INTRODUCTION

The Uniform Commercial Code ("Code") directs courts deciding disputes between merchants to look to usages of trade and other commercial standards and practices to interpret contracts and fill contractual gaps. This so-called incorporation approach was the brainchild of the Code’s principal drafter Karl Llewellyn and was an

1 Wilson-Dickenson Professor of Law, The University of Chicago. I would like to thank the Lynde and Harry Bradley Foundation, the John M. Olin Foundation, and the Sarah Scaife Foundation for financial support and Brian Bix, Emily Kadens, Edward Bernstein, Richard Posner, Stuart Macauly, Steve Burton, Chris Drahozol, James Lindgren, Jake Gerson, Richard Posner, Philip Hamburger, Avery Katz, Douglas Baird, Ariel Porat, Saul Levmore, David Schraub, William Hubbard, Margaret Schilt, Shai Dothan and participants at the Hebrew University of Jerusalem Workshop, the Columbia Law School Legal Theory Workshop, The University of Iowa Faculty Workshop, The Georgetown Contract As Promise meeting, and the Tel Aviv University Law and Economics Workshop for useful comments. I would also like to thank Mary La Brec, Sara Weber, Vania Wang, Kimberly St. Clair, Marc Blitz, Jeremy Bates, Jamie McCloud, Gladys Zolna, Donn Parsons and Marissa Maleck for outstanding research assistance.

2 The version of the incorporation strategy reflected in the drafts of the Code that preceded the public hearings and the adjustments required by the demands of interest group politics, was more sensitive to the procedural and strategic considerations identified in this paper. These early drafts contained a provision for determining the content of customs through the use of what Llewellyn termed “Merchant Experts on Mercantile Facts,” see Report and Second Draft: The Revised Uniform Sales Act, (1941) at 251, who would determine the content of usages relating to a variety of subjects including but not limited to the conformity or nonconformity of goods, whether a nonconformity was substantial, the reasonableness of actions, and other issues within the purview of “special merchant’s knowledge rather than general knowledge” id at Section 59 p. 254. Llewellyn recognized that these determinations were ill-suited to adversarial litigation in front of lay juries, explaining that it “could take three weeks of trial
important application of legal realist philosophy to commercial law.\textsuperscript{3} It remains the dominant interpretive and gap filling approach endorsed by the recent proposed revision of Articles 1 and 2 of the Code,\textsuperscript{4} and plays a prominent role in many of the most important international commercial law statutes.\textsuperscript{5} Ever since the Code’s adoption the incorporation approach has been widely lauded by legal academics.\textsuperscript{6} They contend that as compared to its leading


\textsuperscript{4} See James J. White, Good Faith and the Cooperative Antagonist, 54 SMU L. Rev, 679 (2001)[hereinafter “Cooperative Antagonist”] (noting that good faith, and its invocation of commercial standards that rely on usage of trade for their content has been “expanded” in the revised Code because “revised Article 1 now adopts the expanded definition of good faith that originally applied only to merchants under Article 2”).

\textsuperscript{5} See e.g. CISG____International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial contracts Art. 1.8(2) (1994), United Nations Convention on Contracts for the International Sale of Goods Art 9(2). Despite the expansive role given to usage by the statutes, the debates surrounding the adoption of the usage provisions reveal that they were controversial. See e.g., Carbaneou and Bainbridge (reporting that the controversy centered on whether the usages that existed in more developed countries would be oppressive if applied to transactions in which one or both parties were from less developed countries).

alternatives—either formalist adjudication with courts looking to the plain meaning of contractual language and filling gaps with the most efficient provision from an ex-ante perspective or courts refusing to enforce agreements with gaps on grounds of indefiniteness—the incorporation approach offers important advantages. Incorporations’ defenders argue that it decreases contracting costs by reducing specification costs without unduly increasing interpretive error costs, increases accuracy by ensuring that interpretative findings of a judge or jury conform as closely as

Interpretation Debate: A Critique of the Leading Economic Theory (manuscript on file with the author) (arguing for a theory of interpretation that he labels, “objective contextualism” that gives great weight to practical construction, including course of dealing, course of performance and usage of trade.); Steven Walt, The State of the Debate Over the Incorporation Strategy in Contract Law, [hereinafter, “State of the Debate”] 38 U.C.C. L.J. 255. But see White, Cooperative Antagonist supra note 4 at 685 (criticizing the incorporation of trade usage under the Code’s good faith provision and “suggesting that useful trade practice exists in only a minority perhaps a smaller minority, of all cases where one might search for one. And . . . the capacity of lawyers to find and present this trace practice and of the judge or jury to understand it is even more limited.”).

7 Kraus and Walt, In Defense, supra note ___ at 198 (“The main objective competitors to plain-meaning regimes are incorporation regimes.”).

8 Robert Scott [insert]

9 Kraus and Walt, In Defense, supra note ___ at ___; Gillette, Harmony and Stasis supra note ___ at 707-7099 (1999) (noting that “[t]he commercial law literature contains a somewhat traditional story about the efficient incorporation of trade usage into commercial contracts, . . . Commercial parties, unable to specify every contingency with precision, can reduce transactions costs by incorporating default rules into their contracts; total contracting costs are minimized to the extent that those defaults reflect risk allocations that most parties would have adopted had they negotiated explicitly about the term,” and suggesting that “usages of trade. . .provide an alternative source of majoritarian defaults” that may be desirable for any of a number of reasons among them the fact that the application of even nonperfectly efficient custom “does serve the function of reducing the costs of contracting.”); Goetz [insert cite] at 278; Gillette, supra note ___ at 798 (looking to custom “minimizes the risks related to judicial construction of contractual obligations”); Stephan Bainbridge, supra note ___ at 657 (noting that because “the CISG emphasizes current practice with its test of usage widely known and observed.[ . . .] This aspect of the CISG should reduce uncertainty costs.”) See also, Steven Shavell, On the writing and the Interpretation of Contracts, 22 J. Law, Econ. & Org. 289 (putting forth a specification cost saving justification for an approach to contractual interpretation that includes looking to usage based on a stylized model of contracting that does not take into account error costs or the ability of parties to engage in strategic behavior.)
possible to parties’ intent, makes it easier for merchant transactors to conform their behavior to the law, and provides a more efficient set of gap fillers than those that courts or legislatures could devise. However, despite the fact that the Code’s incorporation strategy has been in operation for over seventy years, neither incorporation’s scholarly defenders nor the participants in the American Law Institute’s (“ALI”) recently completed Article 2 revision process have ever sought to test the conceptual model of the incorporation strategy against the ways that it operates in practice.

This paper presents the results a study of all of the sales-related trade usage cases digested under the Code’s trade usage provision from 1970-2007. Its goal is to produce an empirically accurate picture of the ways that the incorporation strategy is being used by parties and applied by courts in sales disputes that can be used to revisit and explore the strengths and weakness of the empirical assumptions and analytical arguments made by incorporations strongest modern defenders. These scholars (whom this paper refers to collectively as “incorporationists”) argue that the “chief virtue” of the strategy lies in its “promise to yield specification costs well below those of a plain meaning regime.” They maintain that the availability of the strategy enables transactors to leave contractual gaps, include inexpensive standard-like provisions, reference industry-specific terms of art that are shorthand for an array of industry-specific understandings, and contract with reference to customary understandings that are unarticulable at the time of contracting, confident that in the event of a dispute courts will fill gaps and interpret these underspecified obligations in a

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10 This argument surfaces in the literature in many guises. See e.g. David V. Snyder, Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct, 54 S.M.U L. Rev. 617, 617 (2001)[hereinafter “Language and Formalities”] (“This article . . . gives an assent-based justification for constructing contracts in light of custom and conduct”); Randy Barnett, Sounds of Silence, __U. Va. L. Rev. __(suggesting that looking to custom will best effectuate the intent of the parties, thereby reinvigorating consent as an essential element of contract.); Joseph H. Levie, The Interpretation of Contracts in New York Under the UCC, 10 Law Forum 350 (“[T]he rules on trade usage and course of dealing can provide some assurance that the final court decision will be a decision of the actual dispute between the parties.”); Walt, State of the Debate at 262 (noting that historically “[t]he debate between incorporation and formalism. . . has turned on party intent.”).

11 [cite to Llewellyn]

12 Kraus and Walt, supra note __at __
manner consistent with the usages of the their trade. Incorporationists recognize the possibility that the fact intensive inquiry required by the strategy might increase interpretive error costs as compared to a plain meaning regime. They maintain, however, that any increase is likely to be small because the types of evidence the parties are required to submit to establish the content of usages—such as expert witness testimony, trade codes, and statistical evidence that the practice is regularly observed—will effectively guard against the mis-incorporation of nonexistent usages and will constrain the range of interpretations courts might plausibly give to usages that really do exist.

The picture of trade usage disputes that emerges from the study of usage in the courts, however, suggests that trade usage arguments are being made for reasons very different from those suggested by the incorporationists. Trade usages are rarely introduced to fill contractual gaps or give meaning to standard-like contract provisions although they are sometimes invoked to give meaning to industry terms of art. Rather, trade usages are most commonly introduced to “interpret” the meaning of detailed or highly specific contractual provisions that are embedded in detailed written agreements, to determine the enforceability, existence, and scope of warranty and limitation of remedy provisions in contracts formed through a so-called battle of the forms, and to defeat motions for summary judgment. The study also demonstrates that none of the evidentiary safeguards against interpretive error identified by the incorporationists are actually operative in Article 2 disputes. In cases dealing with gap filing and interpretation, expert testimony is introduced in less than twenty percent of the cases, trade codes are introduced in less than ten percent of the cases, and not a single litigant ever introduced statistical evidence that an alleged usage was regularly observed. Rather, the most common type of evidence introduced was the testimony of the parties and their employees. Courts rarely even discussed the statutory requirement that a practice must be regularly observed to be a usage. When they did they found it to be satisfied by the mere assertion of a witness that a given practice was usually followed. Together, these and other findings of the study suggest that transactors may not be taking advantage of the potential specification costs savings the strategy affords and that the magnitude of the interpretive error costs the
strategy creates may be far more significant than its defenders assume.

After reexamining the theoretical defenses of the incorporation strategy in light of the study’s findings, the paper concludes that because the strategy is likely to either increase specification costs or at best leave them largely unchanged, while simultaneously increasing interpretive error costs, there is no longer any justification for retaining the trade usage component of the Code’s incorporation strategy as a quasi-mandatory approach to the interpretation of commercial agreements. It then argues in favor of the idea that for merchant transactors a set of formalist/textualist default rules should be developed to provide a background for contractual interpretation. In recognition of the fact that incorporation may be preferred by certain types of transactors in certain contexts, however, it also recommends giving transactors a statutory option to explicitly opt into incorporationist adjudication as long as they designate an expert arbitrator to make binding factual determinations as to the existence and content of any trade usages they claim are relevant to the understanding of their agreement.

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13 The paper thus provides additional evidence and arguments for a textualist/formalist approach to interpreting business contracts. See Alan Schwartz and Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 Yale L.J. 541, 571 (2003) [hereinafter, “Contract Theory”] (arguing that for sophisticated commercial parties, the best “majoritarian default is Willistonian: Typical firms pressure courts to make interpretations on a narrow evidentiary base whose most significant component is the written contract,” explaining that adopting “[t]his proposed rule would both reverse the UCC’s interpretive style and make the new interpretive style a default”); Bernstein, Merchant Law, supra note __at __ (providing evidence that grain merchants prefer a formalist adjudicative approach and arguing against incorporation of uses, courses of dealing, and courses of performance on a variety of theoretical grounds). Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules Norms and Institutions, 99 U. Mich. L. Rev. 1724 (2001) (providing evidence that cotton merchants reject incorporation in favor of textualism and in doing so are able to better support the creation and maintence of flexible and cooperative contracting relationships), and Robert E. Scott and Jody Kraus, Contract Design and The Structure of Contractual Intent, 84 N.Y.U.L. Rev. 1023 (2009); Alan Schwartz and Robert E. Scott, Contract Interpretation Redux, 119 Yale Law J. 926 (2010) (responding to critics of their call for textualist interpretation of business contracts and extending their defense of formalism).
Part I of this paper explores the statutory framework and assumed evidentiary standards for incorporating trade usages into commercial agreements. Part II presents the case study of usage in the courts. It describes the types of cases that arise most frequently, the types of usage evidence that are actually introduced, and the limitations of the study’s methodology. Part III draws on the case study’s findings as well as theoretical arguments to reevaluate the desirability of the incorporation strategy on the terms put forth by its strongest defenders. Part IV discusses the desirability of changing the interpretive presumptions and background rules of American Commercial law. Part V concludes by identifying additional issues that need to be empirically resolved before the debate between the incorporationists and textualists can be more definitively settled.

I. THE DOCTRINAL FRAMEWORK

Articles 1 and 2 of the Uniform Commercial Code and their Official Comments require or permit courts to make frequent recourse to usage of trade in deciding contract disputes.\(^{14}\) Usages are considered part of the transactors’ legally enforceable agreement,\(^ {15}\) and “writings are to be read on the assumption that . . . usages of trade were taken fore granted when the document was phrased.”\(^ {16}\) Among other things, usages may also be looked to in an effort to interpret contract terms, fill contractual gaps, determine the reasonable time for the taking of an action when the written contract is silent,\(^ {17}\) determine if a contract or a contract provision is unconscionable,\(^ {18}\) define the contours of the actions that can be taken

\(^{14}\) See UCC 2-301 and 2-301 cmt ("[T]o determine what is in accordance with the contract under this Article, usage of trade, course of dealing and performance and the general background of circumstances must be given due consideration.").

\(^{15}\) UCC 1-201(3) (defining “Agreement” as the “bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.”).

