COMMERCIAL LAW, FEDERALISM, AND THE FUTURE

By Lawrence J. Bugge*

One hundred and forty years ago, in an 1851 lecture to the Law Academy of Philadelphia, John William Wallace[1] made the following observation:

> I have seen in the courts of England, its robed and venerable judges bending forward as they listened, on commercial questions to the laws of Rhodes, a little island; the laws of Oleron, an island smaller still; the laws of Wisby, a dreary town of the Gothland Seas. But I waited in vain to hear the commercial law of my own, free, great, commercial country. . . . And why. . . . Because no man can say that such a system exists.[2]

Wallace would have to wait a full century for a uniform, comprehensive body of commercial law for this country. The wait ended with the promulgation of the Uniform Commercial Code (UCC) in 1951.

Appreciation of the need for uniformity in commercial and other areas of the law was not confined to Mr. Wallace.[3] At its founding in 1878, the American Bar Association's (ABA) Constitution proclaimed as one of its purposes the achievement of uniformity of legislation throughout the union,[4] a purpose still set forth in section 1.2 of its Constitution. Subsequently, in 1881, the Alabama State

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This article is derived from the Francis G. Pileggi Distinguished Lecture in Law delivered by the author at the Widener University School of Law on April 3, 1990.

1. John William Wallace was a Philadelphia lawyer who later became the Reporter for the United States Supreme Court.

2. J. Wallace, The Want of Uniformity in the Commercial Law Between the States of Our Union Discourse Delivered Before the Law Academy of Philadelphia 31 (Dec. 26, 1851) (L.R. Bailey, Printer).

3. In his Discourse, Mr. Wallace quoted Chief Justice Shaw of Massachusetts: "[I]t is greatly desirable, that throughout all the States of the Union, which, to many purposes, constitute one extended commercial community, the rules on this subject should be uniform." Staples v. Franklin Bank, 42 Mass. (1 Met.) 43, 47 (1840).

4. ABA Const. § 1.2 (1971) (adopted Aug. 24, 1936; substantially revised July 21, 1971).

Bar Association created a committee to make recommendations for means to achieve uniformity of law between the states.[5] It was hoped that this action would bring the subject to the attention of the bar associations of other states.[6]

In 1889, the president of the Tennessee Bar Association urged the ABA to adopt a resolution recommending a convention of delegates from every state to meet and work on the creation of uniform laws.[7] Later that same year, the ABA did adopt such a resolution and appointed a committee to make recommendations and to adopt measures to achieve "uniformity in the laws of the several states, especially those relating to marriage and divorce, descent and distribution of property, acknowledgment of deeds, [and] execution and probate of wills."[8]

The very next year the ABA resolution bore fruit. In 1890, the New York State Legislature adopted a bill appointing three commissioners from that state

> to ascertain the best means to effect an assimilation and uniformity in the laws of the states, and especially to consider whether it would be wise and practicable for the State of New York to invite other states of the Union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several states . . . .[9]

Later that same year, the ABA endorsed the New York action and recommended the enactment of similar legislation by each state.[10] By the end of 1891, five other states had followed New York's example.[11]

On August 24, 1892, at the invitation of New York, commissioners from seven states met for three days in Saratoga to ascertain "the best means to effect an assimilation and uniformity in the laws

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5. W. ARMSTRONG, JR., A CENTURY OF SERVICE—A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 16 (1991).

6. *Id.*

7. *Id.* at 17.

8. *Id.* at 18 (W.A. Collier of Tennessee presented the quoted resolution to the annual meeting of the ABA in Chicago in August of 1889).

9. *Id.* at 19 (quoting The Committee on Judiciary Law Reform Report to the American Bar Association of 1890).

10. *Id.*

11. *Id.*

of the states."[12] The Uniform Law Conference was born. Delaware was a charter member, along with Georgia, Massachusetts, Michigan, New Jersey, New York, and Pennsylvania.

Soon thereafter, in 1896, the Conference published its first major Commercial Law Project, the Negotiable Instruments Law, which was quickly and universally adopted by the states.[13] In 1949, James T. Connor of New Orleans, a commissioner who served for fifty-one years, wrote: "It is probably not too much to claim that the sponsorship of a uniform negotiable instruments law . . . as one of its first undertakings gave to the Conference the standing and prestige which assured its continuity and growth in importance."[14]

From its beginnings, the Conference has emphasized projects relating to commercial law and commerce among the states. However, the Conference also has addressed a myriad of other subjects, ranging from birth (abortion,[15] assisted conception[16]) to death (rights of the terminally ill,[17] determination of death[18]) and including marriage and divorce,[19] parentage,[20] adoption,[21] marital property,[22] and even flag desecration.[23] Because of its obvious necessity, uniform commercial law has been the Conference's most widely adopted and most successful product. Commercial law is epitomized by the Uniform Commercial Code which Professors White and Summers have called "the most spectacular success story in the history of American law."[24]

As the Conference observes its centennial, commencing with its 100th meeting in August 1991, it is appropriate to review its spec-

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12. *Id.*

13. *Id.* at 25-26.

