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THE PROCESS OF REVISION

The Uniform Commercial Code: Will the Experiment Continue?

by Fred H. Miller*

The first meeting of what was to become the National Conference of Commissioners on Uniform State Laws ("NCCUSL") was held on August 24, 1892, at Saratoga Springs, New York.¹ The purpose was to explore methods for obtaining uniformity of state legislation to compliment what could be accomplished on the federal level. At this date, the Conference perceived that the power of the federal government was severely limited in dealing with many matters of state concern, and a viable alternative to attempting to obtain state laws to cover such matters through agreement

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1. WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 11 (1991).

among the several states, a task many perceived almost insuperable, was sought.²

One hundred years later, one may ponder whether the alternative that developed, which became NCCUSL, is any longer necessary now that the power of the federal government is virtually unrestrained, or whether it is desirable, since it would seem far easier to achieve uniformity in one enactment on the federal level, and other reasons for acting at the federal level may exist as well.³ Since we deal here with the Uniform Commercial Code ("U.C.C." or "Code"), the discussion will be limited to that statute, although it is probable that the analysis may be extended more broadly.

At the one extreme, one can argue that state action on the matters covered by the U.C.C. is no longer constitutionally possible.⁴ Whatever one may think of this argument,⁵ even its author admits no one, excepting himself, appears to have actively pursued it. The probable reason, given the reluctance of Congress to act for political or other reasons,⁶ is that it would leave a black hole that probably would be filled by the very rules constitutionally disclaimed.⁷ Nonetheless, the question remains: Should not Congress be urged to act, which urging no doubt could overcome its

2. *Id.* at 11-13.

3. For a thoughtful articulation of those reasons in the area of wholesale funds transfers, see David B. Goldstein, *Federal Versus State Adoption of Article 4A*, 45 BUS. LAW. 1513 (June 1990).

4. See generally Boris I. Bittker, *The Dormant Commerce Clause Doctrine, Swift v. Tyson, Uniform Commercial Laws, and Federal Common Law: Ships that Passed in the Night?*, 8 CONST. COMMENTARY 87 (1991).

5. Compare JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW §§ 8.4 and 8.6, at 266, 269-70 (3d ed. 1986).

6. This reluctance to act, however, certainly is less than it once was in the area of commercial law. Congress, or federal agencies, have been a source of consumer law for a considerable period, given that the uniform law process does not act in this area very successfully, particularly in relation to commercial law. See Fred H. Miller, *UCC Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405, 412-16 (1991). At times, the consumer tail has caused Congress to act on the commercial dog. The best example is the Expedited Funds Availability Act (12 U.S.C. §§ 4001 to 4010 (1988)), and its massive impact on check collection long governed by Article 4 of the U.C.C. See Robert L. Jordan & William D. Warren, *Introduction*, 42 ALA. L. REV. 373, 399-402 (1991). However, in recent years Congress increasingly has involved itself in commercial law matters with no consumer law prompting. Two examples are the Food Security Act of 1985 (7 U.S.C. § 1281 (1985)) and the 1990 Market Reform Act, Pub. L. No. 101-432, 104 Stat. 963 (1990). See Frederick H. Miller & Patricia Brumfield Fry, *Introduction to the Uniform Commercial Code Annual Survey: Good News and Bad News*, 45 BUS. LAW. 2281 (1990) and Robert C. Mendelson, *Investment Securities Review*, 46 BUS. LAW. 1697, 1703-09 (1991).

7. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979). With a few notable exceptions, federal courts have adopted the Code rules as federal common law. Compare *In re Murdock Mach. & Eng'g Co.*, 620 F.2d 767, 772 (10th Cir. 1980) with *Federal Deposit Ins. Corp. v. Leach*, 772 F.2d 1262, 1265-66 (6th Cir. 1985) and *Federal Deposit Ins. Corp. v. Wood*, 758 F.2d 156, 159 (6th Cir. 1985), *cert. denied*, 474 U.S. 944 (1985).

reluctance, and thus retire NCCUSL's efforts to frame a uniform commercial law to an honored place in the history of law reform in this country?

To the extent the states have failed to act in the area of commercial law, that urging already has occurred, and periodically Congress has responded.⁸ While that action has been piecemeal and not comprehensive like the U.C.C. itself, the possibility of additional and perhaps more extensive action should furnish a persuasive reason for the states to act more responsibly with regard to the U.C.C. in the future. Do any reasons exist for not urging further and more extensive Congressional action, even if the states are willing to act? Essentially two reasons exist.

The first reason is the seeming inability of Congress to act responsibly, at least as it is presently structured.⁹ Rarely are the members of Congress themselves deeply involved in studying, formulating the details of, and drafting legislation. Those tasks are largely delegated to their staff, whether serving them directly or working indirectly on the staffs of the various committees. Current statistics show that the average Congressional staff person has a tenure of less than three years. Thus, while the staff is composed of bright and ambitious young people, their knowledge of and experience with economics, institutions, and legal process comes largely from books; they have very limited hands-on experience. The resulting lack of quality in the Congressional legislative product often is amply demonstrated,¹⁰ or the product appears only in broad form with regulatory agencies to fill in details.

Beyond the above, most political observers also would acknowledge that the Congressional lawmaking process is significantly shaped, and perhaps even corrupted, by special interests. The legislative hearing process often appears to be more devoted to establishing a record for reelection than to sorting out the facts to frame a solid product. It can be perceived that this process often results in an amalgamation of independent provisions derived from the proposals of such groups, which are not

8. See federal enactments cited *supra* note 6.

9. The following observations are based in part on an article by Carlyle C. Ring, Jr., *Uniform State Laws—Giving Vitality to the Tenth Amendment*, XVIII VA. B. ASS'N J. 12 (1992); see also John M. McCabe, *Foreword*, 42 ALA. L. REV. 367, 369-70 (1991) and P. McGuigan, *David Boren Fights the Confusion*, DAILY OKLAHOMAN, Jan. 2, 1992, at 10 (quoting the Senator to the effect that with 12,000 staff generating ideas and 301 committees and subcommittees Congress becomes mired in minutia).

10. "Although even the most pejorative hyperbole is inadequate to fully express what section 1324 [the Food Security Act] deserves, the following is a frail attempt: Section 1324 is internally inconsistent, unintelligible, and unworkable . . . It is a disaster." Chales W. Mooney, Jr., *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.*, 41 BUS. LAW. 1343, 1352 (1986).

always synthesized, rather than an integrated and well-thought out statute.

