

NOTE

FEDERAL CONTRACT COMMON LAW AND ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE: A WORKING RELATIONSHIP

Article 2 of the Uniform Commercial Code presently governs the purchase and sale of "goods"¹ within forty-nine states, the District of Columbia, and the Virgin Islands.² Despite this impressive uniformity, federal contracts for the purchase and sale of goods³ are governed exclusively by federal law⁴ in the form of federal statutes,⁵ administrative regulation,⁶ and judicially created common law.⁷ In addition, disputes arising from the performance of federal contracts are resolved through a contract dispute procedure different from that used in resolving ordinary commercial disputes.⁸ The widespread adoption and use of Article 2 provisions within the states to govern ordinary commercial transactions highlights the uniqueness of federal contract law and spurs reappraisal of the rationale supporting such federal individuality.

Before such a reappraisal may begin, however, current federal policy must be identified. While Article 2 provisions have played a part in the resolution of federal contract actions since 1964,⁹ the present status of the Code

¹ U.C.C. § 2-105(1) provides in relevant part:

"Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.

² 1 UNIFORM LAWS ANNOTATED 1 (West 1977).

³ Federal contracts are usually classified either with respect to the object sought to be accomplished (such as the purchase of supplies or construction of buildings), by particular payment arrangements (such as fixed-price contracts), or in accordance with the particular legal form (such as a purchase order or requirements contract). See 2 J. McBRIDE & T. TOUHEY, *GOVERNMENT CONTRACTS*, § 18-10 (1978). Since this note focuses upon the use of U.C.C. Article 2 as federal contract law, however, the term "federal contract" will be limited herein to federal purchase or sale of "goods" as defined within U.C.C. § 2-105(1). See note 1 *supra*.

⁴ *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944).

⁵ See 41 U.S.C. §§ 5-412 (1976).

⁶ See 41 C.F.R. §§ 1-1 to 60-741 (1977).

⁷ *United States v. Standard Rice Co., Inc.*, 323 U.S. 106, 111 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

⁸ See generally Anthony and White, *Contract Suit Practice and Procedures in the United States Court of Claims*, 49 NOTRE DAME LAW. 276 (1976).

⁹ *John C. Kohler Co. v. United States*, 498 F.2d 1360 (Ct. Cl. 1974); *Northern Helix Co. v. United States*, 455 F.2d 546 (Ct. Cl. 1972); *Everett Plywood and Door Corp. v. United States*, 419 F.2d 425 (Ct. Cl. 1969); *General Electric Co.*, 652 C.C.H. Bd. Cont. App. 23,343, 23,457-58 (IBCA 1965); *Mazur Bros. & Jaffe Fish Co.*, 65-2 C.C.H. Bd. Cont. App. 23,303, 23,305 (VACAB 1965); *Reeves Soundcraft Corp.*, 1964 C.C.H. Bd. Cont. App. 20,869, 20,877 (ASBCA 1964).

as federal contract law is not clear. Three federal circuit courts¹⁰ and various boards of contract appeal¹¹ have specifically named the U.C.C. as a source for federal contract common law formulation. Nevertheless, the Court of Claims has never referred to Article 2 as a source for the formulation of federal common law. Instead, the Court of Claims has termed Article 2 provisions merely "applicable" in the resolution of federal contract disputes.¹² In addition, that court appears to have taken positive steps to distinguish Article 2 provisions from federal contract common law, and to limit their relevance within federal contracts.

Despite this confusing facade, a careful examination of relevant case law reveals four basic approaches towards Article 2 utilization in federal contract disputes. First, Article 2 provisions have been rejected outright where inconsistent with existing federal precedent.¹³ Second, Code logic and provisions have been used solely to support consistent federal contract law.¹⁴ Third, specific Article 2 provisions have been used to balance federal and private interests while preserving the force of prior federal case law.¹⁵ Fourth, specific Article 2 provisions have been integrated into federal contract common law when no significant federal interest or policy has been involved and no relevant federal case law has existed.¹⁶

Against this patchwork of policies, wholesale judicial acceptance¹⁷ and application of the Uniform Commercial Code as federal contract common law

¹⁰ *Gardiner Manufacturing Co. v. United States*, 479 F.2d 39, 41 (9th Cir. 1973); *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966); *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966).

¹¹ *Mazur Bros. & Jaffe Fish Co.*, 65-2 C.C.H. Bd. Cont. App. 23,303 (VACAB 1965); *Carpenter Steel Co.*, 65-1 C.C.H. Bd. Cont. App. 22,944 (AECBCA 1965); *Federal Pacific Electric Co.*, 1964 C.C.H. Bd. Cont. App. 21,582 (IBCA 1964); *Reeves Soundcraft Corp.*, 1964 C.C.H. Bd. Cont. App. 20,869 (ASBCA 1964).

¹² *John C. Kohler Co. v. United States*, 498 F.2d 1360, 1367 n.6 (Ct. Cl. 1974).

¹³ *See, e.g., Federal Electric Corp. v. United States*, 486 F.2d 1377, 1382 (Ct. Cl. 1973), *cert. denied*, 419 U.S. 874 (1974).

¹⁴ *See, e.g., Cities Service Helex, Inc. v. United States*, 543 F.2d 1306, 1317-18 (Ct. Cl. 1977).

¹⁵ *See, e.g., Northern Helex Co. v. United States*, 455 F.2d 546, 553 (Ct. Cl. 1972); *Everett Plywood and Door Corp. v. United States*, 419 F.2d 425, 429 (Ct. Cl. 1969).

¹⁶ *See, e.g., John C. Kohler Co. v. United States*, 498 F.2d 1360, 1367 (Ct. Cl. 1974).

¹⁷ Federal courts in applying U.C.C. provisions as federal law have used the term "adopt" to describe their action. For example, the Court of Appeals for the Sixth Circuit stated in *United States v. Burnette-Carter Co.*, 575 F.2d 587, 590 (6th Cir. 1978) that with respect to FHA security transactions, "the U.C.C. should be adopted as the relevant federal common law." Since in the more usual and, perhaps, more appropriate sense the term "adopt" is used to describe the application of particular state law as federal law in lieu of formulating a uniform federal rule, *see Note, Adopting State law as the Federal Rule Of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823 (1976), within this note "adoption" will refer to this familiar policy of applying existing state law as the federal rule. *See, e.g., United States v. Kimbell Foods, Inc.*, 99 S. Ct. 1448, 1458 (1979). In contrast, the term "acceptance" of Code provisions will be used when considering a general policy of looking to Code provisions in the formulation of uniform

appears desirable. Such action, it is argued, would promote the interests of simplicity and uniformity in contractual relations.¹⁸ It must be remembered, however, that the complexity of an issue is not reduced by simplifying the law governing that issue. Federal courts have acknowledged the utility of Article 2 provisions within particular contract actions. These courts have also quite properly refused to defer to the U.C.C. in the formulation of federal contract common law. Important national interests and express Congressional policies distinguish federal contracts from ordinary commercial transactions. While Article 2 should be considered as a source of concise, workable, modern contract law, federal courts should not abandon existing federal contract precedent simply to achieve speculative uniformity and simplicity.

This note will first outline the conceptual and legal bases of federal common law. The sources available for common law formulation will then be examined in light of issues which may affect common law content as ultimately formulated. Next, a brief explanation of the federal system within which the boards of contract appeal, the federal district and circuit courts, and the Court of Claims develop and apply federal contract common law will be provided. The utilization of Article 2 provisions in federal contract actions then will be examined in an effort to define the present status of Article 2 as federal contract common law and to identify the rationale for each acceptance or rejection of Code provisions. Finally, these policies will be evaluated in light of the nature of federal common law and the needs of contracting parties in general. As a result of this analysis, three conclusions will be drawn. First, neither the legal nor the conceptual basis of federal common law absolutely precludes judicial utilization of Article 2 provisions as federal contract common law. Second, although federal courts have utilized the U.C.C. as a clear, concise, and valuable source for federal common law formulation, Article 2 has not been judicially accepted as *the* federal common law of contracts. Finally, the nature of federal procurement precludes wholesale replacement of existing federal contract precedent with Article 2 provisions, although the Code can and should be used to insure the commercial relevancy of federal contract case law.

I. THEORETICAL FRAMEWORK FOR THE CREATION OF FEDERAL COMMON LAW

A. *The Legal Basis*

An important issue which has stubbornly plagued the concept of federal common law from its inception is the relationship between federal and state

federal common law. While federal courts cannot legislatively accept the entire U.C.C. at any one time, they can look to the Code in uniform common law formulation as a matter of policy. See *United States v. Burnette-Carter Co.*, 575 F.2d 587, 590 (6th Cir. 1978); *Mills Morris Co. of Miss. v. Scanlon*, 446 F.2d 722, 732 (5th Cir. 1971); *United States v. Hext*, 444 F.2d 804, 810-11 (5th Cir. 1971).

¹⁸ See Note, *Application of the Uniform Commercial Code to Federal Government Contracts: Doing Business on Business Terms*, 16 WM. & MARY L. REV. 395, 407-11 (1974).

judicial power; specifically, when may a federal court disregard state law and formulate federal common law. On the same day that the Supreme Court, in *Erie R.R.Co. v. Tompkins*,¹⁹ overruled *Swift v. Tyson*²⁰ by declaring that "[t]here is no federal general common law,"²¹ the Court reversed a decision by the Colorado Supreme Court which adversely affected interstate water rights. Mr. Justice Brandeis, in *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*,²² stated that "whether the water of an interstate stream must be apportioned between . . . two states is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."²³ General common law, which federal courts had been formulating and applying to the states in response to *Swift*, thus was succinctly distinguished from common law specialized in its application to particular federal issues.²⁴ Justice Brandeis's sole reason for separating federal from general common law was the existence of a recognized federal question.²⁵ In each of the next four years, the Court consistently applied this specialized federal common law, but with equal consistency declined to supply an explicit conceptual foundation.²⁶ Finally, with the landmark case of *Clearfield Trust Co. v. United States*,²⁷ the Supreme Court set forth a logical framework upon which the doctrine of federal common law could be rested.

In *Clearfield*, the Federal Reserve Bank of Philadelphia had paid \$24.20 to the Clearfield Trust Co. pursuant to a legitimate government check bearing

¹⁹ 304 U.S. 64 (1938). In *Erie*, the Supreme Court vacated and remanded a district court decision which ignored state common law and found the defendant railroad company liable for negligence on the basis of federally interpreted general law. *Id.* at 70. In so doing, the *Erie* Court ordered that a determination of liability be based on the law of the state in which the accident occurred, including unwritten state common law formulated by that state's courts. *Id.* at 80.

²⁰ 41 U.S. (16 Pet.) 1 (1842). In *Swift*, the Supreme Court first decided that a preexisting debt constituted valuable consideration for the acceptance of a negotiable instrument. The Court then held that state court decisions were not "laws" as defined by the Judiciary Act of 1789, ch. 20, and, therefore, were not binding upon federal courts. *Id.* at 17-18.

²¹ 304 U.S. at 78.

²² 304 U.S. 92 (1938), *rev'g* 101 Colo. 73 (1937).

²³ 304 U.S. at 110.

²⁴ The term "specialized common law" was coined by Judge Friendly in his article entitled *In Praise of Erie—And of The New Federal Common Law*, 39 N.Y.U.L. REV. 383, 407 (1964).

²⁵ *Hinderlider*, 304 U.S. at 110.

²⁶ See *Board of County Commissioners v. United States*, 308 U.S. 343, 350-53 (1939) (independent federal rule applicable to determine state's obligation to pay interest on improper tax levy); *Deitrick v. Greaney*, 309 U.S. 190, 200-01 (1940) (legal consequences which flow from acts declared unlawful under the National Bank Act are federal and not state questions); *Royal Indemnity Co. v. United States*, 313 U.S. 289, 296-97 (1941) (rule governing interest to be paid as damages for delayed payment of a contractual obligation to the United States not controlled by state statute or local common law); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 456-62 (1942) (liability of federally insured bank on note is to be determined in accordance with federal, not state law).