14. Connor, *The Work of the National Conference of Commissioners on Uniform State Laws*, 23 TUL. L. REV. 518, 522 (1949).

15. Revised Unif. Abortion Act, 9(I) U.L.A. 1 (1973 & Supp. 1991).

16. Unif. Status of Children of Assisted Conception Act, 9B U.L.A. 102 (Supp. 1991).

17. Unif. Rights of the Terminally Ill Act, 9B U.L.A. 96 (1985 & Supp. 1991) (revised 1989) (presently slated for further revision by a Conference Drafting Committee for a Health Care Consent Act).

18. Unif. Determination of Death Act, 12 U.L.A. 338 (Supp. 1991).

19. Unif. Marriage and Divorce Act, 9A U.L.A. 147 (1970 & Supp. 1991) (since withdrawn).

20. Unif. Parentage Act, 9B U.L.A. 287 (1973 & Supp. 1991).

21. Unif. Adoption Act, 9(I) U.L.A. 11 (1953 & Supp. 1991) (amended 1969 & 1971) (since withdrawn) (a Drafting Committee of the Conference is currently working on a replacement act).

22. Unif. Marital Property Act, 9A U.L.A. 97 (1983 & Supp. 1991).

23. Unif. Flag Act (1917) (since withdrawn).

24. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 5 (3d ed. 1988).

tacular success story: how it came about; how it is now threatened, in part by federal encroachment, and in part by its own success; and what must be done to preserve its benefits.

I. BACKGROUND OF THE NATIONAL CONFERENCE

Although it was organized 100 years ago and held its first meeting in 1892, the Conference is not widely known even within the legal community. Originally referred to as the Conference of the State Boards of Commissioners on Promoting Uniformity of Law in the United States, its present and only slightly improved name was adopted in 1915.[25] Although we often refer to the Conference as the Uniform Law Commissioners (ULC), there have been several failed attempts to come up with a shorter title or a pronounceable acronym. Nevertheless, the National Conference of Commissioners on Uniform State Laws (NCCUSL) remains our official name, and one law professor and commissioner was prompted to write an article titled "The NCCUSL: With a Name Like That It Must Be Useful."[26]

Regardless of its shortcomings, the name of the organization is both descriptive and accurate. The Conference is an unincorporated confederation of state delegations consisting of lawyers appointed by the governor or legislature of each United States jurisdiction, including the District of Columbia, Puerto Rico, and the Virgin Islands. Presently, there are 322 commissioners representing most legal careers.

- 49% of the commissioners are in private practice, 20 of whom are also part-time legislators;
- 14% are law professors or deans of law schools;
- 7% are state or federal judges, including 4 state supreme court justices, 3 federal court of appeals judges, and 1 Delaware vice-chancellor;
- 25% are state officials or employees, many of whom serve *ex officio* as associate commissioners by virtue of their employment as legislative agency draftsmen;
- 3% are house counsel or in private business; and
- 3% are full-time state legislators.

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25. ARMSTRONG, *supra* note 5, at 30.

26. Hogan, *The NCCUSL: With a Name Like That It Must Be Useful*, 5 CORNELL L.F. 2 (1979).

Among the nearly 2,000 men and women who have served as commissioners in the last ninety-nine years are some of the most distinguished members of our profession. They include: Supreme Court Justices Brandeis,[27] Rehnquist,[28] and Rutledge;[29] President Woodrow Wilson;[30] Dean Roscoe Pound;[31] and Professors George Bogart,[32] John Wigmore,[33] and Samuel Williston.[34] Twenty-one ABA presidents have served as commissioners; three of whom were presidents of the Conference.[35]

Many commissioners serve for extended periods. Those who serve twenty years may become Life Members, no longer requiring state reappointment.[36] Over 135 commissioners have achieved this distinction. All commissioners serve without compensation and many even serve without reimbursement for their expenses while attending the week-long annual meeting.

The Delaware delegation is a distinguished one and presently includes:

- Vice-Chancellor Maurice Hartnett III, who is a Life Member;
- State Family Court Judge Battle Robinson;
- Professor Ann Stilson of Widener University School of Law;
- Practitioner W. Laird Stabler of Potter, Anderson & Corroon of Wilmington; and
- Thomas A. Shiels of Delaware's Legislative Council.[37]

Past distinguished Delaware commissioners include Delaware's original three "charter" commissioners: Thomas Bayard (1892-1898),[33]

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27. ARMSTRONG, *supra* note 5, at 199 (Supreme Court Justice Brandeis served for Massachusetts (1900-1905)).

28. *Id.* at 181 (Supreme Court Justice Rehnquist served for Arizona (1963-69)).

29. *Id.* at 194 (Supreme Court Justice Rutledge served for Iowa (1937-1942)).

30. *Id.* at 209 (President Wilson served for New Jersey (1901-1908)).

