion”? We need to consider somewhat more closely Professor Hyland’s short story. Hyland’s writer and the persons with whom the writer interacts never disagree. They recognize immediately when their own interests are implicated (or not), and they also recognize just as quickly when the interests of the others are implicated. No one, therefore, changes her or his mind. At first glance, of course, matters in litigation do not fit this picture. The interests of all parties appear to be at stake and in a state of opposition. Their accounts of what they thought was their agreement differ, not surprisingly, in ways consistent with their opposing interests. A judge could not expect to find the prerequisites of a single, complementary pattern of assertion and deference in the descriptions by the parties of their under-

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12. U.C.C. § 2-207 (2000 Annual Meeting Draft) available at <http://www.law.upenn.edu/bll/ulc/ucc2/21100.htm> (Uniform Commercial Code Article 2 — Sales (Draft for Discussion Only) prepared for July 28 — Aug. 4, 2000 NCCUSL annual meeting); U.C.C. § 2-207 (2001 Annual Meeting Draft) available at <http://www.law.upenn.edu/bll/ulc/ucc2/ART0612.htm> (prepared for the Aug. 10-17, 2001 NCCUSL annual meeting).

13. U.C.C. § 2-207 preliminary cmt. 3. “There is a limitless variety of verbal and nonverbal behavior that may be claimed to be an agreement to another’s record. The section leaves the interpretation of that behavior to the wise discretion of the courts.” *Id.*

Present section 2-207(3) clearly served as one starting point for the proposal, prefiguring proposed section 2-207 subsections (1) and (3). See page 375 *infra*. The beginnings of subsection (2) are apparent in the somewhat more complex language of “Alternative B” put forward by a U.C.C. drafting committee in October, 1993. See Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the “Battle of the Forms,”* 49 BUS. LAW. 1019, 1020-21 (1994).

taking as they understand it as of the time they appear in court. The judge might be able, however, to suppose that at some earlier time the parties did not understand their interests in such zero-sum terms, and that the terms of their agreement might be properly described as expressing this earlier understanding. The familiar distinction between *ex post* and *ex ante* perspectives would once more be put to work.

But the idea that there was some moment before dispute in which the parties agreed on what mattered or did not matter to each other seems fanciful. The terms at issue, after all, are not "terms that appear in the records of both parties." This must mean that, at the time the parties established their relationship, the terms were not of such immediate concern to either party that either party wanted the relevance of the terms to be fixed unequivocally.<sup>14</sup> Suppose, for example, that the eventual subject of dispute initially appeared to the parties to be a low probability contingency, thus not worth the cost of negotiating. One or the other party might have floated its "ideal" terms, perhaps with an eye to later negotiation or litigation—but there would be no reason to conclude, given the perceived low probabilities, that any such floated terms represented what that party had to have. A judge cannot assume, therefore, that the parties possessed, at some point prior to dispute, fully specified conceptions of materiality. The most that the judge can try to do is extrapolate from those terms upon which the parties plainly did agree, and perhaps from those terms which the parties plainly left for U.C.C. default resolution, in order to hypothesize additional party interests and terms—terms to which the parties would be deemed to have agreed, terms therefore arguably falling within subsection 2-207(b).

It is not especially likely, therefore, that floated terms will be enforced as is on the assumption that I attribute to Richard Hyland—that added terms are effective only if they matter to one but not the other party (or parties). Would-be additions framed to favor strongly one party, we may think, will not very often appear to be of little relevance—immaterial—to the interests of another party.<sup>15</sup> The judge might try to formulate variant terms of lesser advantage to one party, and thus arguably irrelevant to another, or instead declare the absence of party-agreed terms and apply U.C.C. default provisions. The first option puts the judge squarely in the middle of the dispute, unambiguously the

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14. It must also be the case that at least one of the parties is not, at the time of dispute and litigation, satisfied with default terms "supplied or incorporated" by the U.C.C. itself. I assume, for the moment, that trade usage, course of dealing, or similar sources of contract terms are not relevant.

15. Most provisions offering clear-cut gains to one party can be reworded to reduce the gain; another party might bargain for some advantage for itself in a negotiated arrangement, therefore, in return for allowing the unequivocal advantage.

writer of the ultimately decisive terms. The second alternative is radically different: if unilaterally-offered party terms will often be too one-sided from the perspective of the other party, the role of the judge will become simply that of announcer—declaring U.C.C. default terms to be applicable. Subsections (a) and (c) of proposed section 2-207 will matter much more in practice than subsection (b).

Which is the better approach? A straightforwardly substantive inquiry—“interpretation” of the “limitless variety of verbal and nonverbal behavior that may be claimed to be an agreement,”<sup>16</sup> case-specific and therefore seemingly right business for judges—abruptly morphs into the too-familiar, always-vertiginous question of judicial role, judges contemplating their own image, judging themselves as much or more than the case at hand. We should want to resist this institutional translation. But what then are we—and the judge—to think about the discretion that proposed section 2-207 may confer and that Professor Hyland would plainly applaud?

### C.

It is time to read statutory language more closely.

At the outset, we need to recall the wording of the present (long-time) section 2-207:

#### ADDITIONAL TERMS IN ACCEPTANCE OR CONFIRMATION

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms

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16. U.C.C. § 2-207 preliminary cmt. 3 (Annual Meeting Draft May 2001).



incorporated under any other provisions of this Act.<sup>17</sup>

Two concerns are evident. The first is to identify the terms of the contract. This is relatively easy if “the writings of the parties do not . . . establish a contract” but do reveal contract terms. In this case, so long as the conduct of the parties independently “recognizes the existence of a contract,” the terms are, according to subsection (3), the terms “on which the writings of the parties agree,” and otherwise “any supplementary terms” supplied by the U.C.C. itself. But within present section 2-207, there is also a second preoccupation. Subsections (1) and (3), famously, repudiate the common law “mirror image” rule. This does not mean, however, that the idea behind the rule—party intent, in particular, common intent of the parties—also disappears. The prominence of the “conduct by both parties which recognizes the existence of a contract” phrase in subsection (3) (it’s the precondition for all that follows) is revealing: the key is the state of mind (“recognizes”) of the parties—here circumstantially established. In subsections (1) and (2) this preoccupation is even more apparent. “A definite and seasonable expression of acceptance or written confirmation” is sufficient in subsection (1) “unless acceptance is expressly made conditional . . . .” In subsections (2)(a) and (c) the statutory inquiries into whether “the offer expressly limits acceptance” or “notification of objection . . . has already been given” are once more obvious state of mind tests—what one or the other party might be expected to recognize. Materiality, the central test in subsection (2)(b), is also a proxy—another form of circumstantial conclusion. The more emphatic disposition of dealings “between merchants” incorporated in the threshold of subsection (2) fits as well—merchants should know to take each other’s responses seriously and should understand what is at stake for each other.