²⁷ 318 U.S. 363 (1943).

a forged endorsement. Clearfield Trust, as a good faith holder in due course, had no knowledge of the forgery. Sixteen months after payment, government officials discovered the forgery and demanded reimbursement. Clearfield Trust refused and the government sued.²⁸ The district court dismissed this suit, holding that Pennsylvania law barred recovery due to unreasonable delay.²⁹ In his opinion reversing the district court's decision, Justice Douglas explained the Supreme Court's rationale governing the application of federal common law.

The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disperses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. . . . In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.³⁰

The authority of federal courts to formulate and apply federal common law, therefore, ultimately stems from the power of Congress to legislate in that area. The distinction between federal and state common law is a reflection of the distinction between federal and state legislation.

Inherent in Justice Douglas's explanation, and supported by subsequent case law, are three conclusions of general importance. If an activity under consideration is ultimately authorized by the federal Constitution, either directly or through the lawmaking authority of Congress, then the validity of such activity is not dependent upon state authority and state law cannot affect its operation.³¹ Instead, such activity is federal and governed solely by federal law.³² In the absence of relevant federal statutes, the federal judiciary may formulate and apply to such federally authorized activity federal specialized common law.³³ The Court in *Clearfield*, for example, was free to formulate and apply federal common law because the disputed check was authorized by federal rather than state legislation.³⁴ This simple formula, how-

²⁸ *Id.* at 364-65.

²⁹ *Id.* at 366.

³⁰ *Id.* at 366-67.

³¹ *United States v. Standard Oil Co.*, 332 U.S. 301, 305-07 (1947).

³² *United States v. County of Allegheny*, 322 U.S. 174, 182-83 (1943).

³³ *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947).

³⁴ Justice Rehnquist, concurring in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1972), made the following statements:

In *Clearfield Trust Co. v. United States*, [citation omitted] this Court held that federal common law governed the rights and duties of the United States "on commercial paper which it issues . . ." The interest in having those rights governed by a rule which is uniform across the Nation was the basis of that decision.

ever, merely establishes the jurisdictional limits of federal common law. Following the initial identification of federal interests sufficiently important to require the application of federal law, a more difficult task—that of formulating the appropriate federal rule—remains to be considered.

*B. Alternative Methods for Establishing the Content
of Federal Common Law*

Two methods are available to establish the content of federal specialized common law. First, a federal court may simply adopt and apply state law,³⁵ or second, the court may formulate a federal rule independent of state influence and control.³⁶ The advantages of each alternative are readily distinguishable. Federal adoption of state law permits a balance between federal programs and important state interests. In *United States v. Kimbell Foods, Inc.*,³⁷ for example, the Supreme Court held that federal law governs the priority of liens stemming from federal lending programs.³⁸ Nevertheless, the Court refused to “override intricate state laws of general applicability on which private creditors base their daily commercial transactions.”³⁹ Instead, the Court directed that “nondiscriminatory state laws”⁴⁰ be adopted and applied as federal commercial common law.⁴¹ In doing so, the Supreme Court balanced the objectives of federal lending programs with the significant state interest of governing internal commercial procedures.

Although federally adopted state law is held to govern not by virtue of its authority as state law but solely as federal law,⁴² serious consequences nevertheless result from this approach. Since laws vary from state to state,

Id. at 607. Justice Rehnquist's conclusion, which is incorrect, illustrates a common misinterpretation of *Clearfield*. The Court in *Clearfield* determined two separate issues: first, that federal courts are competent “to declare the governing law in an area comprising issues substantially related to an established program of government operation,” Mishkin, *The Variousness of “Federal Law”: Competence and Discretion In The Choice of National And State Rules For Decision*, 105 PA. L. REV. 797, 800 (1957) (hereinafter cited as Mishkin); second, that uniformity of law may be required by the nature of the federal interests at stake. It should be emphasized that the rationale for applying federal common law is not based upon a need for federal uniformity. See *United States v. Kimbell Foods, Inc.*, 99 S. Ct. 1448, 1457-58 (1979); *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209-10 (1946).

³⁵ *United States v. Kimbell Foods, Inc.*, 99 S. Ct. 1448, 1458 (1979).

³⁶ *Id.*; *United States v. Standard Oil Co.*, 332 U.S. 301, 306, 308-11 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

³⁷ 99 S. Ct. 1448 (1979).

³⁸ *Id.* at 1457-58.

³⁹ *Id.* at 1459.

⁴⁰ *Id.* at 1465.

⁴¹ *Id.* See also *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209 (1946); Mishkin, *supra* note 34, at 804.

⁴² *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93 (1973); *Royal Indemnity Co. v. United States*, 313 U.S. 289, 296-97 (1941); *Board of Comm'rs v. United States*, 308 U.S. 343, 351-52 (1939). See also Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 529 (1954).

adoption of state law may sacrifice all chance of achieving federal uniformity. A decision to apply state law as federal law necessarily results in a federal rule the content of which may vary "depending upon the State where the relevant transaction takes place."⁴³ The probability of encountering interstate diversity logically increases whenever issues of significant state interest are involved. In addition to this threat to federal uniformity, federal courts may also surrender an important degree of independence by adopting state law. Federally adopted state law does not shed its basic role as local rule nor escape the reach of local control.⁴⁴ Such laws remain subject to change by state legislatures whenever perceptions by the state of its own interests change.⁴⁵ Federally adopted state law, therefore, inherits an element of instability, since state law may be changed even after federal adoption.⁴⁶

In contrast, federal common law independently formulated by federal courts may be tailored to meet special federal needs. In addition, by focusing strictly upon federal concerns, federal courts may achieve a high degree of legal uniformity. A good example of these advantages may be found in *Clearfield* where the Supreme Court chose to formulate federal common law, declaring that the "desirability of a uniform rule is plain."⁴⁷ The Court then held that the payor of a federal check bearing a forged endorsement would be held liable on the check unless actual damage resulted from the drawee's failure to notify the payor of the forgery.⁴⁸ Pennsylvania law, which barred recovery whenever unreasonable delay in giving notice was shown,⁴⁹ was thus rejected and replaced with a federal rule more suited to federal banking interests.

A decision favoring the formulation of an independent federal rule, moreover, does not automatically disqualify state law as a source.⁵⁰ Since the

⁴³ *United States v. Yazell*, 382 U.S. 341, 357 (1966) (dictum). See also *Clearfield Trust Co. v. United States*, 318 U.S. at 367; *United States v. Sommerville*, 324 F.2d 712, 716 (3d Cir. 1964); Mishkin, *supra* note 34, at 805-06.

⁴⁴ Mishkin, *supra* note 34, at 806.

⁴⁵ The Supreme Court in *Kimbell Foods* noted that the FHA had kept itself informed of statutory changes in state U.C.C. law. 99 S. Ct. at 1460. The Court relied upon this fact as an indication that federal adoption of state law would not administratively burden federal loan programs. *Id.*

⁴⁶ While states may change their laws following federal adoption, federal courts are not required to apply as federal law hostile state law. *Kimbell Foods*, 99 S. Ct. at 1462 n.37; *United States v. Little Lake Misere Land Co.*, 412 U.S. at 602-04.

⁴⁷ 318 U.S. at 367.

⁴⁸ *Id.* at 370.

⁴⁹ *Id.* at 366.

⁵⁰ This conclusion is not as obvious as it may at first appear. Professor Hart, in *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954), made the following statement;

What is ironical is that this trend toward federal uniformity, involving as it does the sterilization *pro tanto* of both state courts and state legislatures as agencies of growth in the law, has been accompanied by a trend toward diffidence in the creative exercise of federal judicial power after federal concern has been asserted.

formulation of an independent federal rule is merely the judicial creation of common law, all of the traditional sources for common law formulation are available to federal courts.⁵¹ The logic and content of particular state laws, therefore, may be incorporated into independent federal common law. As explained by the Sixth Circuit: "The formulation of a uniform federal rule does not require that the wisdom of the states be disregarded, and the federal rule may correspond to the rule applied in many states."⁵² By utilizing state law merely as one source in the creation of independent federal rules, federal courts can avoid the problems of interstate legal diversity as well as insure the present and future consistency of the formulated law with federal policies. While state law is subject to change by the states in response to state perceived priorities, uniform federal law incorporating state law principles changes only at the hands of the federal courts or Congress.⁵³ As a result, some federal circuits have attempted to develop a uniform, independent federal law without abandoning concern for federal/state balance.⁵⁴

Since the formulation of an independent federal rule does not imply federal insensitivity to state interests, the choice between state law adoption and judicial formulation should depend upon the federal need for independence and uniformity. The Supreme Court has recognized this fact and has developed a three step approach to determine when it is suitable to adopt state law. First, the federal need for uniformity should be weighed.⁵⁵ If this need is not great, then the degree of conflict between existing state law and important federal policies must be determined.⁵⁶ A final consideration is the rele-

Id. at 534. From this remark it appears that Professor Hart considered state law excluded from consideration once a decision is made to formulate a uniform federal rule.

⁵¹ *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 469-70 (1942) (Jackson, J. concurring).

⁵² *United States v. Carson*, 372 F.2d 429, 435 (6th Cir. 1967). *See also* *Mills Morris Co. of Miss. v. Scanlon*, 446 F.2d 722, 732 (5th Cir. 1971); *Fruehauf Corp. v. Yale Express System, Inc.*, 370 F.2d 433, 437 (2d Cir. 1966); *Boccardo v. United States*, 341 F. Supp. 858, 862 (N.D.Cal. 1972).

⁵³ *See, e.g.*, *United States v. Hext*, 444 F.2d 804, 808-09 (5th Cir. 1971); *Casidy Commission Co. v. United States*, 387 F.2d 875, 878-79 (10th Cir. 1967); *United States v. Carson*, 372 F.2d 429, 432 (6th Cir. 1967).

⁵⁴ In *United States v. Hext*, 444 F.2d 804 (5th Cir. 1971), the Fifth Circuit Court of Appeals held that rights and duties stemming from FHA loan transactions were to be governed by uniform federal law. *Id.* at 808-09. Nevertheless, the court saw "no reason . . . for fashioning a specialized, esoteric body of federal law . . ." *Id.* at 809. Instead, the court decided to be "guided by the principles set forth in Article 9 and other relevant portions of the Uniform Commercial Code." *Id.* at 810. The court noted that "[i]n this fashion the federal law governing FHA loans and the state law of secured transactions will coalesce to reinforce each other." *Id.* at 811. *See also* *United States v. Burnette-Carter Co.*, 575 F.2d 587, 590-91 (6th Cir. 1978). This compromise approach was recently rejected by the Supreme Court in *United States v. Kimbell Foods, Inc.*, 99 S. Ct. at 1458-59.

⁵⁵ *See, e.g.*, *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

⁵⁶ *See, e.g.*, *United States v. Kimbell Foods, Inc.*, 99 S. Ct. 1448, 1458 (1979); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 596-99 (1973).

vance and importance of traditional state interests.⁵⁷ Once a federal court has decided to independently formulate a uniform federal rule, however, additional policy considerations directly influence the court's choice of federal common law content.

C. *The Content of Uniform Federal Law: Policy Considerations*

Two identifiable policies guide judicial formulation of federal common law content: the promotion and the protection of federal interests. Federal courts promote federal interests by choosing the rule most likely to produce the smooth operation of whatever federal program is under consideration. In *United States v. Hext*,⁵⁸ for example, the Fifth Circuit first decided that "[a]n FHA loan is nothing more nor less than a secured transaction . . ."⁵⁹ and then accepted Article 9 as the governing federal rule since "it is evident that the principle fount of general commercial law governing secured transactions is now Article 9 of the Uniform Commercial Code."⁶⁰ As such, the Code was a logical choice to govern federal secured transactions.

The second, more controversial policy—that of federal interest protection—may first appear as part of a court's rationale for applying federal common law,⁶¹ and later direct the court's choice of uniform federal rule

⁵⁷ *United States v. Yazell*, 382 U.S. 341, 352, 357 (1966). See generally Note, *Adopting State Law as the Federal Rule Of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823 (1976).

⁵⁸ 444 F.2d 804 (5th Cir. 1971).

⁵⁹ *Id.* at 809.

⁶⁰ *Id.* at 810.