31. *Id.* at 206 (Dean Pound served for Nebraska (1906-1907)).

32. *Id.* at 182 (Professor Bogart served for California (1951-1958)).

33. *Id.* at 191 (Professor Wigmore served for Illinois (1908-1924, 1933-1942)).

34. *Id.* at 200 (Professor Williston served for Massachusetts (1910-1928)).

35. *Id.*

36. NCCUSL CONST., art. 2, § 2.3 (1990). This honor is granted upon the recommendation of the Executive Committee and by the affirmative vote of two-thirds of the commissioners present. *Id.*

37. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1990-91 REFERENCE BOOK 20.

38. ARMSTRONG, *supra* note 5, at 186.

who later became a United States Senator; George Valentine Massey (1892-1902),[39] who was chief counsel for the Pennsylvania Railroad; and Alfred B. Robinson (1892-1893),[40] who, at the time, was the most prominent lawyer in Georgetown—and a forebear of Judge Battle Robinson's husband. William Prickett (1926-1963),[41] founder of the prominent Wilmington firm of Prickett, Jones, Elliott, Kristol & Schnee, became a Life Member and served for thirty-seven years. Additional commissioners were James M. Tunnell (1919-1940),[42] a United States Senator; his son James M. Tunnell, Jr. (1941-1944, 1953-1954),[43] a Justice on Delaware's first Supreme Court and later a senior partner in the Wilmington law firm of Morris, Nichols, Arsht & Tunnell; Senator William V. Roth, Jr. (1961-1966);[44] and Chancellor William T. Allen (1978-1988).[45]

Although he was never a commissioner, the late Widener University School of Law Emeritus Professor, Fairfax Leary, Jr., indelibly stamped his mark on the Conference and Uniform Commercial Code. "Fax" served as the reporter for the original Article 4 of the Code nearly forty years ago and, until his death in 1990, he served as an indispensable advisor to the drafting committee charged with revising Articles 3 and 4 and creating Article 4A. He was also, at the time of his death, the reporter for two other Conference committees, the Uniform Foreign Money Claims Act, and a proposed act on Pre- and Post-judgment Interest.

II. HOW THE CONFERENCE OPERATES

The process and procedures of the Conference are difficult to understand. It may be helpful, therefore, to trace the path of a Uniform Act from conception to promulgation by the Conference.

Suggestions for new projects originate from many sources, including state legislatures, the ABA, the American Law Institute, and the commissioners themselves. Any such suggestions are referred to, and reviewed by, a standing committee on Scope and Program.[46]

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39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts of August 2, 1988*, at 105, 108 [hereinafter *NCCUSL Statement of Policy*], *in* NCCUSL REFERENCE BOOK, *supra* note 37.

That committee sometimes recommends further study and suggests that a special study committee be created to further evaluate a suggested project.[47] On the basis of its own review or the report of a Study Committee, the committee on Scope may then recommend that the Executive Committee authorize a drafting committee to prepare an Act.[48]

Once a project is approved by the Executive Committee, the president of the Conference appoints a drafting committee comprising seven or eight commissioners.[49] In addition, a reporter, usually a law professor with experience in the subject matter of the project, is selected, and advisors and observers with expertise in the field at issue are identified and invited to participate. Finally, under a standing agreement, the ABA always appoints an official liaison to each Conference drafting committee, and members of interested ABA sections often appoint their own advisors as well.[50]

Drafting committees assemble at least twice each year at three-day weekend meetings to draft and revise their product. Each drafting committee then presents its draft to the full Conference, sitting as a Committee of the Whole, at the annual meeting.[51] The draft is then read and debated, section by section, at not less than two successive annual meetings.[52]

After a draft is presented and debated, it is put to a vote by the Conference, again sitting as the Committee of the Whole, where each individual commissioner has a vote.[53] If the Committee of the Whole approves the draft, the draft must then be adopted by a majority of the states in a vote where each state, as represented, has one vote.[54] Upon approval by the Conference, Acts are customarily presented to the ABA House of Delegates for endorsement.[55] ABA approval, however, is not required for the promulgation of a Uniform Act.

For UCC projects, new articles and amendments must also be approved at an annual meeting of the American Law Institute, the

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47. *Id.* § 6(c).
48. *Id.*
49. HANDBOOK OF THE NCCUSL 511 (1989).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* ("[A]n act is not promulgated unless a majority of the states represented at an annual meeting and at least twenty jurisdictions have approved the draft.").
55. *Id.*

Conference's partner in developing and revising the Code.[56] Once an Act is approved, commissioners are obligated to procure consideration of the Act in their respective states.[57]

III. THE CASE FOR UNIFORMITY OF STATE LAW—1851, 1891, AND TODAY

The disadvantages of nonuniformity of state law were eloquently stated by John William Wallace in 1851:

> [O]ur law is essentially defective, when our people shall be safe in their business, while they are on one side of a river or surveyor's line, and not safe if they step across it; shall hold their debtor tight, if they can sue him here, and hold him not at all, if they must sue him there; shall find that justice as laid down in some State Courts, is injustice as laid down in other State Courts; and is not known as either in a court of all the States—The Union; . . . where, in fact, law is a science of *geography*, almost as much as of *justice*.[58]

The advantages of certainty and predictability are many:

1. Uniform laws promote economic development by enabling business to be conducted across state lines in the framework of familiar and uniform laws.
2. Uniformity assists individuals, who regularly travel or move from one state to another and enter into family transactions or own property across state lines.
3. For individuals and businesses, uniformity simplifies transactions, and thus reduces transaction costs and delays.
4. Uniform laws lessen the need for federal laws dealing with the same topics, keeping local matters in the hands of the local people.

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56. Agreement Describing the Relationship of the American Law Institute, The National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board With Respect to the Uniform Commercial Code 3-4 (July 31, 1986).

57. *NCCUSL Statement of Policy*, *supra* note 46, § 7, at 109. However, once a commissioner procures consideration of the Act, the commissioner is not obligated to express support for its enactment.

58. Wallace, *supra* note 2, at 28.

5. The process used to draft uniform acts assures that the legislatures will receive well-drafted bills on important topics, thus conserving scarce legislative resources and ensuring consideration of an entire subject, rather than piecemeal responses to immediate problems.
6. Uniform laws are the product of input from representatives of all sections of the nation, reflecting the public policy of the states and an appropriate balancing of regional interests.
7. [Uniform acts provide the courts] with the benefit the drafters' comments and precedent from other states.
8. Finally, the states may be assured that as commerce and society evolve, uniform laws will be reviewed and revised as appropriate, and kept current and responsible to existing needs.[59]

IV. HOW CAN UNIFORMITY BE ACHIEVED?

A. *Federal Common Law*

In 1842, speaking for the Court in *Swift v. Tyson*,[60] Justice Story held that "the true interpretation and effect [of contracts and other instruments of a commercial nature] are to be sought . . . in the general principles and doctrine of commercial jurisprudence,"[61] and not in state law. Thus, for nearly 100 years, until *Erie Railroad Co. v. Tompkins*,[62] the federal courts were free to construct or to consult a brooding omnipresence of federal common law for commercial transactions.

In 1851, John William Wallace suggested, as a cure for the nonuniformity of commercial law, that state courts should "regard the decisions of the Federal Judiciary as a binding and superior authority" on questions of commercial law.[63] His preferred solution, which would have required a Constitutional amendment, would have

59. Miller, Fry, & Burton, *Introduction to the Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 BUS. LAW. 1449 (1991).

60. 41 U.S. (16 Pet.) 1 (1842) (overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938)).

61. *Id.* at 171.

62. 304 U.S. 64 (1938).

63. Wallace, *supra* note 2, at 30.

given a right of appeal from state courts to the United States Supreme Court in all commercial law cases.

However, since common law was not comprehensive and dealt only with questions arising in individual cases, it would have provided little guidance. Federal common law, without a requirement that state courts follow it, would provide little protection because federal jurisdiction was limited: No one could predict whether the federal courts would be available if a dispute arose in a particular commercial transaction.

B. A Federal Commercial Code

Wallace thought that a Federal Commercial Code could never achieve uniformity since it would be subject to interpretation by the then thirty-one separate court systems.[64] Moreover, Congress exercised its power to regulate interstate commerce sparingly, if at all.

Thus, in 1851, as in 1891, commercial law and most other subjects of private legal relationships, including contract law, marriage and divorce, probate, and business organizations, were considered to be the exclusive province of state law.[65] As Madison had said in Number 45 of *The Federalist*:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all of the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .[66]

Consistent with that view, the tenth amendment of the Constitution epitomized the federal system by reserving to the states "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states . . . ."[67]

Thus, in the nineteenth century, voluntary adoption of uniform legislation by the states was perceived as the only available method to obtain uniformity that would be consistent with state sovereignty and the limited power of Congress. It is probably no coincidence

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64. *Id.*
65. ARMSTRONG, *supra* note 5, at 12.
66. A. HAMILTON, J. MADISON & J. JAY, THE FEDERALIST 319 (1937).
67. U.S. CONST. amend X.

that the choice of this path, and the origin of the Conference in 1891, coincided with the centennial celebration for the Bill of Rights and its tenth amendment.

V. THE INCREASE OF FEDERAL ENCROACHMENT

As many persons have observed, the restraints that federalism and the tenth amendment place on the power of Congress to legislate on local issues are hardly felt today. Beginning in 1942 with *United States v. Wrightwood Dairy*,[68] the Supreme Court has read the Commerce Clause to permit regulation of purely intrastate transactions that somehow "affect" interstate commerce.

Ironically, this extension of federal *legislative* power coincided roughly with the 1938 repeal of federal *judicial* power to create a federal commercial law.[69] Perhaps even more ironically, in August 1940, the Conference voted to undertake the development of the Uniform Commercial Code.

