BETWEEN WORLDS: JULIET MORINGIELLO, PRIVATE LEGISLATURES, AND THE FUTURE OF COMMERCIAL LAW EDUCATION

by

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Perhaps reflecting her training in foreign service, Professor Juliet M. Moringiello mediated between worlds—between practice and the academy, theory and implementation, and lawmakers and the communities their rules affect. Grounded in her own experience in practice, she understood that law reform succeeds only when it is both intellectually sound and workable on the ground, and she approached projects like revising the Uniform Commercial Code with discipline, diplomacy, and a deep capacity to listen, earning trust across constituencies that often speak past one another. Her career also illuminates the role of what scholars call "private legislatures"—bodies such as the American Bar Association (ABA), the American Law Institute, and (in certain respects) the Uniform Law Commission—which, though formally private, play a powerful role in shaping public commercial law. In these settings, where effectiveness depends less on formal authority than on expertise, deliberation, and mutual respect, Juliet treated law reform as a public service, grounded in careful listening and disciplined compromise.

This invited memoriam reflects on the constructive role lawyer-academics can and should play in law reform, weaving in my experiences with Juliet in the ABA as both a mentor and a model of how integrity and judgment sustain the legitimacy of the institutions that quietly make much of our law. It concludes by situating the work of private legislatures in larger trends in doctrinal legal education, trends that would have been of concern to Juliet—and should be of concern to all of us.

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Introduction

In the spring of 2001, the dean of the law school where I was a new assistant professor asked if I wanted to attend a meeting of the Business Law Section of the American Bar Association (ABA) in Columbus, Ohio. I had never been to an ABA meeting or to Columbus. I was still fairly young and was game for most things. I did not view this trip as an outright punishment, though the opportunities for growth were concededly not self-evident. In fact, attending that meeting helped advance my career as an academic in important and subtle ways. Meeting Juliet Moringiello, there and then, was an important part of this trajectory.

Juliet was beloved as a teacher and mentor and widely respected as a scholar. But, unlike many academics, she devoted a significant portion of her career to the somewhat unfashionable work of law reform through organizations like the Business Law Section of the ABA (BLS), the American Law Institute (ALI), and the Uniform Law Commission (ULC). These so-called "private legislatures" occupy an important space in the U.S. legal system because they produce black-letter law—think of the Uniform Commercial Code (UCC) and the Model Business Corporation Act as examples—as well as critically important interpretations of the common law, most notably in the form of Restatements produced by the ALI. Juliet was a leader in the ABA—when we met in 2001, she was Vice Chair of the influential Uniform Commercial Code Committee—and would soon become an elected member of the ALI (in 2003). She became a Uniform Law Commissioner (from Pennsylvania) in 2015.[1]

Perhaps reflecting her training in foreign service,[2] Juliet mediated between worlds—between practice and the academy, theory and implementation, and lawmakers and the communities their rules affect. Grounded by her own experience in practice, she understood that law reform succeeds only when it is both intellectually sound and workable in practice. She approached projects like revisions of the UCC with discipline, diplomacy, and a deep capacity to listen, earning trust across constituencies that often speak past one another.

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[1] All biographical information comes from the Celebration of Life for Juliet M. Moringiello and her curriculum vitae posted on the Widener University—Commonwealth School's website. *Juliet M. Moringiello: In Memoriam*, WIDENER U. COMMONWEALTH L. SCH., https://commonwealthlaw.widener.edu/academics/faculty/detail/22/ [hereinafter *Moringiello CV*].

[2] Juliet earned her Bachelor of Science in Foreign Service from Georgetown University School of Foreign Service in 1984 (Major: Comparative and Regional Studies). *Id.*

Part of what made Juliet effective was her judgment about when to push and when to accommodate. Law reform is not only about conjuring good ideas or identifying the best rule in the abstract; it is about building solutions that lawmakers and affected communities can accept and implement. Juliet listened carefully, adjusted when warranted, and treated disagreement as information rather than affront. She had a characteristic response to questionable assertions: "I don't know about that," she would say with a light in her eyes and eyebrows raised. But she always took in all positions before forming a judgment.

On a more personal level, I suspect I recognized in Juliet something of my own trajectory: a scholar shaped as much by the profession as by the academy, and never at home exclusively in either. Juliet offered an example grounded in translation, mediation, and steady institutional work. She showed that it is possible to connect the academy and the profession, theory and practice, principle and compromise, without diluting any of them. In a field that often rewards sharp elbows and loud voices, her example was a reminder that progress in the law frequently depends on those who are willing—and able—to work between worlds.

This invited memoriam in honor of Juliet reflects on her important work with and about private legislatures. Part I describes the ABA, ALI, and ULC, and some of Juliet's work with those organizations. Part II summarizes the dominant institutional theory of private legislatures and Juliet's important critique of an ALI project (on software contracting), which reveals limits in such undertakings.