State of mind, however, plays a plainly diminished part in new section 2-207. Conduct, offer and acceptance, and contract formation “in any manner” are all the same; the focus now is—mostly—the “terms . . . in the records of the parties.”<sup>18</sup> This shift in emphasis is in part a consequence of moving subsection (1) of present section 2-207 to proposed section 2-206 (as new subsection (3)): “A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.”<sup>19</sup> Section 2-206(3) is not itself decisive of anything (it just states a possibility). “[A]ny responsive record must still be fairly regarded as an ‘acceptance’ and not as a proposal for such a different transaction that it should be

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17. U.C.C. § 2-207 (2001).

18. U.C.C. § 2-207(a) (Annual Meeting Draft 2001).

19. *Id.* § 2-206.

construed to be a rejection of the offer.”<sup>20</sup> The crucial provision is really section 2-204(3)—its well-known language unchanged: “Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”<sup>21</sup> State of mind is, of course, the organizing preoccupation of section 2-204: “A contract for sale of goods may be made in any manner sufficient to show agreement . . . .”<sup>22</sup> It is certainly possible to label the proposed relocation of present section 2-207(1) as simply clarification—statutory house-keeping. But it is also jurisprudential work. The question of whether “the parties have intended to make a contract” is a different question—section 2-204 supposes—from whether “there is a reasonably certain basis for giving an appropriate remedy.” “[A]greement” must mean, therefore, something like mutual intent of the parties to assume legal obligations to each other—but plainly enough it does not mean agreement as to the content of the obligation.<sup>23</sup> “Reasonably certain basis” and “appropriate remedy” are matters left for other Article 2 provisions—proposed section 2-207 importantly among them.

Within present section 2-207, in contrast, the question of the existence of the obligation and the specification of its content are distinct but not entirely different issues. Specification is understood, in subsection (2) at least, as a process of positing agreement *to* terms (acknowledgment of obligation) in the absence of agreement *of* terms (acknowledgment of the content of arrangements). Why might present section 2-207 proceed in this way? Statutory provisions define responsibilities—*both* fix obligations and specify their terms—all the time. But statutes—it’s just as plain—need not be so definitive. Proposed section 2-204, we have just seen, ties obligation to the state of mind of parties to a contract (to their mutual agreement to be mutually obliged) even as it separates out the question of content. Does this mean that the parties must be understood to create the obligation? Not exactly: The U.C.C.—like any statute—itself creates the legal obligation. The agreement of the parties, however, is the *statutory* precondition triggering the *statutory* obligation, the specification of the statute’s domain, the description of what it addresses, its subject-matter. The U.C.C. concerns itself with party

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20. *Id.* § 2-206 preliminary cmt. 2.

21. *Id.* § 2-204(3). Proposed section 2-204 now expressly includes offer and acceptance within its domain. See *id.* § 2-204(1).

22. *Id.* § 2-204(1).

23. Proposed U.C.C. § 1-201 defines “agreement” as “the bargain of the parties in fact . . . ,” and defines “contract” as “the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] . . . .” U.C.C. § 1-201(b)(3) & (11) (2001 Annual Meeting Draft) available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc161401.htm>.

understandings of contract terms, from this perspective, because the statute itself attributes value to the parties' sense of the situation. The substantive worth of party understandings is indeed, famously, an Article 2 article of faith.<sup>24</sup> "Merchants" dealing with other "merchants" act on expectations expressing the "knowledge or skill"—the peculiar logic and experience—of their trades.<sup>25</sup> Respect for merchant knowledge also readily explains the "second best" efforts of present section 2-207(2)(b) to draw conclusions from even fragmentary manifestations of party expectations.

But we can just as readily note the statutory impact of some so for unstated second assumption. Present section 2-207(3) identifies as statutorily enforced whatever terms that parties jointly propose even if dealings are not between merchants. The reason why agreement in the sense of matching terms (and nothing more) matters cannot be—whatever it does turn out to be—respect for merchant understandings and courses of dealing. Proposed section 2-207(a) starts from present section 2-207(3). The new statutory language, moreover, drops any reference to, and thus special treatment for, transactions "between merchants." Is this a sharp break with longstanding U.C.C. jurisprudence? Merchant understandings might come in through the back door, of course, by way of proposed subsection (b), which enforces "terms, whether in a record or not, to which both parties agree."<sup>26</sup> A Preliminary Comment observes (ambiguously at once permissive and careful): "An 'agreement' may include terms derived from a course of performance, a course of dealing, and usage of trade."<sup>27</sup> There is also a new cross-reference (unexplained in the Preliminary Comment), preceding and thus conditioning the application of all three subsections—"subject to Section 2-202 . . ." This provision, addressing parol evidence, acknowledges (rather complicately, we will shortly see) the relevance of course of performance, course of dealing and usage of trade. The obliqueness of these 2-207 endorsements is telling, however. It is only within the context of other concerns, whatever they are, and therefore "subject to" the play of these concerns, that courses and usages "may" figure. It is necessary, I think, to move past the usual rhetoric of commercial realism to try to determine what else is at stake.

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24. For a dramatic discussion, see Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

25. See UCC §§ 2-104(1) & (3) (2001 Annual Meeting Draft).

26. On this reading, interestingly, the organization of proposed section 2-207 approximates that of the chapter discussing "Terms of the Contract" in WHITE & SUMMERS, *supra* note 6: "Terms Supplied by Express Agreement of the Parties"; "Terms Supplied by Course of Dealing, Usage of Trade, and Course of Performance"; "Terms Supplied by Gap Filler Provisions of Article 2 and General Law. . ." *Id.* at xxxii.

27. U.C.C. § 2-207 preliminary cmt. 4 (2001 Annual Meeting Draft).

## D.

Proposed section 2-202 is an only slightly changed version of the current U.C.C. parol evidence rule.

## FINAL EXPRESSION IN A RECORD: PAROL OR EXTRINSIC EVIDENCE.

(1) Terms with respect to which the confirmatory records of the parties agree or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be supplemented by evidence of:

- (a) course of performance, course of dealing or usage of trade (Section 1-303); and
- (b) consistent additional terms unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement.