\(^{16}\) UCC 2-202 cmt 2

\(^{17}\) UCC 2-309 cmt 1 (noting that the “criteria as to reasonable time,” depend upon, among other things, commercial standards, but noting that an agreement to a “definite time” may be implied by usage of trade.”)

\(^{18}\) See e.g. Adcock v. Ramtreat Metal Tech., Inc., 44 UCC Rep. Serv. 2d 1026, 1032[unpublished] (2001) (“A party defending a limitation of liability clause may prove it is unconscionable regardless of the surrounding circumstances if the general commercial setting indicates a prior course of dealing or reasonable usage of trade as to the exclusionary clause.”)
by a party given an option to act at his discretion, define the meaning of commercial unit, determine when it is reasonable to conclude that the tender of nonconforming goods with a price adjustment will be acceptable, create or exclude implied warranties, exclude consequential damages, define conforming tender, and flesh out the contours of the implied warranty of merchantability. It may also be used to determine which so-called “different” or “additional terms” in a battle-of-the-forms situation are included in a contract formed under UCC 2-207(2)(b) and the terms of a contract consummated under UCC 2-207(3). Usage is also at the heart of the Code’s non-waiveable duties of “reasonableness” and “good faith between merchants,” which includes “the observance of reasonable commercial standards of fair dealing in the trade.” Unlike at common law, evidence of usage is not barred by the Code’s lax parol evidence rule and no ambiguity in a contract’s written terms needs to be demonstrated before it can be properly introduced.

In describing the proper role of trade usage in contract interpretation, the Code sets out a hierarchy of authority that gives express terms priority over inconsistent usages of trade. In practice, however, courts rarely give effect to express terms over a demonstrated trade usage. Usages are generally considered to be “consistent” with a contrary express term unless the usage is found to “totally negate” the express term, something that rarely happens. As one court observed, “the trend has been for judges, looking

19 See UCC 2-[]
20 See UCC
21 See UCC 2-508 (2) cmt 2 (noting that in determining whether the seller has “reasonable grounds to believe,” that non-conforming goods would be acceptable with a price adjustment, reasonable grounds can be found in “usage of trade.”)
22 See U.C.C. 2-316 (3)(c) (“[A]n implied warranty can also be excluded or modified by . . . usage of trade.”).
23 See UCC
24 See UCC
25 See UCC
26 See U.C.C. 1-205(4) (“The express terms of an agreement and an applicable course of dealing and usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.”); id. 2-208(2) (“Express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade . . . .”)
beyond written contract terms to reach the “true understanding” of the parties, to extend themselves to reconcile trade usage and course of dealing with seemingly contradictory express terms. They have permitted course of dealing and usage of trade to add terms, cut down or subtract terms, or lend special meaning to contract language.”

Although the Official Comments note that particular usages may be excluded from consideration if they are “carefully negated,” the usage component of the incorporation strategy is not a pure default rule. In practice, the enforceability of a general clause opting out of usage is at best unclear, and evidence from the

27 American Machine v. Strite Anderson, [inset string cite].

28 UCC 2-202 cmt__. A leading form book suggests that to exclude a usage, transactors should include a version of the following clause for each usage they wish to exclude: “Specific Trade Usages Negated This Contract was written with the understanding that the following usage of the trade would not affect the content, interpretation or performance of this Contract and is hereby expressly excluded. The trade usage excluded would normally require [Describe normal effect.] In substitution, the parties have agreed to the following [Describe alternate procedures or allocation of rights adopted].” __, Form 4, p 1-28. In addition, to the extent that incorporationists are correct that the strategy permits transactors to contract with reference to “specialized or context specific terms [that] carry with them an array of implications that might be difficult even to bring to mind let alone commit to paper” these usages become, in effect, mandatory terms across the relevant vocation or trade.

29 Some courts have noted the absence of a clause excluding usages as a factor in their decision to give great weight to usage evidence, See e.g. there were no cases in the study presented in this paper, see infra text accompanying notes __-__ in which a court gave effect to such a clause. In some cases, a clause excluding usages was included in the written contract, but did not even merit mention in the court’s opinion. See e.g. Leighton v. Valley Steel, 41 UCC Rep Serv 2d 1128 (denying the plaintiff’s motion for summary judgment and explaining that “whether usage of trade in the pipe industry excluded the implied warranty of merchantability is a genuine issue of material fact,” despite a clause in the contract stating that “no course of prior dealing between the parties and no usage of the trade shall be relevant to supplement or explain any term used in this agreement,” and the contract also included a standard integration clause). In addition, both form books and academic commentators have concluded that it is unclear whether a court would enforce a general provision that attempted to opt out of the trade usage component of the incorporation strategy in its entirety. LEXSTAT 6-1 FORMS & PROCEDURES UNDER THE UCC P 21.06: Forms and Procedures under the UCC (Matthew Bender & Company, 2010) (“The structure of Section 2-202 appears to allow the admission of course of dealing, course of performance and trade usage even when a merger clause is effective to totally integrate the agreement. Indeed,
American Law Institute hearings on the proposed Code suggests that Llewellyn himself was against giving automatic effect to such provisions.\(^{30}\) More generally, given the central role usage plays not only in the Code’s overall jurisprudence, but also in defining the contours of the non-waiveable duties of good faith and reasonableness,\(^ {31}\) the usage component of the incorporation strategy lies somewhere between a pure mandatory rule and a pure default rule.

Despite the importance of the concept of trade usage to determining the scope and meaning of sales transactions governed by Article 2, the Code provides little guidance on how the “existence and scope” of usages are to be proven. It requires only that a party seeking to introduce usage evidence give the other party notice\(^ {32}\) and that “the existence and scope of . . . a usage are to be proved as facts.”\(^ {33}\) The Official Comments provide some elaboration. They explicitly reject the strict English and common law standards for establishing the existence of a custom, create a presumption that usages that are commercially accepted are reasonable, and make the question of whether an extant usage has been incorporated one for the trier of fact.\(^ {34}\) The comments also note that “[i]n cases of a well established line of usage . . . where the precise amount of the

\(^{30}\) During the American Law Institute’s hearings on the proposed Code, Karl Llewellyn was asked, “[S]uppose the contract says, ‘any usage or custom in the trade to the contrary, this expresses all the terms of the contract.’ Or, ‘this expresses all the terms of the contract, usage or custom to the contrary.’ Under this clause that would be disregarded?” And Llewellyn answered, “I don’t see why sir. The matters are to be dealt with consistently if that can reasonably be done.” Lavie, supra note _ at 865 nn 134

\(^{31}\) Although the Code does permit transactors to particularize the “standards by which the performance of such obligations [of good faith and reasonableness] is to be measured,” their ability to do so is constrained by the requirement that such attempts at particularization must not be “manifestly unreasonable,” a concept that is also given content, at least in part, by reference to usages of trade.

\(^{32}\) UCC 1-205(6) (“Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.”)

\(^{33}\) UCC 1-205(2).

\(^{34}\) UCC 1-205 cmt 9.
variation has not been worked out into a single standard the party relying on the usage is entitled, in any event, to the minimum variation demonstrated.” Although the Code and the Comments are silent on the question of who has the burden of proof, the leading Code treatise and the case law suggests that it rests, at least in the gap filling and interpretation contexts, on the party attempting to prove the existence of the usage.

Drawing on these statutory requirements, incorporation’s defenders have developed a fairly well-articulated view of the type and quantum of evidence that they assume will be submitted in actual cases where usage is proffered to fill a gap, interpret a vague or standard-like contract provision, or give content to a term with no plain meaning, the contracting contexts in which they view the benefits of incorporation as being the largest. They explain that “[u]nder Article 2, there are two principal methods of demonstrating the existence of an observable regularity of conduct,” namely “expert testimony and evidence about statistical regularity,” and conclude that “much of the evidence of commercial norms might consist simply in the presentation of evidence of statistic norms—mere frequencies of a given behavior in the trade.” The leading treatise on the Code opines that “to prove [a usage of trade], a party must usually call on an expert,” and this view is echoed by a leading

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35 UCC 1-205 cmt 9.
36 See White and Summers, supra note __ at 128 n. 42 (“Generally the party who asserts the existence of a trade usage or the like and benefits from its proof has the burden of proving it.”) In some UCC 2-207(b) cases, if the additional term in an acceptance is not the type of term that the comments designate as a per se material alteration, a party who wants to exclude the term bears the burden of proving that it caused “unfair surprise” or “hardship.” One way to do this is by showing that the provision is inconsistent with trade usage. [insert cases].
38 White and Summers, Treatise, supra note __ at 140. See also, E. Allen Farnsworth, Contracts, at 41 (explaining that under the UCC, “[a] party commonly shows a usage by producing expert witnesses who are familiar with the activity or place in which the usage is observed.”)
practice manual.\textsuperscript{39} In sum, as one incorporationist put it, “the predicate for a finding that a usage of trade exists is an empirically observable regularity in the conduct of a majority of contractors in the relevant market,”\textsuperscript{40} and as another observed, “the contextual significance of trade usage requires adjudicators to discover the alleged usage, define its scope, and determine its application to the issue at hand.”\textsuperscript{41} Despite their legal realist roots, however, incorporation’s defenders have never explored the ways that trade usages are \textit{actually} established in court. Rather, they have been content to assume that courts and juries are following the directives of the Code as written. As a leading Code commentator and incorporation defender put it, “without a through analysis of a large group of cases, why should we believe that courts are systematically ignoring or misapplying these clear and direct commands?”\textsuperscript{42}

In the spirit of engaging in what Llewellyn might term some “Realism about Realism” and in an effort to assess the claims of the incorporationists that the trade usage component of the incorporation strategy reduces specification costs without a large increase in interpretive error costs—a proposition whose validity turns in part on the types of trade usage issues that arise, the type of usage evidence submitted to and required by courts, as well as the ability of the fact finder to make accurate use of the evidence presented to it -- the next section presents a detailed study of the digested cases in which a trade usage argument was raised in Article 2 sales disputes.

\section*{II. USAGE IN THE COURTS}

In an effort to indentify the types of situations where the Code’s trade usage provision comes into play in litigated cases involving sales of goods transactions governed by Article 2, and to explore how the provision works in practice by looking at the type and quantum of evidence introduced in actual cases, and the doctrinal rules actually applied by courts, a data set was constructed to shed

\textsuperscript{39} See Travatio, Nordstrom on Sales & Leases of Goods, para 3.14[c] at 244 (“[P]resumably expert testimony will be necessary to establish a trade usage”).

\textsuperscript{40} Kraus and Walt, \textit{In Defense}, supra note \textsuperscript{2} at 209

\textsuperscript{41} Gillette, supra note \textsuperscript{2} at ___

light on these questions.

A letter was sent to at least one attorney involved in each of the Article 2 sale of goods case digested under the relevant sections of UCC 1-205, the Code’s trade usage provision, between and 2005. It asked for case documents relevant to the trade usage issues. Additional documents were also downloaded from Lexis and Westlaw as available, and where it was possible to get the relevant information from court files, this was done as well.

Using these methods of data collection, detailed information relating to the type of claim at issue as well as how the parties sought to prove or disprove the existence and scope of each alleged trade usage was obtained for fifty-two cases (the “detail group”). Another group of the forty-three cases (the “opinion-only group”)

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43There were some cases in which the lawyers could not be located in Martindale-Hubble.

44 This section provides in relevant part that “A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.”

45 The cases were drawn from the UCC Case Digest (formerly Callahan’s now West) under the para.1205 “Course of Dealing and Usage of Trade,” omitting 1205.1(6) “As to security interests;” 1205.1(10) “As to acceleration;” 1-205.1 (11) “As to Ownership or Title” 1-205.1 (12) “As to banking practices,” Section 1205.2(3)-(7) “Bank Transactions;” 1205.3 (all) “Course of dealing;” 1205.4(1)(b) “Course of Dealing;” 1205.4(3)(a)”motor vehicles course of dealing” 1205.4(7)(a)-(c) “Banking;” 1205.4(8)(b) “Clothing and fabric: Course of Dealing;” 1205.4(9)(b) “Construction materials: Course of Dealing,” 1205.4 (11) “Security interests;” 1205.4(12)(b) “Other: Course of dealing;” 1205.5 (1)(b) “Express terms of agreement control: Course of dealing;” 1205.5(1)(d) “Express terms of agreement control: Course of performance;” 1205.5(3)(b) “Machinery and equipment: Course of Dealing;” 1-205(4)(a)-(c) “Security agreements;” 1-205(5) (a)-(b) “Banking and lending;” 1205.6(2) (all) “Course of dealing;” 1205.8 (all).__ of the __ cases in these sections of the digest were omitted for reasons noted individually in Appendix A. The most common reasons for exclusion were that the case did not deal with sales, that the case either made no mention of usage, or the court, in remanding or ruling, simply mentioned usage or the possibility of introducing usage evidence in passing. Individual cases dealing with warranty of title were also omitted.

46 For a list of cases included in the sample and the documents obtained and reviewed for each see Appendix B.
was constructed and coded using information gleaned solely from opinions available on Lexis and Westlaw.\textsuperscript{47} An additional fifty cases in which the opinions did not state explicitly what evidence was introduced, and further information was unavailable, were coded separately (the “issue only group”). Data from the “issue only group,” were included in the analysis only to determine the issue to which the usage or alleged usage was addressed. The results are reported below.\textsuperscript{48}

\textbf{A. Case Characteristics}

The cases in the study came from a wide variety of industries. With the exception of disputes over the extent of warranties, warranty limitations, and limitations of remedies in seed and agricultural chemical transactions, and several cases dealing with descriptions of animals’ breeding capacity, there were no claims about the substance of a particular usage that appeared with any frequency across the cases studied.

Additional descriptive statistics, including but not limited to information about the number of cases in state or federal court, the amounts at stake, and whether the contracting relationships between the parties were discrete or repeat (across the twenty-two cases in the detail group that went to trial on a usage-related interpretation issue, at least half involved transactors who had dealt with one another before), and the apparent causes of disputes (particularly large price movements in the relevant market, catastrophic losses, and changes of control all of which appear to be common in the cases under consideration) will be included here.