Over the years, Congress has not hesitated to exercise its newly recognized and expanded powers under the Commerce Clause. For example, beginning in 1968, Congress imposed disclosure requirements in consumer credit transactions, even to the point of regulating type size and format for credit card applications and monthly statements.[70]

But in that case, even Congress seemed to know that the Interstate Commerce Clause would not justify such local legislation. Apparently for that reason, the bill recited that the Consumer Credit Protection Act was grounded in the bankruptcy clause of the Constitution on the theory that informed use of credit would reduce the need for additional bankruptcy courts.[71] Even that attenuated theory was not used for the Equal Credit Opportunity Act,[72] passed in 1974, under which Congress restricts the questions that purely local creditors

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68. 315 U.S. 110 (1942).

69. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). "Whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal common law." *Id.* at 78.

70. The Consumer Credit Protection Act, 15 U.S.C. § 1601 (1988).

71. *See* S. REP. No. 392, 90th Cong., 2d Sess., Conf. R. No. 1397 (1967) ("Thus, it seems clearly within the power of the Congress to protect the Federal statutory right, and to ensure that the bankruptcy laws will be carried into execution by enacting legislation to prohibit extortionate credit transactions.").

72. 15 U.S.C. § 1691 (1988).

may ask any applicant in a credit transaction and regulates the inferences that may be drawn from the answers.

It is not surprising, therefore, that Congress and federal agencies also began regulating commercial law and preempting or overlaying significant areas of the Uniform Commercial Code. Existing examples include the following:

1. The Magnuson-Moss Warranties Act of 1975,[73] which supersedes provisions of Article 2 of the UCC relating to warranties in respect to consumer sales;
2. The 1972 FTC Door to Door Sales Rule,[74] which makes certain consumer sales contracts rescindable;
3. The 1975 FTC Trade Practice Rule on the Preservation of Consumers' Claims and Defenses,[75] which overrides portions of Article 3 of the UCC by precluding the use of negotiable instruments in consumer sales transactions;
4. The 1984 FTC Credit Practices Rule,[76] which overrides Article 3 of the UCC regarding the use of cognovit notes and cosigners on consumer credit transactions and overrides Article 9 of the UCC by invalidating nonpurchase-money security interests in consumer goods;
5. The Food Security Act of 1985,[77] which overrides UCC section 9-307(1) with respect to the continuing validity of a security interest in farm products despite their sale to buyers in the ordinary course of business;
6. The Expedited Funds Availability Act of 1987,[78] which supersedes those portions of Article 4 of the UCC relating to the return of dishonored checks and which authorizes the Federal Reserve Board to adopt similar regulations preempting Article 4 with regard to the forward collection process of checks; and
7. The Market Reform Act of 1990,[79] which authorizes the SEC to preempt entire sections of Article 8 of the

73. 15 U.S.C. § 2301 (1988).
74. 16 C.F.R. § 429 (1991).
75. 16 C.F.R. § 433 (1991).
76. 16 C.F.R. § 444 (1991).
77. 7 U.S.C. § 1631 (1988).
78. 12 U.S.C. § 4001 (1988).
79. Pub. L. 101-432, § 5(b) (1990).

UCC relating to clearing of securities transactions and the granting and perfection of security interests in marketable securities and securities accounts.

The development of commercial law occurs primarily through legislation at the federal and state level. Some may argue that federalization of commercial law is more efficient and effective than the methodical development and prolonged enactment process required for uniform acts. The record, however, suggests the opposite.

When Congress does act on matters of commercial or consumer law, the task is delegated to unelected administrative agencies to legislate by regulation, and the resulting product is generally poorly constructed. The Truth in Lending Act[80] is an example of lengthy Congressional legislation. The development of this Act spawned twelve years of litigation in the federal courts, including the Supreme Court, encompassing issues such as the type size and location of credit disclosures. Similarly, the Food Security Act,[81] which reversed the rule under Article 9 of the UCC regarding security interests in farm products, was initially unworkable and almost unintelligible.

By contrast, legislation at the state level, particularly legislation achieved through the adoption of uniform acts, produces a superior result. Local regulation and administration is usually more accessible and less cumbersome, for example, with respect to perfection of security interests under Article 9.

Legislation and regulation at the state level is generally more efficient because states have existing enforcement structures. Federal agencies, by comparison, generally have to be created or expanded to duplicate existing state capabilities. Moreover, local governance of commercial transactions permits flexibility and diversity, even in the context of uniform or model legislation. For example, the state of Delaware has achieved a deserved reputation for ingenuity and innovation for its version of the Model Business Corporation Act[82] and the Uniform Limited Partnership Act.[83]

The quality of legislation developed and available to state lawmakers through organizations like the Conference, the ALI, the ABA, Law Revision Agencies, and the State Bar is consistently higher than that of federal legislation. On occasions when Congress relies on

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80. 15 U.S.C. § 1601 (1988).
81. 7 U.S.C. § 1281 (1988).
82. DEL. CODE ANN. tit. 8, § 101 (1983 & Supp. 1990).
83. DEL. CODE ANN. tit. 6, § 17-101 (Supp. 1990).

expert study and review committees, as it did when revising the Bankruptcy Act[84] in 1978, the Federal Commission is temporary and the process is often politicized.