⁶¹ The Court in *Clearfield* carefully distinguished the rationale for applying federal common law from considerations affecting that law's substance. Rights and duties stemming from federal sources were held to require federal law to govern their exercise. *Clearfield Trust Co. v. United States*, 318 U.S. at 366-67. After the initial determination of federal law applicability, the desirability of a uniform federal rule over state law adoption was considered, but solely to determine the substance of the appropriate federal law. *Id.* at 367. Shortly thereafter, however, the Supreme Court, in *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), found federal law applicable to govern the liability of a private tortfeasor for expenses stemming from injuries sustained by a federal soldier. The Court based its decision on the government's right to protect both "the relation between persons in the service and the Government" and the federal treasury. *Id.* at 306. In response to this "protection" criteria, the desirability of a uniform federal rule to protect significant federal interests from interstate diversity was itself held by federal courts to form the principle justification for applying federal common law. Compare *United States v. Sommerville*, 324 F.2d 712, 714-16 (1963) with *United States v. Union Livestock Sales Co.*, 298 F.2d 755, 757-59 (1962). Recently the Supreme Court, in *United States v. Kimbell Foods, Inc.*, 99 S. Ct. 1448, 1457-58 (1979), reaffirmed the distinction between initial identification of federal law applicability and the subsequent determination of that law's content. After noting that "the priority of liens stemming from federal lending programs must be determined with reference to federal law," *id.* at 1457, the Court proceeded to adopt state law as the federal rule. "Because the state commercial codes 'furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s]' [citation omitted] we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions." *Id.* at 1459. While federal law

content. Thus, federal courts may justifiably reject state law adoption in order to protect federal interests from interstate diversity and potential state/federal conflicts.⁶² This protection policy, however, may also disrupt the balance between federal and state interests and result in "a specialized, esoteric body of federal law . . ."⁶³ In *United States v. Bank of America National Trust and Savings Association*,⁶⁴ for example, a federal district court refused to apply as federal law U.C.C. § 3-405(1)(c)⁶⁵ to a case in which two United States Navy personnel had issued valid government checks payable to a third party, had fraudulently endorsed the checks themselves, and had received payment from the defendant bank.⁶⁶ The defendant claimed that "federal courts must look to the general commercial law at the time of the transaction in fashioning a 'federal law.'"⁶⁷ Since the principles of U.C.C. § 3-405(1)(c) were followed in all fifty states, the defendant argued, the federal rule should correspond.⁶⁸ The district court, in rejecting this argument, interpreted *Clearfield* as creating a "duty of the federal courts to choose 'a federal rule designed to protect a federal right.'"⁶⁹ While the court acknowledged that "the need for uniformity [would] be met with the adoption of either body of law,"⁷⁰ "the duty of determining the federal interest in protecting the government's rights in its commercial paper"⁷¹ precluded application of the U.C.C.⁷² The choice of common law content, therefore, was not based upon the promotion of a federal policy nor upon the protection of federal uniformity. Instead, the district court applied a law best suited to protect an important federal interest—here the national treasury.

applicability, therefore, should not rest solely upon the desirability of a uniform federal rule, the protection of federal interests nevertheless appears to be a basic purpose for applying federal common law. In *Kimbell*, for example, the Court noted that "federal interests are sufficiently implicated to warrant the protection of federal law." *Id.* at 1457-58 (emphasis added).

⁶² See *United States v. Standard Oil Co.*, 332 U.S. 301, 308-11 (1947); *United States v. Clearfield Trust Co.*, 318 U.S. at 367. Compare *United States v. Sommerville*, 324 F.2d 712, 714-17 (3d Cir. 1973) with *United States v. Hext*, 444 F.2d 804, 807-11 (5th Cir. 1971).

⁶³ *Hext*, 444 F.2d at 809.

⁶⁴ 288 F. Supp. 343 (N.D.Cal. 1968), *aff'd*, 438 F.2d 1213 (9th Cir. 1971). In affirming the district court's decision, the Ninth Circuit relied not upon the establishment of a unique federal interest, but rather on the doctrine of *stare decisis*. 438 F.2d at 1214.

⁶⁵ U.C.C. § 3-405 (1):

An endorsement by any person in the name of a named payee is ineffective if:

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

⁶⁶ 288 F. Supp. at 344-45.

⁶⁷ *Id.* at 347.

⁶⁸ *Id.*

⁶⁹ *Id.*, citing *Clearfield Trust Co.*, 318 U.S. at 367 (district court's emphasis).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 348.

No rationale exists for the formulation of totally self-serving federal law. Where federal and state interests are not in conflict, federal common law, though independent and uniform, should reflect a balance. The Supreme Court has implied that federal interests must be balanced against those of parties affected by the formulation of federal common law. In *United States v. National Exchange Bank of Baltimore*,⁷³ the government sued to recover an additional amount of money paid on a federal check drawn by an authorized federal agent and validly endorsed, but which had been altered before presentation. Justice Holmes, declaring that "[t]he United States does business on business terms," held the government liable.⁷⁴ The Court noted: "We are of opinion that the United States is not excepted from the general rule by the largeness of its dealings. . . ." ⁷⁵ This theme of balancing federal and private interests appeared later in *Clearfield*, where the Court seemed to balance arguments for federal exemption as a drawee against the general commercial interest of subsequent holders in due course in receiving prompt notice of forgery.⁷⁶ Having decided that the government as drawee was entitled to recover money paid on a federal check bearing a forged endorsement, the Court declared that "[t]he United States as drawee of commercial paper stands in no different light than any other drawee"⁷⁷ and held that delay in discovery and notice of forgery which resulted in actual damage to the payor would be a defense in a subsequent action brought by the drawee.⁷⁸ According to *Clearfield*, the presence of federal interests sufficiently important to mandate the formulation of uniform, federally controlled common law may yet lack the justification necessary for the creation of federally protective law.⁷⁹

D. Federal Contract Common Law:
Application of the Theoretical Framework

In light of the preceding discussion, two basic approaches to federal application of Uniform Commercial Code provisions are available. Federal courts could simply adopt Article 2 as extant state law.⁸⁰ Such a decision would result in automatic Code application in all federal contract actions. Exceptions would be made on a case by case basis to eliminate those provisions considered hostile to federal interests.⁸¹ As an alternative, federal courts could reject state law adoption in favor of formulating an independent body of federal contract law. In this event, the courts would approach Code utilization in one of two ways. First, Article 2 could be accepted in its entirety by

⁷³ 270 U.S. 527 (1926).

⁷⁴ *Id.* at 534-35.

⁷⁵ *Id.* at 535.

⁷⁶ 318 U.S. at 363, 369-70.

⁷⁷ *Id.* at 369.

⁷⁸ *Id.*

⁷⁹ *Accord*, *United States v. Kimbell Foods, Inc.*, 99 S. Ct. 1448, 1458-59, 1464-65 (1979); *United States v. Hext*, 444 F.2d 804, 809-10 (5th Cir. 1971).

⁸⁰ *Kimbell Foods*, 99 S. Ct. at 1465 (1979).

⁸¹ *DeSylva v. Ballentine*, 351 U.S. 570, 581 (1956). *See also* Mishkin, *supra* note 34, at 805-06.

federal courts as a coherent, comprehensive body of federal contract principles.⁸² This approach differs from state law adoption in only one important respect: accepted Code provisions would neither reflect interstate diversity nor be subject to individual state modifications.⁸³ Exceptions would nevertheless be made by federal courts on a case by case basis to eliminate inappropriate or hostile provisions.⁸⁴ The second approach involves a gradual integration of particular Article 2 provisions into the existing body of federal contract common law.⁸⁵ Although the Code would not be applied automatically in this way, the familiarity and dependability of existing contract law would not be sacrificed. Article 2 provisions would be available as a supplement and as an aid in evaluating traditional federal contract principles.

As discussed earlier, federal need for uniformity is a primary consideration in a federal court's decision to adopt state law or formulate an independent federal rule. One year after *Clearfield*, the Supreme Court, in *United States v. County of Allegheny*,⁸⁶ established guidelines for the development of federal contract common law and indicated a need for federal uniformity. In that case special machinery had been purchased by the government and leased to a private manufacturer for the production of military ordnance. Title to this machinery was to remain at all times with the government.⁸⁷ As a result of this contract, however, Allegheny County, Pennsylvania, increased the manufacturer's tax assessment by an amount equal to the assessed value of the government machinery.⁸⁸ In defense of its action, the County claimed in part that federal contracts are "subject to the legal rules applicable to private transactions."⁸⁹ Since, under Pennsylvania law, "transfer of title to be good as against subsequent purchasers and lienors must be accompanied by delivery of possession,"⁹⁰ the County argued that it was taxing private and not federal property.

The Supreme Court rejected this argument, holding that "[t]he validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state."⁹¹ In addition, the Court recognized that federal contract law should be not only independent of state control, but internally uniform as well. "The purpose of the Supremacy

⁸² See, e.g., *United States v. Burnette-Carter Co.*, 575 F.2d 587, 590 (6th Cir. 1978); *United States v. Hext*, 444 F.2d 804, 809-10 (5th Cir. 1971).

⁸³ *Hext*, 444 F.2d at 810.

⁸⁴ See *DeSylva V. Ballentine*, 351 U.S. 570, 581 (1956); *United States v. Burnette-Carter Co.*, 575 F.2d 587, 590 (6th Cir. 1978); *United States v. Hext*, 444 F.2d 804, 809-10 (5th Cir. 1971); *Mishkin*, *supra* note 34, at 805-06.

⁸⁵ See, e.g., *John C. Kohler Co. v. United States*, 498 F.2d 1360, 1367 (Ct. Cl. 1974); *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966).

⁸⁶ 322 U.S. 174 (1944).

⁸⁷ *Id.* at 178-79.

⁸⁸ *Id.* at 179-80.

⁸⁹ *Id.* at 181.

⁹⁰ *Id.*

⁹¹ *Id.* at 183.

Clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls."⁹² Here, as in *Clearfield*, the Court established the jurisdiction of federal common law and rejected state law adoption as a means of providing that law's content. Consequently, federal contracts are to be governed by federal law—including judicially formulated federal common law.

In determining the content of federal contract common law, federal courts are guided by the established need to promote and protect federal interests. With respect to federal contracts, the Supreme Court has clearly indicated that federal contract common law should reflect a balance between federal and general commercial interests. In *United States v. Standard Rice Co.*,⁹³ the government had contracted to buy rice at a price which included applicable federal taxes. When a processing tax subsequently was held invalid, the government attempted to reduce the contract price proportionately by refusing to refund an overpayment of income tax owed the contractor.⁹⁴ The Court refused to allow the government to make an adjustment in contract price not permitted by the contract terms. "When problems of the interpretation of its contracts arise the law of contracts governs."⁹⁵ With language reminiscent of the "business on business terms" logic of *National Exchange Bank of Baltimore*,⁹⁶ the Court warned that even where national procurement policies were concerned, federal courts are not free to formulate excessively protective federal contract law. "Although there will be exceptions, in general, the United States as contractor must be treated as other contractors under analogous situations."⁹⁷ These words appear to require the formulation of federal contract law patterned after modern commercial principles and responsive to changes and developments in state contract law—including Article 2 of the Uniform Commercial Code. The Court's statement, however, cannot be construed to *direct* federal use of U.C.C. provisions. While federal common contract law should reflect legal trends within the commercial world, it must also be consistent with Congressional policy and national interests. By refusing to provide clear guidelines, the Supreme Court passed responsibility for balancing federal and commercial interests to the individual courts responsible for the formulation of federal contract common law.

II. FEDERAL CONTRACT COMMON LAW AND ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE

In light of the Supreme Court's directives in *Clearfield* and *Allegheny County*, federal courts are responsible for formulating an independent and uniform body of federal contract common law. This law must not only promote the smooth operation of federal procurement policies, but must also,

⁹² *Id.*

⁹³ 323 U.S. 106 (1944).

⁹⁴ *Id.* at 107-08.

⁹⁵ *Id.* at 111.

⁹⁶ 270 U.S. 527, 534-35 (1926).