Usage issues arose at many stages of the litigation process. Across the detail and opinion-only groups 61% involved trials and/or appeals from a trial judgment, 30% motions for summary judgment, 4% motions to stay or compel arbitration and 3% other procedural postures.\textsuperscript{49}

\textsuperscript{47} Cases were included in the “opinion-only” group where the opinion made explicit reference to the type of usage information introduced. It is possible, however, that these cases understate the full extent of the evidentiary record. [insert data testing this].

\textsuperscript{48} About ten cases remain to be coded and full files for six cases have just arrived and have not been incorporated in the data base used to produce these numbers.

\textsuperscript{49} See Figgie v. Destilleria Serralles, 925 F. Supp 411 and 190 F.3d. 252 (motion for
Across the detail and opinion-only groups, the study sought to identify the type of issue the usage was introduced to address. It found that 6% involved gap filling, 52.4% involved interpretation, 13% involved warranties, 15.5% limitations of remedies and 13% other issues. There were no cases dealing with remote contingencies.

[The types of issues that arose will be further broken down here. Among other things the data will demonstrate that in almost all of the cases in the detail and opinion-only groups, the usage at issue related to a core or routine aspect of trade (defined as a practice related to price, quantity, quality, payment, warranty, acceptance, rejection, delivery terms or limitations of damages).

[Across the cases in the detail group that involved the introduction of a usage to interpret a contractual provision 44% involved a large price movement, 44% did not and in 12% of the cases it was impossible to tell. Most of the clauses at issue were very detailed and embedded in contracts (or exchanges of writings) that were also quite detailed. It will also separately consider cases where the usage was introduced to give meaning to a term that appeared to be a term of art in the industry, that is, a phrase like “hard-red No. 2 wheat,” that either does not have a plain meaning or seems very likely to have an industry-specific meaning. This section will also include data which suggest usages are typically introduced to imply a precondition to the operation of an express clause, to excuse non-compliance with an express clause, or to suggest that a clause should be applied more flexibly than its language dictates. More data will be

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\(^{50}\) A case was coded as involving gap filling if the written contract in question was silent on the issue the usage purported to cover. Technically, under the Code, usages are part of the transactors’ legally enforceable agreement so the nomenclature of referring to a gap filled by a usage is inconsistent with the jurisprudential foundation of the Code.

\(^{51}\) The study defined a remote contingency as a low probability event that did not relate to the core terms of the deal.
B. The Types of Evidence Introduced

**Party or Party Employee Evidence** Across the cases in the detail and opinion-only groups, the most common type of evidence that parties introduced or sought to introduce was the testimony of a party or a party’s own employee.\(^52\) Plaintiffs and/or their employees testified/gave affidavits in 48.4% of the cases, while defendants and/or their employees testified/gave affidavits in 42.6% of the cases. Looking only at the cases where a trial was held, Plaintiffs and/or their employees testified in 58.2% of the cases, defendants and/or their employees in 57.9%. In 42.2% of these cases this was the only type of evidence introduced on the usage issue.

Moreover, even in cases where a trial was held and a usage was found to exist, no evidence of usage other than party testimony was introduced in 54.3% of the cases. In 18.2% percent of these cases, however, the court found that a course of dealing or course of performance argument supported its finding on this issue.

**Non-party Witness Evidence** The study sought to examine how often parties introduced expert testimony and the extent to which the introduction of this testimony was in fact required by courts in order to establish the existence of a usage. However, even in cases in the detail group for which full transcripts were available it was often impossible to determine whether a particular nonparty witness was being offered as a lay opinion witness or an expert witness. Consequently, all non-party or party-employed witnesses were coded together as nonparty witnesses. Across the detail and opinion-only groups, plaintiff’s introduced nonparty testimony only 19.3% of the time, while defendants did so 22.8% of the time. Even looking only at cases in which a trial was held and a usage was found to exist, plaintiffs introduced non-party witnesses only 14.3% of the time, while defendants did so 27% of the time. Since only some of the nonparty witnesses would have qualified as experts, this data permits the conclusion that the introduction of expert witness testimony is not required to establish the existence of a usage.\(^53\)

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\(^52\) Former employees of a party were coded as employees of a party.

\(^53\) However, the inability to distinguish expert witnesses from lay opinion
Trade Codes and Similar Writings The introduction or attempted introduction of Trade Codes and other trade association publications occurred in just 11% of the cases. In the five cases where this type of evidence was admitted at trial, a usage was found to exist in three of them, but the number of cases is too small to draw reliable conclusions about the weight courts attribute to this kind of evidence.

Prior Cases Judges rarely referred to prior cases as evidence of the content or existence of a usage. Across the ninety-five cases in the detail and opinion-only groups, this occurred in four cases. One of these was a maritime case, two related to the question of whether the statement that a horse was “sound” created an express warranty, a subject that did not garner a consensus, and the third dealt with the reasonable time for a grain merchant to send a written confirmation of an oral contract.

Evidence of Statistical Regularity Across the gap filling and interpretation cases studied in depth, there was not a single instance of a party trying to prove a statistical regularity using data about the frequency with which a practice is observed, a finding echoed in the data from the opinion-only cases. Rather, the witness affidavits/testimony/depositions, which were obtained for witnesses across the cases studied in depth reveal that to the extent the question of frequency is addressed at all, the affiant, witness or deponent usually simply states that X is the practice of his firm and others he knows of, that X is widely followed, X is a custom or usage of trade, or that he does not know anyone who does not do X. Even in the cases with the largest stakes, the best lawyers, and

witnesses makes it impossible to establish whether or not expert testimony, when introduced in a particular case, was or was not treated as conclusive by courts.

55 Bureau Service v. King 721 N.E. 2d 159.
56 In order to get a feel for the types of evidence that courts accept as fulfilling the statutory requirement that the usage be regularly observed, consider the testimony that was actually introduced in cases where a trial was held and the court found the claimed usage to exist. In Spurgeon v. Jamison Motors, 521 P.2d 924 (1974) two of the defendant’s employees testified as to the usage of the used farm machinery trade. Ingeman Svendson, testified that he had worked with farm machinery for 40 years, and when asked whether it was customary to warrant
used combines, he said "no." That was the extent of his testimony on the scope of the usage. *Spurgeon v. Jamison Motors*, Transcript of Testimony, C.A. No. 6985 p. 41. Keith Jamison also testified to Jamison Motor’s policy of sharing repair costs 50-50 on newer used models and providing no additional warranties. He was then asked if this was “pretty much standard throughout the business in your trade,” and he replied that it was. Id. at 79 Similarly, in *Truckers Exchange v. Boarder City*, the plaintiff testified to the usage that buyers will reject the product if shipping seals are broken, but when asked how often he had been in this situation he said only twice, and when questioned the other situation he could not recall what happened. Later he was asked “What is your expectation as a shipper of refrigerated poultry product if it is shipped in a refrigerated truck that has a seal on it?,” and he answered “We expect it to arrive at the customer with the seal on it.” He was then asked “Based upon your experience is that a customary practice in the business,” and he answered “Yes it is,” and when then asked “if that the way you do business with all the carriers that you do business with,” he replied, “That’s right, with all the carriers we do business with.” Deposition of Milton Smallwood at 44 The plaintiff also introduced the testimony of employee Pam Stewart, who had been employed by Border City for seven years. She testified that, “I am aware of a customary practice in the business where shipping refrigerated product [is by] [sic] a sealed trailer. . . Based upon my experience working with Border City, with shippers; I am familiar with the custom and practice of what a shipper expects, who delivers the load of refrigerated products sealed, to a motor carrier, in so far as how that product should be delivered to the ultimate recipient. Once it leaves the facility it has to reach the destination with the seal. There is no other reason to seal it. Because it protects us and the carrier as well.” She also explained that : “The seal is suppose [sic] to stay there until it’s delivered. As long as I can remember it is the practice of the industry that if a trucker breaks a seal, he does so at his own risk.” Abstract and Brief of Appellant, p. 50. “I did not communicate that to Trucker’s Exchange, because that’s been normal practice for years.” Id. at p. 29. She then went on to say, “I know when you seal a trailer with a seal it’s suppose [sic] to stay on there until it reaches its destination. I know that there’s trucks coming in bringing poultry to us, they have seals, and they don’t break them. . . Tyson’s is another customer that we have that has rejected a load because of a broken seal.” Id. 34. However she also testified that “I have no experience with trucking outside of my years with Boarder City Foods, Id. at 34 Finally, Dale Worthy, the plant manager of the plaintiff testified that, “All of the products shipped by Border City are sealed. That is not unusual for someone to ship fresh poultry. It’s common practice. . . It is my testimony that when a shipment leaves my plant that’s carried by another carrier that [is] going farther than the freezer, it’s going to be sealed. We expect the [product] [sic] to be delivered in a wholesome manner. That means with the seal intact” id. at 39-41. He testified that there were several reasons for using the seal.

Similarly conclusory evidence of the regularity with which a usage is observed was introduced in the cases where a party moved for and was granted summary judgment on an trade usage related issue. In *Graaf v. Bakker Bros.*, 934 P.2d 1128 (1997) the court granted the defendant’s motion for summary judgment, finding a usage to exist on the basis of an affidavit from one of the defendant’s
testifying witnesses with traditional expert qualifications, proof of statistical regularity was still a matter of assertion and opinion. Across the detail and opinion-only cases not a single litigant introduced statistical or survey-based trade usage related evidence.

The only types of cases in which parties introduced evidence that the usage in question had actually been observed in any specific transactions, were cases dealing with whether an additional or different term in a variant acceptance in a battle-of-the-forms situation was part of a contract. In six out of ___ of these cases one party introduced a few contracts drafted by others in their industry in an effort to establish that there were at least some specific instances where similar written limitations were used. There were, however, no cases where the proffered evidence came close to establishing the frequency with which the practice was observed in a place, vocation, or trade.

C. Case Outcomes

Trial Of the 56 cases in the detail and opinion-only groups that went all the way to trial on a usage issue, courts found usages to exist in 75% of them. In 54.3% of the cases where a usage was found to exist, no evidence of usage other than the testimony of the parties’ employees was presented. And, both sides introduced usage related evidence in only 19.4% of these cases. In cases where both sides introduced usage evidence, a usage was found to exist 58% of the time.

Summary Judgment. Across the detail and opinion-only groups, employee’s which with respect to the issue of regularity of observance, simply noted that the practice in question was followed by his firm, and “was acceptable. . .procedure followed in the seed industry for determining if seed is acceptable.” Affidavit of Chris Jancik at 2 undated. 

57 M.A. Mortenson Co., Inc. v. Timberline Software, 37 UCC rep Serv 2d 892 (1999);998 P.2d 305 (2000) (where in a high profile case that attracted an amicus brief from the ___because it had huge potential ramifications for the software industry, the defendant introduced fifteen “true copies of personal software license agreements from 15 well known software developers,” that were similar).

58 This data set cannot provide an accurate picture of how important the summary judgment defeating role of trade usage arguments is among litigated cases. Because in most jurisdictions a denial of summary judgment is not a final order and is hence not appealable, these cases are less likely to show up in
just over a quarter of the cases involved motions for summary judgment on a usage-related issue. In 65% of these cases (seventeen cases), the usage argument was raised by the non-movant in an effort to defeat the motion. This tactic was successful 70.6% of the time. In the other 34% of the cases (nine cases), the movant asserted the existence of a usage and was granted summary judgment on the usage-related issue 88.9% of the time. There were only two cases where the parties presented conflicting evidence of usage and the court denied summary judgment in both.

In the cases where a usage argument defeated a motion for summary judgment, courts did not as a doctrinal matter, require the party asserting the usage to produce a great deal of evidence supporting their claim. In 83.3% of such cases, the only evidence of the usage introduced by the non-movant was an affidavit of one of its employees. Other evidence was introduced in 17.6% of the digested opinions. Although as the cases in the opinion-only and detail groups illustrate, courts sometimes do publish opinions on this issue, there is no data on the frequency of this practice.

59 53% of the cases were decisions rendered at a primary court level, 40% were an appeal from a grant of summary judgment (and the appellate court reversed and denied the grant 66.7% of the time) and one was an appeal from a denial of summary judgment. (compare evidence in two groups).

60 37% of these cases were at the trial level and 62.5% at the appellate level.


62 50% were primary court decisions and 50% were appeals from a grant of summary judgment or a denial of summary judgment (one case on interlocutory appeal by leave of court). One might be concerned that a selection effect would be operating with respect to the cases on appeal that would lead the cases with the weakest evidence of usage to be appealed. In this connection, however, it is important to note that none of the appealed cases involved situations where both parties introduced evidence of usage.