Finally, despite the occasional demonstration of speed, the Congressional process is usually slow as well as imperfect. The problems referenced above often result in stalemate on a subject. In other cases, they result in a retention of focus on a subject that prevents action on other subjects. For example, as a part of the Article 4A project,¹¹ the drafting committee considered what could and should be done to diminish the risk of systemic failure in the event of a large, or a series of large, bank failures because the result of the CHIPS rules¹² for unwinding all transactions for the day in which a large bank failed would be lengthy and litigious. Article 4A's solutions not only provide a degree of certainty with respect to liabilities, but legislatively reinforce the Federal Reserve's requirement for added security (in effect self-insurance) to cover large failures¹³ and statutorily permit netting for a settlement rather than unwinding all transactions.¹⁴ However, during the drafting committee discussions in 1986 and 1987, it was observed that state law cannot control federal institutions and there was no federal law clearly authorizing netting despite its obvious advantages to avoid systemic paralysis. A draft of proposed federal legislation was circulated and discussed at the drafting committee meetings and presented to Congress by the New York Clearing House to alleviate the problem. Only at the end of 1991 was that legislation finally enacted as Title IV, Subtitle A—Payment System Risk Reduction, of the Federal Deposit Insurance Corporation and RTC Improvement Acts of 1991,¹⁵ and only because the focus of Congress had been forcibly drawn to financial institution failure for a period of years. On the other hand, in a shorter period of time Article 4A has been completed, adopted by 32 states, and incorporated into the rules of the major wire systems, including as a part of Federal Regulation J.¹⁶

The second reason for questioning the wisdom of urging federal legislation is more philosophical; it is reflected in the Tenth Amendment to the Federal Constitution and the underlying principles upon which the United States is founded. As expressed less elegantly but not less forcefully by one of the advisors to the project to revise U.C.C. Articles 3 and

11. New Article 4A to the U.C.C., added in 1989, deals with "wholesale" funds transfers. Like most of the other amendments prepared or being prepared, it is a response to new technology and practices, and to old ambiguities and other drafting deficiencies in the Code that have surfaced over the years. U.C.C. Art. 4A (1989).

12. Rules governing funds transfers on the funds transfer system operated by the New York Clearing House. See U.C.C. Art. 4A (1986).

13. U.C.C. § 4A-405(e) (1989).

14. *Id.* § 4A-403(b), (c).

15. 12 U.S.C. §§ 1281-1286 (1991).

16. 12 C.F.R. pt. 210 (1991).

4: In the NCCUSL process he was a participant rather than a supplicant.¹⁷

Of course, as has been long recognized, a fine line exists here because a systematic uniform laws movement also could "destroy the autonomy, or at least the individuality, of the states; . . . [in short,] 'even a self-imposed uniformity tends to centralization and is opposed to the principle of local self-government.'"¹⁸ The response is that "[a] state which unites with other states in framing . . . general and uniform laws in matters affecting the common interests of all the states, and in the spirit of mutual compromise, through mutual Commissions and investigations, yields, in so doing, nothing whatever of its state sovereignty."¹⁹ Moreover, "[n]o objection can fairly be made to this method of uniformity, because all states, as has been well said, are equally interested in securing the administration of the same general rights [and] the realization of the same common freedom under the law."²⁰ Keeping this concept, as well as the related definition of uniformity in mind for future discussion,²¹ we can assume that the work of NCCUSL on the U.C.C is likely to continue for the foreseeable future.

17. ARMSTRONG, *supra* note 1, at 41. This is not a new viewpoint; President Coolidge made a like observation when he said:

Without doubt, the reason for increasing demands on the Federal government is that the States have not discharged their full duties So demand has grown up for a greater concentration of powers in the Federal government. If we will fairly consider it, we must conclude that the remedy would be worse than the disease. What we need is not more Federal government, but better local government.

In 1925, Conference President Nathan William MacChesney elaborated further:

"I say that there is no way by which a unified or federal law can be [made] sufficiently elastic to cover local situations. But it is the peculiar merit of our constitutional system that State legislation does give this elasticity and through uniform laws in the various States much can be done"

Id. at 43 (quoting Nathan William MacChesney, *Uniform State Laws: Their Effectiveness and Vital Function as an Aid to Constitutional Government*, National Conference of Commissioners on Uniform State Laws 333 (1925)).

18. *Id.* at 21 (quoting Lyman D. Brewster, *Uniform State Laws*, before A.B.A. NCCUSL PROCEEDINGS (1899)).

19. *Id.*

20. *Id.* at 13.

21. In contrast to the definition of uniformity quoted, see *Id.* at 14-15 (citing an article in the Ohio State Bar Journal to the effect that diversity of substantive law is "amazingly small; . . . the slight but almost infinite variations are the hazard which lawyers and businessmen fear. It is not the log but the unseen sturdy vine which trips the unwary traveler."). It would seem this concept of virtual absolute uniformity carries the essential reason for uniformity too far, and in doing so becomes an infeasible goal. See *infra* notes 23-25 and accompanying text.

It is not surprising that the initial attention of the group that first met at Saratoga Springs in 1892, and which ultimately would develop into NCCUSL as representing the alternative method to obtain uniform laws by the voluntary action of state legislative bodies adopting identical laws or laws nearly so prepared by the group, immediately focused on the subject of commercial law. In 1786 a convention of the states met at Annapolis to consider "how far a uniform system in the commercial requirements [of the states] would be necessary to their common interest and their permanent harmony."²² That convention, fortunately, was somewhat redirected by Alexander Hamilton's resolution that resulted in the constitutional convention a year later,²³ but the second group of representatives of the states that met in 1892, and which constituted the fledgling NCCUSL, returned to the subject. In that first year, they voted to "recommend the abolition of days of grace on notes and bills and that all notes and bills falling due upon a Sunday or a legal holiday, should be payable and presentable for payment on the secular or business day next succeeding . . . [the] holiday."²⁴ The Conference also put forth a proposal for a uniform law validating a scroll as a substitute for a seal on any written instrument.²⁵ Finally, a committee on commercial law was established to further explore the subject of uniform commercial law products.²⁶

All of this occurred in accordance with the urging of the American Bar Association, one purpose of which is to promote uniformity of legislation throughout the union, and whose own Committee on Uniform Law in early 1891 conducted a survey which disclosed consensus on the proposition

That greater uniformity is desirable and most urgently and immediately needed in matters affecting directly the business common to and coextensive with the whole country, such as the enforcement of contracts, the collection of debts, the transmission of property, the nature, validity, negotiability, and construction of commercial paper, and the formalities of all legal instruments and the proofs of their authenticity.²⁷

The Commercial Law committee of the nascent NCCUSL was instructed to procure as soon as practicable a bill relating to commercial paper. This bill, derived largely from an existing California statute, was adopted by the Conference at its 1896 meeting and was known as the

22. ARMSTRONG, *supra* note 1, at 12 (quoting uncited source).

23. *Id.*

24. *Id.* at 23 (quoting uncited source).