⁹⁷ 323 U.S. at 111.

whenever possible, reflect a balance between federal and general commercial interests.⁹⁸ Within this section, federal use of Article 2 provisions to achieve both of these goals will be examined. The resolution of federal contract disputes and the formulation of federal contract law, however, is largely performed within the unique context of a federal contract dispute mechanism.⁹⁹ The structure of this mechanism should be understood before the use of Article 2 provisions in formulating federal contract common law is considered.

A. Procedures and Forums for Resolving Federal Contract Disputes

As with all contract disputes, federal contract actions may be initiated by either contracting party. Unlike most contract disputes, however, specific procedures are required for settlement under federal law. These procedures vary depending on the characterization of an action as either a disputes clause claim or breach of contract claim. Action on a federal contract containing a clause specifying what relief can be granted or the manner of resolving disputes is characterized as a disputes clause claim—as a claim arising “under the contract.”¹⁰⁰ If such a dispute cannot be resolved by agreement, the contracting officer decides the issue. This decision may be appealed to the head of the appropriate procuring agency within 30 days by the contractor pursuant to the contract’s dispute clause or, as often occurs, to a board of contract appeal acting in the agency head’s place.¹⁰¹ Absent fraud or bad faith, appeals to the Court of Claims from the decisions of authorized boards of contract appeal may be initiated only by the aggrieved contractor.¹⁰² Judicial review at this stage is strictly limited under the Wunderlich Act¹⁰³ to administrative conclusions of law and to those findings of fact which are “fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or [are] not supported by substantial evidence.”¹⁰⁴ In addition, judicial review of administrative fact-finding is strictly limited to review of the record. No trial *de novo* is allowed at this stage, nor is the court permitted to substitute its view for that of a board.¹⁰⁵

⁹⁸ See text and notes 73-79 *supra*.

⁹⁹ See generally Anthony and White, *Contract Suit Practice and Procedures in the United States Court of Claims*, 49 NOTRE DAME LAW. 276 (1973).

¹⁰⁰ Edward R. Marden Corp. v. United States, 442 F.2d 364, 366-67 (Ct. Cl. 1971).

¹⁰¹ Disputes, 41 C.F.R. § 1-7.102-12 (1978). Validity of these provisions was first upheld in *Kihlberg v. United States*, 97 U.S. 398, 401-02 (1878); accord, *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 8-10 (1972).

¹⁰² *S&E Contractors v. United States*, 406 U.S. 1, 12-14 (1972); *Roscoe-Ajax Construction Co. v. United States*, 499 F.2d 639, 644-45 (Ct. Cl. 1974). See also, Note, *GOVERNMENT CONTRACTS—The Government, Unable to Appeal Decisions of the Boards of Contract Appeals, May Counterclaim Only Where Limited To The Disputes Raised In Contractor's Suit—Roscoe-Ajax Construction Co. v. United States*, 43 GEO. WASH. L. REV. 647 (1975).

¹⁰³ Wunderlich Act, §§ 1-2, 41 U.S.C. §§ 321-322 (1976).

¹⁰⁴ 41 U.S.C. § 321 (1976).

¹⁰⁵ *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 419-20 (1966); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963).

By contrast, breach of contract claims are *not* governed by a disputes clause and may be brought directly before an appropriate federal court for a *de novo* hearing.¹⁰⁶ Claims against the government not exceeding \$10,000 may be filed in either the United States Court of Claims or a federal district court.¹⁰⁷ With respect to claims exceeding \$10,000, the Court of Claims enjoys exclusive jurisdiction.¹⁰⁸ Appeals from decisions of the Court of Claims can be taken only in the United States Supreme Court.¹⁰⁹

As a result of this dispute system, federal common contract law is formulated on three separate levels: first, on an administrative level by the various procuring agencies acting through their boards of contract appeal; second, on a reviewing level by federal courts acting in accordance with the Wunderlich Act; and, finally, on an independent basis by both the Court of Claims and the various federal district and circuit courts. Because of the jurisdictional limitations, however, the Court of Claims enjoys a more influential role than the district and circuit courts in contract law formulation within contractor initiated breach actions. Although parties seeking damages for government breach of federal contracts may bring suit in federal district court, the \$10,000 maximum recovery ceiling limits the impact of district court decisions. In contrast, government initiated suits for such claims as breach of contract, breach of warranty, or annulment of contract may be freely brought in federal district court with no recovery limitations.¹¹⁰

A significant result of this jurisdictional allocation is the isolation of expensive government *defended* contract claims from commercial trends prevalent within traditional contract forums. The jurisdiction of the Court of Claims is limited to claims "against the United States . . ."¹¹¹ As a result, federal common contract law formulated by that court essentially determines *federal* liability to individual contractors.¹¹² Conversely, federal district and circuit courts shoulder the responsibility for determining *private business* liability to government suit. These courts, unlike the Court of Claims, are regularly exposed to the marketplace and to developing trends in general commercial

¹⁰⁶ 28 U.S.C. §§ 1346, 1491 (1976); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 412 (1966); *Edward R. Marden Corp. v. United States*, 442 F.2d 364, 367 (Ct. Cl. 1971).

¹⁰⁷ 28 U.S.C. §§ 1346, 1491 (1976).

¹⁰⁸ *Atkins v. United States*, 556 F.2d 1028, 1036 (Ct. Cl. 1977).

¹⁰⁹ 28 U.S.C. §§ 1252, 1255 (1976).

¹¹⁰ 28 U.S.C. § 1345 (1976).

¹¹¹ 28 U.S.C. § 1491 (1976).

¹¹² The major exception to this rule occurs in renegotiation cases appealed to the Court of Claims from the Renegotiation Board in which private contractors defend against government allegations of excess profit. *See Lykes Bros. Steamship Co. v. United States*, 459 F.2d 393 (Ct. Cl. 1972). *See also* Anthony and White, *Contract Suit Practice and Procedures in the U.S. Court of Claims*, 49 NOTRE DAME LAW. 276, 281-83 (1973). A second, less frequent exception occurs when a contractor's liability to the government arises under the terms of his contract rather than by breach. Since such cases are covered by the disputes clause, appeals from a contracting officer's determination of liability must be taken to the appropriate board of contract appeals. *See Liability of Delcher Brothers Storage Company*, 70-2 C.C.H. Bd. Cont. App. 39,875 (ASBCA 1970).

law, thereby gaining experience in applying the Uniform Commercial Code within the context of private contract actions. Since federal liability is largely determined by the Court of Claims, it is reasonable to expect that federal district and circuit courts, unburdened by the responsibility for protecting the government from expensive suits and familiar with general commercial law, would more readily apply Article 2 provisions as federal law. Even so, federal circuit courts have largely followed the lead of the Court of Claims in formulating federal contract common law.

B. *Application of Article 2 in Practice*

Although Article 2 provisions have been applied as federal common law in all three federal contract forums, a review of relevant federal circuit court, board of contract appeal and United States Court of Claims cases reveals that the U.C.C. has not been accepted as the federal common law of contracts. Instead, and at best, the Code stands as a valuable source for modern federal contract law formulation. Two issues appear important in any decision to utilize Article 2 as such a source. The first consideration is whether relevant federal contract legislation, regulations, or case law already exist. Second, federal courts and boards determine whether proposed provisions appear likely to preserve and enhance an equilibrium between federal and private interests. In light of these concerns, case law within each of the three forums indicates that Article 2 provisions are most likely to be utilized as federal contract law in the absence of both important federal interests and applicable federal precedent. The Court of Claims, however, has demonstrated a preference for utilizing Article 2 provisions in resolving individual contract disputes solely to insure the justified realization of underlying bargains.

1. Federal Circuit Courts

To date only the Second, Ninth, and District of Columbia Circuits have directly relied upon Article 2 provisions in formulating federal contract common law.¹¹³ These courts have demonstrated a willingness to consider the Code in the formulation of *new* federal contract law, but have made no attempt to utilize Article 2 provisions to change or replace existing federal case law. The United States Court of Appeals for the Second Circuit, in *United States v. Wegematic Corp.*,¹¹⁴ broke the ice in 1966 and utilized Article 2 as a source for contract law formulation where controlling federal precedent was unavailable. In *Wegematic*, an electronics corporation had failed to develop and deliver a computer to the government as promised. The defendant claimed that engineering difficulties rendered the contract unenforceable due to impossibility of performance.¹¹⁵ Finding the cases cited by the government

¹¹³ *Gardiner Manufacturing Co. v. United States*, 479 F.2d 39 (9th Cir. 1973); *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966); *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966).

¹¹⁴ 360 F.2d 674 (2d Cir. 1966).

¹¹⁵ *Id.* at 675.

inconclusive on this issue, the court sought "guidance elsewhere,"¹¹⁶ applied U.C.C. § 2-615¹¹⁷ as federal contract law, and found the government entitled to damages for breach of contract on an assumption of risk theory.¹¹⁸ While the court in *Wegematic* looked to Article 2 for guidance in formulating federal contract common law, the court clearly did so by default. Only the absence of any relevant federal precedent produced consideration of the Code.

Regardless of the reason, Article 2 had finally appeared as federal common law. Moreover, in dicta, Judge Friendly suggested a far more liberal approach to U.C.C. utilization than that actually taken.

When the states have gone so far in achieving the desired goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States.¹¹⁹

With this language Judge Friendly seemed to suggest that Article 2 be utilized as a source of federal contract law not only in the absence of relevant precedent, but as an instrument for federal contract law modernization and change as well. The United States Court of Appeals for the District of Columbia heeded Judge Friendly's dicta and, in *Transatlantic Financing Corporation v. United States*,¹²⁰ took a definite step toward replacing obsolete federal contract precedent with Code provisions.

In *Transatlantic*, the operator of a ship chartered to carry wheat from the United States to Iran was forced to take a longer route due to Egypt's seizure of the Suez Canal. Claiming dissolution of the original contract on impossibility grounds, the plaintiff sought recovery for additional expenses incurred on a quantum meruit theory.¹²¹ The district court had relied upon traditional federal impossibility doctrine¹²² to deny plaintiff's claim.¹²³ The circuit court, however, in recognition of the new approach to contractual impossibil-

¹¹⁶ *Id.* at 676.

¹¹⁷ *Id.* at 676. U.C.C. § 2-615 states:

Except so far as a seller may have assumed a greater obligation . . .

a) Delay in delivery or non-delivery . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . .

¹¹⁸ 360 F.2d at 674, 676.

¹¹⁹ *Id.*

¹²⁰ 363 F.2d 312 (D.C. Cir. 1966).

¹²¹ *Id.* at 315.

¹²² The traditional federal impossibility doctrine provides that where an unexpected, supervening event does not totally prevent a party from performing under contract, but merely increases the expense or difficulty of that performance, the contracting party is not relieved from the duty to perform nor permitted extra compensation in the absence of evidence showing a reallocation of risk. See *Transatlantic Financing Corp. v. United States*, 259 F. Supp. 725, 728 (D.D.C. 1965).

¹²³ 259 F. Supp. at 728.

ity being applied in general commercial contract litigation,¹²⁴ relied heavily upon U.C.C. § 2-614¹²⁵ and § 2-615¹²⁶ to formulate a federal doctrine of commercial impracticability. On the basis of this new formulation, the circuit court denied the plaintiff's request for additional costs.¹²⁷ While the District of Columbia Circuit did not replace obsolete federal contract law with Article 2 provisions,¹²⁸ the court, in modernizing federal contract common law, did turn to the Code for guidance.

Despite this promising start, Article 2 did not reappear in circuit court decisions for seven years. Indeed, the 1973 citation of an Article 2 provision as federal contract law by the Ninth Circuit in *Gardiner Manufacturing Co. v. United States*,¹²⁹ signalled the end of federal circuit court experimentation with Article 2 provisions begun so enthusiastically with *Wegematic*. In *Gardiner*, a subcontractor who had delivered merchandise to the government was denied payment by a bankrupt contractor. He then brought suit for conversion against the United States under the Federal Tort Claims Act.¹³⁰ Citing U.C.C. § 2-403,¹³¹ the court held that since title to the merchandise rested in the government as a result of the primary contract, the subcontractor's claim of conversion must fail.¹³² The court, however, did not specify its reasons for applying Code provisions, but merely characterized the U.C.C. as a source "to which federal courts look in developing federal 'sales' law."¹³³ Seven years

¹²⁴ See Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589, 596 (1920); 6 WILLISTON CONTRACTS § 1931-1979 (Rev. Ed. 1938); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 293 (1916).