63 In the five cases where a usage argument was not successful in defeating a motion for summary judgment, the non-movant introduced only its own or its employees testimony in three of the cases. In one of these cases the court explicitly noted the inappropriateness of relying on testimony of a party or a party’s employees to defeat a motion for summary judgment, see CoreStar v. LPB (__) In the remaining two cases, the parties sought to introduce additional types of evidence but the court excluded the usage evidence in both cases. See Golden Peanut v. Hunt 18 UCC Rep. Serv. 2d. 26 (1992) (noting that while the defendant had submitted affidavits from an employee and a non-employee as to the content of an alleged usage, the evidence was inadmissible as it contradicted an express term of the contract); Crescent Oil v. Philbro (where the non-movant introduced
cases\textsuperscript{64} and in one case it is not possible to tell because summary judgment was denied so the non-movant could take additional depositions.\textsuperscript{65}

In cases where the party moving for summary judgment introduced a usage argument in support of its claim, it obtained summary judgment on the usage issue 88.9\% of the time (eight cases). In 75\% of the cases where the motion was granted (six cases), the parties introduced evidence other than party and employee testimony. All six cases dealt with whether an additional term in a variant acceptance was or was not a material alteration of the agreement—a determination which turned in each case on whether or not its use was customary in the relevant industry.\textsuperscript{66} In the remaining two cases, the court granted summary judgment based solely on the testimony of the parties or their employees, but in both cases the party opposing the motion did not introduce any usage

\textsuperscript{64} See Rich v. Keumatec, 66 F. Supp 937
\textsuperscript{65} See Ralston Purina v. McFarland
\textsuperscript{66} See Bayway v. OMI, 215 F. 3d 219 (2000) (where the movant-plaintiff introduced the testimony of two expert witnesses, and five industry contracts containing the disputed clause); MA Mortenson v. Timberline, 970 P.2d 1228 (1999)(where the defendant movant introduced two expert witnesses and copies of personal software license agreements from 15 well known software suppliers); Gooch v. El Dupont De Nemours, 40 F. Supp 2d. 863 (1999) (where movant-defendant introduced the deposition of the plaintiff’s employee which included eleven other herbicide contracts for products he purchased which also included the clause at issue and the court noted that similar clauses had been upheld in other agricultural chemical cases); Stirin v. El Dupont De Nemours, 21 UCC Rep. Serv. 2d. 979 (1993) (where movant-defendant, albeit as an attachment to an employee’s affidavit introduced six labels from other chemical products some produced by DuPont and some by others, with a similar limitation of remedy clause); Suzy Philips v. Coville, 939 F Supp 1012 (1996) Aff’d 1997 US App. Lexis (1997) (where the movant-defendant introduced the Worth Street Textile Rules to argue that a limitation of remedy clause in an acceptance was not a material alteration as it was standard in the textile industry and had been included in numerous previous contracts between the parties); Adacock v. Ramtreat (where the contract at issue was a trade association standard form contract with a limitation of remedy provision that the plaintiff claimed was unconscionable, the defendant introduced an affidavit of a trade association executive that the term was commonly used and was granted summary judgment in its favor)
D. Plaintiff and Defendant Behavior

Plaintiff and Defendant Behavior (Regarding Evidence) Across the detail and opinion-only groups, plaintiffs raised the trade usage issue in 41% of the cases and defendants raised it in 59% of the cases. Looking only at the cases that went all the way to trial, plaintiffs raised the issue 46.3% of the time and defendants 52.7% of the time. Plaintiffs succeeded in establishing the existence of a usage in 75% of the cases in which they raised the usage issue and defendants did so in 74% of the cases in which they raised the usage issue. In attempting to prove the existence and content of usages, however, plaintiffs and defendants introduced very different types and amounts of evidence. In the cases where plaintiffs established the existence of the usage, they introduced nonparty witness testimony 18% of the time (defendants also introduced such evidence in 5% of these cases). In contrast, in cases where defendants established the existence of a usage, they introduced nonparty witness testimony 58% of the time (plaintiffs also introduced such evidence in 5.9% of these cases).

In cases that went to trial and both sides introduced evidence of trade usage, a usage was found to exist 58.3% of the time. In these cases, plaintiffs and defendants both introduced nonparty witness testimony in 28.6% of the cases. There was only one case where both parties introduced expert witness testimony and the court found a usage to exist, and that was the casebook classic Columbia Nitrogen v. Royster.

In cases that arose on a motion for summary judgment, plaintiffs raised the usage issue 28.6% of the time, while defendants did so 71.4% of the time. Or, looked at from a different perspective, the trade usage issue was raised by movants in 34.6% of the motions

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67 Graaf v. Bakker Bros. 934 P.2d 1228 (1997) (where the court granted the defendant’s motion for summary judgment, finding a usage asserted by the defendant to exist based only on an affidavit supplied by one of its employees); B/R Carpet Sales Inc. v. Krantor Corp., 226 AD2d 328 (1996) (where the court granted summary judgment for the plaintiff, finding that the defendant had not rejected the goods within a reasonable time, which the plaintiff’s employee testified was 48 hours under a usage of the trade)
and non-movants 65.4% of the time.

**Plaintiff and Defendant Behavior (Regarding Issues)** There were some striking differences in the types of usage issues raised by plaintiffs and defendants. For example, in cases where the Plaintiff raised the trade usage issue, only 3% involved warranties and limitation of remedies, whereas in cases where the defendant raised the usage issue these subjects accounted for 45% of the cases. Large differences were also seen with respect to gap filling, with was involved in 12% of the cases where the usage argument was raised by the plaintiff but only 2% where it was raised by the defendant. [the discussion here will continue]

In sum, while Code commentators and academics have long expressed concerns that courts might impose too high a requirement for establishing a trade usage, “for it is likely to be confused with ‘custom’ and the law has long encumbered proof of custom with stringent requirements,”68 precisely the opposite seems to be the case.

**E. Methodological Issues and Limitations of the Study**

The picture of the role played by usage in contract disputes that emerges from the study of cases that were decided by published opinions has certain limitations. Most importantly, it does not give us any direct information about how, if at all, the prospect that courts will apply the incorporation strategy influences primary contracting behavior—the types of provisions transactors will include in their contracts and the ways they will behave when disagreements arise over their respective rights and duties. Indeed, it does not even tell us whether the law in fact influences behavior in its shadow as there are a multitude of other considerations that might influence the contracting behavior whose importance cannot be assessed on the basis of this data alone.

The findings may also have been influenced by the two types of selection effects that typically characterize case-based research that relies on cases decided by reported judicial opinions, as these cases tend to be in Federal (trial or appellate) court, one of the rare

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68 White and Summers 3-3 at 127 3rd ed. Hornbook student series.
state trial court decisions memorialized in a published opinion, or involved an appeal of some sort that resulted in a published decision. Given the origin of the data, a selection effect, of the classic Priest-Klein\(^69\) variety, may have introduced bias into some of the results relating to the types and quantum of evidence introduced. As a consequence, the study cannot rule out the possibility that more or different trade usage evidence was introduced in the cases that were decided without an opinion. However, several considerations suggest that the selection effect problem does not undermine the study’s findings. First, in ___% of the cases in the detail and opinion only group, the usage-related issue is not the only issue that was appealed. [insert the data] These data suggest that any selection effect that is introduced may be quite noisy with respect to the quantum of evidence introduced. Second, only a small percentage of the cases (for reasons discussed further below) were cases where the court was faced with one party’s evidence that the usage was A and another party’s evidence that the usage was B, and had to decide between them, the classic situation in which the Priest Klein selection effect with respect to the strength and quantum of evidence introduced would be the greatest. Rather, in over 80% of the cases in the study, the most common posture for cases to arise was where, one party submitted evidence of usage and the other party claimed that the usage was inadmissible based on a legal argument other than that the evidence submitted was insufficient to meet the burden of proof. In these cases, there is no reason to think that a selection effect is operating to make cases with weaker evidence go to appeal. In fact, for cases in some postures, the selection effect might well lead to a bias in favor of cases with stronger evidence of usage making it into the published reports.\(^70\)


\(^70\) To see why consider the following four situations: (1) Suppose that at trial the plaintiff seeks to introduce a usage, and the defendant seeks to exclude it. Suppose that the court admits the usage and it is found to exist and the plaintiff prevails, and the defendant is deciding whether to appeal. His decision will be based on his estimate of the strength of his legal argument on appeal, not on the strength of the plaintiff’s usage evidence. If, on the other hand, the court said the evidence did not establish a usage (meaning the evidence was weak), the defendant would not be likely to appeal since the fact that it was admitted did not effect the outcome. The plaintiff in such a situation is also unlikely to appeal, because appellate courts do not ordinarily reverse factual determinations of this sort except in egregious cases; (2) Now suppose that the court excludes the plaintiff’s evidence of usage and the
The study’s results about the types of issues (gap filling, warranty, etc) that arise may also have been affected by a second type of selection effect, a factual issue-based selection effect, that makes cases that went to trial and that turn on factual rather than legal issues far less likely to be appealed given the tremendous deference given to trial courts findings of fact in most contexts. This effect might account for the paucity of cases involving gap filling or looking to usage to interpret vague or standard-like provisions. In these types of cases, one party will typically claim the usage is A, and the other that its B, so which ever way the court rules, an appeal, and with it a reported decision, is unlikely to occur since the probability of prevailing is very low. In an effort to explore the possibility that this type of selection bias is responsible for the infrequency of these types of cases, a data set was constructed that looked at the Westlaw Court Document Data base for Illinois state and Federal Court Filings. A search of the term “usage of trade”

plaintiff must decide whether to appeal. Holding constant the strength of the plaintiff’s legal argument on appeal, the more likely it is that if he prevails and the usage evidence is admitted, it will be found to establish a usage, the more likely he is to appeal. Thus, the selection effect here should be in favor of appeals occurring more often when the plaintiff’s evidence is strong then when it is weak; (3) Suppose that at trial the defendant seeks to introduce usage evidence, the plaintiff claims that it should be excluded, and the court admits the usage. If the usage is found to exist, the plaintiff’s decision on whether to appeal will be based on his evaluation of the strength of his legal argument. If the court finds that the usage does not exist, the plaintiff wont appeal and neither will the defendant, as reversals of finding of fact are rare. Since cases where the usage is found to exist should be ones where stronger rather than weaker evidence is admitted, there is no reason to think that cases with weaker evidence are being weeded out of the sample, and in fact the reverse seems to be true; (4) Now suppose that the defendant seeks to introduce usage and the court excludes it. Holding the strength of the defendant’s legal argument constant, the stronger his usage evidence the more likely that he is to appeal, since the greater is the likelihood that if he is successful on the legal appeal and the case is remanded that it will change the outcome. In sum, in cases that arise in this posture, the selection effect, if any, inclines towards cases with stronger evidence of usage being more likely to appear in the appellate courts than cases where usages are weak.

71 The data base is IL-FILING-ALL and is described by Westlaw as including “documents filed with Illinois state and federal trial courts. Documents include the following civil trial court filings: pleadings, motions, memorandum, trial briefs, non-expert depositions and discovery, non-expert affidavits, proposed orders, agreements, verdicts, settlements and other trial filings.” See: https://web2.westlaw.com/scope/default.aspx?db=IL%2DFILING%2DALL&RP=/scope/default.wl&RS=WLW11.07&VR=2.0&5V=Split&FN=_top&MT=208&MS
turned up 170 hits for the years 1999-2010, a total of 104 independent cases. After excluding the types of cases that the large case study excluded, and cases that merely cited statutory language referring to usage, like the Code’s warranty provisions, without asserting that a usage existed or suggesting that a usage-based argument was in the offing, 24 cases remained. Of the cases, 1 (4.2%) involved gap filling in the context of a contract by conduct and one (4.2%) involved filling a gap in a written contract and 1 (4.2%) involved making a general clause more specific, findings which echo the results of the case study in terms of the type of trade usage issues that wind up in courts. Whether gap filling by usage is or is not occurring in the shadow of the law in the disputes that arise, but do not result in legal filings, cannot be determined.

In sum, despite the methodological limitations of the study, it tells us more about the role of trade usage in litigated disputes than we knew before. It also demonstrates that as a doctrinal matter courts do not require the introduction of expert testimony or statistical evidence that a practice is regularly observed as a predicate to finding a usage exists and that in ruling on motions for summary judgment, courts generally consider an affidavit from a party (or his employee) sufficient evidence of a usage to raise a disputed issue of material fact and deny the motion. More generally, the Study’s findings suggest that if the incorporation strategy is to be properly defended, its supporters must adduce empirical evidence as well as theoretical arguments to justify it. The next sections draw on the study’s findings, and some of the important, yet unexplored, empirical questions they raise, to revisit the core arguments in the debate over the incorporation of usage.

II. REVISITING INCORPORATION ON ITS OWN TERMS

The study of usage in the courts identified significant differences between the way the incorporation strategy is assumed to work in theory, and the ways that it works in practice. In order to fully evaluate the merits of the strategy and assess whether the it is in fact a theoretically justifiable or judicially implementable approach to contract interpretation, it is useful to revisit the
arguments behind the main defense of the strategy—namely that it decreases specification costs without unduly increasing interpretive error costs—against the background of this empirically grounded picture of the types of trade usage disputes that arise and the ways the existence and content of usages are established in US courts. Although the data set was constructed to test claims about interpretive error costs, its findings about the ways courts employ the strategy as a matter of doctrine, together with the study’s findings about the types of usage issues that are litigated, suggest that without data demonstrating that the strategy reduces specification costs, there are reasons to be skeptical of this claim, especially when the reasons for memorializing understandings in writings other than providing courts with guidance in the event of litigation are integrated into the analysis and the wide-spread use of standard form contracts that are unique to either firms or industries is taken into account.

A. Specification Costs

Starting from the assumption that merchant contractors want their contracts to be given their customary meaning, incorporationists identify three ways that the strategy might decrease specification costs. First, when transactors are confident that courts will look to trade usages to fill gaps, interpret contra, and deal with remote contingencies, they may choose to leave more gaps in their agreements and may include more standard-like provisions that are relatively inexpensive to draft. Second, when transactors do want to enter into detailed written contracts or want to include some detailed provisions in their agreements, the availability of the strategy may enable them to economize on writing costs by enabling them to “naturally and costlessly use terms that have a domain specific meaning that have evolved to address the particularized needs and expectations of contractors with in a given domain.” Finally, when transactors want their agreements to incorporate or be interpreted against the background of usages reflecting “specialized or context specific terms [that] carry with them an array of implications that might be difficult even to bring to

73 A standard-like provision is one that by its wording invites a court to give it contextual meaning, for example, a provision that delivery should be on customary terms, or that the widgets need to function reasonably well.
74 Kraus and Walt, In Defense, supra note __ at __.
mind let alone commit to paper,”\textsuperscript{75} the availability of the strategy enables them to contract with reference to these inchoate understandings, rather than bear the transaction costs and efficiency losses that would result if they were to draft written provisions embodying the most desirable terms that they were able to articulate, terms that would, by definition, be second-best.