Part III shifts the focus to legal education. It observes that private legislatures can inadvertently contribute to a de-emphasis in the role of doctrine in legal education. The rise of empirical legal studies, the increasing complexity of law, and growing interest in skills education—all laudable developments spurred by private legislatures—tend to displace doctrinal teaching. This is problematic in fields such as commercial law which are intensely rule-driven: learning basic commercial law concepts (such as liens, priority, and bona fide purchaser status) requires immersion in legal doctrine, which occupies a diminishing place in the curriculum. Because Juliet was both a commercial law scholar and a committed doctrinal educator, this essay concludes by suggesting that a renewed focus on teaching commercial law doctrine would be a fitting way to honor Juliet's important legacy.

I. The Rise and Role of "Private Legislatures"

Much of the law that governs commercial life is not written in the first instance by legislatures or courts. Instead, uniform laws, such as the UCC, model acts (such as the Model Business Corporation Act), and "restatements" of common law are written by what scholars sometimes call "private legislatures." While there are probably many organizations that could qualify as private legislatures, three of the most important in the United States are the ALI, the ABA, and the ULC.[3] These organizations are formally private, but serve public-interest functions by drafting laws or statements (or restatements or principles) of precedent intended to aide legislatures, judges, and other legal actors in addressing specific problems and in adopting sets of rules for the management of whole classes of problems. Juliet Moringiello contributed in important ways to all three.

A. American Law Institute

The ALI is a private law-reform group that chooses its own members. It uses a multi-stage, deliberative process to develop both Restatements of the Law and Principles of the Law.[4] Projects typically begin with topic selection and approval: ideas are generated by the Director, members, or others, then vetted by the Projects Committee, and formally approved by the ALI Council, usually on the basis of a prospectus prepared by proposed academic experts, referred to as "Reporters."

Once approved, a project is led by one or more Reporters, working with advisers, a Members Consultative Group, and ALI staff. Drafts are developed over time and subjected to extensive internal review and revision, including discussion at meetings and written comments from participants representing diverse perspectives (judges, practitioners, and academics).

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[3] Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 912 (1995) ("Uniform state laws increasingly represent some of the most important statutes in America."). The ULC differs in certain respects from the ALI and ABA because its commissioners are acting as public officials and work directly with legislators to enact the laws the ULC drafts. Nevertheless, experts tend to conflate the ALI, BLS, and ULC into the category "private legislature," though this might elide distinctions not important for this essay. *See, e.g.*, Charles W. Mooney, Jr., *Modeling the Uniform Law "Process": A Comment on Scott's Rise and Fall of Article 2*, 62 LA. L. REV. 1081, 1081 (2002) (discussing "private legislatures such as the [ULC] and the ALI (the co-sponsors of the U.C.C.)"). Formally, the ULC is a not-for-profit unincorporated association. *See About Us*, UNIF. L. COMM'N, https://uniformlaws.org/aboutulc/overview.

[4] *Frequently Asked Questions*, A.L.I., https://www.ali.org/faq.

The process is iterative and can take years. Drafts proceed through multiple stages (e.g., preliminary drafts, council drafts), culminating in formal approval by both the ALI Council and the ALI membership at annual meetings. Only after this approval does the text become the official position of the ALI.

The ALI undertakes two types of law reform projects: Restatements of the Law (Restatements) and Principles of the Law (Principles). Although they share a common institutional process—reporters, iterative drafting, and approval by the Council and membership—they differ in purpose and orientation. Restatements seek to clarify and synthesize existing law, especially in common-law fields. They aim to identify prevailing rules, reconcile doctrinal tensions, and present the law as it "is," or as a court might reasonably articulate it, even when doing so requires selecting among conflicting positions or authorities.[5] Sometimes, of course, Restatements may seek to impose coherence on certain aspects of doctrine that does not otherwise exist, which can be controversial.[6]

Principles projects are more explicitly normative and forward-looking. They are typically undertaken in areas where the law is unsettled, rapidly evolving, or marked by significant variation across jurisdictions. Principles projects seek to propose best practices or preferred rules, drawing on existing law but not necessarily constrained by it. In this sense, they function more like model codes or reform proposals, offering guidance to legislatures, courts, and other policymakers about how the law *should* develop. As we will see, Juliet had some important insights into the strengths and limitations of one Principles project—the project involving software contracting.

The distinction between Restatements and Principles is one of emphasis rather than method. Both approaches rely on the ALI's characteristic process of expert deliberation and consensus-building, and both aim to influence public law through persuasion rather than formal authority. No one is bound by Restatements or Principles. But where Restatements derive much of their legitimacy from their claim to reflect the law as it exists, Principles

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[5] *About ALI Publications,* A.L.I., https://www.ali.org/faq (answering "If ALI is not writing the law, how are ALI publications used?" and describing Restatements as synthesizing the law and reflecting what courts may adopt); *see also id.* (answering "Who works on ALI projects?" and describing Restatement's methodology).