25. *Id.*

26. *Id.* at 25.

27. *Id.* at 20-21.

Negotiable Instruments Law. This act was adopted in every state and territory and the District of Columbia and no doubt gave to the Conference the standing and prestige that assured its continuity and growth in importance.²⁸

But even at the beginning, the work of the Conference in the commercial law area had harsh critics who concentrated on the trees and not on the goal of a uniform forest. They failed to recognize that the essence of successful legislation is compromise and not perfection. Thus, James Barr Ames wrote in the *Harvard Law Review*: "But if the preceding criticisms are well founded, the errors and imperfections of the Negotiable Instruments Law are so numerous and so serious that, notwithstanding its many merits, its adoption by fifteen states must be regarded as a misfortune."²⁹ After all, what could the fifteen legislatures that had enacted the law know as opposed to the wisdom of a person who had not participated in the give and take of creating the statute and who thus was free to comment from a vacuum? The president of the Conference replied: "Sometimes the point of view is quite as important as extensive knowledge, and I am constrained to believe that so keen a controversialist is somewhat affected by that 'gaudium certaminis' which the most open-minded advocate cannot wholly resist."³⁰ Nonetheless, Illinois rewrote the Negotiable Instruments Law to accord with some of Dean Ames' views, thus beginning a long tradition of the states operating to defeat their own purpose in the attempt to achieve uniformity of commercial law.

In 1915 the Conference officially became the National Conference of Commissioners on Uniform State Laws. By that date, building on the success of the Negotiable Instruments Law, four more commercial acts had been adopted: The Uniform Sales Act³¹ and the Uniform Warehouse Receipts Act in 1906,³² and the Uniform Bills of Lading Act³³ and Uniform Stock Transfer Act in 1909.³⁴ Two more acts, the Uniform Conditional

28. *Id.* at 25-26.

29. *Id.* at 26.

30. *Id.* at 27. Perhaps the first Executive Director of the Conference, Allison Dunham, summed up the point when he said:

Theoreticians sometimes deduce from an analysis of legal theories that the solution of a particular problem "ought" to be such and such, and urge that law should be changed in order to conform with this theoretical "oughtness . . ." In the United States, where the Commissioners on Uniform State Laws have been drawn from the judiciary, the practicing bar, and from the academic community, this justification for uniformity has not been heavily emphasized.

Id. at 110.

31. UNIF. SALES ACT (1906), 1 & 1A U.L.A. (1959).

32. UNIF. WAREHOUSE RECEIPTS ACT (1906), 3 U.L.A. (1959).

33. UNIF. BILLS OF LADING ACT (1909), 4 U.L.A. (1922).

34. UNIF. STOCK TRANSFER ACT (1909), 6 U.L.A. (1922).

Sales Act in 1918³⁵ and the Uniform Trust Receipts Act in 1933,³⁶ were to be promulgated before the advent of the Uniform Commercial Code project at the end of the 1930s.³⁷

In 1938 the United States Supreme Court overruled *Swift v. Tyson*,³⁸ holding in *Erie Railroad v. Tompkins*³⁹ that, except in matters governed by the federal constitution or by acts of Congress, the law to be applied in any case is the law of the state.⁴⁰ "This decision erased the rickety framework of Federal common law which had served as a unifying factor of sorts for commercial law since [the *Swift* case in] 1842 . . ." State law remained, if any express law really existed at all.⁴² The above uniform commercial acts by that date, however, aside from not covering all of commercial law and being less than uniformly enacted and interpreted, were outdated due to changed patterns of commercial activity.⁴³ Indeed, NCCUSL was already at work revising the Uniform Sales Act⁴⁴ to ward off the threat of federal action that would arise if the states did not act to rectify its outmoded nature. NCCUSL was also considering revision of the Negotiable Instruments Law.⁴⁵ In 1940 a larger project to write a Uniform Commercial Code in cooperation with the American Law Institute ("A.L.I.") emerged from this preliminary work.⁴⁶

The U.C.C. project occupied the next decade, being completed in May of 1951 and being approved by the American Bar Association House of Delegates later that same year.⁴⁷ Pennsylvania was the first state to enact the U.C.C. in 1953,⁴⁸ and it became effective on July 1, 1954.⁴⁹ Then, for

35. UNIF. CONDITIONAL SALES ACT (1918), 2 U.L.A. (1922).

36. UNIF. TRUSTS RECEIPTS ACT (1933), 9C U.L.A. (1957).

37. See generally Table 1: Uniform & Model Acts Approved & Adopted, 3 U.L.A. xiii-xv (1959).

38. 41 U.S. (16 Pet.) 1 (1842).

39. 304 U.S. 64 (1938).

40. *Id.* at 66-67.

41. ARMSTRONG, *supra* note 1, at 53.

42. See Bittker, *supra* note 4, at 94, 99-103.

43. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 3 (3d ed. 1988).

44. UNIF. SALES ACT (1943), 1 & 1A U.L.A. (1959).

45. NEGOTIABLE INSTRUMENTS LAW (1938), 5 U.L.A. (1943).

46. ARMSTRONG, *supra* note 1, at 53-57.

47. *Id.* at 75. The U.C.C. was approved with the power in the NCCUSL and A.L.I. Editorial Board to approve the comments being prepared to guide the interpretation of the Code and to make such further changes in style and other matters as might be required for clarity and consistency. The Editorial Board, who had been set up to supervise the Code project when the Code was being drafted, later became the Permanent Editorial Board, whose job it was to promote uniformity in the enactment and interpretation of the Code and to evaluate the need for and prepare (currently, propose) changes to the statute for approval by its co-sponsors, the A.L.I. and NCCUSL.

48. 13 PA. GENS. STAT. ANN. §§ 1101-9507 (1953). See 1 U.L.A. 1 (1953).