(2) Terms in a record may be explained by evidence of course of performance, course of dealing, or usage of trade without a preliminary determination by the court that the language used is ambiguous.<sup>28</sup>

Proposed section 2-202 works in part to identify and privilege matching party-proposed terms—terms that then become subjects of other Article 2 provisions like proposed section 2-207. It is easy to see why proposed section 2-207 itself need not take up directly dealings “between merchants.” Merchant understandings figure in the workings of proposed section 2-202 as subsection (1)(a) “usage of trade” to be taken into account either to explain “[t]erms in a record” with respect to which it is already clear that the parties are in agreement or to supplement such terms.<sup>29</sup> Supplementary usages of trade are tantamount to matching terms according to a Comment accompanying proposed section 1-303, the provision cross-referenced in subsection 202(1)(a):

[T]he meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by

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28. *See id.* § 2-202 (showing the text of the proposed rule and also the changes). The discussion that follows develops a reading of proposed section 2-202 treating it as one element of a statutory scheme—as a parol evidence rule peculiar to Article 2. Obviously, it is also possible to interpret section 2-202 as an amalgam of thinking about parol evidence rules that originates independently of distinctive U.C.C. concerns. I do not develop this alternative approach here. For an excellent discussion of the leading themes in twentieth century American thinking about parol evidence, *see* Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CIN. L. REV. 269 (2000).

29. On the overlap of trade usage and merchant understanding, *see* U.C.C. § 1-303(c) & preliminary cmt. 4 (2001 Annual Meeting Draft).

the commercial context, which may explain and supplement even the language of a formal or final writing.<sup>30</sup>

This account, however, is too straightforward. Proposed section 2-202 purports to address three situations: cases involving challenges to “[t]erms with respect to which the confirmatory records of the parties agree;” cases involving challenges to terms “otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to such terms;” and cases concerning the preemptive effect of a record found “to have been intended also as a complete and exclusive statement of the terms of the agreement.”<sup>31</sup> The records at issue in all three cases oust “any prior agreement or . . . contemporaneous oral agreement.” In the first and second sorts of cases, record terms “may be supplemented by evidence of . . . consistent additional terms,” presumably originating in some prior or contemporaneous agreement of the parties, presumably without regard to whether the added terms reflect “course of performance, course of dealing or usage of trade.” In the third sort of case, such added terms are out of bounds. What about courses and usages as such? Proposed section 2-202 standing alone appears to declare these supplements to be pertinent in both the first and second cases without concern for consistency and similarly seems to apply the restriction in the third case only to added terms other than courses and usages.

The cross-reference to proposed section 1-303, however, is important:

COURSE OF PERFORMANCE, COURSE OF DEALING, AND USAGE OF TRADE

. . .

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. . . .

(e) . . . the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

(1) express terms prevail over course of performance, course of dealing, and usage of trade;

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30. *Id.* § 1-303 preliminary cmt. 1. Proposed section 2-207(b), it appears, is complementary, making usages of trade available in any cases that fall entirely outside section 2-202 because terms in records are altogether absent although the conduct of the parties nonetheless triggers obligations.

31. U.C.C. § 2-202(1) (2001 Annual Meeting Draft).

- (2) course of performance prevails over course of dealing and usage of trade; and
- (3) course of dealing prevails over usage of trade.<sup>32</sup>

Subsection (e) imposes a consistency requirement. Subsection (d) suggests that the requirement is met by courses and usages that “supplement” or “qualify” record terms.

In a classic battle of the forms, section 2-202’s restrictions are not especially salient apart from the protection afforded to matching terms in party records—there is no one document with a plausible claim to definitiveness (indeed, each party’s form may proclaim itself to be the exclusive record). From the perspective of proposed section 2-207, section 2-202 may have more significance insofar as it restricts the set of relevant party-supplied terms in cases in which one (and only one) record lays claim to be the “final expression” of party understandings.<sup>33</sup> Only “consistent,” “supplement[al]” additional terms or usages are pertinent—and even these become irrelevant if the “final” record was meant to be a “complete and exclusive statement.”<sup>34</sup> If there is a “final” record, therefore, added terms disclosed in other party records must be “consistent” or “supplemental”—and thus will not suggest disagreement, thus neither displacing nor excluding opposing terms in a “final” record under section 2-207. But if added terms originate in the records of one party only, is consistency or supplementarity for section 2-202 purposes alone sufficient to establish that there are “terms, whether in a record or not, to which both parties agree” in the sense of 2-207(b)? “[C]ourse of performance, course of dealing or usages of trade” are deemed to be agreed upon by the parties by proposed section 1-303, to be part of the understanding of the parties if consistent with express terms in party records. Perhaps this statutory presumption is enough for 2-207(b). Proposed section 1-102 declares: “This article applies to a transaction to the extent that it is governed by any other article of the [U.C.C.]”<sup>35</sup> If a record is taken to be “a complete and exclusive statement of the terms of the agreement” per section 2-202(1)(b), are evidences of 1-303 courses and usages therefore irrelevant? Section 1-102 would suggest that the answer must be “no.” Section 2-202(1)(b), moreover, addresses only

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32. U.C.C. § 1-303 (d), (e) (2001 Annual Meeting Draft). Subsection (f) declares that “a course of performance is relevant to show a waiver or modification of any term inconsistent with course of performance,” qualifying subsection (e). *Id.* § 1-303(f).

33. Use of master agreements and electronic alternatives to written forms may, in any event, reduce the number of form battles—and therefore increase the salience of other settings for purposes of section 2-207 jurisprudence. *See generally* Keating, *supra* note 6; McCarthy, *supra* note 13, at 1024-27.

34. Terms that pass the section 2-202 tests, of course, may not meet other U.C.C. requirements.

35. U.C.C. § 1-102 (2001 Annual Meeting Draft).

“consistent additional terms” in party records—perhaps itself suggesting that parties cannot by agreement legally displace otherwise relevant courses or usages, except by providing express alternatives sufficient to cause inconsistencies within the meaning of section 1-303(e).<sup>36</sup>

How proposed sections 1-303, 2-202 and 2-207 are supposed to fit together is a question of some importance in at least one kind of dispute we can repeatedly glimpse in 2-202 opinions in recent years. Businesses functioning as purchasers of widely-marketed, branded or otherwise specialized products—prototypically retailers of, for example, franchise food or petroleum products—frequently enter into arrangements with a supplier on terms specified in an elaborate, standard, mostly non-negotiable document put forward by the supplier. This document will often grant discretion to the supplier with respect to matters of obvious importance to the retailer—for example, product price, specifications, or the proximity of competing product retailers. The document will also often proclaim itself to be “a complete and exclusive statement of the terms of the agreement.” It is easy to understand why suppliers faced with large numbers of purchasers would proceed in this fashion. It is just as easy to understand why purchasers should worry.