[6] As discussed below, the Restatement of the Law of Consumer Contracts may be an example. *See* Adam J. Levitin, *The Death of Consumer Contract*, 68 ARIZ. L. REV. 55, 62 (2026) (criticizing the Restatement of Consumer Contracts and observing that "Restatements will sometimes take a position on issues that divide the courts, but they are generally meant to capture the existing law, not fundamentally change it.").

projects derive theirs from the quality of their reasoning and their responsiveness to emerging legal and social conditions, as well as their capacity to accommodate conflicting aspirations about the development of the law.

This difference has practical consequences. Restatements tend to be used by courts as persuasive authority in resolving doctrinal questions, while Principles projects are more likely to be invoked in legislative reform, policy debates, and areas of legal innovation. Restatements tend to look backwards, whereas Principles tend to look forward. The latter can therefore be more controversial, as they more openly invite disagreement about normative direction and institutional competence. It is in this space—where law is being actively shaped rather than merely clarified—that questions about the role and legitimacy of "private legislatures" become especially salient.[7]

B. American Bar Association—Business Law Section

The BLS plays a distinctive and often underappreciated role in the development of commercial law. Organized into more than fifty subject-matter committees, it functions as a network of practitioners, academics, and judges who collaborate to produce legal content, policy proposals, and model rules. These committees serve as forums for sustained engagement with emerging issues, offering opportunities to "develop content," "participate in projects," and contribute to the evolution of business law across jurisdictions.[8] In this respect, the BLS operates not merely as a professional association, but as a site of ongoing lawmaking activity. Moreover, and more practically, the BLS typically provides advisers to ULC drafting projects who provide formal and informal input into the drafting process.[9]

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[7] Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 600–05 (1995) (discussing the normative and institutional role of private lawmaking bodies).

[8] *Business Law Committees*, A.B.A., https://www.americanbar.org/groups/business_law/about/committees/ (describing committee structure and opportunities to develop content and participate in projects).

[9] In 1986, the ALI and the ULC (then known as the National Conference of Commissioners of Uniform Laws) formalized a comprehensive agreement addressing their relationship with respect to the UCC and the future role and activities of the "Permanent Editorial Board" of the UCC (PEB), and this agreement made special provision for an ABA adviser to the PEB. *See* Carl S. Bjerre et al., *The UCC and the ABA's Business Law Section: In Praise of the Omnium Gatherum*, 75 BUS. LAW. 2411, 2426 (2020). Juliet became a member of the PEB in 2015, when she became a Uniform Law Commissioner from Pennsylvania. *See* Moringiello CV, *supra* note 1, at 10.

Nowhere is this more evident than in the BLS's role in shaping core areas of commercial law. Through committees such as the Uniform Commercial Code Committee—of which Juliet was Vice Chair from 1999–2003—the Section provides "timely information and training" on developments in commercial transactions while also engaging directly with the substance of those rules.[10] Its members frequently participate in drafting, commenting on, and refining uniform laws and model statutes, often working in coordination with bodies such as the ALI and the ULC.[11] Outside of commercial law, BLS's Corporate Laws Committee (of which I am an ex officio member) is responsible for the Model Business Corporation Act, a model statute that has been adopted in a majority of U.S. jurisdictions and has significantly shaped modern corporate law and practice.[12]

The BLS's influence derives less from formal authority than from its capacity to convene expertise and build consensus across the practicing bar. Its committees generate reports, commentary, continuing legal education materials, and legislative proposals that inform both public lawmaking and private ordering. In this sense, the Section exemplifies the core features of a "private legislature": it produces draft rules and interpretive frameworks that are not binding in themselves, but that are frequently incorporated into statutes, judicial decisions, and commercial practice.

At the same time, the BLS's processes reflect both the strengths and limitations of such institutions. Its work is grounded in professional expertise and practical experience, which enhance the technical quality and real-world applicability of its outputs. But like other private lawmaking bodies, it is composed largely of members of the organized bar, and thus inevitably reflects the perspectives and priorities of that community. Thus, as discussed

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[10] *Uniform Commercial Code Committee*, A.B.A., https://www.americanbar.org/groups/business_law/about/committees/uniform-commercial-code/; *Moringiello CV*, *supra* note 1 at 11.

[11] For a discussion of the BLS's provision of "advisers" to ULC drafting committees, see *supra* note 9.

[12] The Model Business Corporation Act has been enacted in whole or in part in over thirty U.S. jurisdictions and has had a significant impact on the development of corporate law. As Andrew Verstein recently observed:

> [T]he MBCA, considered as a single body of law, is the largest body of American corporate law. It covers nearly half of all American corporations, and vastly more than the law of Delaware. It has grown almost continuously, and it grew faster than Delaware law even during the periods in which Delaware is thought to have secured dominance.

Andrew Verstein, *The Corporate Census* 39 (Feb. 25, 2025) (unpublished manuscript) (on file with author).

below, there is concern that UCC Article 9 is becoming harder to teach and to test on bar examinations as it seeks to accommodate growing transactional complexity in practice.