In contrast, the Conference operates independently of any particular legislature, interest group, or perceived political urgency. Because the Conference uses commissioners who are politically disinterested and legally trained drafting experts, and, because it consults and involves those who are affected by the legislation, the Conference generally produces a much superior statutory product.

Most importantly, the achievement of uniformity through parallel state adoptions, rather than by preemptive Congressional enactment, preserves the prerogatives of the states in the federal system that was described by Madison and prescribed by the tenth amendment.[85]

VI. "NEW" UNIFORM COMMERCIAL CODE

As mentioned above, the UCC is, by far, the most important and most successful project of the Conference.[86] Nevertheless, in a sense, the continued vitality of the UCC is threatened as much by its own success as by federal preemption.

The UCC remains the most ambitious undertaking of the Conference. Approved as a project in 1940, the Conference was joined by the American Law Institute as a co-sponsor in 1944.[87] The Code embraced topics formerly covered by seven different uniform acts: the Negotiable Instruments Law,[88] Warehouse Receipts Act,[89] Sales Act,[90] Bills of Lading Act,[91] Stock Transfer Act,[92] Conditional Sales Act,[93] and Trust Receipts Act.[94]

In 1951, the original version of the UCC was approved by the Conference and the ALI and endorsed by the ABA.[95] Early in 1953,

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84. 11 U.S.C. § 101 (1988).
85. *See supra* notes 64-67 and accompanying text.
86. *See supra* note 24 and accompanying text.
87. ARMSTRONG, *supra* note 5, at 57.
88. 5 U.L.A. 1 (1943) (since withdrawn).
89. 3 U.L.A. 1 (1959) (since withdrawn).
90. 1 U.L.A. 1 (1950) (since withdrawn).
91. 4 U.L.A. 1 (1922) (since withdrawn).
92. 6 U.L.A. 1 (1922) (since withdrawn).
93. 2 U.L.A. 1 (1951) (since withdrawn).
94. 9A U.L.A. 274-317 (1951) (since withdrawn).
95. ARMSTRONG, *supra* note 5, at 75. On May 18, 1951, the Conference approved the UCC "with the power nevertheless in the Editorial Board to approve the comments and to make such further changes in style and other editorial changes as may be required for clarity and consistency in the Code." *Id.*

the Code was introduced in the Pennsylvania legislature and promptly enacted without a dissenting vote.[96] It was signed by the Governor thirty-eight years ago on April 3, 1953.[97]

It is not surprising that Pennsylvania was so receptive to the Code. Pennsylvania was the home state of Commissioner William A. Schnader, president of the Conference in 1940. Commissioner Schnader first proposed the UCC project and chaired the UCC committee of the Conference. "General" Schnader was twice Attorney General of Pennsylvania and received the ABA Gold Medal for conspicuous service to American jurisprudence for his work on the Code.

The Code was significantly revised before achieving its next adoption by Massachusetts in 1957.[98] After further revision, New York adopted the Code in 1962[99] and other states quickly followed. Delaware adopted the Code in 1966, with an effective date of July 1, 1967.[100] By 1968, every state and territory had adopted the Code except for Louisiana which has failed to adopt certain provisions.[101] Although the legislative process was protracted and difficult, it was also extraordinarily successful. A full generation of American lawyers cannot conceive of a world without the UCC.

Because commercial law and practice are constantly changing, the UCC cannot remain static if it is to retain its success. Thus, in 1972, clarifying amendments to Article 9 were proposed by the Conference, and they have been adopted in all but one state (and the territories of the Virgin Islands and Puerto Rico).[102] Similarly, in 1977, necessary amendments to Article 8 were proposed to accommodate transactions in uncertificated securities, a phenomenon unknown when the Act was originally drafted.[103] Unfortunately, nine jurisdictions have yet to enact the Article 8 amendments although four of these jurisdictions have introduced bills to do so this year.[104]

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96. Pub. L. No. 3, § 1-101 (Apr. 6, 1953) (current version at 13 PA. CONS. STAT. ANN. § 1101 (Purdon 1980)).

97. *Id.*

98. St. 1957, c. 765, § 1 (current version at MASS. GEN. LAWS ANN. ch. 106, §§ 1-101 (West 1990)).

99. L. 1962, c. 553, §§ 1-101 (current version at N.Y. UNIFORM COMMERCIAL CODE LAW §§ 1-101 (McKinney 1964 & Supp. 1991)).