This is a situation very different from Richard Hyland’s idyll—the prospect of self-interested assertion likely will not prompt indifferent acquiescence. And indeed, some purchasers do seek assurances from agents of a supplier that discretion will not be exercised in ways significantly inconsistent with retailer interests. The agents may respond orally, referring sometimes to established supplier policies or procedures that should work to protect purchasers. Or so purchasers claim.<sup>37</sup> In other cases, purchasers might write to the agents (or the agents might write) regarding the expectations of the purchasers.<sup>38</sup> In any case, the standard document will not be changed. Purchasers whose worst fears materialize, who confront sudden price hikes, unfit goods, or nearby competitors, and who sue to enforce their sense of the arrangements, often find that courts read section 2-202 as a bar. There is, it appears, only one relevant record. Not only inconsistent oral communications and unilateral writings, but also supplier policies codified in other docu-

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36. If such practices and exclusivity terms were to be regarded as not agreeing for purposes of section 2-207, even if coexisting for purposes of section 2-202, parties would be left with only U.C.C. gap-fillers pursuant to section 2-207(c).

37. *See, e.g.*, *Davis v. McDonald’s Corp.*, 44 F. Supp. 2d 1251, 1254 (N.D. Fla. 1998) (oblique oral reference to policies); *Precision Printing Co. v. Unisource Worldwide*, 993 F. Supp. 338, 344 (W.D. Pa. 1998); *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1336 (D. Kan. 1996); *Lykes Pasco, Inc. v. Ahava Dairy Prods. Corp.*, CV-97-0652, 1997 WL 855504 (E.D.N.Y. Nov. 13, 1997).

38. *E.g.*, *Steiner v. Mobil Oil*, 569 P.2d 751 (Cal. 1977).

ments which might in any event be understood to structure supplier discretion, are legally invisible because the master agreement—signed by the supplier—proclaims its own exclusivity.<sup>39</sup>

Cases like these put considerable pressure on the proposed section 2-202(1)(b) phrase “intended . . . as a complete and exclusive statement of the terms of the agreement.”<sup>40</sup> If suppliers in any case expect to be—more precisely, organize themselves so that their agents ordinarily will be—governed by criteria articulated in other documents, in what sense can it be said that suppliers intend to act at their discretion, as the would-be master contracts proclaim? A supplier can only assert a party-specific claim to discretion, a freedom to act inconsistently vis-à-vis any particular purchaser. Plainly enough, purchasers cannot be presumed, without closer investigation, to intend to subject themselves to substantial risks inherent in unqualified supplier discretion. The judges, however, may have a point. There is at least sometimes an obvious agency problem in these cases—Professors White and Summers refer to it as the problem of “the seller’s effusive salesperson.”<sup>41</sup> Why not afford suppliers the opportunity to restrict legal rights of purchasers, and thereby restrict the apparent authority of their own agents—at least if the master document terms are not unconscionable?

Section 2-202 does not itself suggest how—through consideration of what factors—a court can decide that it “finds the record to have been intended as a complete and exclusive statement . . . .” In many cases, judges appear to be persuaded by a document’s own proclamation, and the signatures of the parties. But this smacks of question-begging. The hardest cases have to do with the implications of a seller’s own policy documents—sources of either ordinary limits that the seller exceeded in the particular instance, or moral hazards sharpening the sense that unilat-

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39. See, e.g., *W. Intermodal Servs., Ltd. v. Singemas Container Indus., Co.*, 41 U.C.C. Rep. Serv.2d (CBC) 1168, No. 98 Civ. 8275, 2000 WL 343780 (S.D.N.Y. Mar. 31, 2000); *Davis*, 44 F. Supp. 2d at 1256-58 (elaborate policy documents do not limit discretion conferred in self-labeled integrated contract); *Precision Printing*, 993 F. Supp. at 354-55; *Wayman*, 923 F. Supp. at 1331-41 (extensive account of policy documents followed by recognition of supplier discretion). See also *Betaco, Inc. v. Cessna Aircraft Co.*, 103 F.3d 1281, 1286-92 (7<sup>th</sup> Cir. 1996) (oral representations and marketing documents irrelevant regarding terms of airplane sale). Some courts, to be sure, do look closely at context before judging the significance of records additional to the record claiming exclusivity. See, e.g., *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1300 (S.D. Fla. 1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1308 (S.D. Fla. 1999); *Confer Plastics v. Hunkar Labs.*, 964 F. Supp. 73, 79 (W.D.N.Y. 1997). Outside the U.C.C. setting, this latter approach is sometimes depicted as dominant. See, e.g., ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* 169 (1997). Other commentators present courts as chronically divided in their analyses of integration clauses. See, e.g., Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534-40 (1998).

40. U.C.C. § 2-202(1)(b) (2001 Annual Meeting Draft).

41. WHITE & SUMMERS, *supra* note 6, at 105.



eral discretion ought not to be understood as agreed. Supplier policies are not readily labeled as “courses” or “usage” for purposes of proposed section 1-303. The U.C.C. definitions are innocently pre-Weberian. They focus on dealings “between the parties” or conduct “in a place, vocation, or trade,” and appear to ignore the bureaucratic positionings, the specifications of routine, through which the parties organize themselves.<sup>42</sup> But even if the definitions were to be read broadly, the section 1-303(e) consistency requirement would remain a hurdle. Perhaps subsection 1-303(d)’s assertion of the relevance of courses and usages, and its recognition that such practices “may . . . qualify the terms of the agreement,” could provide a basis for incorporating seller policies as limits on seemingly conferred discretion. The use of “may” in section 1-303, plainly, does not itself motivate this aggressive approach.

Courses and usages, however, are not the only explanatory resources identified in proposed Article 1.

Every contract . . . imposes an obligation of good faith in its performance and enforcement.<sup>43</sup>

‘Good faith’ . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing.<sup>44</sup>

The obligation[ ] of good faith . . . may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which . . . performance . . . is to be measured if those standards are not manifestly unreasonable.<sup>45</sup>

The complex interaction of these provisions is reminiscent of the interior arrangements of sections 2-202 and 2-207. The “obligation of good faith” is a matter of “contract” but not “agreement.” It is in this sense statutory. “Good faith” is not, however, itself a contract “term.” The obligation of good faith “does not support an independent cause of action.”<sup>46</sup> Its enforcement can occur, therefore, only within the context of a dispute concerning some other contract “term,” originating in either agreement or statute (the U.C.C., we have seen, defines “contract” more broadly than “agreement”).<sup>47</sup> The agreement of the parties “may determine the standards” giving content to the obligation. But these standards cannot be “manifestly unreasonable,” and are therefore statutorily delimited. The legislative definition of reasonableness, however, is “commercial standards of fair dealing.” Section 1-303 courses and

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42. See U.C.C. §§ 1-303(a), (b) & (c) (2001 Annual Meeting Draft).