It was within this institutional setting that Juliet Moringiello did much of her most meaningful work. The BLS's collaborative, committee-driven process—iterative, deliberative, and often painstaking—was one in which her strengths were especially evident. I worked closely with Juliet on various UCC-related projects for the ABA, including a best-selling book of forms for use in practice under UCC Article 9 in the early 2000s (shortly after the law had been comprehensively revised) and the ABA's publications and legal-education-related committees. In fact, my first real connection within the ABA was through Juliet, who recommended me for the UCC-9 forms project. It was through that set of connections that I met and worked with lawyers in a variety of business law settings. Those relationships, in turn, helped me design and implement various studies, including on the use of "third-party closing opinions" in transactional practice and the role of "examiners" in chapter 11 restructurings, that would have been largely inaccessible to legal outsiders.[13] These projects led, in turn, to other projects, many of which benefited from collaboration with practitioners I met through the ABA.[14]

[13] *See, e.g.*, Jonathan C. Lipson, *Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 BERKELEY BUS. L.J. 59, 59 (2005); Jonathan C. Lipson, *Cost-Benefit Analysis and Third-Party Opinion Practice*, 63 BUS. LAW. 1187 (2008); Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1, 1 (2010). One may wonder what closing opinions have in common with bankruptcy examiners. The answer—which I did not understand until interviewing lawyers I met through the ABA for the legal-opinions project—was that the bankruptcy examiner in *In re* Enron Corp. generated a great deal of attention to opinion practice, as it was implicated in Enron's fraud. *See* Lipson, *Price, Path & Pride, supra*, at 63, 84–85 (discussing opinion practice at Enron as reported by the chapter 11 examiner).

[14] *See, e.g.*, Donald W. Glazer & Jonathan C. Lipson, *Courting the Suicide King: Closing Opinions and Lawyer Liability*, BUS. L. TODAY, March/April 2008, at 59; Jonathan C. Lipson & Steven O. Weise, *The Business Lawyer at 75 and Secured Transactions Under Article 9 of the Uniform Commercial Code*, 75 BUS. LAW. 1575 (2020). The first of these was coauthored with Don Glazer, a leading expert on closing opinion practice; the second was coauthored with Steve Weise, a leading expert on secured lending under UCC Article 9. I would never realistically have met and worked with either but for my participation in the ABA which, in turn, was fostered by Juliet Moringiello's inclusiveness and support.

C. Uniform Law Commission

While Juliet was perhaps most active in the ABA, she also played an important role in the ULC, when she became a commissioner from Pennsylvania in 2015 and a member of the UCC's Permanent Editorial Board.[15] The ULC, formerly known as the National Conference of Commissioners on Uniform State Laws, plays a central role in the development of uniform state legislation across a wide range of fields, including commercial law. Established in 1892, the ULC is composed of commissioners appointed by each state, typically drawn from the practicing bar, judiciary, and academy.[16] Its core mission is to draft uniform and model laws that states may adopt to promote consistency and clarity across jurisdictions, particularly in areas where divergent state laws would create inefficiency or uncertainty.

The ULC's process is formal, iterative, and designed to build consensus over time. Projects typically begin with topic selection and study, often through a study committee that evaluates whether uniform legislation is needed and feasible. If the project is approved, a drafting committee is appointed, consisting of commissioners and advisers representing diverse perspectives.[17] Drafting committees meet regularly to produce successive drafts, which are discussed, revised, and debated in open meetings. These drafts are then presented to the full body of commissioners at annual meetings, where they are subject to line-by-line review and amendment.

Approval of a uniform act requires multiple readings at successive annual meetings, ensuring that proposals are carefully vetted before final adoption.[18] This multi-year process allows for extensive input from stakeholders, including representatives of industry, government, the practicing bar, and other interested observers (all of whom may participate in the development process). Once approved, uniform acts are recommended for enactment by state legislatures, often accompanied by coordinated efforts to promote adoption across jurisdictions.

Like other private legislatures, the ULC operates without formal lawmaking authority; its enactments have no legal effect unless adopted by a state. Its influence instead depends on the quality of its drafting, the inclusiveness of its process, and the credibility of its participants. The success

[15] *See* Moringiello CV, *supra* note 1, at 9.

[16] *About the ULC*, *supra* note 3.

[17] *Legislative Process*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/process.

[18] *Constitution*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/constitution (describing process of development and adoption of uniform laws).

of the UCC—jointly developed with the ALI and including participants from the ABA—illustrates the potential reach of this model, as well as the importance of sustained collaboration among law reform institutions.[19]

At the same time, the ULC's processes reflect both the strengths and limitations of expert-driven lawmaking. Its emphasis on deliberation, technical competence, and consensus can produce durable and widely accepted legal frameworks. But, as with other private lawmaking bodies, questions arise about representativeness, transparency, and the extent to which its outputs reflect the interests of all affected constituencies. These tensions are inherent in any system that relies on expertise rather than electoral accountability (although, of course, the ULC's work must ultimately be enacted by true legislatures).