¹²⁵ U.C.C. § 2-614(1) provides:

Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

¹²⁶ See note 117 *supra*.

¹²⁷ 363 F.2d at 319-20.

¹²⁸ Article 2 provisions were not directly applicable since the contract did not concern the sale of goods. See U.C.C. § 1-202: "Unless the context otherwise requires, this Article applies to transactions in goods . . ."

¹²⁹ 479 F.2d 39 (9th Cir. 1973).

¹³⁰ *Id.* at 40 citing 28 U.S.C. § 1346(b) (1976).

¹³¹ U.C.C. § 2-403 states in relevant part:

(1) . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though . . .

(b) the delivery was in exchange for a check which is later dishonored. . . .

¹³² 479 F.2d at 41.

¹³³ *Id.* The recent district court case of *United States v. Humboldt Fir, Inc.*, 426 F. Supp. 292 (N.D. Cal. 1977), may support the theory that within the Ninth Circuit, Code provisions will be considered only in the absence of relevant federal precedent. In *Humboldt*, a company which had contracted with an Indian tribe to buy and clear timber from Indian land declared bankruptcy before full performance. The Indians subsequently sold the remaining timber and through the Bureau of Indian Affairs filed a claim with the bankruptcy court for recovery of damages. Having first determined the issue to be governed by federal contract law, the court explained that in the

after *Wegematic*, therefore, the *Gardiner* court utilized Article 2 in exactly the same manner as had the Second Circuit. The *Gardiner* court's analysis exhibited one significant difference, however. Gone were any proposals for merging the U.C.C. with federal contract law. Since the *Gardiner* decision, no federal district court or circuit court has relied upon an Article 2 provision to resolve a federal contract claim. Federal circuit courts appear determined not to utilize the U.C.C. in federal contract actions where relevant federal precedent is available.

Two considerations may explain the reluctance of federal circuit courts to change existing federal case law in favor of Article 2 provisions. First, federal courts are infrequently faced with the task of deciding federal contract issues. Since a federal contractor is obligated to comply with the decision of a contracting officer pending appeal, the government is rarely forced to sue for breach of contract.¹³⁴ Alternatively, the most profitable contractor initiated suits—those with claims exceeding \$10,000—must be brought in the Court of Claims.¹³⁵ As a result, federal district and circuit courts may prefer to apply existing federal precedent simply to preserve as much uniformity as possible. Second, primary responsibility for determining government contract liability to contractors falls upon the Court of Claims.¹³⁶ Federal district and circuit courts may prefer to apply relevant federal precedent in simple deference to that court's responsibility for balancing federal liability with the justified con-

absence of relevant legislation, federal contracts are construed in accordance with general contract law. *Id.* at 294-95. The court then declared:

The Uniform Commercial Code, adopted in fifty jurisdictions including California, is a recognized source of general contract law. *United States v. Wegematic Corporation*, 360 F.2d 674, 676 (2d Cir. 1966). In the absence of federal cases on point, state statutory and decisional law may furnish a convenient source for the general law of contracts to the extent that it does not conflict with the federal interests"

Id. at 296-97. The court, however, failed to specify whether the U.C.C. is to be considered a source of general contract law separate from state law and thus exempt from state law qualifications, whether the Code, though separate, nevertheless is governed by the state law qualifications, or, whether the Code is simply to be considered state law.

¹³⁴ The disputes clause contained in 41 C.F.R. § 1-7.102-12 (1978) provides in part that "[p]ending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision." This clause has been interpreted by the Court of Claims as protecting "an important interest of the Government by permitting it to continue to receive needed supplies on schedule, despite disputes which might arise during performance." *Dynamics Corp. of America v. United States*, 389 F.2d 424, 432-33 (Ct. Cl. 1968) (contractor who filled government order received after contract expiration period held entitled to market value rather than contract price). Rather than simply refuse performance, a dissatisfied federal contractor may fulfill his contractual obligation and bring suit in accordance with the disputes clause for additional compensation. *See Federal Electric Corp. v. United States*, 486 F.2d 1317, 1381-82 (Ct. Cl. 1973), *cert. denied*, 419 U.S. 874 (1974) (dispute clause held inapplicable since contractor claimed contract unenforceable).

¹³⁵ 28 U.S.C. § 1346(a)(2) (1976). *See also Atkins v. United States*, 556 F.2d 1028, 1036 (Ct. Cl. 1977).

¹³⁶ *Id.*

tractual expectations of federal contractors. Despite the present policy of applying Article 2 provisions only in the absence of relevant federal precedent, *Wegematic*, *Transatlantic Finance*, and *Gardiner* established Article 2 as a source for "developing federal sales law."¹³⁷ An incidental result of this breakthrough was an end to the confusion over the Code's federal status which had previously existed among the boards of contract appeal.

2. Federal Boards of Contract Appeal

Since contractors may always appeal administrative determinations of contract law to the Court of Claims,¹³⁸ relevant federal court precedent dictates the content of federal contract law applied by the various boards of contract appeal. As a result, boards today follow the federal circuit policy of applying U.C.C. provisions only in the absence of *any* relevant federal precedent. The Armed Services Board of Contract Appeals (ASBCA), for example, relied in *Meeks Transfer Co.*¹³⁹ upon traditional bailment law¹⁴⁰ as expressed by federal admiralty courts and held a bailee not liable for federal property lost in a warehouse fire.¹⁴¹ In response to a government motion for reconsideration contending U.C.C. applicability, the board remarked:

While we have not considered the Uniform Commercial Code as enunciative of Federal Common Law, we have in the past looked to this Code for guidance when there was no other federal precedent available. Adequate legal precedent here being available, we do not come to a consideration of the provisions of the Uniform Commercial Code.¹⁴²

With these words the ASBCA rejected any suggestion that Article 2 be considered federal contract law. The U.C.C. is merely one source of commercial contract principles to be used by the boards in formulating new federal contract law.

Such clear policy regarding Code usage was not always evident. The Court of Claims in *The Padblock Co. v. United States*¹⁴³ committed itself and the various contract boards "to take account of the best in modern decision and discussion"¹⁴⁴ in formulating federal contract law. Responding to this directive, the ASBCA began in 1964 to apply provisions of the Uniform Commercial Code to federal contracts because "[w]e believe the Code governs as re-

¹³⁷ *Gardiner Manufacturing Co. v. United States*, 479 F.2d 39, 41 (9th Cir. 1973).

¹³⁸ 41 U.S.C. § 322 (1976).

¹³⁹ 67-2 C.C.H. Bd. Cont. App. 30,468 (ASBCA 1967).

¹⁴⁰ *Id.* at 30,472-73, *citing* *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 110-11 (1911). A good definition of federal bailment law is set forth in *United States v. Cloverleaf Cold Storage Company*, 286 F. Supp. 680 (N.D. Iowa 1968), where the court stated: "The federal rule as to the negligence of a carrier in handling goods is that once the shipper has proved a prima facie case the final burden of proof shifts to the carrier to explain the loss." *Id.* at 682.

¹⁴¹ 67-2 C.C.H. Bd. Cont. App. 30,468, 30,472-473 (ASBCA 1967).

¹⁴² *Meeks Transfer Co.*, 68-1 C.C.H. Bd. Cont. App. 32,644 (ASBCA 1968).

¹⁴³ 161 Ct. Cl. 369 (1963).

¹⁴⁴ *Id.* at 377.

flecting the best in modern decision and discussion"¹⁴⁵ From 1964 through 1966, Article 2 provisions were applied a total of six times by three separate boards of appeal in resolution of federal contract litigation.¹⁴⁶ Uncertainty, however, existed among the various boards concerning the proper status of the U.C.C. as federal law. Most boards considered the Code to be a convenient source for the formulation of federal contract law.¹⁴⁷ Some, however, appeared to view Article 2 as a valid articulation of federal common law.¹⁴⁸ But in May of 1966, Judge Friendly issued his opinion in *Wegematic*.¹⁴⁹ This opinion constituted the first judicial statement of Article 2's status as federal contract law. Subsequently, the ASBCA issued its decision in *Meeks*¹⁵⁰ explaining that the Code is not federal law but merely a source to be utilized only in the absence of relevant federal precedent.¹⁵¹ In doing so, the ASBCA adopted the same policy regarding Article 2 utilization as that followed by the various circuits. This decision of federal circuit courts and boards of contract appeal to consider Code provisions only in the absence of relevant federal precedent, however, has had the practical effect of delegating to the Court of Claims the major responsibility for integrating Article 2 provisions into federal common contract law.

¹⁴⁵ Reeves Soundcraft Corp., 1964 C.C.H. Bd. Cont. App. 20,869, 20,877 (ASBCA 1964).

¹⁴⁶ Productions Unlimited, Inc., 66-1 C.C.H. Bd. Cont. App. 25,511, 25,515 (VACAB 1966); General Electric Co., 66-1 C.C.H. Bd. Cont. App. 25,785, 25,792 (IBCA 1966); General Electric Co., 65-2 C.C.H. Bd. Cont. App. 23,454, 23,457-58 (IBCA 1965); Mazur Bros. and Jaffe Fish Co., 65-2 C.C.H. Bd. Cont. App. 23,303, 23,305 (VACAB 1965); Carpenter Steel Co., 65-1 C.C.H. Bd. Cont. App. 22,942, 22,944 (AECBCA 1965); Federal Pacific Electric Co., 1964 C.C.H. Bd. Cont. App. 21,582, 21,585 (IBCA 1964).

¹⁴⁷ Carpenter Steel Co., 65-1 C.C.H. Bd. Cont. App. 22,942, 22,944 (AECBCA 1965); General Electric Co., 65-2 C.C.H. Bd. Cont. App. 23,454, 23,457-58 (IBCA 1965); Mazur Bros. and Jaffe Fish Co., 65-2 C.C.H. Bd. Cont. App. 23,303, 23,305 (VACAB 1965); Federal Pacific Electric Co., 1964 C.C.H. Bd. Cont. App. 21,582, 21,585 (IBCA 1964).

¹⁴⁸ General Electric Co., 66-1 C.C.H. Bd. Cont. App. 25,785, 25,792 (IBCA 1966); Productions Unlimited, Inc., 66-1 C.C.H. Bd. Cont. App. 25,511, 25,515 (VACAB 1966).

¹⁴⁹ *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966). See also text at note 77, *supra*.

¹⁵⁰ *Meeks Transfer Co.*, 68-1 C.C.H. Bd. Cont. App. 32,644, 32,644 (ASBCA 1968).

¹⁵¹ *Id.* One writer has suggested that the board in *Meeks* was concerned with a conflict between the U.C.C. and federal contract common law. Note, *Application of the Uniform Commercial Code to Federal Government Contracts: Doing Business On Business Terms*, 16 WM. & MARY L. REV. 395, 402-04 (1974). A more likely interpretation, however, is that the board in *Meeks* was not faced with a conflict between the U.C.C. and federal common law. In *United States v. Cloverleaf Cold Storage Co.*, 286 F. Supp. 680 (N.D. Iowa 1968), § 7-403(1) of the Uniform Commercial Code, absent optional language adopted at the time by only eight states, was "held to in substance codify previous majority and federal rules." *Id.* at 682. The assumption that the government in *Meeks* had included the optional, minority provision in its promotion of the Code as federal common law is unfounded. *Meeks*, therefore, should be read as declaring a board policy of applying federal case law to federal contract actions even where the U.C.C. is not in conflict. See 68-1 C.C.H. Bd. Cont. App. 32,644.

3. United States Court of Claims

The Court of Claims has taken not one but four separate approaches in utilizing Article 2 provisions as federal contract law. Initially, the court has endorsed the circuit court and board of contract appeal approach by relying primarily upon existing federal case law while using the U.C.C. as a supportive backdrop where possible. Consistent with this policy, the court has also rejected Article 2 provisions which conflict with existing federal contract precedent and has utilized relevant code provisions only in the absence of applicable federal case law. Finally, the Court of Claims appears to have used the Uniform Commercial Code sporadically to balance federal with private contract interests while preserving the force of prior federal contract common law. Since the majority of federal contract common law is formulated by the Court of Claims, each of these four approaches will be examined in detail.