49. WHITE & SUMMERS, *supra* note 43, at 4.

reasons which no doubt were premised at least in part on justification for existence, the New York Law Revision Commission, when enactment of the Code was proposed in New York, took upon itself to replicate the study done on the Code by NCCUSL and the A.L.I. in a national context in the localized, albeit important, context of New York. Not surprisingly, the Commission came up with a number of different ideas and ultimately concluded "that New York should not enact the UCC without extensive revision."⁵⁰ Despite this "two bites at the apple" advantage by New York, NCCUSL and the A.L.I. had little choice but to go along. Consequently, the Editorial Board prepared the appropriate amendments, the Code was revised, and, as a result, the 1957 Official Text, with slight modifications in 1958 and 1962, was widely enacted, becoming the law in 49 states, the District of Columbia, and the U.S. Virgin Islands by 1968.⁵¹

50. ARMSTRONG, *supra* note 1, at 39 (quoting Frederic J. Stinson, *Uniform State Legislation*, American Academy of Political and Social Science (1895)). This outlook is hardly new. As one Commissioner put it:

We find it commonly said to us by members of the several State legislatures—and even by members of the national conference of commissioners—"Why, that is not the law in my State," as if that objection were final Of course if objections on this score are to prevail, when there is no real objection arising from the circumstances or condition of the people, the whole movement will come to an end.

Id. Commissioner Jack Burton more generally has observed:

There never was a perfect law, just as there never was a perfect trial or a perfect child. It is always tempting to tinker with law, either in form or substance. Almost anyone can think of a different way to say the same thing. Anyone can usually think of arguments that any given issue ought to be dealt with in a different way.

Frederick H. Miller et al., *Introduction to Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 BUS. LAW. 1449, 1453-54 (1991). Today the probability is, given the drafting process described *infra* at notes 65-67 and accompanying text, that most locally and later devised alternative phrasings and arguments were considered by the drafting committee and rejected.

Uniform laws are formed from the wide diversity of legal thought in this country. Full consideration is given to alternative theories and to suggestions by the public, by legal scholars, by legislators, and by commissioners from each state. Uniform laws are carefully drawn to reflect a national consensus on appropriate compromises about important, complex issues The sometimes chaotic diversity of thought is thereby distilled into uniformity of law, for the benefit of all people.

Id. at 1453.

51. WHITE & SUMMERS, *supra* note 43, at 4-5 and ARMSTRONG, *supra* note 1, at 77. In 1974 Louisiana adopted all but Articles 2, 6, and 9. L.A. REV. STAT. ANN. § 10:101 (West Supp. 1991) (p.2, *Table of Jurisdictions Wherein Code Has Been Adopted*, n.1). More recently, in line with the NCCUSL/A.L.I. recommendation, Louisiana repealed its bulk sales law and enacted Article 9. *Id.* § 10:9-101 (West Supp. 1992) (Historical and Statutory Notes). As a result, its divergence mainly lies in nonenactment of Articles 2 and 2A, which is due primarily to Louisiana's different civil law.

White and Summers call the U.C.C. "The most spectacular success story in the history of American law."⁵² That appellation is accurate, not only because of the substantive excellence of the product, but perhaps even more so because of the great experiment of attempting to get (and then getting) fifty states to enact such a comprehensive act in relatively uniform form. Even considering the prior uniform commercial acts, that cannot be said to have been tried before and, even to the degree tried, the effort had not been successful. Thus, the accomplishment of the Uniform Commercial Code truly represents a first and extraordinary event.⁵³

Like any broad based statute dealing with a legal area that is not static, the Code carries the seeds of its own destruction. Notwithstanding its evolutionary goals⁵⁴ and the methods it employs to prevent becoming outdated,⁵⁵ the Code is a law created by humans embodying the imperfect foresight of humans, and it can go only so far in accommodating changes in practices and, more particularly, changes in technology. Original Article 3, for example, recognized the latter point.⁵⁶ As practices and technology change ever more rapidly, it is not unreasonable to expect that the U.C.C. may undergo more frequent periodic amendment, rather than longer intervals such as the period between its initial promulgation in 1951 and its first self-generated substantial amendment in 1972.

The first point about the limits of human vision manifested itself soon after the Code was widely enacted and led to the 1972 amendments.⁵⁷ Article 9 of the U.C.C., the most innovative part, combines different pre-

52. WHITE & SUMMERS, *supra* note 43, at 5.

53. Nonetheless we are told that Karl Llewellyn was disappointed at the result, stating the Code "has already been mutilated by conditions and by the ignorance of the bar." ARMSTRONG, *supra* note 1, at 77 (quoting KARL LLEWELLYN, JURISPRUDENCE (1967)). But this is too pessimistic a view, given the core of uniformity that resulted, and to a degree ignores the proper definition of state uniform laws. The proper definition involves a general uniformity based on diversity of thought at the inception, but which in operation must leave enough flexibility so the 50 state laboratories can continue. See *supra* note 20 and accompanying text discussion *infra* at note 94-95.

54. See U.C.C. §§ 1-102(2)(b), (c) (1962).

55. See, e.g., U.C.C. § 1-102(3) (1962) on freedom of contract; various provisions that allow flexibility such as U.C.C. § 9-504(3) (1972) and U.C.C. § 2-314(2) (1962); the generous use of supplementary law in U.C.C. § 1-103 (1962) and U.C.C. § 2-318 (1966).

56. U.C.C. § 3-101 cmt. (1962) (amended 1990) (recognizing changes in practice in the 50 odd years of the Negotiable Instruments Law).

57. NCCUSL recognizes this point today by keeping the drafting committee as a standby committee for a period after a Code amendment or, indeed, after any act is completed. Also as one Commissioner stated: "At times, too, the functioning of an act after its adoption in one or more jurisdictions focuses attention upon matters that were overlooked in its preparation and leads the Conference to amend the act or replace it with a more perfect version." ARMSTRONG, *supra* note 1, at 87 (quoting Commissioner Jones W. Day, *The National Conference of Commissioners on Uniform State Laws*, 8 U. FLA. L. REV. 276 (Fall 1955)).