Juliet's engagement with the development of what became Article 12 of the UCC—governing digital assets—illustrates both her forward-looking instincts and her commitment to doctrinal discipline. The 2022 amendments to the UCC, jointly developed by the ALI and the ULC, introduced a new category of property—"controllable electronic records"—designed to accommodate emerging forms of digital value, including cryptocurrencies and non-fungible tokens.[20] These amendments address foundational commercial law questions, including how such assets may be transferred free of competing claims, and how security interests in them may be created, perfected, and prioritized.[21] Article 12 is the most important addition to the UCC in a generation. Juliet was an active participant in these efforts, contributing to the collective work of adapting the UCC to a rapidly evolving technological environment.[22]

What is striking about Article 12, in light of Juliet's broader body of work, is not simply that it embraces innovation, but how it does so. Rather than treating digital assets as wholly exceptional, the amendments integrate them into the existing architecture of commercial law, extending familiar

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[19] *See Uniform Commercial Code*, UNIF. L. COMM'N, https://www.uniformlaws.org/acts/ucc; *see also About ALI Publications*, *supra* note 5.

[20] *See* UNIF. COMM. CODE AMENDMENTS (2022) (introducing Article 12 governing "controllable electronic records").

[21] *See id*.

[22] *See Free Webinar on UCC and Digital Assets*, ALI ADVISER, (Aug. 18, 2022) https://www.thealiadviser.org/uniform-commercial-code/free-webinar-on-ucc-and-digital-assets/ (panel discussion featuring Juliet and other leaders on digital assets amendments). As noted in Laura N. Coordes, *Putting Ideas to Practical Use: Juliet Moringiello and the Uniform Assignment for the Benefit of Creditors Act*, 100 AM. BANKR. L.J. 558, Juliet was also an active participant in the Uniform Assignment for the Benefit of Creditors Act, completed after her passing.

concepts—such as "control," priority, and good-faith purchaser protections—into new technological contexts.[23] This approach reflects a characteristically commercial-law sensibility: pragmatic, system-oriented, and attentive to the needs of market participants.

New Article 12 also reflects the kind of judgment Juliet brought to law reform more generally. She recognized that new problems require new solutions, but also that those solutions must be anchored in the received structure of the law if they are to be durable. In this respect, her work on digital assets stands in productive tension with her critique of the *Software Contracts Principles*, discussed below: In the latter setting, she questioned unnecessary doctrinal innovation. In the former, she helped shape it—always with an eye toward coherence, usability, and institutional fit.

II. Critiques of Private Legislatures and Their Work

A. A Theory About Private Legislatures

Juliet Moringiello's active and important participation in "private legislatures," such as the ALI, ABA, and ULC, invites us to consider the strengths and weaknesses of these institutions. In their influential article, *The Political Economy of Private Legislatures*, Alan Schwartz and Robert E. Scott argue that these bodies arise in response to the need for technically sophisticated, uniform legal rules in areas like commercial law, where decentralized legislative processes would otherwise produce costly fragmentation.[24] In this account, "private legislatures" serve as intermediaries between markets and states, generating legal standards that public actors can adopt.

Schwartz and Scott emphasize that the distinctive feature of these institutions is not formal authority, but process. "Private legislatures" rely on participation by affected stakeholders—particularly commercial actors and their lawyers—who have both the expertise and the incentive to develop efficient rules.[25] Because the outputs of these bodies are not binding unless adopted, their success depends on producing rules that relevant constituencies will accept. This absence of formal authority creates a form of market-like

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[23] *See* Edwin E. Smith et al., *A Summary of the 2022 Amendments to the Uniform Commercial Code*, 12 TRANSACTIONAL LAW. 1, 2 (2022) (summarizing rights of transferees).

[24] Schwartz & Scott, *supra* note 7, at 598–600.

[25] *Id.* at 606–15.

discipline: inefficient or impractical rules are unlikely to be adopted or followed.

At the same time, the authors acknowledge potential concerns about interest-group influence. Because participation is often dominated by repeat players—commercial lawyers and industry representatives—there is a risk that private legislatures will generate rules that favor those groups.[26] However, Schwartz and Scott argue that this risk is mitigated by the structure of the process itself. The need for broad acceptance of proposals and the resulting rules, including by courts and legislatures, constrains the extent to which any single group can impose self-serving rules. In their view, the requirement of consensus among informed participants tends to produce outcomes that are, on balance, efficient and welfare-enhancing.

Ultimately, Schwartz and Scott present private legislatures as a functional and often desirable alternative to traditional public lawmaking in specialized domains. Their analysis suggests that, under the right conditions, expert-driven, consensus-based processes can generate high-quality legal rules, even in the absence of direct democratic accountability. At the same time, their framework highlights the importance of participation, transparency, and institutional design in ensuring that such bodies remain responsive to a broader set of interests.