43. *Id.* § 1-304.

44. *Id.* § 1-201(19).

45. *Id.* § 1-302(b).

46. *Id.* § 1-304 preliminary cmt. 1.

47. Sometimes a statutory term itself acknowledges the pertinence of good faith. See, e.g., U.C.C. § 2-305(2) (2001 Annual Meeting Draft) (price to be fixed by party must be fixed in good faith).

usages are relevant in this regard, to be sure. But they cannot be considered as exhausting the statutory obligation if “good faith” is not a statutory redundancy.<sup>48</sup>

We have, it becomes apparent, a series of statutory responses to the problem—what the U.C.C. notably treats as a problem—implicit in the specification of contract terms. Section 2-202 identifies and freezes terms to be treated as matters of party agreement; section 1-303 similarly isolates party courses of conduct and trade usages statutorily deemed to be parts of an agreement (a neatly ambiguous exercise in blurring the line between party choice and legal imposition). Section 2-207 addresses remaining gaps, perhaps picking up agreed-upon terms outside sections 2-202 and 1-303, perhaps more often matching gaps with Article 2 provisions able themselves to supply missing terms. The U.C.C. good faith obligation is, it appears, more microscopic: it fills gaps *within* terms, in particular replacing opportunities to act unilaterally—at discretion—with responsibility to observe “commercial standards of fair dealing.” This requirement, in turn, initiates its own interplay, requiring formulation of a perspective drawing upon, but still independent of, party practices.

In the supplier discretion cases, from the perspective of good faith analysis so conceived, it would not be easy to explain why supplier policies were irrelevant. As descriptions of the way a supplier ordinarily proceeded, these policies would be one plausible source of benchmarks—“commercial standards” as it were—for determining whether the supplier’s conduct in the particular instance was either arbitrary or alternatively a plausible response to changed circumstances. Alleged oral representations of supplier agents would ordinarily seem to be less pertinent, however, unless the particular agents possessed policy-making authority or communicated often enough with policymakers. It would not be sufficient, from this perspective, for a supplier to argue that a would-be exclusive record was entirely clear in its declaration of discretion. There would need to be some basis as well for concluding that narrowly case-by-case determination, akin to the approach to adjudication propounded by Richard Hyland, was reasonable because no broader “commercial standards of fair dealing” were plausibly conceivable. Good faith, thus, appears to provide resources for directly addressing the issues at hand.

#### E.

This accumulation of statutory mechanisms cannot be explained—

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48. U.C.C. § 1-304 preliminary cmt. 1 (2001 Annual Meeting Draft) (obligation of good faith is “further implemented” by § 1-303).

the deployment of any of the alternatives defended—through straightforward invocation of the virtues of freedom of contract or the in-dwelling wisdom of commercial practices. Party agreement and commercial practices count, to be sure, but (with apologies to Gertrude Stein) there is simply too much too statutory there there.

More precisely: Proposed section 2-202 is preoccupied with records and terms, with attributes or intentions bound up with *form*—the exclusivity or non-exclusivity of particular records, for example. Intentions or expectations of parties concerning the *substance* of their arrangements as such are less pertinent (this distinction is never air-tight, of course). The formal investigations that implementation of section 2-202 supposes extend beyond the question of exclusivity. A nonexclusive record may (or may not) claim status as a “final expression” of the terms it incorporates. Given a recorded “final expression,” additional terms, originating in other records, must not be contradictory, but consistent and supplementary. Additional or overlaying terms originating in party course of conduct or trade usages must pass similar scrutiny under section 1-303. Cases and commentary suggest that considerations like these start from the idea that an acceptable additional term must appear to fill a gap left by other terms, to address a subject not covered by other terms.<sup>49</sup> A contract, thus, is implicitly modeled on the notion of a list, an accumulation or aggregation of terms conceived as independent items, and not as an inter-related whole.<sup>50</sup>

The idea of the list does not require that any given list be complete. Seemingly paradoxically, the possibility that terms do not specify a complete list, that there may be missing items, is just as pertinent with respect to records parties “intend[ ] . . . as a complete and exclusive statement of . . . terms.” Section 2-202 refers here to intent with respect to relevant records (“this is the only relevant record”); it does not suppose that, somehow, the intent of the parties proves that all necessary terms can indeed be found in the relevant record if the reader looks carefully enough.<sup>51</sup> Section 2-207, of course, begins with missing items.

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49. See *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 545 (Iowa 1995); WHITE & SUMMERS, *supra* note 6, at 94-101; 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-202:3, pp. 2-189 to 2-197 (1999). One starting point for this approach is the U.C.C. definition of “term,” included unchanged in proposed U.C.C. § 1-201(43): “‘Term’ means a portion of an agreement that relates to a *particular matter*.” U.C.C. § 1-201(43) (2001 Annual Meeting Draft) (emphasis added).

50. See generally JACK GOODY, *What's in a List? in THE DOMESTICATION OF THE SAVAGE MIND* 74-111 (1977). It is the combination of the acknowledged possibility of incompleteness and the assumption that terms possess their own separate fields of reference that suggest the image of the list. Incompleteness alone is not inconsistent with inter-relatedness. See, e.g., SUSAN HAACK, EVIDENCE AND INQUIRY 81-89 (1993) (crossword puzzle as epistemological model).

51. See also *Laing Logging Inc. v. Int'l Paper Co.*, 644 N.Y.S.2d 91, 93-94 (N.Y. App. Div.

It supplies added terms—in particular, cross-references U.C.C. gapfillers—but not to fill out, in full, a contract list. The only provisions that 2-207 supplies are those needed to resolve the immediate dispute. The good faith obligation is, in principle, different. It invokes a generally applicable norm. But because Article 1 ties good faith to disputes about particular terms, its universality becomes beside the point: good faith, too, functions as a gapfiller informing (informing only) terms in question.

This statutory preference for parts instead of wholes, the accompanying agnosticism as between incomplete and complete lists, is as much hard-headed drafting as it is mereology. If we expect contract terms to come from several sources, we would not want to approach the process of interpretation by assuming that contracts are unitary. Too much emphasis on common themes or inter-relationships or overlaps would not be true to the enterprise of contract formation. We would not be surprised to encounter, too often, frustrating incongruities, dissonance, antinomies. Proposed sections 2-202, 1-303, and 2-207, as well as U.C.C. subordination of the good faith norm, because they all proceed on an opposite formal assumption, work to marginalize this risk.