Code personal property security devices into a unitary security interest, for which no previous experience existed. Article 9 also tries to reconcile the quite different worlds of personal property and real estate security where they converge in the case of fixture financing. This first integration of complex legal and political problems led to some imperfections in analysis, drafting, and striking an acceptable balance.⁵⁸ Nonetheless, only modest revisions of Article 9 were undertaken and completed in 1972 because overall, Article 9 was working successfully without significant problems. The demands for change had been relatively slight, and it was recognized that to seek excessive perfection could run the risk of opening up further problems; at a minimum, any recommended changes would take several years to enact, during which time a degree of nonuniformity would exist.⁵⁹

The second point concerning how the statute may be overcome by subsequent events is evidenced by the 1977 amendments to U.C.C. Articles 8 and 9. These amendments were designed to implement a response to the unforeseen rapid growth in activity on the securities markets and the resulting inability to handle the paper evidences of the securities that had to be processed.⁶⁰ Again, the focus in the revision effort for Article 8 was narrow for the same reasons that guided the earlier Article 9 effort.⁶¹

58. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PRELIMINARY DRAFT NO. 2, *General Comment on the Committee's Approach* 1-3 (Feb. 1, 1970).

59. *Id.* All states except one have now enacted the 1972 Article 9 Code amendments. Clearly the enactment time was greater than contemplated, and excessive. The timing problem should be reduced by the process, discussed *infra* note 94. The other observations on the correct course for amendment still are valid and have guided the more recent revision efforts discussed, *infra* at note 72, as well as the current study under the auspices of the Permanent Editorial Board examining Article 9 for possible further revision. However, it also is recognized that the narrowness of the 1972 effort contributed to the need for the recent study and that this approach likely will again produce that result. Nonetheless, where a Code article basically is working well, it is perceived that limited amendment is superior to broad scale tinkering that may break more than it fixes. But the approach depends upon the circumstances; for example, the Article 2 revision effort, discussed *infra* note 76, is likely to follow the same approach, while the revision of Article 5, discussed *infra* note 76, will probably be more extensive. Concerning the Article 9 study, see William M. Burke et al., *Interim Report on the Activities of the Article 9 Study Committee*, 46 BUS. LAW. 1883 (1991).

60. See Gordon H. Rowe & Fred H. Miller, Commentary, *Oklahoma Uniform Commercial Code Article 8: Time for Change*, 35 OKLA. L. REV. 549 (1982).

61. The time for enactment of the 1977 amendments also has badly exceeded expectations; as of the end of 1991, five states have yet to act. As noted *supra* note 59, that problem is being addressed. However, in the case of Article 8 the narrow focus deliberately left some other issues unaddressed and laid a basis for yet others to develop. These issues, plus the fact the industry structure has changed further, arguably making various aspects of Article 8 no longer appropriate to address the matters for which they were designed, have led to a sooner than contemplated new project to revise Article 8. Thus, it is clear there must be a

With some reservations,⁶² the 1972 and 1977 amendments to the Code can be said to represent a continuation of the successful experiment to create and maintain a viable body of state uniform commercial law. The next step in the process, however, demonstrated the outer limits of the methods then being utilized.

After completing work on the Article 8 amendments, the responsible committee under the Permanent Editorial Board, the 348 Committee, turned its attention to the possible need to update Articles 3 and 4 of the U.C.C. on commercial paper, bank deposits, and collections for changes in technology and practices. The need was soon determined,⁶³ but instead of the narrow focus of the first two projects, the 348 Committee this time concluded that a drastic revision, one that would cover the rules for all payments systems except cash and that would provide a "New Payments Code," was in order. Having so concluded, the Committee proceeded to prepare drafts to accomplish that end. The result was a disaster for many reasons, but perhaps the most important reason was that the Committee, in formulating this revolution, did not prepare the groundwork to convince people it was desirable. The Committee also did not operate like NCCUSL does generally where interested persons may attend and participate in the meetings which prepare the draft. As a result, persons who had an interest in the proposed product that, because of the changes proposed, could affect their operations significantly, perceived, even if somewhat inaccurately, that their world was being revised without representation on their part and that such comments on the approach and on the drafts that were tendered were not being fully considered in the preparation of the product. Consequently, their inclination was to force the termination of the project rather than work with and perhaps ultimately support the project.⁶⁴

This sort of problem usually does not arise because NCCUSL is an organization that conducts its business in the sunlight. Commissioners are appointed by their governors, and in some cases by other political sources such as leaders of the legislature. As such, commissioners are familiar with how government works and the need to gain a consensus for any product. Equally important: "The Conference . . . personnel, recruited

careful balance between being too adventuresome in a revision effort and pursuing one that is overly restrained. Again, the Articles 2 and 5 efforts, discussed *infra* note 76, will test how well this balancing lesson has been learned, as may the new project to further revise Article 8 itself. For a discussion of the new Article 8 effort, see Mendelson, *supra* note 6, at 1703-09 and Miller et al., *supra* note 50, at 1453.

62. See *supra* notes 59 and 61 and accompanying text.

63. See Hal S. Scott, *On the Record—New Payment Systems Transactions*, 3 A.L.I.-A.B.A. COURSE MATERIALS J. 6 (Aug. 1978).

64. See Miller, *supra* note 6, at 405.

from the bench, bar, and classrooms of fifty-three jurisdictions, encompasses the social, economic, and political experience of rural and urban societies and the contrasting viewpoints of a geographically diverse nation."⁶⁵ This lends the kind of common sense balance to projects that the New Payments Code project was perceived to lack. Indeed, NCCUSL joined with the larger A.L.I. on the U.C.C. project to provide as broad a base of experience as possible in order to initially formulate the statute.⁶⁶ Under the NCCUSL process, advisors and observers may meet with the drafting committee composed of Commissioners and, on the U.C.C., often one or more A.L.I. representatives. Under both the NCCUSL and A.L.I. processes, the work of the drafting committee is debated line by line before the membership of each organization at their annual meetings each year it is presented (a minimum of twice in most cases).

However, there is even more significant participation. Each drafting committee has an American Bar Association liaison appointed to it, and in some cases additional advisors or liaisons from Sections of the American Bar Association may be present. The task of the liaison is to present the drafts to each interested constituency in the American Bar Association for discussion, comment, and relay of these comments to the drafting committee. Moreover, uniform acts ultimately go to the American Bar Association House of Delegates for approval.⁶⁷ To illustrate, the project to prepare Article 2A of the U.C.C., which concerns leases, had three American Bar Association advisors from the Sections of Corporation, Banking and Business Law; Taxation and Real Property; and Probate and Trust Law. The negotiations leading to the approval of Article 2A by the American Bar Association formed the beginning of the article's 1990 amendments.