B. Moringiello (and Reynolds) on the Limits of Private Legislatures: The ALI's Principles of the Law of Software Contracts

Although a member of the ALI, and ever the diplomat, Juliet could be a tough critic. In *What's Software Got To Do With It?*, she and William L. Reynolds offered a sustained critique of the ALI *Principles of the Law of Software Contracts*, arguing that the project was premised on a questionable diagnosis of the underlying problem.[27] In effect, they identified the limits of the Schwartz-Scott theory of private legislatures.

The *Software Principles* were initially justified by claims of "disarray" in software contracting law, but, as the authors observe, the final version retreated to the more modest assertion that the law was "continu[ing] to develop" and required clarification.[28] Even so, they argued that the project

[26] *Id.* at 650–55. As explained below, for example, amendments to UCC Article 9 in the early 2000s were highly complex in response to evolving transactional practices, which legal educators found problematic.

[27] Juliet M. Moringiello & William L. Reynolds, *What's Software Got to Do with It? The ALI Principles of the Law of Software Contracts*, 84 TUL. L. REV. 1541, 1542 (2010).

[28] *Id.* at 1542 (alteration in original).

proceeded without adequately demonstrating that existing law—principally common law contract doctrine and UCC Article 2—was incapable of addressing the relevant issues.[29] In their view, the *Software Principles* reflected an effort to solve a problem that had not yet manifested.

From that premise follows a deeper critique of the project's substance. Moringiello and Reynolds argued that the *Software Principles* largely failed to address the genuinely software-specific issues that might have justified a separate body of law, particularly the distinction between licenses and sales and the relationship between contract law and federal intellectual property law.[30] Where these issues were treated, the discussion was limited or inconclusive. At the same time, the *Software Principles* devoted significant attention to general contract doctrines—including unconscionability, interpretation, and the "battle of the forms"—that were neither unique to software nor in evident need of reform in that context.[31] This mismatch between purpose and content, they suggest, undermined the coherence of the project.

The article also raised concerns about the institutional role of the ALI in undertaking a Principles project of this sort. Because such projects are explicitly normative—aimed at stating what the law *should be*—they carry a greater risk of overreach than Restatements. Moringiello and Reynolds cautioned that the *Software Principles* at times seek to alter well-settled doctrines, such as those governing choice of law and forum selection, without meaningful engagement from the broader communities of scholars and practitioners who typically shape those fields.[32] This, they warned, reflected a form of "mission creep," in which a project ostensibly focused on software transactions extends into general contract law under the imprimatur of the ALI.

At bottom, the critique is also a defense of the adaptive capacity of existing law, without need for the *Software Principles*. Drawing on their review of electronic contracting cases, the authors argued that courts were generally able to apply traditional contract principles to new technological contexts without significant difficulty.[33] The relative absence of persistent, software-specific doctrinal problems suggested, in their view, that the common law and the UCC are capable of evolving incrementally to meet new challenges (though of course significant new developments, such as digital

[29] *Id.* at 1542–43.
[30] *Id.* at 1543–47.
[31] *Id.* at 1547–49.
[32] *Id*. at 1553–55.
[33] *Id*. at 1552–53.

assets, would warrant a whole new Article of the UCC). They drew a cautionary lesson for law reform: projects should be grounded in clearly identified needs, should address those needs directly, and should remain within their defined scope. Otherwise, even well-intentioned efforts risk becoming, as they memorably concluded, "much ado about nothing."[34]

Situated against the best-case analysis of Schwartz and Scott, Moringiello and Reynolds were an important, insiders' reminder that private legislatures function well when they are anchored in practice and constrained by the need to solve real problems faced by those who will use the law. By addressing issues that were not uniquely tied to software, while leaving more difficult, genuinely contested questions unresolved, the project, in Moringiello's view, loosened the connection between law reform and the constituencies it is meant to serve. In this respect, her critique underscores a central insight of Schwartz and Scott's account: that the success of private legislatures depends not only on expertise, but on disciplined adherence to the limits and purposes that justify their role in the first place.

III. The Commercial Law Education Problem

If Juliet Moringiello found the *Software Principles* objectionable because they were not responsive to an accepted problem, it is worth pausing for a moment to consider how she might have viewed the ALI's *Restatement of the Law of Consumer Contracts* ("*RCK*"), which is perhaps the most controversial and contentious project ever undertaken by the ALI. The *RCK* "restates the common law of contracts as courts have applied it in the context of consumer contracts."[35] This has been contested because, as Adam Levitin has observed, "American law has never recognized a body of 'consumer contracts' law distinct from contract law writ large."[36]

The *RCK* project was completed shortly before Juliet passed away, so we do not know exactly what she would have thought of it. She did, however, coauthor an article critical of an early draft which questioned "the accuracy and soundness of the entire project."[37] The accuracy of the analyses underlying the *RCK* was problematic because the Reporters attempted to use "empirical" and quantitative methods to assess the state of the law of consumer contracts, rather than a doctrinal analysis of published, binding

[34] *Id*. at 1553.

[35] A.L.I. RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 1(b) (2024).