As basic underlying policy, the court appears to have adopted the familiar approach of relying primarily upon existing federal precedent while citing Article 2 provisions merely in support of the result. In *Natus Corporation v. United States*,¹⁵² for example, the court was called upon to decide whether the production and delivery of 18,000,000 square feet of portable steel airplane landing mat in accordance with the terms of a federal procurement contract was commercially impracticable. After first referring to the common law doctrine of impossibility, the court admitted the existence of its modern equivalent in commercial impracticability, but listed U.C.C. § 2-615 (Comment 3) last among available "expressions".¹⁵³ The court then quoted from the District of Columbia Circuit Court opinion in *Transatlantic Financing Corp.*¹⁵⁴ to express the official meaning and purpose of federal impracticability.¹⁵⁵ The Court of Claims made no reference, however, to the significant reliance of the court in *Transatlantic* upon the Uniform Commercial Code in formulating this federalized version of the impracticability doctrine.¹⁵⁶ Furthermore, although *Natus* was concerned with the sale of goods and, therefore, the Article 2 provisions underlying *Transatlantic* were entirely applicable, the Court of Claims chose instead to apply consistent federal precedent.

¹⁵² 371 F.2d 450 (Ct. Cl. 1967).

¹⁵³ *Id.* at 456. U.C.C. § 2-615, Comment 3 states:

The first test for excuse under this Article in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with "impossibility," "frustration of performance" or "frustration of the venture") has been adopted in order to call attention to the commercial character of the criterion chosen by this Article.

¹⁵⁴ 363 F.2d 312 (D.C. Cir. 1966).

¹⁵⁵ The court stated that "the doctrine ultimately represents the ever-shifting line, drawn by the courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance." *Natus Corp. v. United States*, 371 F.2d 450, 456 (Ct. Cl. 1967), quoting *Transatlantic Financial Corp. v. United States*, 363 F.2d at 315.

¹⁵⁶ Judge Wright, in *Transatlantic*, relied primarily upon U.C.C. §§ 2-614, 2-615. See 363 F.2d at 315-20.

Similarly, in *Cities Service Helix, Inc. v. United States*,¹⁵⁷ the court looked to Article 2 provisions merely for support after basing its decision upon available federal precedent. *Cities Service Helix* involved claims for contract price plus interest brought by two companies who had contracted to produce and sell helium to the government over a 22 year period. These contracts corresponded with a long-range federal program¹⁵⁸ designed to conserve the gas as a natural resource.¹⁵⁹ Approximately eight years into the program, the government notified plaintiffs that no payments would be made for further deliveries of helium. Plaintiffs thereupon obtained a court injunction preserving the contract and requiring the government to accept delivery. When a second notice of termination was later upheld,¹⁶⁰ the government ceased accepting deliveries of helium. The plaintiffs then brought suit on a breach of contract theory to recover value plus interest for helium delivered during the injunctive period. The government, citing strict election of remedies doctrine, moved for partial summary judgment to prevent plaintiffs from claiming, as an independent breach of contract, federal non-payment for the helium delivered prior to the second termination.¹⁶¹ Plaintiffs cited U.C.C. §§ 1-207¹⁶² and 2-703 (Comment 1)¹⁶³ in defense. The court refused to employ Code provisions to override traditional federal caselaw and granted the government's motion on an election of remedies theory.¹⁶⁴ Nevertheless, the court cited eight Article 2 provisions to exemplify the importance of prompt and specific action in the preservation of legal rights and particularly to demonstrate that plaintiffs' claim also was untenable under the U.C.C.¹⁶⁵ The Court of Claims found Article 2 useful, therefore, in demonstrating the similarity between general and federal contract law, but not as a basis for the federal decision.

The natural consequence of a court policy which extends priority to existent federal precedent over relevant and consistent U.C.C. provisions is out-

¹⁵⁷ 543 F.2d 1306 (Ct. Cl. 1976).

¹⁵⁸ Helium Act Amendments of 1960 § 2, 50 U.S.C. §§ 167(a)-167(n).

¹⁵⁹ 543 F.2d at 1308.

¹⁶⁰ *National Helium Corp. v. Morton*, 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

¹⁶¹ 543 F.2d at 1312.

¹⁶² U.C.C. § 1-207 provides:

A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient.

¹⁶³ U.C.C. § 2-703, Comment 1 states:

This section is an index section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer. This Article rejects any doctrine of election or remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.

¹⁶⁴ 543 F.2d at 1319.

¹⁶⁵ *Id.* at 1317-18, nn.29 & 30, *citing* U.C.C. §§ 2-602(1), 2-606(1)(b), 2-607(3), 2-608(2), 2-612(3), 2-616, 2-703, 2-711.

right rejection of the Code where inconsistent with federal caselaw. Such was the result in *Federal Electric Corp. v. United States*.¹⁶⁶ The plaintiff corporation, desiring to be released from an unprofitable contract, notified the government that it was withdrawing its offer to supply as yet unordered contract items, that the contract was enforceable only to the extent of orders already received, that at government insistence subsequent orders would be filled, but that such action would not constitute a waiver of plaintiff's right to renegotiate the contract price.¹⁶⁷ When plaintiff brought suit to recover additional expenses, the court refused to honor plaintiff's reservation of rights under U.C.C. § 1-207,¹⁶⁸ and held the contract enforceable to the extent performed.¹⁶⁹

In support of this decision the court relied upon federal precedent contained in two Supreme Court cases¹⁷⁰ which explicitly rejected the concept of continued performance after reservation of rights. The court explained that:

Though we might find persuasive the contemporary view of performance under protest as restated in section 1-207 of the Uniform Commercial Code . . . we hesitate to extend this view in the face of a clear, contrary rule established and affirmed, albeit a half century ago, by the Supreme Court.¹⁷¹

By basing its decision upon Supreme Court precedent, the Court of Claims avoided the necessity of explaining its rejection of Article 2 provisions. Any contrary federal precedent apparently would produce the same result under the court's demonstrated policy of applying federal case law whenever possible.

Mechanical adherence to established federal precedent, however, is not only contrary to the Court of Claims's commitment "to take account of the best in modern decision and discussion,"¹⁷² but also blocks a parallel development of federal contract law with the law followed by "other contractors under analogous situations."¹⁷³ In the absence of relevant federal precedent the Court of Claims, in fact, has applied Article 2 provisions as federal contract law. This third approach to federal utilization of the U.C.C. by the Court of Claims appears in the case of *John C. Kohler Co. v. United States*.¹⁷⁴ In *Kohler*, a contractor who installed a new boiler for the government sued to recover the costs of repair after the boiler exploded during normal use. A

¹⁶⁶ 486 F.2d 1377 (Ct. Cl. 1973), *cert. denied*, 419 U.S. 874 (1974).

¹⁶⁷ *Id.* at 1379-80.

¹⁶⁸ See note 162 *supra*.

¹⁶⁹ 486 F.2d at 1382.

¹⁷⁰ In *Willard, Sutherland Co. v. United States*, 262 U.S. 489, 492, 494 (1923), the Court held a contract for delivery of an unspecified amount of coal, though unenforceable at inception due to lack of consideration and mutuality, enforceable to the extent performed regardless of plaintiff's reservation of rights. In *Early & Daniel Co. v. United States*, 271 U.S. 140, 141-42 (1926), performance, though under protest, was held to waive rights to additional compensation under a federal supply contract.

¹⁷¹ *Federal Electric Corp.*, 486 F.2d at 1382.

¹⁷² *Padblock Co. v. United States*, 161 Ct.Cl. 369, 377 (1963).

¹⁷³ *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944).

¹⁷⁴ 498 F.2d 1360 (Ct.Cl. 1974).

major issue on appeal was whether acceptance of delivery had occurred before the damage was incurred.¹⁷⁵ Although the boiler had been operated by government employees for nearly three months, the government denied taking possession. The contract provided for written notice of installation and official inspection before final acceptance of contract performance.¹⁷⁶ Since written notice of installation had not been given by the contractor, the government claimed that the required inspection and, hence, final acceptance had never occurred.¹⁷⁷ With only a footnote comment,¹⁷⁸ the court applied U.C.C. § 2-606(1)(c)¹⁷⁹ as the federal definition of acceptance. Although the court did not specifically state its rationale, the reason appears obvious. Acceptance of performance is a basic contract principle, applicable to federal as well as commercial contracts. The formulation of a unique, federal definition without convincing justification would conflict with the Supreme Court's directive to treat the United States "as other contractors under analogous situations."¹⁸⁰ Since a federal agency had merely purchased one boiler, no special federal interests or policies were involved. The Uniform Commercial Code, therefore, could be safely utilized as a source for federal contract common law formulation.

These three approaches to federal utilization of Article 2 provisions complement and reinforce the policy embraced by the federal circuits and boards of contract appeal. The Court of Claims, however, has also used Article 2 provisions to resolve federal contract disputes in the face of consistent, and even contrary, federal precedent. In doing so the court has developed a unique method of balancing federal and private interests using Article 2 provisions while preserving the force of prior federal case law. The court manages to do this by first distinguishing the Code from the body of federal contract common law in order to apply selected Article 2 provisions as exceptions to normal federal precedent.

This fourth approach became apparent in 1969 in *Everett Plywood and Door Corp. v. United States*.¹⁸¹ In that case a contractor had successfully bid for the right to cut an estimated yield of timber located on inaccessible government land. When actual yield fell far short of the published estimate, the contractor sued to recover the difference as damages on an express warranty claim.¹⁸² Two kinds of express warranties—stemming from specifications contained in federal contracts and applicable in this case—previously had

¹⁷⁵ *Id.* at 1364.

¹⁷⁶ *Id.* at 1365.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1367 n.6.

¹⁷⁹ U.C.C. § 2-606 provides:

1) Acceptance of goods occurs when the buyer

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

¹⁸⁰ *United States v. Standard Rice Co.*, 323 U.S. at 111.

¹⁸¹ 419 F.2d 425 (Cl.Cl. 1969).

¹⁸² *Id.* at 426-29.

been recognized by the Supreme Court respectively in *Hollerbach v. United States*¹⁸³ and *Christie v. United States*.¹⁸⁴ In awarding the plaintiff damages for breach of an express warranty, the Court of Claims found U.C.C. § 2-313¹⁸⁵ to be the "fair and just law applicable in the instant case . . .,"¹⁸⁶ and used the federal precedent merely to support its decision.¹⁸⁷ A close examination of the court's action reveals the emergence of a new, utilitarian approach towards Article 2 application.

On evidence presented, the court found the government responsible for the undercut of timber.¹⁸⁸ The area to be cleared was vaguely defined as well as inaccessible, thus justifying plaintiff's reliance on the published estimate.¹⁸⁹ Due in part to complicated provisions tying recovery of plaintiff's costs in constructing and maintaining a road to the total amount of timber to be recovered, the government's published estimate was found by the court to

¹⁸³ 233 U.S. 165 (1914). *Hollerbach* involved an unconditional express warranty. The contractor was awarded damages resulting from reliance on misstatements of material fact regarding the type of material used as dam backing regardless of contract terms cautioning the contractor not to rely upon the contract description but to independently investigate the work site. *Id.* at 172.

¹⁸⁴ 237 U.S. 234 (1915). *Christie* involved a conditional express warranty—namely, a warranty applicable to material representations of fact on which the contractor was justified in relying. The contractor here had relied on government drawings and bore samples in bidding on an excavation job. He recovered increased costs because the material to be excavated was not in actuality as represented by the government. *Id.* at 239-42. The Court noted government knowledge of contrary conditions, plaintiff's reliance on the representations, and the impracticability of independent testing by the plaintiff. *Id.* at 240-42.

¹⁸⁵ U.C.C. § 2-313 provides:

Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warranty" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

¹⁸⁶ *Everett Plywood and Door Corp. v. United States*, 419 F.2d at 429 (emphasis added).