In addition, NCCUSL procedures charge each drafting committee with identifying and soliciting participation from as many interested parties as is feasible. These interested parties may receive, review, and comment on drafts to the drafting committee, or they may send a representative to the meetings of the drafting committee. The representative of interested parties, in addition to attending, may participate in the discussion along with other such representatives and with committee members over issues and the proper way to resolve them in the draft. If the drafting committee has done its work, the result is in essence a national debate involving virtually all of the essential constituencies for the future law, and the resolutions reached form a national consensus, which involve compromise within the

65. ARMSTRONG, *supra* note 1, at 63.

66. See Application to Falk Foundation for Funding the U.C.C. project, printed in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 149-150 (1944).

67. See generally ARMSTRONG, *supra* note 1.

perimeters of appropriate policy as determined by the Commissioners as the representatives of their states. In short, a uniform state law is every bit as much, or even more so, a national law as a statute formulated by Congress, but without most of the deficiencies of congressional enactments noted earlier.

To see a concrete example, consider the following description of the NCCUSL process in formulating the new Article 4A and the revisions to Articles 3 and 4. This description was contained in a letter by Carlyle C. Ring, Jr., dated November 22, 1991, to the co-chairs of a Special Study Commission on the U.C.C. of the Kentucky Legislative Research Commission that was considering Revised Articles 3 and 4 and new Article 4A:

The essence of Uniform Law revision is to obtain sufficient consensus and balance among the interests of the various participants so that universal and uniform adoption by the legislatures of all fifty states can be achieved.

The process of drafting by the Conference encourages as wide as possible participation and the willingness to accept the "give and take" that is essential for consensus. Any particular interest group or individual may feel that a particular approach is better but consensus cannot be achieved if everyone insists on "having it all his own way."

The Conference widely circulated requests to those who might be interested to participate in the drafting meetings. Upon request, names were put on the mailing list to receive copies of the drafts as they progressed. In addition, the American Bar Association Ad Hoc Committee on Payment Systems closely followed the work of the Conference and widely circulated the drafts.

In total, the Drafting Committee had sixteen meetings and, in addition, made six presentations of the draft to the ALI and to the Conference with extended debates and consideration. Altogether this represents 57 full days of debate and consideration. In addition, there were a large number of meetings of the ABA Ad Hoc Committee and lengthy discussions in their deliberations. Progress of the project was broadly reported including 10 articles in *The Business Lawyer*.

The Reporters for the drafting project are well-known and distinguished commercial law professors who had also served as Reporters for the Uniform Consumer Credit Code. The reporters were Professor William D. Warren, University of California at Los Angeles School of Law, and Professor Robert L. Jordan, University of California at Los Angeles School of law.⁶⁸

68. Copy of letter in author's files. The letter continues:

In addition, the Drafting Committee had the benefit of the participation of four additional distinguished commercial law professors: William E. Hogan, NYU School of Law; Professor Richard F. Dole, Jr., University of Houston Law Center; Professor Fred Miller, University of Oklahoma College of Law; and Adjunct Pro-

The failure of the New Payments Code project did not alter the accuracy of the conclusion of the 348 Committee that Articles 3 and 4 needed attention. There also was a consensus that large dollar funds transfers needed a more certain legal framework than then existed when courts borrowed contract and tort concepts to resolve problems in, and applied Article 4 by analogy to, quite different transactions.⁶⁹ The co-chair of the NCCUSL drafting committee with A.L.I. representation, which would begin a new and more limited project to revise Articles 3 and 4 and prepare

fessor Donald J. Rapson, Columbia University School of Law and Rutgers School of law.

The other members of the Drafting Committee included one U.S. District Court Judge, Charles W. Joiner, and six practicing attorneys including myself and the Co-Chair Robert Haydock, Jr.

The Advisors who faithfully and regularly attended the Drafting Committee meetings were: Thomas C. Baxter, Jr., Federal Reserve Bank of New York; Roland E. Brandel, American Bar Association; Leon P. Ciferni, National Westminster Bank USA; William B. Davenport, American Bar Association, Section of Business Law, Ad Hoc Committee on Payment Systems; Professor Carl Felsenfeld, Association of the Bar of the City of New York; Thomas J. Greco, American Bankers Association; Oliver I. Ireland, Board of Governors of Federal Reserve System; John R.H. Kimball, Federal Reserve Bank of Boston; John F. Lee, New York Clearing House Association; Norman R. Nelson, New York Clearing House Association; Ernest T. Patrikis, Federal Reserve Bank of New York; Anne B. Pope, National Corporate Cash Management Association; Paul S. Turner, Occidental Petroleum Corporation and National Corporate Cash Management Association, and Stanley M. Walker, Exxon Company, U.S.A. and National Corporate Cash Management Association.

Other participants who regularly attended drafting meetings at various times were: Henry N. Dyhouse, U.S. Central Credit Union; Robert Egan, Chemical Bank; Paul T. Even, National Gypsum Corporation; James Foorman, First Chicago Corporation; J. Kevin French, Exxon Company, U.S.A.; Richard M. Gottlieb, Manufacturers Hanover Trust Company; Douglas E. Harris, National Corporate Cash Management Association; Arthur L. Herold, National Corporate Cash Management Association; Shirley Holder, Atlantic Richfield Company; Paul E. Homrighausen, Bankers Clearing House Association; Gail M. Inaba, Morgan Guaranty Trust Company of New York; Richard P. Kessler, Jr., Credit Union National Association; James W. Kopp, Shell Oil Company; Donald R. Lawrence, Citibank, N.A.; Robert M. McAllister, Chase Manhattan Bank, N.A.; W. Robert Moore, American Bankers Association; Samuel Newman, Manufacturers Hanover Trust Company; Nena Nodge, National Corporate Cash Management Association; Robert J. Pisapia, Occidental Petroleum Corporation; Deborah S. Prutzman, Arnold & Porter; Professor James S. Rogers, Boston University School of Law; Robert M. Rosenblith, Manufacturers Hanover Trust Company; Jamileh Soufan, American General Corporation; and Irma Villarreal, Aon Corporation.