Proposed section 2-207 plainly treats contracts as typically composites. It proclaims three sources for contract terms—manifest agreement of the parties, implicit agreement of the parties, and other provisions of the U.C.C. itself. It treats all three sources as equally available—proposes “formal democracy.”<sup>52</sup> Terms that result from party agreements are listed first. This is plainly not, however, a statement of legislative preferment.<sup>53</sup> There is, in fact, no simple rank order. The salience of other U.C.C. provisions, of course, does depend upon which terms in particular turned out to be subjects of party agreement.<sup>54</sup> But insofar as section 2-202 censors additional party terms generating overlaps, and therefore leaves unresolved the issues addressed only by the overlapping additional terms, the space for statutory supplements

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1996) (§ 2-202 allows reference to § 2-306 to insert good faith obligation in requirements contract).

52. It may be notable that the new version changes the title of the section. Instead of dealing with the seemingly only occasional, party-triggered problem of “Additional Terms in Acceptance or Confirmation,” proposed section 2-207 is both entirely general and purports to be definitive: “Terms of Contract; Effect of Confirmation.” The Preliminary Comment is quite clear about this: “This section has been thoroughly revised. It states the terms of all contracts for sale, not just those as to which there has been a ‘battle of the forms.’” U.C.C. § 2-207 preliminary cmt. 1 (2001 Annual Meeting Draft)

53. Statutory mandatory terms are effectively first terms.

54. Some U.C.C. provisions are mixed cases: recognize the possibility that party terms might supersede, but closely define the circumstances in which this can occur. *See, e.g.*, proposed U.C.C. § 2-309(3) (2001 Annual Meeting Draft) (notice of termination); *id.* § 2-312(3) (regulating disclaimer of warranty of title).

increases. Proposed section 2-202 does not subject added statutory terms to its screens. Section 1-303 imposes agreement on parties given extant courses of dealing or performance or trade usages, and subsection 1-303(e) plainly arranges these resources in a hierarchy. The consistency requirement again breaks priority: overlapping party terms oust courses and usages. The good faith norm takes charge over party terms seemingly granting freedom to pursue unilateral advantage. But the content of the norm acknowledges the relevance of commercial understandings, and thus the pertinence of party practices, even as it signals without defining a (therefore unresolved, unstable) statutory recasting.

The proposed U.C.C. sections thus appear to assume, setting aside statutory-mandated terms, that party terms, courses and usages, and particular U.C.C. terms simply co-exist, disclose no clear-cut priorities. Such stratification is, perhaps, a not-surprising phenomenon in intensely wrought legal language.<sup>55</sup> It is also, perhaps, substantively a sign of an underlying legislative agnosticism. Arguments may be made for the advantages of any one resource; each may be understood as a superseding critique of the others.<sup>56</sup> This skepticism is not easily fit within perspectives that treat bodies of contract law as concerned chiefly with the understandings of the immediate parties to contracts.<sup>57</sup> Legislation (either statutory or judge-made) correspondingly figures as peripheral, addressing “failures” of various kinds. But the idea of “party understandings,” it might be argued, perhaps especially in the commercial setting, is not always easy to elaborate. Because of information costs or other transactional difficulties, parties might not negotiate terms as such; each might in any case attach priority to different parts of an agreement, and thus act more on a sense of parts than wholes; parties might reasonably behave strategically in all sorts of ways.<sup>58</sup> Difficulties like these

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55. Cf. M.M. BAKHTIN, *Discourse in the Novel*, in *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 288-91 (1934-35) (Caryl Emerson & Michael Holquist trans. 1981).

56. It is evident from this formulation that there is no necessary “private sphere” acknowledged within this perspective, no ordinary domain of freedom of contract or private ordering that is presumptively acknowledged or taken for granted—only case-specific and therefore provisional arrangements. Cf. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 *COL. L. REV.* 94, 125-26, 168-71 (2000) (criticizing Fuller’s “internal” analysis of “private autonomy”).

57. For an especially clear presentation of this assumption, in the course of a careful discussion of the parol evidence rule, see Posner, *supra* note 39, at 541-42.

58. These possibilities are widely-recognized. Indeed, they are sometimes taken as almost the entirety of the subject of economic analyses of contracts. E.g., BERNARD SALANIE, *THE ECONOMICS OF CONTRACTS: A PRIMER* (1997). Ian Ayres and Robert Gertner situate their well-known essay precisely within the universe of incomplete and strategy-beset agreements. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 92-94 (1989). Indeed, they propose their notion of “penalty defaults”—contract law supplying terms in cases of gaps in agreements—precisely as a response to the problem: if legal default rules are properly ill-tailored, parties will address matters, and reach

could perhaps be pushed to the margin, depicted as unusual or extreme cases (the stuff of legislation), if it were plausible to posit the existence of accumulations of customary practice—both rich and generally acceptable—figuring in the backdrop, in enough lines of business, informing and overshadowing individual negotiations or agreements. Article 2 as it now stands, many believe, proceeds on such a hypothesis. But this supposition is also controversial. Trade custom might be a kind of efficient collective unconscious; but it is also readily represented as subject to strategic maneuver and prone to incompleteness—as more or less arbitrary, sometimes sporadic private government.<sup>59</sup>

## F.

It does seem odd, all the same, to ground consensus legislation like the Uniform Commercial Code in a general commitment to doubt. Awkwardness abates, I think, if we reverse gestalt and treat party choices or trade practices as delegations within the U.C.C. statutory scheme. The norms that organize and justify statutes, ultimately expressions of constitutional assumptions, become starting points for analysis, supplanting and at least partly supplying content for notions like party understandings and trade customs. Within statutory and constitutional perspectives, I think, the possibility of disagreement, doubt, and dissent appears precisely as an important part of the subject at hand—and as therefore addressable.<sup>60</sup> As a general matter, the U.C.C. recognizes party-specified terms or business usages to be substitutes for statutory formulations.<sup>61</sup> Proposed section 2-207 is the most obvious Article 2 implementation. From the legislative perspective, in which statutory terms and party terms appear as alternatives, party terms are treated as better choices (statutory terms themselves apply only if there are no pertinent party terms or usages). From the perspective of parties themselves, correspondingly, their agreements appear as opt-outs, repudiations of inferior, otherwise already in-place statutory terms.

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agreements they otherwise would not have reached, in order to preclude enforcement of the default rules. Party agreements that the law can enforce presuppose legal provocation.

59. See, e.g., Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999). See also Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995). For an especially striking overview, see David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999).

60. I do not mean to suppose that consensus obtains as to the assumptions behind statutory and constitutional jurisprudence—only, rather, that conflict is itself a recognized part of the subject-matter.