The only way to directly test whether transactors in markets governed by the Code were taking advantage of these specification cost savings in the manner incorporationists envision, would be to look at a sample of contracts from representative industries. However, notwithstanding the selection effects identified in the previous section, the study provides an indirect way to begin to shed light on this question. If parties were taking full advantage of the specification cost savings the strategy might afford, a large proportion of the trade usage cases that went to court should involve gap-filling, giving meaning to standard-like provisions, or attempts to prove the existence of complex usages reflecting a set of fluid understandings between the parties that could not have been expressed orally or captured in written terms at the time of contracting. This is not, however, what is observed. Gap-filling accounted for only 11\% of the cases, a finding confirmed by the pilot study of filings. There were no cases in the detail group in which usage evidence was introduced to give meaning to a standard-like term. Cases that pitted the plain meaning of a word or phrase against an industry meaning existed but were uncommon. And, while it was impossible to tell for sure whether transactors were trying to establish the existence of complex customs that could only be articulated ex-post, none of the usages transactors sought to establish seemed as if they would have been very complex or difficult to articulate at the time of contracting. Indeed, most interpretation cases in the detail group, involved usages that were introduced to “interpret” a detailed clause embedded in a detailed agreement, typically to suggest that the clause be applied more flexibly, or to claim that there was an usage-based pre-condition to

\textsuperscript{75} If courts do incorporate usages of this description, these usages are in effect mandatory rules. Because these understandings cannot by definition, be written down, they also cannot be specifically negated in commercial agreements. See Quinn, supra note __at __(noting that a contract provision that seeks to specifically negate a usage should include a statement describing the usage to be negated).
its application, or to demonstrate that there was a usage that excused its observance.

Although the lack of gap filling cases might also be viewed as an indication that the incorporation strategy is functioning extraordinarily well by inducing transactors to fill any gaps in their agreements with usages due to the “shadow” effect of the strategy, this explanation is hard to reconcile with the large number of cases where parties are arguing about usages that were alleged by one party to be relevant to interpreting a detailed contractual provision, that is, to believe that the shadow effect of the strategy was working so well, it would be necessary to explain why the customary meaning of words that were written down was less clear to the parties than the customary meaning of terms that were not written down.

In light of these findings, it is important to explore some of the main reasons that transactors might decide to forgo some of the potential specification cost reduction benefits the strategy creates and opt instead to include written provisions memorializing important usages, even if they in fact want any gaps or standard-like provisions that remain in their commercial agreements to be given meaning by reference to trade usage.

First, if parties are dealing with one another for the first time, they might not have much information about one another’s understanding of the content of the relevant usages. They will therefore need to incur either the cost of investigating the other party’s understanding (perhaps by discussing the meaning of core terms or unwritten expectations), or the cost of memorializing the relevant usages in writing. Although it is difficult to predict whether the cost of investigation or the cost of drafting is likely to be higher, the cost of investigation will have to be borne every time a new contracting partner is chosen (and unlike drafting will not make disputes more amenable to resolution on a motion for summary

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76 Although at the time a dispute arises, the Code imputes knowledge of trade usage to all members of the trade regardless of their actual knowledge, at the time of contracting transactors are typically concerned with ensuring they get the promised performance, something that is far more likely if the person rendering that performance understands the expectations as to the contours of the expected performance/s.
Usage in the Courts

judgment), but cost of drafting provisions reflecting the relevant usages will be incurred only once. Thereafter the provisions can be used in subsequent transactions at little or no cost. As a consequence, transactors, particularly those who enter into many contracts in a single market, may find it advantageous to incur the one-time cost of memorializing usages in contract provisions (which they will implicitly pro-rate over all the future contracts in which they anticipate their use), rather than bear the cost of investigating the usage-related knowledge of all of their future contracting partners. This saving may be particularly large for transactors who sell their goods over the internet on click-to-buy websites. In these situations sellers typically do not know the identity or location of the buyer, making it especially important to specify all parameters of the deal in advance.\(^\text{77}\) Second, transactors who are familiar with one another’s understanding of the relevant usages might nonetheless choose to write the usages down out of concern that, should their interests become adverse and third-party adjudication become necessary, each side would be able to introduce at least facially plausible conflicting evidence about content of the usage (which can be created merely through the introduction of an affidavit from a party or a party’s employee), thereby making summary judgment unavailable.\(^\text{78}\) Finally, transactors might decide to memorialize usages in writing simply for planning purposes—that is, to clarify between themselves what is to be done and to clear up any ambiguities in the content of the relevant usages and to help ensure that their deal continues to run smoothly in the event of a change of control or personnel.\(^\text{79}\) At the time of contracting transactors are said to be focused on performance, not the consequences of non-performance, so they may well find it worthwhile to spend time articulating and clarifying the details of the performance they expect

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\(^{77}\) These clauses could also be included in contracts with contracting partners who are either in different trades, or located in different localities that may or may not have different usages, thereby facilitating the creation of new contracting relationships.

\(^{78}\) One form book takes this a step further and advises that “if investigation reveals that there is some course of dealing or usage which is advantageous, describe it specifically in the contract, rather than reply on interpretation,” explaining that “the penalty for lack of express language may be some uncertainty as to what is or will be the trade usage, course of performance, or course of dealing.” Nimmer, supra note 2010 supp 5-44.

\(^{79}\) See Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, ___Am. Soc. Rev.___(196_).
to receive.

In sum, recognizing the many benefits to transactors of memorializing usages in written terms, together with the paucity of cases where courts are in fact called upon to fill gaps or interpret standard-like provisions, together with the fact that ___% of the usage cases dealt with battle of the forms issues under 2-207(b) where at least one of the parties incurred the specification cost of memorializing the usage, suggests that the actual specification cost savings created by the incorporation strategy may, across all of the contracting relationships governed by the Code, be far smaller than incorporations’ defenders claim, even when transactors want their agreement to be subject to incorporationist interpretation.80

Although a mere failure to produce specification cost savings as large as incorporation’s defenders claim would not necessarily undermine the strategy, incorporationists have failed to recognize that in contexts where transactors either do not want an incorporationist adjudicative approach to be applied to their transactions, or want to enter into a detailed agreement that specifies many of their obligations in detail, but leaves others to be given meaning by the court, the availability of incorporation may greatly

80 Although incorporationists might say that this is strong evidence that the strategy is working, since in its shadow parties are filling gaps and performing contracts according to the dictates of usage without the need to seek third party intervention, to substantiate this claim they would have to provide a reason why the usages that give meaning to standard like terms and gaps are almost always agreed upon and understood, while the usages and understandings that parties memorialize in their contracts are likely to give rise to conflict. Incorporationists might then respond that the issues covered in contracts are covered because the usages related to them are less clear than the usages that govern aspects of their agreement that they never mention. However, if this is their rejoinder, it might provide a satisfactory justification for looking to usages to fill gaps, but simultaneously argues strongly against letting usage be used to interpret provisions since the mere presence of the provision is an indication that a sufficiently clear usage does not exist. In addition, since the markets where usages are most likely to arise are markets where many transactions are repeat and nonlegal sanctions are strong, over a range of typical market conditions, transactors are very likely to comply with any extant usages regardless of the background legal rules. That is, many of the supposed benefits of incorporation for the cases that do not go to court, will be realized even in the absence of the strategy.
increase the specification costs transactors will incur in entering into their preferred contractual arrangements.

The Code’s interpretive hierarchy states that express terms take precedence over inconsistent trade usages. In practice, however, the mere inclusion of an express term governing an aspect of a contracting relationship does not automatically exclude a trade usage governing the same aspect of the relationship. Usages are only excluded from the interpretation of express terms when they would result in the “total negation” of the term, a conclusion that courts are very hesitant to reach. As a consequence, transactors who want to control the meaning of their contract through express terms will have to include additional detail and/or additional provisions fortifying these terms against usage-based interpretation. The cost of this fortification will be particularly high if transactors’ specially drafted and preferred terms actually conflict with either actual trade usage or a usage that one or the other of them might plausibly assert if a dispute arises.81 As a leading form-book explains, to ensure usages cannot be used to interpret a contract, the contract should include a provision specifically setting out, negating, and replacing each usage-based interpretation that the transactors wish to exclude.82

To get a feel for the specification costs that might be required to fortify even a simple transaction against incorporationist interpretation, consider a contract for the sale of two hundred tons of fertilizer with a 22% nitrogen content to be delivered FOB seller’s place of business on March 1st for a price of $X. Suppose that the price of fertilizer rose after the contract had been signed, and the seller delivered one hundred and eighty tons of fertilizer with a 16% nitrogen content on March 7th. If the buyer sued for breach of contract and these facts were undisputed, he might nevertheless be unable to prevail on a motion for summary judgment. The seller

81 The fact that courts are so wedded to interpreting even very detailed contractual provisions in light of trade usage (thereby creating a regressing to the usage effect), increases the specification costs of transactional innovation and may therefore impede the development of more efficient contract provisions and structures across a market.

82 See Quinn, supra note _ (providing template clause for opting out of a trade usage).
could claim there was a usage that quantities were mere estimates, or that any quantity within twenty tons of the promised amount was considered good tender under a usage of trade. The seller might also claim that although the contract called for 23% nitrogen content, by a trade usage any nitrogen percentage within eight percent of the promised amount was also acceptable. As regards the delivery date the seller could assert the delivery dates were mere estimates or any of a number of other usages under which its late delivery would be considered acceptable. The seller might also claim that it should have been given additional time to cure because the usages outlined above made it reasonable for him to conclude that the nonconforming fertilizer would be accepted with a price adjustment. Conversely, if the price of fertilizer fell, the buyer could reject a portion of the delivery claiming that the two hundred ton number was merely an estimate or might pay less claiming the price was an estimate. As a consequence of the Code’s interpretation strategy, transactors who wanted to ensure that this simple agreement would be given its plain meaning would have to include provisions in their writing reciting and negating all of the above mentioned usages (and perhaps many more) that their contracting partner might be able to plausibly assert in the event of a dispute. Although incorporationists claim that parties do not have to take steps to protect their writing, in practice, transactors who want the written terms of their contract to be strictly enforced will have to incur significant specification costs to fortify their writing against usage based interpretation.

The magnitude of the fortification costs created by the Code’s incorporation strategy, will depend on a number of considerations, most important among them whether or not a majority of contractors in the markets governed by the Code want courts to apply the incorporation strategy. If transactors do in fact want all contractual gaps to be filled and all written provisions interpreted according to the norms of their trade, the overall magnitude of these fortification costs may be relatively small. In their attempts to defend

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83 See Columbia Nitrogen v. Royster, [insert cite] Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, inc., 19 U.C.C. Rep. Serv. 1067 (1976) (where a contract for delivery of a fixed number of bushels of potatoes, was interpreted as being a contract for an estimated number of potatoes due to a usage of the potato processing industry).

84 See Hillman, supra note __ at __
incorporation, however, neither Karl Llewellyn nor modern day incorporationists have produced any evidence that incorporationist interpretation is what a majority of contractors desire-- a condition that any quasi-mandatory rule of commercial contracting should have to meet. Llewellyn simply assumed that merchants wanted the legal rules governing their transaction to reflect the practices they followed in their work-a-day interactions, explaining that such an approach would both result in the generation of efficient commercial rules and make it easier for merchants to conform their actions to the dictates of the law. Modern incorporationists have concluded that transactors prefer incorporationist adjudication based solely on their empirically unsubstantiated belief that “contractors often, even typically, use express terms with vague or ambiguous plain meaning, [from which] we infer that they intend these terms to be interpreted in light of commercial practices.”

Although the logic of this claim is plausible in situations where transactors leave gaps in contracts or include standard-like provision solely because the transactions costs of memorializing them in a writing is too high (and incorporationist adjudication therefore simply replicates their hypothetical bargain), the current literatures on incomplete contracting and the behavioral economics of contract drafting and negotiation offer many alternative explanations for the use of standard-like provisions and the presence of contractual gaps that cannot plausibly be said to carry this implication. Consequently, even if it were empirically established that gaps and standard-like provisions were ubiquitous in commercial contracts, this observation could not, as an analytical matter, substantiate the incorporationists’ claim that most transactors have a strong preference for

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85 Kraus and Walt, In Defense, supra note __ at __
86 [This footnote will explore the reasons for gaps given in the incomplete contracts and behavioral law and economics literature such as—bounded rationality, a desire not to reveal private information, a desire to close an advantageous deal even if certain details are not worked out, a desire to use the contract to create an optimal framework for renegotiation, a conscious decision to defer negotiation over a particular issue until later in the relationship when additional information may be available, bargaining through agents without the proper agency cost reduction controls in place— and will conclude that given the wide variety of reasons, apart from the specification cost of memorializing understandings in writings that transactors might leave gaps or include vague provisions in their contracts, it is far from clear that the presence of gaps indicates a desire to have them filled by reference to usage, or that as a normative matter they should be filled in this way.]
incorporationist interpretation. Moreover, the only direct information on merchant preferences in this regard, strongly indicates that merchant transactors do not want third-party adjudicators to look to trade usages to interpret contracts.\textsuperscript{87} Many merchant industries that have opted out of the legal system and the Code and replaced it with privately run legal systems have rejected incorporation in favor of a relatively plain meaning textualist approach to interpretation\textsuperscript{88} that looks to trade usage (if at all) only in the presence of a contractual gaps narrowly defined.

The specification cost saving arguments in favor of incorporation, are even weaker with respect to the subset of cases (x\% of the sample) in which usage issues come up in the battle-of-the-forms context under 2-207(b), where provisions that are in conformity with usages are deemed not to constitute “unfair surprise” and are therefore enforced. In these cases, the issue is whether an additional or different term in a confirmatory memoranda becomes part of the parties “agreement,” but there are no specification costs are saved as the provision is in writing.