69. See Tony M. Davis, *Comparing Article 4A with Existing Case Law on Funds Transfers: A Series of Case Studies*, 42 ALA. L. REV. 823 (1991); see also ARMSTRONG, *supra* note 1, at 124.

a new article on large dollar or "wholesale" funds transfers within the participatory NCCUSL process, stated:

In the next five to ten years a major element of the UCC—Articles 3 and 4—will be antiquated by new computer and electronic technology. It would be a tragedy if our principal achievement became outmoded. A representative of the Federal Reserve Board recently pointed out that two billion dollars each year is expended in processing paper that could be saved by available technology—but the inadequacies of existing law are the major roadblock. Our expanding economy will demand the new technology. The gap between differing interests appears to be closing. The Committee has agreed to change the format and to preserve the present terminology and existing UCC provisions for paper transactions.⁷⁰

In fact, the NCCUSL process that was instituted worked so well to create an atmosphere in which consensus could be reached that later, when it appeared most provisions in Article 3 would need amendment, the drafting committee and its advisors were able to agree that a complete rewrite and reorganization of Article 3 was desirable, even though that would accomplish some of what the New Payments Code attempted. The rewrite and reorganization simply made good sense as opposed to the piecemeal tinkering that had been the only consensus up to that point.⁷¹

A principal lesson from the decade long project to update the state law governing payment systems is that a process giving an opportunity to participate must exist for all but the narrowest efforts to add to and revise the Code rules. This principle can be viewed as the first thread in the weaving of a new fabric to continue the experiment with the U.C.C. as viable state law.⁷² However, another lesson that would furnish an essential second thread for that fabric also was in the making.

In 1980-81, certain members of the American Bar Association's then Section on Corporation, Banking and Business Law's Uniform Commercial Code Committee recommended that a uniform law on personal property leasing be formulated. While the group that developed this recom-

70. ARMSTRONG, *supra* note 1, at 119 and 121-22.

71. See Jordan & Warren, *supra* note 6, at 385-86 and Miller, *supra* note 6, at 407-12.

72. This thread also is a key to cure the previous excessive enactment times experienced with amended Articles 8 and 9. The consensus built by it produces enactment results. Thus, as of December 1, 1991, after only two legislative sessions, Article 4A has been enacted in 32 states, including the major states of California, CAL. COM. CODE §§ 11101-11507 (West Supp. 1992), Illinois, ILL. ANN. STAT. ch. 26, §§ 4A-101 to 4A-507 (Smith-Hurd Supp. 1991), and New York, N.Y. U.C.C. LAW §§ 4-A-101 to 4-A-507 (McKinney 1991), and has been adopted as part of Regulation J, which governs funds transfers over Fedwire. In addition, the version enacted in New York has been adopted as part of the rules governing funds transfers over CHIPS and the Automated Clearing House network. After only one legislative session, revised Articles 3 and 4 have been enacted in 10 states, including Illinois, ILL. ANN. ST. ch. 26, §§ 3-101 to 4-407 (Smith-Hurd Supp. 1991).

mentation was composed of experienced lawyers knowledgeable about the subject, industry groups, as such, on whom the statute would impact were not directly involved.⁷³ Moreover, the NCCUSL study⁷⁴ that preceded the formation of the drafting committee for this project was not extensive⁷⁵ and relied heavily on the existing limited work done by the American Bar Association group.⁷⁶ In addition, the leasing project draft-

73. Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar Alike*, 39 ALA. L. REV. 575, 584-85 (1988).

74. When a proposed uniform act is suggested to NCCUSL, a study committee of Commissioners normally is formed that, after a year's study, makes a recommendation to the Scope and Program Committee of NCCUSL. In turn, the Scope and Program Committee makes a recommendation to NCCUSL's Executive Committee. If the project is approved, the president of NCCUSL appoints six to ten Commissioners as a drafting committee. The drafting committee usually is served by a reporter who is an expert in the legal subject involved and who must not only advise the drafting committee as to the issues and the law as a basis for their decision making, but who also must record those decisions in statutory form with the assistance of the legislative drafting experts who also are Commissioners.

75. Today in the case of the U.C.C., studies normally are performed by or in coordination with the Permanent Editorial Board, which submits a recommendation based on the study to the A.L.I. and NCCUSL's Committee on Scope and Program. For approved projects, the drafting committee is appointed in consultation with the A.L.I. and may include an A.L.I. representative or representatives. However, since many Commissioners also are members of the A.L.I., on some projects there is no separately identified A.L.I. representative.

76. Boss, *supra* note 73, at 585-91. The ABA conclusions are discussed in Charles W. Mooney, Jr., *Personal Property Leasing: A Challenge*, 36 BUS. LAW. 1605 (1981). As suggested, today predicate studies for U.C.C. revision projects are more exhaustive. See *supra* note 25 and accompanying text. For example, the present project to revise Article 5 on letters of credit also stems from an American Bar Association initiative. But that work, reviewed by the Permanent Editorial Board and recommended to the A.L.I. and NCCUSL, involved a much more extensive study and involved persons familiar with all sides of the transaction as well as operations. See Task Force on the Study of U.C.C. Article 5, *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 BUS. LAW. 1521 (June 1990). Likewise, the current project to revise Article 8 on investment securities is based on the work of a broad range of persons including the staff of a federal regulatory agency, and resulting recommendations derived from a study by the American Bar Association Advisory Committee on Settlement of Market Transactions that encompasses 51 pages and that is in essence supplemented by symposia articles in 12 CARDOZO L. REV. (Dec. 1990). See Mendelson, *supra* note 6, at 1703-09.

The Article 2 (Sales) revision project that began in late 1991 also was preceded by an extensive study by a Study Group directly under the Permanent Editorial Board, which was composed of academics and practicing lawyers with the opportunity for broad public comment. See *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (Aug. 1991). Any future project to revise Article 9 on secured transactions will be based on the study of that Article by the Article 9 Study Committee also directly under the Permanent Editorial Board. This group involves an even broader based number of academics and practicing lawyers and has involved many more persons through independent assistance groups on discrete topics that have included industry comment on proposals. See Burke et al., *supra* note 59, at 1883.

ing committee solicited the participation of as many advisory groups as possible, a number of principal interested groups participated, and the successive drafts were discussed by several subcommittees of the American Bar Association with some significant impact.⁷⁷ Despite these efforts, key groups were not represented at the drafting sessions even though the opportunity existed, perhaps because they did not adequately focus on the implications of the draft.⁷⁸ Perhaps this lack of focus occurred because the leasing project was the first broad scale project to amend the Code since its inception, and the importance of participation and the inevitability that the project would conclude in a uniform law that would be widely enacted were not accurately perceived.⁷⁹ Finally, the timing of the leasing project was unfortunate. Because the A.L.I. was fully committed to other projects, the decision was made by NCCUSL to go it alone with a free-standing uniform act, only to be included within the Code if the A.L.I. was later able to participate. That participation did eventuate between 1985 and 1987, but it was not as extensive as it should have been, and the participants had to deal with a product that was virtually a completed statute, even though it was yet to be integrated into the U.C.C. as new Article 2A.⁸⁰

The result of the lack of actual wide-spread initial participation through the process of an extensive study, the lack of adequate advisor

Finally, whatever revisions may be made to Articles 1 and 7 will be preceded by American Bar Association Task Force studies reviewed by the Permanent Editorial Board and recommended to the A.L.I. and NCCUSL as projects or as part of then existing projects. See Miller et al., *supra* note 50, at 1453.