100. DEL. CODE ANN. tit. 6, §§ 10-101 (1975 & Supp. 1990).

101. ARMSTRONG, *supra* note 5, at 77.

102. NCCUSL REFERENCE BOOK, *supra* note 37, at 110.

103. Uniform Commercial Code, art. 8, 2C U.L.A. 267 (1991).

104. NCCUSL REFERENCE BOOK, *supra* note 37, at 110.

The failure to achieve universal enactment of these Article 8 amendments was cited by the SEC when it sought authority to preempt whole portions of Article 8 by administrative rule. The SEC received that authority last fall under the Market Reform Act of 1990.[105]

More recently, as commerce has changed and new industries have arisen, the Conference has revisited the forty-year-old Commercial Code and made substantial revisions. These revisions include:

1. *Article 2A.* In 1987, an entirely new Article 2A, patterned after existing Article 2 on sales, was promulgated to deal with commercial leasing of personal property.[106] Already adopted in twenty states, it is pending in sixteen others. Because of nonuniform amendments adopted in some states, the Conference revised Article 2A last year to accommodate the concerns expressed in those nonuniform provisions.[107] Rapid and uniform enactment of Article 2A should follow.
2. *Article 4A.* In 1989, another new article was approved. Article 4A, which deals with wholesale wire transfers of funds, was enacted to regulate a trillion-dollar business for which no prior statutory law existed.[108] Thirty-two states, including California, Illinois, and New York, have already enacted this Article without a dissenting vote, and it is pending in the legislatures of eleven others. Article 4A may set a record for speed in achieving universal enactment.
3. *Article 6.* In 1989, the Conference also recommended repealing Article 6 of the UCC relating to Bulk Transfers on the grounds that Article 6 was too cumbersome, offered little protection to unsecured creditors, and was haphazard in its application.[109] Recognizing, however, that repeal might be politically unacceptable in some states, an alternative, revised, and clarified version of the article was also made available.[110] Fourteen states

105. Coordinated Clearance and Settlement Act of May 8, 1990.
106. Uniform Commercial Code, art. 2A, 1B U.L.A. 647 (1989 & Supp. 1991).
107. *Id.*
108. Uniform Commercial Code, art. 4A, 2B U.L.A. 455 (1991).
109. Uniform Commercial Code, art. 6, 2C U.L.A. 5 (1991).
110. *Id.*

have already adopted one of the other versions, and they have been introduced by six other states.

4. *Articles 1, 3 and 4.* Most recently, at the 1990 annual meeting, the Conference approved revisions to Article 3 on Negotiable Instruments with conforming amendments to Articles 1 and 4.[111] These revisions and amendments were approved in order to modernize the law governing checks and other negotiable instruments.[112] Ten states have already adopted these amendments and they are presently pending in ten other states.
5. *Article 5.* More changes to Article 5 are soon to follow. This year a Conference drafting committee began work on the revision of Article 5 which deals with letters of credit.[113] The project will attempt to relate that rather sketchy Article to the Uniform Customs and Practices of the International Chamber of Commerce concerning letters of credit, which are currently also under revision. In addition, the United Nations Commission on International Trade Law (UNCITRAL) has formed a working group to explore the possibility of a model statute or international convention to govern standby letters of credit and international bank guaranties.[114] Our Conference Committee plans to coordinate its work with that project as well. Current plans call for a first reading of Article 5 in 1992, approval by the ALI in 1993, and final approval by the Conference in August 1994.
6. *Article 2.* One step behind is Article 2 regulating the sale of goods. As the oldest part of the Code, Article 2 has been the subject of a three-year study by a committee operating under the aegis of the Permanent Editorial Board for the Uniform Commercial Code.[115]

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111. Uniform Commercial Code, art. 3, 2 U.L.A. 5 (1991).
112. *Id.*
113. Minutes of the Executive Committee of the NCCUSL (July 17, 1990).
114. Report of the U.S. Delegation to the XIVth Session of the UNCITRAL Working Group on International Contract Practices (Sept. 3-14, 1990).
115. March 1, 1990 Preliminary Report of the Permanent Editorial Board Study Group for Uniform Commercial Code Article 2, *reprinted in* 16 DEL. J. CORP. L. 981 (1991).

The final report of that committee is complete, and the Conference began a drafting project to revise Article 2 in late 1991.[116]

For this project, substantial issues have to be faced. Issues include whether contracts for services should be covered, whether computer software contracts deserve separate treatment, and how the present Article's general reliance upon written agreements can be modified to accommodate computer electronic data interchange (EDI), the method by which many contracts for the sale of goods are now accomplished.[117]

7. *Article 9.* Finally, Article 9 of the UCC is currently under study by a separate committee appointed by the Permanent Editorial Board (PEB).[118] This committee can be expected to recommend a drafting project to the PEB and the Conference by the summer of 1992. Because it presently appears that wholesale revision of Article 9 will not be necessary, amendments to that article could well be promulgated by 1995.