61. "Except as otherwise provided in subsection (b) or elsewhere in the Uniform Commercial Code, the effect of provisions of the Uniform Commercial Code may be varied by agreement." U.C.C. § 1-302(a) (2001 Annual Meeting Draft).

There is nothing especially remarkable about this. It is not at all uncommon for statutes to acknowledge that matters may sometimes be better handled by adaptations by individuals or institutions subject to the statutes. Louis Jaffe's New Deal formulation remains classic: "The machine must be harnessed and run by those who can best run it. . . . [T]he legislature may legitimately consider that public administration in some cases is inadequate acting alone and is otherwise a positive and unnecessary embarrassment."<sup>62</sup> "Lawmaking by private groups" is a familiar phenomenon.<sup>63</sup>

Constitutional law conditions statutory delegations. Legislation must propound an "intelligible principle,"<sup>64</sup> some basis for supposing that particular private choices, akin in this respect to the choices of government administrators, are likely to serve public purposes—and, to assure this end, are also susceptible to independent assessment and enforcement.<sup>65</sup> A provision such as proposed section 2-207 does not announce straightforwardly substantive legislative criteria confining private discretion. The assurance that private choices match up with public purposes served must be oblique, derive instead from characteristics of the context of private choice. The process of private choice must be a version of public politics. Proposed section 2-207—or rather, the ensemble of U.C.C. provisions that section 2-207 ties together—may be read from this perspective as both resting upon and working to realize three assumptions:

*First*, insofar as a choice to displace statutory terms in favor of party terms supposes the agreement of parties acting on the basis of partly congruent and partly conflicting interests, choice (it must seem) does not reduce, too often anyway, to unmediated preference for the agenda of one or the other party.

*Second*, insofar as choice addresses matters that are also identifiably statutory subjects, party agreement (it must seem) is plausibly described as disagreement with statutory dispositions—the considered dissent that the U.C.C. means to accommodate.<sup>66</sup>

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62. Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 253 (1937).

63. For a careful effort to sort out different versions, see DONALD R. BRAND, *CORPORATISM AND THE RULE OF LAW* (1988).

64. See *Whitman v. American Trucking Ass'ns, Inc.*, 121 S. Ct. 903, 912 (2001).

65. For discussion of the general framework, see Lisa Schultz Bressmann, *Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000). For an especially intensely-argued application, see A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000).

66. Proposed section 2-207 therefore rejects the option that some see to be afforded by

*Third*, insofar as party agreement is also framed as specific and segmented, agreement is expressed (it must seem) in a form amenable not only to enforcement, but to restatement and scrutiny.

In this light, proposed section 2-202 plays an initially crucial role. It distinguishes those party agreements (if any) that are definitely concluded, in some or all respects, from interchanges that are less clear-cut, attributing authority only to the former. As a result, it can be argued, section 2-202 works to restrict party replacement of statutory terms to those matters to which parties are most likely to have brought to bear their combination of overlapping and competing interests, and thus reached *governing* conclusions rather than simply *restating* their perhaps strategically exaggerated wants. In any event, section 2-202, because of what it brings about, itself engineers this transformation. A record singled out by section 2-202 becomes an “inscribed” commitment, an *instrumentum pacis*. Because section 2-202 marks it as legally enforceable, the record is not only a list of party choices, but itself (because it exists) a reason to adhere to choices once made. Choices become self-supporting, limit subsequent strategic options, reduce the ex post attractiveness of unilateral advantage-taking, and thus generate reliable assurance, trust in forbearance, even (perhaps precisely) for strategically-minded parties.<sup>67</sup> Party agreements become exercises in self-government.<sup>68</sup>

This account is most persuasive in association with section 2-202’s treatment of records deemed “final expressions” or “complete and exclusive statements.” These records, it can be concluded, already single themselves out. The parties, it may be thought, are acting against the backdrop of the same document that the U.C.C. marks. Matching terms

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present section 2-207: exchange of inconsistent forms blocking application of substantive statutory provisions, leaving actual terms to be negotiated after dispute emerges, under threat of costly and uncertain litigation. See Mark E. Roszkowski & John D. Wladis, *Revised U.C.C. Section 2-207: Analysis and Recommendations*, 49 BUS. LAW. 1065, 1068-69 (1994) (reporting practitioner view).

67. See U.C.C. § 1-201(34) (2001 Annual Meeting Draft) (defining “record”); JOHN BOSSY, *PEACE IN THE POST-REFORMATION* 4 (1998) (*instrumentum pacis*); T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* 302-09 (1998) (promising as assurance); PAUL WEIRICH, *EQUILIBRIUM AND RATIONALITY: GAME THEORY REVISED BY DECISION RULES* 51-54 (1998) (self-support). It is not, therefore, that the parties agree in some strong substantive sense, but merely agree to regulate (and therefore create reason to reduce) subsequent disagreements that circumstances might motivate. U.C.C. statutory terms, obviously, induce precisely the same responses in the absence of a section 2-202 record.

68. For further discussion of the idea of self-government, and its jurisprudential and constitutional overtones, see Patrick O. Gudridge, *Public Privacy (Self-Government)*, 53 U. MIAMI L. REV. 395 (1999). I owe to Mary Coombs the suggestion that a developed notion of self-government should need to address contract law.



in multiple confirmatory records are also protected by section 2-202, however, and are recognized as decisive in proposed section 2-207(a). Should the mere fact that record terms agree, a fact that parties may not realize until a dispute is at hand, be treated as somehow proof of “self-government” in the sense just laid out? The U.C.C., we are assuming, not only judges but also structures party choices (in order to satisfy the constitutional constraint on legislative delegations). Proposed sections 2-202 and 2-207 put parties on notice to take seriously all terms in their own confirmatory records. The end result may be more actual negotiation—self-government. Or parties may reduce the number of proffered terms, increasing the field for Article 2 terms or pertinent courses or usages. If parties instead opt for unilateral but relatively general formulas, and records turn out to match, the U.C.C. good faith obligation might well determine the outcome in the event of subsequent dispute. The delegation would again become moot. If unilaterally-proposed terms which are relatively specific are offered, given these alternative possibilities, and in fact match, the conclusion that these terms catch the equities of the arrangement is certainly plausible. Agreement is not likely just coincidence.<sup>69</sup>

A reading of section 2-202 along these lines highlights the troubling element in the cases in which a first party’s representative offers supplemental oral or written changes, responding to the second party’s insistences, without literally altering the first party’s seemingly definitive draft of contract terms. The clearer the departure that the supplemental materials make from ostensibly official terms, the greater the difficulty in treating the process as an attempted resolution of competing interests—rather than just a Mutt and Jeff ploy. The public dimension that “finalization” proclaims—the signal and assurance of self-government—seems more than ordinarily likely to be a false face. This does not mean that the supplemental communications replace their counterparts in the supposedly integrated agreement. There is no unequivocal commitment. As a result, new section 2-207 becomes relevant. Because they disagree, neither the pertinent parts of the would-be final document nor the addendum become legally enforceable terms under either subsections 2-207(a) or (b).<sup>70</sup> Subsection (c) would then install U.C.C. terms.<sup>71</sup>

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69. I am not suggesting some magical meeting of the minds. Agreement to be governed by terms is not necessarily agreement to the elaborated content of terms.