¹⁸⁷ The Court of Claims had already applied both warranties as federal contract law. See *Dale Construction Co. v. United States*, 168 Ct.Cl. 692 (1965); *Dunbar and Sullivan Dredging Co. v. United States*, 65 Ct.Cl. 567 (1928). These two cases, however, were cited by the court in *Everett* merely for support. 419 F.2d at 431-33. Since § 2-313 had been found applicable simply "in the instant case," 419 F.2d at 429, the court's action may be interpreted as a reaffirmance of underlying federal case law.

¹⁸⁸ 419 F.2d at 429.

¹⁸⁹ *Id.* at 430-31.

be an important basis of the final bargain.¹⁹⁰ Most importantly, the Forest Service, through misplaced confidence in the accuracy of its estimate, had refused to utilize an approved contract form which contained a disclaimer of warranty as to quantity.¹⁹¹ As a result, plaintiff upon performance sustained damages in excess of \$250,000 through no fault of his own.¹⁹²

As previously noted, two federal warranty theories stood ready for the court's use. The first, established by the Supreme Court in *Hollerbach*, made positive statements of material fact within federal contracts binding upon the government to the extent of actual detrimental reliance shown by a contractor.¹⁹³ Under these circumstances, contractors were specifically relieved of any responsibility to independently examine and verify such "warranted" facts.¹⁹⁴ A second, less protective warranty covering factual representations suggested by contract drawings was recognized by the Supreme Court in *Christie v. United States*.¹⁹⁵ To recover on this warranty theory as subsequently applied, a contractor was required to demonstrate *justified* reliance—the absence of governmental caution regarding the reliability of the representations coupled with the impracticability of pre-contract verification.¹⁹⁶ Since the Forest Service had not disclaimed an implied warranty of quantity, and since the contractor had justifiably relied upon the government's published estimate, the *Christie* warranty appeared applicable.

Both of the warranties set forth in *Hollerbach* and *Christie*, however, were qualified by the prior Supreme Court decision in *Brawley v. United States*.¹⁹⁷ The Court in *Brawley* held that good faith estimates of quantity regarding goods sold by specific lot are *not* warrantable representations of fact.¹⁹⁸ The Court of Claims was thus faced with the task of balancing the justified claim of a federal contractor with the express policy of the Supreme Court not to create a federal warranty of quantity. Application of the *Christie* warranty in

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 430.

¹⁹² *Id.* at 433.

¹⁹³ *Hollerbach v. United States*, 233 U.S. 165, 172 (1914).

¹⁹⁴ *Id.*

¹⁹⁵ 237 U.S. 234, 240, 242 (1915).

¹⁹⁶ See *Dale Construction Co. v. United States*, 168 Ct.Cl. 692, 703-04 (1965).

¹⁹⁷ 96 U.S. 168 (1877). The case concerned a requirements contract which bound the plaintiff to supply such wood as needed by an army post at an estimated total of 880 cords. *Id.* at 173. Only forty cords of wood were actually purchased. The Supreme Court dismissed plaintiff's subsequent claim for breach of contract. *Id.* at 173-74.

¹⁹⁸ The Court stated:

Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, . . . and the quantity is named with the qualification of "about" or "more or less", or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

Id. at 171.

Everett would create a troublesome federal precedent. To avoid this result, the Court of Claims distinguished *Brawley* from the case before it on the basis that the parties in *Everett* had actually contracted to cut and carry a specified amount of timber¹⁹⁹ and turned to Article 2, which it clearly qualified as the "fair and just law applicable in the instant case" In utilizing § 2-313, the court neither replaced federal precedent with a Code provision nor added an Article 2 provision to the available body of federal contract common law.²⁰⁰ Instead, the court merely identified Article 2 as an independent source of modern sales law useful in achieving equitable results in *particular* contract situations. Applied solely in this respect, the Code more closely resembles a federal tool than an available source for federal contract law formulation. With *Northern Helex Co. v. United States*,²⁰¹ the court more clearly revealed its Code-as-tool approach to contract dispute resolution.

Northern Helex presented a substantially similar fact situation as that found in *Cities Service Helex*,²⁰²—a 22 year contract to produce and sell helium to the government pursuant to a long-range federal program to preserve natural resources. The plaintiff in *Northern Helex* produced helium in conjunction with its usual petrochemical operations. The company had no storage facilities or regular helium customers, but sold helium solely to the government pursuant to contract. The plaintiff responded to the government's notice of termination by claiming an immediate, material breach of contract but continued to make deliveries "in mitigation of damages and in the interests of conservation."²⁰³ On cross motions for summary judgment, the court decided only the issues of materiality of breach and possible waiver. The court first characterized plaintiff's notice as a reservation of rights under U.C.C. § 1-207,²⁰⁴ and then found the plaintiff's continued performance to be commercially

¹⁹⁹ 419 F.2d at 431-32. The court also distinguished the case of *Brock v. United States*, 84 Ct.Cl. 453 (1937), in which a contractor who had agreed to cut and buy an estimated amount of timber on government land had sued on an express warranty theory to recover his losses. The court explained that since the plaintiff in *Brock* was familiar with the area to be cleared, no justifiable reliance on the published estimate could be shown. In addition, it noted that no evidence existed establishing government estimates of quantity as the basis of agreement. 419 F.2d at 433. As a result, the court concluded that no warranty was created in *Brock. Id.*

²⁰⁰ Acceptance of the Code warranty as federal law would have conflicted with the *Christie* warranty established earlier by the Supreme Court. See U.C.C. § 2-313, Comment 3:

... In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.

²⁰¹ 455 F.2d 546 (Ct. Cl. 1972).

²⁰² 543 F.2d 306 (Ct. Cl. 1976). See text at notes 152-60 *supra*.

²⁰³ 455 F.2d at 549.

²⁰⁴ *Id.* at 552. See note 162 *supra*.

reasonable in accordance with U.C.C. §§ 2-703(c)²⁰⁵ and 2-704(2).²⁰⁶ The court explained: "We are convinced of the fairness of following the modern U.C.C. rule in this case because of the harshness of a contrary result on our special facts, where cessation of production was commercially impossible and avoidance of waste most desirable."²⁰⁷ Reservations of rights under U.C.C. § 1-207, however, was not necessary to preserve the breach remedies of § 2-704.²⁰⁸ In addition, the Supreme Court had specifically rejected the principle of continued performance after reservation of rights.²⁰⁹ The Court of Claims nevertheless insisted upon linking the two Code provisions when applied to resolve federal contract disputes. While the court did not specifically explain the rationale underlying this action, elements of the code-as-tool approach are discernible.

An application of U.C.C. § 2-704(2) alone in *Northern Helex* would not have provided the Court of Claims with sufficient grounds to distinguish that case in the future.²¹⁰ Section 2-704(2) would appear as an integrated part of

²⁰⁵ 455 F.2d at 553. U.C.C. § 2-703 provides:

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract . . . then also with respect to the whole undelivered balance, the aggrieved seller may

(c) proceed under the next section respecting goods still unidentified to the contract.

²⁰⁶ 455 F.2d at 553. U.C.C. § 2-704(2) provides:

Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

²⁰⁷ 455 F.2d at 553 (emphasis added). Plaintiff's suit claimed \$83,632,368 as due. *Id.* at 548.

²⁰⁸ U.C.C. § 1-207, Comment 2 states:

. . . The section is not addressed to the creation or loss of remedies in the ordinary course or performance but rather to a method of procedure where one party is claiming as of right something which the other feels to be unwarranted.

²⁰⁹ *Early & Daniel Co. v. United States*, 271 U.S. 140, 142 (1926); *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 494 (1923).

²¹⁰ General application of § 2-704 would have changed existing federal contract law. Compare 5 S. WILLISTON, A TREATISE OF CONTRACTS (3d ed. 1961):

[W]herever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to.

(cited by the Court of Claims in *Northern Helex*, 455 F.2d at 551) with note 206 *supra*. In addition, straight adoption of U.C.C. § 2-704 would have placed the burden of proving contractual unreasonableness upon the government. Consider U.C.C. § 2-704, Comment 2:

Under this Article the seller is given express power to complete manufacture or procurement of goods for the contract unless the exercise of reasonable commercial judgment as to the facts as they appear at the time

federal contract common law, applicable at any time hence as federal precedent. Since the underlying principles of § 1-207 had been rejected earlier by the Supreme Court,²¹¹ the Court of Claims was able to limit that provision's application to "particular circumstances" in "specific cases."²¹² By making continuance of performance under § 2-704 contingent upon reservation of rights under § 1-207, this additional control was extended to *both* provisions. The court subsequently characterized its action in *Northern Helex* as a necessary response to special circumstances rather than the creation of new federal contract law.²¹³ In doing so the court consciously rejected Article 2 as an acceptable source for federal law reformation or change and, instead, forged a new federal contract tool. The Court of Claims then used the combination of §§ 1-207 and 2-704 to reward the commercially reasonable conduct of the plaintiff in *Northern Helex* without sacrificing federal policy concerning waiver of claims by continued performance.

In summary, the federal judiciary, when faced with the task of formulating a body of federal contract law uniform in scope as well as fair in application, has clung to traditional contract principles as reflected in existing federal case law. These courts have, in addition, refused to allow the contract provisions of U.C.C. Article 2 to change established common contract law. Instead, Article 2 is utilized most often either for support, when consistent with existing precedent, or as a unique legal tool when absolutely necessary to achieve fair and just results without changing the underlying legal structure. Whether

he learns of the breach makes it clear that such action will result in a material increase in damages. The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture. The court, therefore, did not wish to accept these provisions as general federal contract law.

²¹¹ See note 209 *supra*.

²¹² *Federal Electric Co. v. United States*, 486 F.2d 1377, 1382 (Ct. Cl. 1973).

²¹³ The court first limited the general precedential value of *Northern Helex* in *Ling-Temco-Vought, Inc. v. United States*, 475 F.2d 630 (1973):

In *Northern Helex* we found "particular circumstances [centering on the need to prevent waste of helium] justifying further performance in the specific case" 455 F.2d at 551-52, 553 . . . but even then we rested, equally, on the significant facts that that contractor had made an express reservation of its rights when it continued performance, . . . and that the "Government was not hurt and it did not change its position." . . . The court was at pains to spell out the "special aspect" and the "special facts" of that case, . . . which permitted the contractor to continue performance while at the same time claiming total breach.

Id. at 637 (emphasis in original). In *Cities Service Helex*, the Court again focused on the uniqueness of *Northern Helex*:

The position adopted in *Northern Helex Co. v. United States* . . . allowed a plaintiff to claim a material, contract-ending breach—despite having continued performance—only in the context of that plaintiff's explicit reservation of material breach claims, explanations in advance of the reasons for its continued performance, prompt suit before the Government took any action to terminate, the lack of prejudice to the Government, and other special factors.

543 F.2d at 1315-16.

these courts have done a "distinct disservice" to insist on traditional federal contract law "for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States"²¹⁴ should be determined in reference to the type of contract law permitted by the doctrine of federal common law and required by the nature of federal contracting.

III. EVALUATION

A body of federal contract law which satisfactorily balances unique federal policies with private commercial goals has yet to be formulated. Nevertheless, important and desirable aspects of such a law can be identified. The federal rule should at least be uniform and consistent with national interests, since these are key factors in the initial decision to formulate federal common law.²¹⁵ As the backdrop for complex bargaining,²¹⁶ basic federal contract principles should be clear, concise and dependable. Finally, the law under which the federal government buys or sells goods should fairly protect not only the attainment of important national goals, but the bargained-for interests of private contractors. The Uniform Commercial Code, adopted and applied in forty-nine states,²¹⁷ has been termed "a truly national law of commerce"²¹⁸ and "a source of 'federal law' . . . more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of *Swift v. Tyson*."²¹⁹ Yet, boards of contract appeal, the federal courts, and the Court of Claims have demonstrated extreme caution, if not reluctance, in the application of Article 2 provisions to federal contract disputes. This final section will propose and examine plausible reasons for such hesitancy towards Code utilization while evaluating the various approaches toward Article 2 utilization which have been followed by the federal contracting boards and courts.

An apparent barrier to federal court utilization of U.C.C. provisions is the refusal by Congress to adopt the Code for federal use. Such action would provide a clear and concise body of commercial law consistent with that fol-

²¹⁴ *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (Ct. Cl. 1966).