In sum, although the data from the study of usage in the courts cannot provide any direct evidence on the magnitude of either the specification cost savings or specification cost increases that the incorporation strategy creates as compared to a plain meaning regime, the data suggest that either incorporation is working near perfectly so that all gaps and standard-like provisions are being

\textsuperscript{87} In almost all merchant run private legal systems, where commercial disputes are decided by industry-expert arbitrators, the adjudicative approach of the tribunals are anti-incorporationist. Usages are admissible, if at all, only in the rare case where both a contract and the industry’s trade rules are entirely silent on an issue. Although incorporationists have dismissed the importance of this finding, on the grounds that because the same groups that create these tribunals also publish trade rules that in their view memorialize usages and come close to a complete contingent state contract, these trade rules are not significantly more detailed than many of the run-of-the-mill standard form contracts that turn up in Article 2 litigation. Moreover, notwithstanding the existence of the trade rules, work-a-day contracting practices in these industries often differ markedly from the actions required by the parties contracts as supplemented by the trade rules. Transactors often follow unwritten practices that are not included in the trade rules, and frequently conflict with them.

\textsuperscript{88} See Bernstein, Merchant Law, supra note __, Creating Cooperation, supra note __ and Flawed Empirical Basis, supra note __ at __.
cooperatively filled by transactors without the need for recourse to third party dispute resolution,\textsuperscript{89} or that the gains from the strategy in terms of specification cost savings may be nowhere near as large as they suggest.

The arguments presented here suggest that while the incorporation strategy may, under certain assumptions and conditions, give transactors the opportunity to avoid the cost of specifying their generally understood usage-based obligations in written provisions, they may nevertheless prefer to memorialize them in writing. The reason is simple. Although the cost of writing these usages down for the first time may be significant, this cost will have to be borne only once. The provisions can then be included in all future contracts, making the effective specification cost per contract of drafting them (as well as the cost savings from omitting them) very small.

The incorporation strategy also increases the specification costs of drafting provisions that are unique to particular contracting relationships. It requires transactors to incur the cost of fortifying these provisions—which are likely to be central to the value of the transaction as a whole—against usage-based interpretation. This increase will be particularly large when the specially negotiated provisions are at odds with existing trade usages. Together the evidence and arguments presented here suggest that there are reasons to be skeptical of the claim that the incorporation strategy can be justified in terms of its ability to create significant specification cost savings. In addition, the specification costs of incorporationist regimes are likely to remain stable over time,\textsuperscript{90} while specification costs in a plain meaning regime costs are likely to

\textsuperscript{89} Although the absence of gap filling cases and the invocation of usages to give meaning to standard like provisions might mean that the incorporation strategy is working this does not necessarily follow. The situations in which usages are most likely to exist—when transactors deal with one another on a repeat basis or within a well defined market where most participants are buyers one day and sellers the next, are also the situations in which transactors who want to continue to do business with one another in the future are likely to work out any rough edges in their relationship in a cooperative manner (at least in the absence of a huge price movement that makes a great deal of money turn on a “provision” of their agreement that in the absence of the same would have been unimportant) that strikes them both as fair but does not necessarily reflect some market wide practice.

\textsuperscript{90} [add note on nonemergence of default rules]
decrease over time as industry members borrow provisions memorializing customs from one another’s contracts and industry associations step up— as they did when contracts were governed by the textualist oriented Uniform Sales Act— to provide standard form contracts, phrase books, and term banks to help reduce the cost of contracting.

B. Interpretive Error Costs

Incorporationists acknowledge that the strategy’s desirability depends, in large part, on its effects on interpretive error costs.\textsuperscript{91} They maintain, however, that the Code contains two evidentiary checks that are likely to minimize such costs by “constrain[ing the] interpretation of a relevant custom” and making it unlikely that courts will incorporate nonexistent usages. The first check is the assumed requirement that a party will have to introduce expert testimony to prove a usage.\textsuperscript{92} The second is the assumed requirement that to establish a usage a party will have to introduce either statistical evidence that a practice is regularly observed, or at a minimum, some examples of actual commercial transactions in which the practice was followed.\textsuperscript{93} Based in large part on their assumption that courts require, and parties will attempt to introduce, these types of “objective evidence of . . . business norm[s],”\textsuperscript{94} incorporationists conclude that any potential increase in interpretive error costs attributable to the Code’s incorporation strategy is likely to be outweighed by the specification cost savings the strategy creates. The study of usage in the courts demonstrates, however, that the evidentiary basis of determinations relating to the existence and scope of usages is much less substantial than incorporationists assume and that neither of these supposed checks on the mis-incorporation or mis-interpretation of commercial norms are operational in Article 2 sales disputes.

The study established that across all types of cases, the most

\textsuperscript{91} Interpretive error costs include the costs of courts mistakenly finding usages to exist when they do not, the costs of courts making errors in defining the scope and content of usages, as well as the cost of courts mistakenly incorporating extralegal understandings into legally enforceable contracts.

\textsuperscript{92} Kraus and Walt, In Defense, supra note __

\textsuperscript{93} Id. at __

\textsuperscript{94} Walt, The State of the Debate, at 277.
common type of evidence introduced to establish a usage is the testimony of the parties and/or their employees. Courts do not, as a doctrinal matter, require the introduction of expert testimony to establish the existence of a usage. As reported above, among the cases that went all the way to trial on a usage issue, plaintiffs introduced nonparty witness evidence in 20.4% and defendants did so in 25% of cases. Even looking only at cases that went to trial and found a usage to exist, nonparty witness testimony was introduced by the party asserting the usage in only ___% of the cases. The introduction of nonparty testimony was even less common in situations where a usage argument was introduced to defeat a motion for summary judgment. In cases where the party raising the usage issue succeeded in defeating the motion, nonparty testimony was introduced only ___% of the time, and in ___% of these cases, the testimony of the party and or its employees was the only evidence introduced.

The data also demonstrate that in cases dealing with gap-filling and interpretation, parties never introduced statistical evidence that a usage was regularly observed. They also very rarely presented evidence of specific transactions in which the usage had actually been followed. Courts, did not, as a doctrinal matter require either type of evidence as a predicate to a finding that a usage existed. Although there were a few cases where a court found a usage not to exist and noted that sufficient evidence of regularity of observance had not been introduced, most courts seemed to largely ignore this doctrinal requirement. In practice, courts implicitly permitted it to be met through the mere assertion of a witness that something was a usage or a custom. Although incorporationists maintain that problems of this sort do not reflect an underlying problem with the incorporation strategy per se, but only a problem with its implementation, they fail to recognize that even detailed statistical evidence on the regularity with which a usage is observed in a market, would not, standing alone, necessarily enable courts to identify “such regularity of observance in a place, vocation or trade, as to justify an expectation that it will be observed,” in any particular transaction. 95

95 Although there were no cases in the digest in the detail or opinion-only groups where a party introduced a statistical survey of trade practices to demonstrate the existence of a usage, a recent survey of trade practices in the feed trade in and
Consider a contract for the delivery of one hundred bales of hay on the first of the month over the calendar year 2011 for a price of $50 per bale. Suppose that the price of hay suddenly increased on April 20, 2011 and that the seller delivered only eighty-five bales claiming that there was a custom in the industry that quantity statements in contracts were only approximate and that delivering any amount plus or minus twenty bales was considered acceptable under a usage of trade. Suppose further that to establish that usage he introduced a study which found that in one hundred contracts that called for the delivery of one hundred bales of hay on the first of the month, under one-third of the contracts eighty bales were tendered and accepted, under another third one hundred bales were tendered and accepted, and under the final third one hundred and twenty bales were tendered and accepted. If courts looked at this data through the lens of the Code and the Official Comments, they would likely conclude that it established a usage that when a contract says one hundred bales, one hundred bales plus or minus twenty bales is considered proper or customary tender. Given the structure and operation of the hay trade, however, a more accurate interpretation of this behavior is that the one hundred contractual relations observed were among transactors who trusted one another and dealt with one another on a repeat basis, so that within any individual relationship where eighty were accepted one month, a look at the next months tender would show one hundred and twenty were tendered. Among parties who trust one another and have sufficient inventory, it might be much cheaper to take the level of precaution that results in an average of one hundred bales per month being delivered, rather than the level of precaution associated with delivering exactly one hundred bales each time. Yet if relations between these parties broke down and they did not anticipate dealing with one another in the future, and one party delivered eighty-five at a time when the price had gone way above the contract

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96 See H & W v. Occidental (where the court explicitly noted that in seeking to introduce trade usage evidence the defendant had not produced sufficient evidence of regularity of observance)

97 [insert case]
price, to excuse delivery of the additional fifteen bales on the basis of a usage would be far from implementing the parties’ intent of the parties.98

As this example illustrates, courts face interpretive difficulties in these situations because transactors’ willingness to make the types of adjustments that look on their surface like behavioral regularities often depends on the existence or non-existence of conditions that are observable to them but are not verifiable by a court—such as the degree of trust they have in one another, the expected benefit of future dealings, and the likelihood that the difference will be made up in a future deal even if the market price makes it non-advantageous to do so. As a consequence, when courts incorporate behavioral regularities into contracts as trade usages some of the of regularities they incorporate are likely to be the types of norms that transactors are willing to follow when they want to preserve their relationship (a “relationship preserving” or “informal norm”), but that they would have been unwilling to promise to follow in their written agreement for any of a number of reasons.99 When courts incorporate informal norms into commercial agreements, they will therefore be acting directly contrary to the parties’ intent and will therefore be creating large interpretive error costs.

Incorporationists view the incorporation of informal norms as “simply another potential source of interpretive error costs,”100 and one that is not likely to be large given their “speculation” unsupported by any data, “that observable patterns of commercial behavior more often than not reflect formal rather than informal norms.”101 The consequences of courts routinely incorporating

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99 For a comprehensive discussion of the ways that relationship preserving norms and end game norms impact commercial behavior and the consequences of confusing them in adjudication, see Bernstein, Merchant Law, supra note __.

100 Kraus and Walt, In Defense, supra note __at 209.

101 Kraus and Walt, In Defense, supra note __at __. In defending this position, incorporationists explain that because “informal norms are more likely to develop in the context of relational rather than discrete contracts . . .and [m]any, perhaps a majority of the transactions governed by Article 2 are discrete,” informal norms will not be common in contracting relationships governed by the Code. However, the data show that a significant proportion of the cases arising under the Code
informal norms into commercial contracts, however, are more significant than the consequences of their making occasional errors in filling gaps or determining the meaning of written contractual provisions. In contracting contexts where both formal and informal norms are common, parties will often, for any number of reasons, find it beneficial to structure their contracting relationship using a mix of legally enforceable promises that condition on verifiable information, and informal agreements (both express and tacit) that condition on information that may only be observable. By transforming all of transactors’ commitments reflected in both formal and informal norms into legally enforceable contract obligations, the incorporation strategy makes it impossible for parties to realize the significant efficiency gains that come with using this two tiered contractual structure. Unlike other types of interpretive error, whose magnitude transactors can influence, though certainly not completely control, through the inclusion of various types of contract provisions, the only way for transactors to avoid this type of error and obtain the benefits of their preferred contracting structure, is to opt out of the court system and the Code. This is precisely what a large number of merchant industries in which informal understandings add tremendous value to contracting relationships have done. Transactors in industries that do not offer a private legal system with textualist interpretation, however, will have to either bear the interpretive error costs that come with the mis-incorporation of informal norms, or will have to

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102 [Insert a tightly written footnote summarizing these reasons]
structure their relationship using second best terms that they are willing to both follow in their work-a-day interactions, and have courts enforce in the event of a dispute.

Incorporationists have dismissed the importance of this type of interpretive error on practical grounds. They point out that even if informal norms did exist in significant numbers, their existence does not pose any serious problems for the incorporation strategy because the Code’s trade usage provision does not require courts to take them into account. There is nothing in the language of the Code or the interpretations advanced in the Official Comments, however, to suggest that courts have the authority to incorporate only informal norms. The Code defines the existence of a trade usage by the regularity of its observance and the reasonableness of the expectation that it will be observed in a particular contracting relationship. Applying these criteria informal norms are indistinguishable from formal norms.\textsuperscript{103} Moreover, even if the Code were interpreted, or explicitly amended, to give courts the authority to incorporate only formal norms, it is far from clear that such a rule could be implemented in practice. While any transactor in the relevant market could be called to testify about their own subjective beliefs about whether a usage was meant to be enforced in court, it is unclear how, absent a social scientific survey, anyone would be able to testify as to the general attitude across the market since it would depend on an aggregation of subjective beliefs across a large number of people. Indeed incorporationists conclude that “the paradigm evidence of an informal norm is provided by trade-wide testimony that a practice is not intended to be given legal effect,” a type of evidence that even if available would likely be too expensive for litigants to actually acquire.

[Another reason to suspect that interpretive error costs might be significant, stems from the context in which many interpretation cases reach the court, namely times of extreme price movements or an unusually large one sided loss where one suspects that the norm broke down or was never intended to apply.]