[36] Levitin, *supra* note 6, at 63.

[37] Adam J. Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REG. 447, 451 (2019) (Moringiello was one of several coauthors).

precedent.[38] Among other things, the scholars that Juliet joined had found coding errors and questioned basic assumptions in the empirical strategy, including that the empirical work relied on many lower federal court decisions, which could not have been binding precedent in any sense.

For present purposes, however, the accuracy of the *RCK* Reporters' methods is beside the point because they reflect one of several recent changes in the role of doctrine in commercial law education—a subject of considerable importance to Juliet Moringiello. Juliet was not merely a law reformer; she was also a legal educator of the first order. While she taught many courses, her role as an accomplished teacher of commercial law subjects—sales, secured transactions, and payment systems—seems especially salient now in light of growing concern that legal academia is losing touch with them.

The work of legal educators is sometimes likened to a three-legged stool: we teach, we engage in scholarship, and we perform service (of which law reform can be an important part). In some distant, and perhaps exaggerated, past, law professors were primarily doctrinalists, teaching professional discipline through the familiar—though sometimes unforgiving—Socratic method. That approach aimed both to instill mastery of existing law and to probe its limits. With the rise of legal realism, however, legal education increasingly turned outward, incorporating insights from other disciplines, including empirical efforts to understand the law in operation, and not merely in formal aspiration. That shift has, in many respects, enriched both scholarship and teaching. At the same time, it has contributed to a gradual rebalancing among theory, doctrine, and practice in at least three ways.

First, as academics like the Reporters of the *RCK* increasingly use empirical methods, they may lack facility with traditional doctrinal methods.[39] Indeed, the Reporters of the *RCK* conceded as much: "We are scholars devoted to studying the *effects* of laws and whether they achieve their intended consequences," they observed in a recent companion article to the

[38] *See* Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7 (2017) (describing the empirical methodology of case selection and presenting a subset of the findings on some actively debated issues).

[39] Lynn M. LoPucki, *Disciplining Legal Scholarship*, 90 TUL. L. REV. 1, 19 (2015) ("Although many legal scholars recognize 'the critical role of substantive, institutional knowledge in empirical inquiry' and the necessity to 'grappl[e] with substantive law,' disciplinary scholars tend to be blind to both.") (alteration in original) (quoting Daniel E. Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195, 1201 (2013)).

RCK.[40] "As Reporters, we now had to swim in the treacherous waters of doctrinal nuance. What could we possibly bring to a common law black letter codification project?"[41]

It is a fair question, and yet to ask it is to recognize that empiricism can crowd out doctrinal analysis. This is a problem because doctrine is the central analytic framework for most of what lawyers do. It may only be in the background much of the time, but it forms a shared vocabulary that makes reasoned discourse possible. Moreover, lawyers are not generally trained to assess or engage in empirical and quantitative studies. As noted above, while the ALI's traditional process was susceptible to criticism, it was methodologically legible to lawyers, because all competent lawyers understand how to read and analyze doctrinal precedent. Not so for quantitative studies and regression analyses. Thus, it is not clear whether or how practicing lawyers or judges could even assess for themselves the quality of these analyses.

Second, doctrine itself has become increasingly complex and more difficult to teach, perhaps nowhere more evident than in revisions to UCC Article 9. Article 9 was substantially revised in 1998, with an effective date in 2001. While it made important improvements over prior law, its "impenetrability," Jean Burns wrote at the time, "united all professors who did not serve on the drafting committee. None of us claims to understand it completely, and all of us dread teaching it."[42]

The complexity of the (then-) "new" Article 9 corresponded to a decline in its testing on state bar exams. Most recently, the National Conference of Bar Examiners made a decisive change: beginning with the July 2026 administration of the Uniform Bar Examination, secured transactions under UCC Article 9 will no longer be tested on the Multistate Essay Examination, a change designed to align the current exam with the forthcoming "NextGen" bar. In place of doctrine, the NextGen exam will increase emphasis on lawyering skills such as legal research, client counseling, negotiation, and problem solving, often in settings where the relevant law is provided rather than recalled. This shift—the third form of rebalancing in legal education—reflects a broader reorientation from doctrine toward practice, and from knowledge toward application.

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[40] Oren Bar-Gill et al., *A Companion Guide to the Restatement of Consumer Contracts* 2, CHICAGO UNBOUND (2025), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2711&context=law_and_economics.

[41] *Id.* at 2.

[42] Jean Wegman Burns, *New Article 9 of the UCC: The Good, the Bad, and the Ugly*, 2002 U. ILL. L. REV. 29, 32 (2002).

These developments are, on the whole, laudable. Doctrine divorced from testable hypotheses or the real needs of practice is problematic because doctrine is a means to an end—not an end in itself. But these developments come with a cost, which is a reduced emphasis on, or capacity to teach and test, commercial law subjects as a matter of legal doctrine. This reduced emphasis risks creating a downward spiral in which less testing leads to less teaching, which in turn diminishes the pool of lawyers and scholars equipped to engage with the doctrinal systems that govern commercial transactions.