²¹⁵ See *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co.*, 318 U.S. at 367.

²¹⁶ While government contracts are technically contracts of adhesion with set terms, bargaining between the government and industry representatives does occur. See Pasley, *The Interpretation of Government Contracts: A Plea For Better Understanding*, 25 *FORD. L. REV.* 211, 214 (1956). In regards to "negotiated" government contracts, an awareness of underlying federal contract law is important in order to anticipate in individual negotiations the demands that will be made in subsequent contract performances. See J. PAUL, *UNITED STATES CONTRACTS & SUBCONTRACTS*, 163-66, 173-74 (1964).

²¹⁷ See note 2 *supra*.

²¹⁸ *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966).

²¹⁹ *New York, N.H. & H.R. Co. v. Reconstruction Finance Corp.*, 180 F.2d 241, 244 (2d Cir. 1950) (originally cited in reference to the U.C.C. by Justice Friendly in *United States v. Wegematic Corp.*, 360 F.2d at 676, and subsequently by the Court of Claims in *Everett Plywood and Door Corp. v. United States*, 419 F.2d at 430, and *Groves v. United States*, 202 Ct. Cl. 660, 674 (1973)).

lowed by the states. This goal led Mr. Justice Clark, in *Bank of America National Trust and Savings Association v. United States*,²²⁰ to specifically request congressional action.

The commercial interests of our country would be better served if interested parties could expect uniformity in the federal and state courts' application of commercial law. To this end, we would urge Congress to adopt, in the not distant future, the U.C.C. for federal application, as our fifty states have already done for local application.²²¹

Nevertheless, Congress has not adopted the Uniform Commercial Code as federal law. This refusal might be interpreted as congressional rejection of Code logic and provisions. The failure of Congress to adopt the U.C.C. as federal law, however, should not be attributed to congressional disapproval of the Code as a body of commercial law since, in 1963, Congress officially accepted the U.C.C. for application within the District of Columbia.²²² A more plausible explanation is that Congress simply chose not to commit federal contracting to the Code in order to pursue, through federal contracts, such independent goals as national security,²²³ the preservation of natural resources,²²⁴ and the attainment of various social welfare ends.²²⁵ Specific federal regulation can be more easily tailored in such situations towards achieving the desired result.²²⁶ Congressional rejection of the Code as federal statutory law, therefore, should not be misconstrued as a negative evaluation of the usefulness of Article 2 as federal law.

Federal courts are free to utilize Code provisions to formulate federal common law in any way consistent with congressional policies. Where unique federal interests are not involved, federal courts have been willing to accept Code provisions as federal common law. For example, the Fifth Circuit Court of Appeals, in *United States v. Hext*,²²⁷ commented: "We perceive no reasons why the rights of the United States arising out of secured transactions pursuant to the FHA loan program should be any different than those of other

²²⁰ 552 F.2d 302 (9th Cir. 1977).

²²¹ *Id.* at 303 n.1. Justice Clark's comments were directed to Articles 3 and 4 which have been adopted by all fifty states. See 1 UNIFORM LAWS ANNOTATED 1 (West 1977).

²²² D.C. Code Ann. § 28 (1973 & Supp. IV 1977) (originally enacted as Act of December 30, 1963, 77 Stat. 630).

²²³ See, e.g., *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 292 (1942).

²²⁴ See, e.g., *Northern Helix Co. v. United States*, 455 F.2d 546, 551 (Ct. Cl. 1972) (preservation of helium).

²²⁵ See Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, WISC. L. REV. 301, 302-03 (1974).

²²⁶ Examples of such tailored provisions are 41 C.F.R. § 1-1.319, which requires jewel bearings used in federal contracts to be purchased from a government owned plant in North Dakota in order to "maintain a jewel bearing production plant in the United States as part of the industrial mobilization base," and C.F.R. § 1-12.803-1, which requires a lengthy equal opportunity clause to be included in each government contract.

²²⁷ 444 F.2d 804 (5th Cir. 1971).

financiers of farming operations under the Uniform Commercial Code."²²⁸ The court then accepted U.C.C. Article 9 as the federal common law of secured transactions.²²⁹ Deciding a similar issue in *United States v. Burnette-Carter Co.*,²³⁰ the Sixth Circuit stated that: "We agree with the reasoning of the Fifth Circuit that the U.C.C. should be adopted as the relevant federal common law."²³¹ The court then applied Article 9 provisions to find a livestock broker liable to the FHA for the sale of livestock which was subject to a perfected federal security interest.²³²

It is essential that no unique federal interest be involved in federal programs governed entirely by the Uniform Commercial Code. Federal courts which have accepted the Code as federal common law abandon the task of juggling federal policy, federal interests and private expectations. Instead, those courts simply "apply the rules found in 'the Code itself and the general body of precedent developed by the Code states.'"²³³ Where this is possible, adoption of the Code does indeed provide a concise, uniform body of law readily available to courts and interested parties alike. As demonstrated above,²³⁴ however, federal boards of contract appeal, circuit courts, and the Court of Claims have refused to accept Article 2 of the U.C.C. for general application within federal contracts. Far from being a "distinct disservice",²³⁵ this action is reasonable and proper, as far as it goes, for two quite simple reasons.

First, inherent in the Supreme Court's directive that federal contract common law reflect, where possible, commercial contract principles²³⁶ is the limiting assumption that important federal objectives are not to be sacrificed to achieve federal/state legal uniformity.²³⁷ Federal contracts are not merely commercial transactions, but also vehicles for the achievement of federal policy—be that policy the procurement of necessary supplies or the promotion of desired social change.²³⁸ The nature of federal common law as out-

²²⁸ *Id.* at 810.

²²⁹ *Id.* This interpretation of *Hext* is directly supported by *United States v. Topeka Livestock Auction, Inc.*, 392 F. Supp. 944, 948 (D.C.N.D. Ind. 1975): "The Uniform Commercial Code on secured transactions has been judicially adopted as the federal common law as well. *Hext, supra.*"

²³⁰ 575 F.2d 587 (6th Cir. 1978).

²³¹ *Id.* at 590.

²³² *Id.* at 591-92. See also *Mills Morris Co. of Miss. v. Scanlon*, 446 F.2d 722, 732 (5th Cir. 1971). The Court of Claims has also apparently recognized Article 9 of the U.C.C. as the federal common law of secured transactions. See *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977); *Groves v. United States*, 202 Ct. Cl. 660, 674 (1973); *Merchants Nat'l Bank & Trust Co. v. United States*, 202 Ct. Cl. 343, 345-46 (1973).

²³³ *United States v. Burnette-Carter Co.*, 575 F.2d 587, 590 (6th Cir. 1978).

²³⁴ See text at notes 113-213 *supra*.

²³⁵ *United States v. Wegematic Corp.*, 360 F.2d at 676.

²³⁶ *United States v. Standard Rice Co.*, 323 U.S. at 111.

²³⁷ The Supreme Court, in *Standard Rice*, specifically recognized that "there will be exceptions . . ." to the general policy of treating the United States as "other contractors under analogous situations." *Id.*

²³⁸ The Commission on Government Procurement has listed 39 contract clauses designed to further national policies. 1 COMMISSION ON GOVERNMENT PROCUREMENT, REPORT III, 114-15 (1972).

lined above²³⁹ requires that these important federal interests be balanced with state interests in the formulation of the governing federal rule. The Uniform Commercial Code is not designed to promote such a balance.²⁴⁰ This sometimes complicated task appears to require the flexibility of federal common law rather than the uniformity of a civil code.

Second, the assumption that universal acceptance of Article 2 as federal common law will painlessly produce uniform federal contract law is insupportable. Either method for federal utilization of Code provisions—state law adoption or judicial acceptance—necessarily occurs within the context of individual cases and in reference to particular contracts. Article 2 provisions, otherwise relevant, may be rendered totally irrelevant or altered in meaning and impact by specific contract provisions or federal contract regulations.²⁴¹ Those Code sections which conflict with federal policy or statutes would be rejected outright.²⁴² To insist, therefore, that federal courts now accept and apply Article 2 provisions exclusively as federal common law is in reality to require the application of “federal” contract law where necessary and Article 2 provisions whenever possible. While uniformity of law is desirable, legal predictability in contracting is almost essential.²⁴³

Certainly the easiest method of attaining any measure of dependability in federal contracting law is to preserve relevant federal precedent. Justice Holmes, commenting upon the nature of common law in general, observed that “the substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results,

²³⁹ See text at notes 73-79 *supra*.

²⁴⁰ The Uniform Commercial Code has listed its primary objectives in § 1-102(2):

- a. to simplify, clarify, and modernize the law governing commercial transactions;
- b. to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- c. to make uniform the law among the various jurisdictions.

²⁴¹ See Gusman, *Article 2 of the U.C.C. and Government Procurement: Selected Areas of Discussion*, 9 B.C. INDUS. & COMM. L. REV. 1, 7-18 (1967). The author points out, for example, that federal contract regulations may limit federal use of U.C.C. § 2-706 (permitting acceptance of an offer in any reasonable manner) and § 2-707 (recognizing the validity of acceptances containing additional terms) to situations in which either the government or contractor attempt to avoid an agreement on the ground that contract formalities were not perfectly observed. *Id.* at 7-10.

²⁴² *DeSylva v. Ballentine*, 351 U.S. at 581; *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 210 (1946). See also *Mishkin*, *supra* note 34, at 805-06.

²⁴³ Section 1-105(1) of the Uniform Commercial Code specifically recognizes the right of parties to choose applicable law before contracting. U.C.C. § 1-105(a) provides:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

depends very much upon its past."²⁴⁴ In respect to contract law, these observations are particularly apt. Federal contract common law, at present, represents a formulated compromise between federal policy and individual interests. Federal contractors are familiar with this law and rely upon it in both bidding and contract performance.²⁴⁵ With federal adoption of Article 2, all necessary exceptions will not only be made *after* contract performance, these exceptions will be made exclusively in favor of the government. To avoid this result, the Court of Claims has resolutely applied familiar federal contract precedent while utilizing the Code only in favor of individual contractors.²⁴⁶ In this way federal contractors know in advance the balance struck by federal courts between federal and commercial interests. They also know that the U.C.C. may be applied as an exception to established federal precedent whenever balance and fairness so require.

To apply Article 2 provisions simply in mitigation of glaring inequities or in the absence of relevant federal precedent, however, is to shirk the difficult, though necessary task of federal contract common law reevaluation. The fact that federal contract precedent exists is no guarantee that all of it should exist. As the court in *Transatlantic Finance*²⁴⁷ recognized, federal contract common law needs updating and change at times in order to efficiently serve both federal and private interests. The widespread acceptance of the Uniform Commercial Code qualifies Article 2 as a model for federal contract law reform. Federal courts and boards of contract appeal should review established federal contract precedent in light of Code developments. The result should be a body of clear, concise contract law with sufficient flexibility to protect reasonable contractor expectations as well as national interests.

CONCLUSION

Although provisions of the Uniform Commercial Code have been utilized by federal courts in the resolution of federal contract disputes, Article 2 itself has not been generally accepted as the federal common law of contracts. Instead, federal courts and boards of contract appeal have consistently distinguished federal contract law based on existent federal precedent from Article 2 provisions, preferring to utilize Article 2 either for support or as a source for federal contract law formulation in the absence of relevant precedent. The Court of Claims has, in addition, sporadically applied the Code as a unique legal tool under the particular circumstances of individual contract disputes. These efforts are apparently directed towards the formulation and preservation of a uniform, federal law of contracts capable of protecting national interests while guaranteeing the reasonable realization of bargained for return. While these courts are correct in refusing to initiate a policy of wholesale

²⁴⁴ O. HOLMES, *THE COMMON LAW* 1-2 (1881).

²⁴⁵ See note 216 *supra*.

²⁴⁶ See text at notes 152-213 *supra*.

²⁴⁷ *Transatlantic Finance Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966).

Code adoption, Article 2 should not be overlooked as a source of concise, modern contract law in the formulation of new federal contract law nor in the development and change of old. The goal should be a body of federal contract law responsive to federal policy yet containing the unity, clarity and commercial reasonableness of the Uniform Commercial Code.

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