\textsuperscript{103} In markets where such norms are common, they are often backed by an array of non-legal sanction that make them, in effect, self enforcing over a range of typical market conditions. It is therefore quite likely that they will, in fact, be observed by a majority of transactors most of the time.
Finally, it is important to note that the debate over the magnitude of the interpretive error costs introduced by the strategy has focused entirely on cases that go to trial. It has entirely ignored the effect of the strategy on motions for summary judgment. As the study demonstrated, however, a party opposing a motion for summary judgment can assert the existence of a usage based on nothing more than the most cursory affidavits supplied by one of its own employees (an affidavit that is simply attached to the moving papers so the affiant’s assertions are not subject to cross examination) a finding which suggests that summary judgment determinations may be subject to significant interpretive error costs, and that the strategy may well be encouraging certain types of strategic behavior as formalist/ textualists have feared.104

**Conclusion** In sum, the case study revealed that the evidentiary basis of trade usage arguments and findings is far weaker than incorporationists assume. It also demonstrated that the primary checks incorporationists rely on to constrain the mis-incorporation of non-existent usages, are not actually operational in Article 2 sales disputes. Together these findings suggest that the incorporation strategy may lead to far higher interpretive error costs in practice, than incorporations’ defenders predicted based on their assumptions about how trade usages would be proven in court. Indeed, the near total absence of in gap filling and interpretation cases of either statistical evidence of a regularity of observance or even examples of actual commercial transactions in which the usage was observed, might give pause to even incorporations strongest defenders, who have taken the position that “an analysis counts as an interpretation of custom only if it adequately fits relevant commercial behavior and attitudes [demonstrated through actual instances of commercial behavior]. . .otherwise, the analysis is not an interpretation of anything. It instead serves as a recommended decision rule.”

**C. Rehabilitating Incorporation**

Incorporations defenders acknowledge that the interpretive error costs associated with the incorporation strategy might be larger than they assume. They maintain, however, that even if these costs

104 See Schwartz and Scott, supra note __
turned out to be unacceptably high, the strategy need not be abandoned since “all of the sources of interpretive error critics identify can be substantially reduced, if not avoided, by making feasible alternatives to Article 2 that nonetheless preserve its incorporationist character.” For example, incorporationists suggest that interpretive “errors can be reduced by seeking a better decision maker,” with greater skill or expertise in the in the subject matter of the dispute. While this may be beneficial, it is unlikely to prove a complete solution to the problems caused by the strategy. There are, in fact, many merchant-run private legal systems in which contract disputes are decided by panels of well-regarded merchant arbitrators, just the sort of adjudicators incorporations defenders suggest could improve the implementation of the strategy. Because these industry participant arbitrators should be as well versed in industry usages as either party, one might expect that the rules of these groups would be pro-incorporation; yet precisely the opposite is the case. The rules governing these private systems, are quite anti-incorporationist. This suggests that even when ideal decision makers are used, the merchants themselves who determine the rules of such systems are more uncomfortable with the effects of incorporation than its defenders want to believe.

105 Kraus and Walt, In Defense, supra note __ at
106 They are similar to the merchant jury that Karl Llewellyn provided for in the early drafts of the Code that required questions of mercantile fact to be submitted to a panel of merchant experts
107 For a discussion of the anti-incorporationist leaning of merchant run private legal systems see Bernstein, Merchant Law, supra note __ at __ and Lisa Bernstein, Creating Cooperation, supra note __ at __ Incorporationists have dismissed the relevance of the finding that most merchant systems are anti-incorporationist on the grounds that their trade rules, which guide the arbitrators’ resolutions of disputes are themselves compilations of customs, making reference to other usages unnecessary. It should be noted, however, that in most markets governed by private legal systems with detailed sets of trade rules, there are nonetheless many work-a-day practices that merchants often follow that cannot be said to arise in the shadow of their contractual obligations as supplemented by the trade rules. In addition with respect to aspects of contractual performance that call for subjective determinations—such as quality—these rules typically require parties to establish them through certificates from particular quality grading intermediaries (who typically make their determinations without knowing the identities of the disputing parties). Although the arbitrators themselves are well versed in industry norms, they are not tasked with making these determinations. Further more, the rules are not that much more detailed than a typical standard form purchase or sale order in terms of what is covered.
Incorporationists also suggest that interpretive error can be reduced by “requiring that interpretation be based on more reliable evidence . . . superior evidentiary bases or higher standards of evidence.” However, given the relative dearth of cases in which a solid evidentiary basis was established to demonstrate the existence and scope of a usage, even when large sums were at stake, it may well be that more, or more reliable, evidence is not available to the parties, or cannot be obtained at a cost that makes economic sense given the amounts at stake. There may also be additional barriers to parties obtaining different types of usage evidence. For example, it may be quite difficult for a company to convince its similarly situated competitors to disclose the parameters of the flexibility they offer to their customers. Firms typically prefer to keep this type of information private. A company might also fear that undertaking a statistical study of the contracting behavior of its competitors would, even in the unlikely event that anyone would respond to the survey, raise antitrust concerns. Finally, it is important to note that even if changes in evidentiary standards could decrease the number of interpretive errors made at trial by inducing parties to introduce more, or more reliable, types of evidence at trial, to effectively reduce the undesirable interpretive error effects of the incorporation strategy, changes in the evidentiary standards applied in summary judgment motions would also be required.

Finally, incorporationists’ suggest that if interpretive error costs turn out to be high, courts might be directed to look only to trade codes and similar trade association-produced writings to determine the existence and content of usages. However, if the theory behind incorporating unwritten usages is that they arise from the competitive selection of rules and practices and are presumptively efficient and reasonable given their wide-spread use by merchants, looking to trade association trade rules and standard form contracts would be problematic. Associations whose members are buyers one day and sellers the next and that also have well-constructed committee structures and voting rules may generate the types of trade rules and standard-form contract provisions that come close to meeting these criteria. However, many trade associations represent only buyers or only sellers and some trade associations that run private legal systems govern transactions between members
who play a fixed role in the chain of production and distribution, making rent-seeking in Trade Rules and standard-form contract creation a serious potential issue. As a consequence, in order to determine which association rules and standard form contract provisions should be incorporated as substitutes for unwritten usages that evolve over time, courts would need to engage in a detailed game theoretic analysis of their rules-creation process, an inquiry that is likely to exceed the limits of their institutional competence.108

**Conclusion** In sum, incorporationists maintain that even if it could be shown that the Code’s incorporation strategy increased interpretive error costs above those that would be incurred in a plain meaning regime, any problems with the strategy could be solved by implementing any of a number of suggested procedural and evidentiary fixes.109 Yet given the institutional competence of courts, and the types of evidence that parties to these disputes choose to submit, the viability of these fixes is highly questionable.

IV. REFORMING COMMERCIAL LAW

The analysis presented here suggests that in practice the trade usage component of the Code’s incorporation strategy is not working the was its defenders have long assumed. Whether the flaws in the strategy lie in the mistaken assumption that these usages exist, in litigators lack of knowledge of how to prove them at trial, the lax evidentiary requirements actually imposed by courts, or in most court’s limited institutional competence to discern and apply trade usages in particular cases is unclear, but the evidence presented here provides additional support for the idea of reforming


109 If, however, customs exist, are plentiful, and transactors want them to be incorporated into all of their commercial agreements, then the lack of a solid evidentiary basis for courts finding usages to exist may not be problematic. If the vision of commercial reality underlying the strategy is accurate, there would be nothing wrong with picking three merchants, expert or not, asking them what the relevant usages are and then drawing on their articulation of the usages to resolve disputes, for the strategy presupposes that their will be wide-spread consensus about contractual meaning and practice.
contract and commercial law in the direction of adopting a default approach in contracts among businesses and merchants that lies towards the formalist-textualist side of possible adjudicative approaches rather than the incorporationist-contextualist pole.\textsuperscript{110}

[Drawing on my prior work and recent work by Alan Schwartz and Bob Scott,\textsuperscript{111} this section will defend making the default rule a textualist/formalist one, while giving parties the opportunity to opt into an incorporationist adjudicatory regime provided that their contract appoints an expert arbitrator to make binding determinations about the content of usages. In the course of defending the change, the section will argue that if such a rule is properly structured it can have desirable information forcing effects and may largely eliminate commonly litigated issues such as whether the parties are merchants (which they will have to recite or will be considered to have stipulated to by virtue of the opt in), whether they are part of the same commercial community, and, if not, which communities usages should govern (a choice of usage clause), and whether they should have been aware of relevant usages (their opt in would constitute their consent to be bound). The section will also defend the new rule in terms of its anticipated effect on strategic behavior, particularly the types of behavior identified by Schwartz and Scott. The section will conclude that the proposed change is, actually consistent with the commercial law theories of Llewellyn himself, and have the additional benefit of bringing the private and social costs of litigation into better alignment].

[After defending this reform, the section will outline smaller statutory changes that might reduce, although not eliminate, some of the worst effects of the strategy in the event that larger changes are politically infeasible. This will look at 2-207(b) limitation of warranty and remedy provisions which are especially problematic as the sellers will always seek to limit and buyers contracts wont. If these limits are common in the industry and accepted by everyone and both sides use a form, why doesn’t that form match. These are not the sorts of different terms that one party might just overlook or say gee we will look to custom, they are critical to the value of the deal]

\textsuperscript{110} See Supra_.

\textsuperscript{111} Unlike Schwartz and Scott, however, the argument will not assume that more information, also referred to in the literature as a wider contextual base, will lead to more accurate interpretations of a contract.
V. CONCLUSION

This paper has attempted to explore validity of the incorporation strategy on the terms put forth by its strongest defenders. The desirability of the strategy and the feasibility of improving it, however, also depend on the validity of a core assumption underlying the strategy that neither Karl Llewellyn nor modern day incorporationists have ever empirically demonstrated—namely the assumption that unwritten usages of trade that transactors want courts to take into account and that are clear enough for courts to apply are common in merchant communities. Although there are some case studies of US merchant industries who sought to codify their customs into trade rules at the turn of the century, which suggest, though do not prove that usages of trade may be neither as common nor as clear as incorporationists suggest, incorporationists have dismissed the importance of the

112 Llewellyn’s biographer, William Twining, explicitly acknowledges that while some limited empirical “research was in fact undertaken . . . [in connection with the Code] it must be conceded that there was virtually no systematic project research of the kind postulated by the scientific model. There were no orderly research designs, disciplined sampling or carefully tested questionnaires. Such Fieldwork as was done tended to be adhoc . . . field work was the exception.” See Twining, Realist Movement supra note ___ at 316. The primary source of empirical information was “Llewellyn's own knowledge and understanding of many phases of business,” which in Twinning’s view and the view of Llewellyn’s contemporaries was “truly extraordinary.” Nevertheless, even Twining acknowledges that the lack of realist style empiricism behind the Code, was deeply at odds with Llewellyn’s social scientific approach to law. As he explained, “[i]n so far as ‘realism’ involves some commitment to relatively systematic collection of data,” the Code project “raises an important doubt about the relationship between Llewellyn’s practice in respect of the Code and the jurisprudential ideas that he preached in other contexts.” id at 314

113 See Lisa Bernstein, Questionable Empirical Basis, supra note ___ at ___ (presenting historical evidence that in US merchant industries that sought to codify their customs around the turn of the century, a time when all of the pre-conditions generally associated with the emergence of unwritten commercial custom such as social or ethnic homogeneity, repeat smaller scale transactions among those who were buyers one day and sellers the next, were near perfectly met, usages of trade that were geographically coextensive with the scope of trade did not consistently exist. During the codification efforts, hay dealers were unable to agree on the meaning of terms as central as “bale of hay,” textile merchants could not agree on the meaning of “seconds,” grain merchants argued over the meaning of a “carload”
evidence to the contemporary incorporation debate, explaining that is too old to be relevant and that the time period it looked at is one where customs would have been particularly unlikely to exist.

and a “day” and Silk merchants fought bitterly over the meaning of quality designations that were nonetheless used throughout the industry. While these efforts began as an attempt to codify existing practices, their goal was ultimately change to making existing practices more nearly uniform. For a detailed discussion of these efforts and additional data that usages of trade did not widely exist in these merchant communities)

114 See Snyder, Private Languages supra note at 627 (noting in response to Bernstein’s studies that “there is the problem of extrapolating from codification debates that took place in the first decade or two of the last century,” to the present); Kraus and Walt, In Defense supra note _ at 201 (“The most important limitation of Bernstein’s study is that, even by its own lights, it demonstrates at most that there were few if any Uniform National Customs in many commercial industries,” and “ the dearth of Uniform trade wide customs in the early part of the centaury provides poor evidence that such customs do not exist now”).

115 Although critics of these studies claim the industries studied had not been national in scope long enough for national customs to evolve, they have overlooked the fact that the conditions that are widely viewed as being most conducive to the emergence of custom were far more robust at the time of the historical case studies than they are today. In addition, the industries studied had been either centered in a particular location—New York City in the case of textiles and silk, see Frank L. Walton, Tomahawks to Textiles: The Fabulous Story of Worth Street (1953), 61, 62, 102, 104 (When the idea of codifying textile industry customs was first proposed in 1918, the industry had already been centered in New York City for a long period of time. From 1635-1835, the trade was centered on Pearl Street, until a fire and changes in the real estate market forced it to relocate. In 1853, the trade decided it should again locate in one geographic area and it chose Worth Street, less than a mile and a half from its former location. The first large merchants moved there in 1857. By 1861 it was recognized as “the primary mill agency market in the United States” and by 1870, it was considered the “textile center” of the country.); See also See Bernstein, Questionable Empirical Basis, Supra note __-at 730-735 (The first set of codified textile customs, the Worth Street Rules, were adopted sixty-six years after Worth Street became the center of the trade, after eighteen years of drafting, during which time infighting about the meaning of words and the content of customs was intense)— or had been national in scope —in the case of hay and grain—for a long time before the efforts at codification even began. See William Cronon, Nature’s Metropolis: Chicago and the Great West Ch. 3 (Norton 1991)(noting that cross country trade in grain had emerged by 1840’s); See also Atack, Bateman, & Parker, “The Farm, The Farmer and The Market,” in Cambridge Economic History of the United States, Vol. 2. at 250 (“[B]y 1875-79, the East Coast was producing barely half of what it consumed,” and by “1910-13, its production relative to consumption had slipped to only 23%). Moreover, the decision to study merchant industries who drafted trade rules and resolved disputes in association-run arbitration tribunals, as a way of understanding what merchants want, is a methodology implicitly endorsed by
Notably, however, incorporationists did not respond to these empirical findings by producing any empirical evidence that unwritten usages of trade\textsuperscript{116} exist. Rather, they responded by advancing additional theoretical justifications for the strategy. These justifications draw on linguistic theories about the limitations of language,\textsuperscript{117} evidence from inter-jurisdictional competition for arbitral services,\textsuperscript{118} and public choice,\textsuperscript{119} as well as what they

Llewellyn himself whose early drafts of the Code made use of the actions and approaches of these very groups as inspirations for his work.