Thus, in the ten-year period beginning in 1987 when Article 2A was promulgated, the entire Uniform Commercial Code, except for Article 7, will be substantially rewritten and expanded. If the enactment of these changes becomes protracted, the commercial law of the United States will be decidedly nonuniform during this period because many states will have different versions of the Code.[119] Thus, the very success of the Code in accommodating modernization, change, and improvement may cause nonuniformity among the different states.

In many respects, the enactment process for this "new" UCC will be more difficult than the enactment process for the original Code. It will be a piecemeal process because the Articles will be considered one at a time as they are promulgated. During the original enactment process, the states were presented with a fully developed

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116. Minutes of the Executive Committee, *supra* note 113. The author has been appointed chairman of the Article 2 Drafting Committee.

117. Preliminary Report, *supra* note 115.

118. Documents Nos. 27-34 of the Permanent Editorial Board Study Group for Uniform Commercial Code Article 9 (Oct. 28, 1991).

119. *See supra* notes 96-104 and accompanying text.

Code in a single integrated package that discouraged tinkering. Nevertheless, universal enactment of the original Code still took fifteen years.[120]

The drafting and enactment process for the original Code was supported by generous endowments totalling more than a half a million dollars, largely from the Falk Foundation of Pittsburgh.[121] Although such resources are not currently accessible to the Conference and the ALI, the Conference has established the Uniform Laws Foundation to attract tax-exempt contributions to support the enactment process.[122] In anticipation of such contributions, the Conference added a full-time staff attorney to concentrate on assisting the enactment process through legislative appearances and testimony.

Finally, the enactment process for the original Code was easier because it was not carried out under a threat of federal preemption if prompt success was not achieved. This time, however, Congress has already preempted parts of Article 4 and threatens to do the same to Article 8.[123] Enactments cannot, therefore, proceed at the relatively leisurely pace of thirty years ago.

To update but preserve a uniform commercial law for this country through state enactments, the Bar, Law Revision Commissions, legislative committees, and other interest groups in each state must help the process. They must realize that uniform acts are carefully drawn to reflect a national consensus and usually represent a compromise on important, complex, and often controversial issues. The final product is the result of years of study and drafting by the Conference, the ALI, affected industries, and the ABA. Uniform Acts should, therefore, be adopted as written.

There was never a perfect law, a perfect trial, or a perfect child. Lawyers and legislators are forever tempted to tinker with proposals, both in form and substance. One can always think of another, perhaps better, way to say the same thing. Those temptations should be resisted in considering the UCC.

The introduction of uniform laws often elicits opposition or amendments from interest groups whose arguments were heard,

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120. ARMSTRONG, *supra* note 5, at 77.
121. *Id.* at 65.
122. Agreement Establishing the Uniform Law Foundation (Dec. 1, 1990).
123. *See supra* notes 79 & 103-05 and accompanying text.

considered, but rejected during the drafting process. The drafting process is an open one in which participation and comment from interested groups is both encouraged and solicited. Although politically appealing, the argument for deferral or last minute changes because an issue was not considered or because the proponent was unaware of the drafting process is usually disingenuous, at best. During a limited study, it is impossible for a legislative committee or a state's legislature session to duplicate the years of study, debate, and drafting which culminate in uniform laws.

Failure to promptly enact the existing and forthcoming UCC changes or the nonuniform amendments deprives the state of the benefits of uniform laws catalogued above.[124] Thus, nonuniformity can impede economic development, complicate transactions, burden the legislature, deprive courts of useful precedent, increase the likelihood of federal preemption, and forego the benefit of a national consensus on important issues.

As General Schnader said in his foreword to West's 1962 publication of the Code:

> The Code project was undertaken by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, to achieve UNIFORMITY in state laws regulating commercial transactions. It was not undertaken as a project merely to improve the law; the Act was promulgated not as a *model* act but as a *uniform* act.[125]

VII. CONCLUSIONS

It is clear that the commercial law of the United States, in the form of the UCC, has achieved substantially uniform adoption and has been "a spectacular success."[126] Furthermore, it is true that the Code cannot be a static monument, and that it must change to accommodate developing commercial practice.[127] Numerous and significant changes to the Code have already been proposed and more are imminent. Essentially, the Code must be reenacted, on a piecemeal basis, during the decade of the 1990s.

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124. *See supra* notes 58-59 and accompanying text.
125. *Foreword* to UNIFORM COMMERCIAL CODE (1962).
126. *See supra* note 24 and accompanying text.
127. *See supra* notes 102-20 and accompanying text.

In the words of the ABA's 1891 report that led to the creation of the Conference, prompt and uniform achievement of this reenactment is consistent with our federal system because it "[t]akes from the general government any excuse for absorbing powers now confined to the states, and therefore directly tends to preserve intact the independence of the states."[128] Reenactment of the Code would be a fitting tribute in honor of the centennial of the Conference and the bicentennial of the tenth amendment.

If we can achieve this goal, America will continue to enjoy the uniform commercial law of our "own, free, great commercial country" that John William Wallace was hoping for 140 years ago.

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128. ARMSTRONG, *supra* note 5, at 21.