70. Other provisions of the putative final agreement, because not contradicted, fit readily within subsection 2-207(a).

71. Given the apparent popularity of “master agreements,” see Keating, *supra* note 6, at 2696-97, but also the likelihood that party representatives may from time to time generate additional documents in order to close a deal, see *Steiner v. Mobil Oil*, 569 P.2d 751 (Cal. 1977), the

Proposed section 1-303 reveals political dimensions akin to those evident in proposed section 2-202. The definition of “course of performance” emphasizes not only “repeated occasions for performance,” but “knowledge of the nature of the performance” and “opportunity for objection”<sup>72</sup>—clear circumstantial indicators of thought-out interaction. “Course of dealing” similarly tests choice: the decisive question is not only whether “previous transactions” establish “a common basis of understanding” but whether “previous transactions” constitute “a sequence of conduct” and thus, it might be argued, a series of opportunities for choice.<sup>73</sup> The framework of choice here is less sharply presented—past is not present, and accumulation of transactions is not necessarily suggestive of assent. It is hardly surprising, within the terms of this account, that subsection 1-303(e)(2) gives priority to course of performance over course of dealing.<sup>74</sup> “Usage of trade” is the section 1-303 counterpart of matching terms. The statutory definition insists that a “practice or method of dealing” possess sufficient “regularity of observance” so as “to justify an expectation that it will be observed with respect to the transaction in question.”<sup>75</sup> This is a test of notice. Subsection 1-303(e)(1) itself supplies the opt-out chance: inconsistent “express terms prevail . . . .”<sup>76</sup> (This subsection enables exit from—and therefore underscores assent to—courses of performance and dealing as well.)

It is important to note that the good faith obligation extends to all U.C.C. “contract” terms,<sup>77</sup> not just those that are matters of “agreement” identified by proposed sections 2-202 and 2-207(a) and (b), but proposed section 1-303 courses and usages, and U.C.C. provisions incorporated by proposed section 2-207(c).<sup>78</sup> Spaces for discretion are filled whatever the source. Individual choices are not dictated; good faith concerns, however, test choices—demand defensible explanations. From the constitutional perspective, therefore, the U.C.C. provisions that I have been discussing describe an intricate arrangement of off-sets. Party agreements are put in position to dissent—to reject and replace statutory

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interaction of sections 2-202 and 2-207 in this setting may be of some practical significance. See also Avery W. Katz, *On the Use of Practitioner Surveys in Commercial Law Research*, 98 MICH. L. REV. 2760, 2769-72 (2000) (forms and agency).

72. U.C.C. § 1-303(a) (2001 Annual Meeting Draft).

73. See *id.* § 1-303(b).

74. See *id.* § 1-303(e)(2).

75. *Id.* § 1-303(c).

76. *Id.* § 1-303(e)(1).

77. See *id.* § 1-304.

78. See *id.* § 1-201(11). Because the good faith obligation is a matter of “contract,” it independently addresses statutory terms included in a contract whether or not the statutory provisions themselves make express mention of good faith.

terms or trade usages. But there is no zone of party autonomy per se: freedom of contract is freedom to legislate, protected only as affirmatively exercised. Incomplete exercises in self-government return legislative jurisdiction to statute and usage—as either sources of terms or, within the working out of terms, the tests of good faith scrutiny. This is a familiar, near-Madisonian constitutional order. Skepticism—entirely general—both prompts and organizes legal pluralism.

### G.

The particular questions posed at the start of these investigations now have answers:

*First*, proposed section 2-207(b) is not an open-ended grant of authority to judges on my model of Richard Hyland's proposal. This subsection is plausibly the site for incorporation into section 2-207 of proposed section 1-303's processing of courses and usages given the emphasis on assent we have discerned in the latter provision's framings. Subsection 2-207(b) may also serve as a catch-all for party agreements that somehow fall outside proposed section 2-202. Subsections (a) and (c) will in practice likely mark the most common sources of contract terms.<sup>79</sup>

*Second*, proposed section 2-207 is not, despite its admirably succinct wording, itself decisive of very much. Before section 2-207 becomes pertinent, proposed sections 1-103 and 2-202 specify important, potentially complex investigations. After 2-207 does its work, the U.C.C. good faith obligation remains relevant for purposes of judging uses parties make of U.C.C. contract terms. Richard Hyland is nonetheless right, I think, in hypothesizing some sort of ambitious judicial responsibility. It is not, to be sure, oracular divination of party understandings, whether unmediated or (as in present section 2-207) through contemplation of fragments. It is not, mostly, 2-207 application at all—this provision, however revealing as a kind of jurisprudential tableau vivant, has become simply a list of possibilities. Rather, in the effort to bring to bear proposed sections 1-303 and 2-202, and especially the U.C.C. good faith obligation, judges enforce formal democracy, take seriously the possibility of alternative sources of contract terms, and therefore the opportunity for critique and acknowledgement.

*Third*, it is not just this. The idea of self-government as the model of party agreement in particular possesses real substantive bite. It sets outside the politics of the provisions that I have been discussing the

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79. For discussion predating proposed section 2-207, but arguing in essence for this result, see Roszkowski & Wladis, *supra* note 66, at 1073-75.

pattern of assertion and acquiescence, of individual opportunity-seeking, that Richard Hyland's asides dramatize.<sup>80</sup> Self-government instead, supposes common projects—in this sense, public ends. It imparts to the idea of good faith, in particular (the other proposed provisions also), a peculiarly constitutional function and content. Hyland's assumption (or rather, the assumption that I impose upon him) that contracts begin with the individual is incomplete. Rather, new section 2-207 and company suggest that contracts originate in law, and in the question of the sources of law, and thus the question of politics. It is only within this matrix that individual parties appear. The role of the judge is to identify and protect the integrity of the alternating politics.

Not Karl Llewellyn, John Ely?<sup>81</sup>

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80. Opportunistic consensus does not disappear, of course. It can manifest itself, however, only in circumstances of no dispute whatsoever (Hyland's instances). It is not a point of departure for dispute resolution.

81. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). John Ely is the Richard A. Hausler Professor of Law at the University of Miami.