\textsuperscript{116} The few scholars who even purport to provide examples of unwritten usages of trade, to rebut the information in the case studies, are in fact providing evidence of written usages. The most common example given is that everyone in the lumber industry knows that a 2x4 does not mean a board measuring 2x4 inches, but rather a board measuring $1 \frac{1}{2} \times 3 \frac{1}{2}$ inches. See, Stewart Macaulay, \textit{Relational Contract Theory: Floating on a Sea of Custom? Thought About the Ideas of Ian Macneil and Lisa Bernstein}, 94 NWU L. Rev 775 (2000)(offering as an example of business custom the fact that “if you go to a lumber yard and ask for a “two-by-four,” the board tendered will not measure two inches by four inches. It will be approximately one-and-one half inches by three-and-one half inches,” but noting in a footnote that this is written into a US Product standard); John E. Murray, Jr., \textit{Contract Theories and the Rise of Neoformalism}, 71 Fordham L. Rev 869, 913 (2002) (describing Macaulay’s innovation of the “two-by-four” example of customs “an example that has occurred to neoclassicists for the last fifty years.”); Snyder, \textit{Private Languages} supra note ___ at 218 (picking up on Macaulay’s discussion of the meaning of 2x4 and noting that “this fact can be proved with testimony from people in the trade, not to mention actual 2-by-4s and birdfeeders made to be mounted on two-by-fours”); Steven L Harris, \textit{Rules for Interpreting Incomplete Contracts: A Cautionary Note}, 62 LA L Rev 1279, 183 (2002) (“anyone with any familiarity with a [contract for the sale of two-by-fours] . . .knows that [the parties did not contemplate] boards that are two inches by four inches.”); Franklin G. Snyder, \textit{Clouds of Mystery: DisPELLing the Realist rhetoric of the Uniform Commercial Code}, 68 Ohio St. L.J. 11, 47 (noting that “the classic example is the trade usage that says a “two by four” piece of lumber will actually measure 3.5 x 1.5 inches). Today, this meaning of the term 2x4 appears to be generally accepted throughout the contemporary lumber trade, but it is a poor example of an unwritten custom. The history of the meaning of the term actually proves that prior to being written down and codified there was no clear understanding of its meaning. For more than half a century the lumber associations attempted to define uniform sizes for particular lumber designations, but were unsuccessful. Finally, the industry asked the Commerce Department to issue US product standards with such definitions. The definition of a 2x4 was adopted in 1964.

\textsuperscript{117} Snyder, ___supra note ___ at ___

\textsuperscript{118} See Christopher R. Drahozal, \textit{Commercial Norms, Commercial Codes, and International Commercial Arbitration}, 33 Van. J. Transnational L. 79 (2000). Drahozal claims to offer an “empirical rejoinder,” id. at 8, to the case studies. He argues there is fierce inter-jurisdictional competition to provide international arbitration...
services, so the fact that “international arbitration rules and awards reveal[] an approach to trade usage [that is] more like the approach taken by the drafters of the UCC and the CISG than the formalist approach of the [trade association] arbitrators,” suggests that the incorporation of custom and usage “is preferred by parties given that they have a choice of arbitral fora.” Id. at 8. There are several weaknesses in this argument. First, when a litigant or lawyer selects an arbitral forum they select from among sets of rules not a menu of possible individual rules. Meaningful inferences about preferences with respect to any one particular rule therefore cannot be made from this type of data. In contrast, at the merchant-run trade associations explored in the case studies, each trade rule is separately approved by industry members, which provides a strong indication that each individual rule adopted is viewed as desirable. Second, the international arbitration rules studied by Drahozal are not independent of one another. The rules of some Arbitration providers replicate or were explicitly based on the UNCITRAL Rules and the UNCITRAL rules committee looked at the rules of other tribunals in the process of drafting its rules, see Arbitration Rules of the United Nations Commission on International Trade Law, 99 Plenary Meeting of General Assembly, 15 December 1976. The United Nations Commission on International Trade Law has also actively sought to persuade international arbitration tribunals to adopt the UNCITRAL laws in their entirety without modification. See Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations Under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission, at 420. It also publishes commentaries on the rules, see id at 120-424, sets out guidelines for administering arbitrations under the rules, see e.g., UNCITRAL Notes on Organizing Arbitral Proceedings (1996) and holds seminars to teach lawyers and arbitrators about their workings, See Training and Assistance in the Field of International Trade law: Report of the Secretary-General: Training and Assistance, (A/CN.p/206) at 25. The dominance of the rules, therefore be due to a combination of the comfort level of lawyers making the choices, information cascades, network effects (including the positive interpretive network benefits of the extensive interpretations and commentaries on the rules), lock-in effects and the fact that UNCITRAL, rather than the adopting institutions, bears the cost of updating and revising the rules.

119 Some defenders of incorporation have argued that if many transactors viewed the incorporation of usages as undesirable and “[I]f, as has been alleged, business lawyers dominate the U.C.C. revision process, one might interpret the reaffirmation of the Code’s approach as a “vote” against a more formal approach by those whose clients are affected by the law.” Woodward, supra note ___ at 958; Robert A. Hillman, supra note _ at 62 LAL. Rev 1153,1157 (“I am unaware of any effort by business to overturn the codes use of trade custom”). However, at the time the Code was adopted, “the tastes of the practicing lawyers who advised the draftsmen were, in most cases, opposed to the flexible ideas of the Chief Reporter [Karl Llewellyn]; they insisted on a tightly drawn statute, precise, detailed and ridged.” Litowitz, supra note __ at 55 citing Grant Gilmore, In Memoriam: Karl Llewellyn, 71 Yale L.J. 813. In addition, these views were shared by members of the Commerce and Industry Association of New York, who testified against adoption of Article 2 at hearings in front of the New York Law Reform
Commission, and in their testimony articulated some very specific objections to some of the Code’s most incorporationist positions. For example, the Association objected to the Code’s lax formation rules and its lenient statute of frauds, on the grounds that “you may find you have an unintended contract on your hands even though the ‘memorandum’ concerning a ‘sale omits all of the following: price, time and place of payment, time and place of delivery, general quality of goods, and warranties!’” It also opposed the unconscionability provision on the grounds that it gives courts the authority to rewrite contracts, Testimony at 22-23, and pointed out that the non-waiveable obligations in the Code, namely “good faith, due diligence, commercial reasonableness and reasonable care . . . do not tend to greater precision in the law . . . the determination will result in much litigation.” Id. 25 The group also objected to the definition of good faith to be applied to merchants, explaining that the Code means that “a merchant is guilty of breach of contract if he does not observe reasonable commercial standards,” yet “[t]he usages, customs, and practices of business are far from being uniform, and the determination of whether a merchant has conformed to reasonable commercial standards would be difficult and would produce excessive litigation.” Similarly, as regards the 2-207 (the battle-of-the-forms provision) the Association observed that “It will be difficult for a party to a contract to determine whether additional terms materially alter the contract or not.” Id. 33 And, as regards the cure provision’s time extension in instances where the seller tenders nonconforming goods under the belief that he had “reasonable grounds to believe would be acceptable with our without money allowance to the buyer,” UCC 2—_ _they said, “there is no reason why a seller should ever believe that a nonconforming tender would be acceptable to the buyer.” Id. at 37.

Second, the idea that if business interests were opposed to the Code, business lawyers would necessarily choose to advocate for their client’s preferences during the ALI/NCUSSAL process overlooks the existence of lawyer-client agency problems as well as the political economy of these private legislatures. Although businessmen want to reduce legal transaction costs, lawyers do not necessarily share that goal, especially if the costs are mandated by law and therefore cannot be competed away by other lawyers. The Code is good for law firm revenue. By making it easy to defeat summary judgment, see text accompanying notes nn-nn, and requiring large amounts of context specific evidence to be introduced, the Code increases the cost of litigation. It also makes lawyers relevant at more stages of the contracting process than they would be in a more formalist system. For example, rather than advising on contract formation (that is drafting) and on contract litigation in the event of a dispute, the Code requires lawyers to play an active role in the administration of contracts—they must send non-waiver letters after deviant performance is accepted, must advise loading dock personnel, need to be consulted to assess whether there are reasonable grounds to demand adequate assurances of due performance, whether it is proper to assume that nonconforming tender with a price adjustment would be acceptable and to make many other determinations with significant legal consequences that arise over the life of a contract. In a multi-agent enterprise lawyers may also be needed to structure important aspects of internal firm hierarchy and to educated the cadres of sales agents on the types of actions that
describe as the “near universal insistence by merchants of all kinds that their conduct is governed, in large measure and important respects, by relatively clear commercial norms,” an insistence for

might affect the firm’s legal position.

Even leaving aside firm revenue effects, the Code’s approach may be more attractive to lawyers than its more formalist competitors. Lawyers tend to be reviled by businessmen, and lawyer who are viewed as transactions facilitators, rather than deal breakers, will generally be viewed more favorably by their clients. Sometimes when a client hammers out the business aspects of a deal and turns to a lawyer to formalize the agreement with opposing counsel, aspects of the deal that the lawyer knows to be important are likely not to have occurred to either principle, either because they are unacquainted with the relevant legal principles or because the aspect was not central to the deal and they knew that arguing over it would create a risk of transaction breakdown. In such situations, lawyers may be quite happy to leave the gaps or ambiguities as they stand, knowing that if the contingency arises, their will be an opportunity to renegotiate, and that in the rare instance where the parties fail to agree and litigation ensures, the Code will fill the gap and in the event that it does so in a way adverse to the client’s interests, the Code’s all the facts and circumstances approach which leads to its unpredictability will enable the lawyer whose position looses to blame the court, thus avoiding guess risk. See Edward Bernstein (discussing second guess risk)

And, finally, and perhaps most importantly, this argument ignores the political economy of the private legislatures that generated and are responsible for the current revision of Article 2. As Schwartz and Scott have persuasively argued once one takes a political economy perspective on private legislatures, one would predict that the proportion of rules and standards in the output is much more a function of the structural features of these organizations than it is a function of conscious policy choice.” Alan Schwartz and Robert E. Scott, The Political Economy of Private Legislatures, 143 U. Pa. L Rev 595, 598 (1995)

Kraus and Walt, In Defense, supra note __ at __. In an effort to test this claim a survey that was designed to explore the existence of usages in transactions between grain dealers and feed lot owners within 500 miles of Amarillo Texas, the fifty respondents were asked “When you use written contracts, or purchase and sale orders, are there some unwritten rules, or customs or practices that you expect your trading partner to follow even though they are not explicitly written down?” NORC Survey, supra note ___ at question __. In response to this question, 65.3% of respondents said there were such unwritten practices, but 34.7% of respondents, a significant minority, said there were not. Of the 34 people who said there were such practices, 31 of them said they were shared by everyone in their industry, 2 said they were not universally shared, and one had no idea if others shared his views. In addition, in several instances, the interviewers noted that the respondent said these unwritten practices existed; yet changed his mind when probed to give an example. Interestingly, however, even among those who answered that such practices exist and were universally shared by others, the interviewers, had difficulty soliciting specific examples of unwritten practices. This difficulty persisted even after a follow up probe that attempted to focus respondent’s attention on three core areas of contracting by asking “Are there unwritten rules...
which they provide no evidence, to justify their (and all of American commercial law’s) continued reliance on what they describe as the “extremely solid pre-theoretical empirical assumption that widespread, identifiable, and effective commercial practices exist.”

They have also dismissed the importance of this question, which they refer to as the “existence debate,” claiming that if usages are less common than they assume, courts will not incorporate them, and the availability of the strategy will result in nothing more harmful than courts or party engaging in an occasional “vain attempt to identify the relevant commercial practices.” The evidence presented in this paper, however, demonstrates that even if courts do make correct incorporation decisions at trial, something that the actual evidentiary basis of trade usage findings calls into question, the mere availability of the strategy might still adversely effect commercial transactions. Given the fact intensive inquiries the strategy requires, it is likely to increase litigation costs, make summary judgment harder to get, and introduce a type of litigation uncertainty that is likely to increase the number of cases that go to trial. As a consequence, if it could be definitively shown that usages are not common, or that the strategy is not operating well enough to induce transactors to take advantage of specification cost savings, or that interpretive error costs are in fact higher than expected, it may be time to abandon the Codes approach in its entirety.

you follow that involve quality or time or cost considerations.” NORC Survey, supra note ___ at question __. The examples of unwritten practices given by those who answered that they existed were all over the map. Many respondents simply stated old boy rules of thumb like “my word is my bond.” Others made explicit reference to one or more sets of written rules, despite the care the interviewer took to focus their attention on unwritten practices. A number of respondents gave examples that are actually codified in the Southwest Scale of Discounts or the NGFA or TGFA Rules. A few respondents also some noted that certain practices might only apply to a particular segment of the market. The answers to these questions about the existence of unwritten usages, even in this even in this socially homogeneous, geographically concentrated industry characterized by long term repeat dealing contractual relationships, do not support Code’s assumption that merchant transactors, approach a sales transaction with a robust set of usages that are generally-known and anywhere near automatically taken into account at the time of contract formation. They also suggest a reason to be wary of concluding that usages must exist simply because merchants insist that they do.

121 Kraus and Walt, In Defense, supra note ___ at __.