Unlike some other fields, commercial law is highly structured and deeply embedded in statutory frameworks such as the UCC. Doctrine matters. The development and maintenance of these frameworks depend on sustained engagement with doctrine—not only understanding what the rules are, but how they fit together and how they operate in practice. When doctrinal instruction recedes, so too does exposure to the intellectual habits that make this kind of work possible. Soon, it will be possible to become a U.S. lawyer with no demonstrable understanding of liens, priority or bona fide purchase. This is a remarkable, and potentially problematic, development because these are central features not just of commercial law, but of the law of private ordering, generally.

Recognizing this risk, a number of commercial law scholars have recently begun to organize around the continued importance of teaching these subjects, even in the absence of bar exam coverage.[43] Their efforts reflect an understanding that commercial law is not merely a specialized field, but a foundational component of the legal system's infrastructure—one that underlies lending, payments, and the broader functioning of markets. The concern is not simply pedagogical, but institutional: without sustained engagement in the classroom, the capacity of the legal profession to participate effectively in law reform—particularly in the "private legislatures" that shape commercial law—may gradually erode.

Juliet's career reminds us of what is at stake. She was, as I have suggested, a mediator among theory, doctrine, and practice, but her work was firmly anchored in doctrine and in the institutions that sustain it. She appreciated the contributions of other disciplines and engaged seriously with emerging issues, including those posed by new technologies. But she also understood that academic insight, however sophisticated, must ultimately be

[43] *See* Anthony J. Palermo, Kara J. Bruce & Laura N. Coordes, *An Open Letter to Law School Deans About the Importance of Commercial Law Education* (Apr. 20, 2026) (unpublished manuscript) (on file with author). While scores of law professors signed the letter, it came too late to garner Juliet's signature. I am confident that she would have signed it.

translated into rules that courts can apply and that lawyers can use. It is no accident that her scholarship (with Christopher Odinet) on digital assets focused on their characteristics as "property," a core doctrinal category.[44] Linking doctrine to theory and practice, as Juliet did, requires a form of expertise that is not easily acquired outside the discipline of law itself. In a moment when both legal education and legal practice are evolving in ways that may diminish the centrality of doctrine, her example underscores its continuing importance—not as an end in itself, but as the framework within which theory and practice can be brought into productive alignment.

Conclusion

Juliet Moringiello's career illuminates both the promise and the limits of the institutions that quietly make much of American commercial law. The ALI, the ULC, and the BLS depend on a particular kind of participant—one who is willing to engage deeply with doctrine, to listen across constituencies, and to translate between theory and practice. These institutions do not command authority; they earn it. And they earn it only when the people within them adhere to the disciplines that make consensus possible and outcomes legitimate.

That is why the developments described in this essay should give us pause. If legal education is moving away from sustained engagement with doctrine—whether because of new methods of scholarship, doctrinal complexity, or changing bar examinations—then it is also moving away from producing the kinds of lawyers and scholars on whom these institutions depend. The point is not that empirical work or skills training are misguided (I am a strong supporter of both). To the contrary, they have enriched legal education in important ways. But, without a grounding in doctrine and in the institutional practices of law, such work risks becoming detached from the systems they ultimately seek to influence.

Juliet understood this. She was neither a throwback to an earlier mode of legal education, nor a critic standing outside the academy's evolution. She was a participant in it, but one who insisted that law reform requires more than good ideas. It requires the capacity to embed those ideas within a structure of rules, institutions, and practices that can sustain them. Her critique of the *Software Principles* was, in this sense, not an outlier, but an expression of a deeper commitment: that reform must be anchored in real

[44] Juliet Moringiello & Christopher Odinet, *The Property Law of Tokens*, 74 FLA. L. REV. 607, 609 (2022).

problems, disciplined by institutional limits, and responsive to the communities it affects.

There is a more pointed lesson here. If we continue to deprioritize doctrinal fields such as commercial law in legal education, we should not be surprised if the institutions that depend on doctrinal expertise begin to weaken. Private legislatures function well when they are anchored in practice and disciplined by the need to solve real problems. But those conditions are not self-executing. They depend on a pipeline of lawyers and scholars who are trained to think doctrinally, who understand how legal systems fit together, and who are willing to engage in the often slow, collaborative work of reform. Without that pipeline, the risk is not only that doctrine will fade, but that the quality and legitimacy of lawmaking itself will suffer.

Professor Juliet Moringiello's career thus stands as both an example and a warning. It shows what these institutions can achieve when they are populated by individuals of judgment, discipline, and integrity. But it also highlights how much they depend on a form of legal education that is no longer assured. The challenge going forward is not to resist change, but to ensure that, in embracing new forms of scholarship and new modes of education and practice, we do not lose the connective tissue that allows law to function as a coherent and durable system. Juliet spent her career preserving and strengthening that connective tissue. The question is whether we will continue to do so.

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