77. Boss, *supra* note 73, at 592-93.

78. For example, even though invited, no groups representing lessees, including the National Consumer Law Center, were induced to participate. Moreover, even though the National Commercial Finance Association participated, most of its energy was spent on attempting to secure a rule that would require the filing of leases, and the impact of the draft on using leases as collateral was not perceived until later. Boss, *supra* note 73, at 592-93; see also Steven L. Harris, *The Rights of Creditors Under Article 2A*, 39 ALA. L. REV. 803 (1988).

79. The report of the California Bar Committee that began the movement that ultimately resulted in the 1990 amendments to Article 2A represents a case in point. If their suggestions had been formulated earlier, they could have been and no doubt to some extent would have been accommodated. But to restate the response of Harry Sigman, who was an active participant in preparing the report, as to why the suggestions were not made until the project was virtually complete, it is difficult to get busy lawyers to spend much time on a proposal. Nonetheless, the California Bar Committee has learned, as has NCCUSL and the A.L.I. On the project to revise Article 5, the California Bar Committee was solicited to comment and has begun work on its review of the drafts to revise Article 5 at an early stage. It may even be suggested that a law revision commission at least has an obligation to study and provide input to the Commissioners from that state during the development of the statute, rather than first studying it and possibly disagreeing with some judgments made after the fact. See *supra* note 50 and *infra* note 94 and accompanying text.

80. Boss, *supra* note 73, at 593-94.

participation, and the lack of A.L.I. attention during early drafting efforts on the leasing law was that a consensus did not form about many of the details, even though agreement existed, for the most part, about its essential concepts and approach.⁸¹ This led California ultimately to adopt significant nonuniform amendments to the law after it was incorporated into the Code as Article 2A, and some other states either followed suit⁸² or proposed to do so.⁸³ Because still other states enacted the uniform version of Article 2A,⁸⁴ however, uniformity was impaired and, worse, a number of states postponed enactment until they could study the competing products in detail and formulate their own judgment. When it became apparent that NCCUSL's response⁸⁵ to the nonuniform amendments generated in California would not deter their proponents,⁸⁶ the NCCUSL process, which employs a Standby Committee (essentially the former drafting committee) to monitor the progress of the act,⁸⁷ was utilized to prepare a series of amendments that at last produced consensus and a greatly accelerated enactment schedule for amended Article 2A.⁸⁸

81. *Id.* at 599-603; Donald J. Rapson, *Deficiencies and Ambiguities in Lessors' Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute*, 39 ALA. L. REV. 875 (1988); and Harry C. Sigman & Jeffrey S. Turner, *Preface to the California Report on Article 2A (With Some Thoughts About Participation in the Legislative Process)*, 39 ALA. L. REV. 975 (1988).

82. Oregon is an example. 1989 Or. Laws ch. 676 §§ 1-78, 84(2).

83. Massachusetts is an example.

84. Oklahoma is an example. OKLA. STAT. ANN. tit. 12A, §§ 2A-101 to 2A-531 (West Supp. 1988) (amended 1992).

85. See Lawrence F. Flick II, *Article 2A—Leases*, 44 BUS. LAW. 1501 (Aug. 1989) for a discussion.

86. Another factor in the difficulty over Article 2A was that the academic community which, for the most part, had not involved itself in the work on Article 2A, found it more profitable to criticize it in the legal journals than to explain it and promote the effort it represented. Compare Michael J. Herbert, *A Draft Too Soon: Article 2A of the Uniform Commercial Code*, 93 COM. L.J. 413 (1988) with Fred H. Miller et al., *Leases of Goods in Oklahoma: The New Rules*, 41 OKLA. L. REV. 417 (1988). One may hope this is a product of a lack of knowledge about the process, and thus a failure to constructively participate for that reason through the A.L.I., the American Bar Association, or in another manner, rather than a manifestation of the attitude observed in note 30, *supra*. In any event, the Uniform Commercial Code Committee of the American Bar Association, to try to obtain valuable academic input early on, is increasing its efforts through presentations at the annual meetings of the Association of American Law Schools and expanding its membership to acquaint academicians in the commercial law area of revision projects for the Code and to explain the opportunities for and to gain participation in the projects. In this manner critical input can be included as the product is prepared, rather than being used as a basis for nonuniform amendment or objection to enactment.

87. Miller & Fry, *supra* note 6, at 2285. NCCUSL also has a Uniform Commercial Code Committee to perform this function for an Article after a Standby Committee is discharged.

88. As of December 1, 1991, 20 states had enacted Article 2A, an increase after the 1990 amendments of 11 states. Moreover, California, CAL. COM. CODE §§ 10101-20532 (West Supp.

The Article 2A experience teaches the principal lesson that both obtaining actual participation, as opposed to only making an opportunity for participation available, and careful preliminary groundwork are necessary for an ultimately acceptable product. To illustrate how this lesson has been implemented recently, several years ago an American Bar Association report recommended that consideration be given to a uniform act on computer software contracting. The NCCUSL study committee formed to examine the proposal agreed.⁸⁹ However, the earlier report, while carefully researched, had not been developed with broad participation, and the study committee process also had not involved opportunity for a broad range of input. Perhaps as a result, the future course of the proposed project and opportunity for participation was unclear. Severe opposition developed and generated broad reaching discussions revolving around the study committee recommendation. Consequently, NCCUSL's Executive Committee requested that broader based groups in the American Bar Association and members of the study committee communicate and consider the recommendations further. The recent result is a revised set of recommendations that appear to be much more acceptable to all. A special committee of NCCUSL has been formed that will advise and work with the drafting committee to revise and prepare appropriate amendments to Article 2 and, as necessary, Article 2A. The Committee will also address, so far as is possible, computer software contract issues within the context of the Code.

The Article 2A experience also introduced a third and final thread to be woven into the new fabric for successfully continuing the Code experiment. The California Bar Committee that studied Article 2A recognized that the goal of uniformity must be given considerable weight and should prevail over the tendency of any group in studying a product to rephrase it. The goal of uniformity should also prevail because, given enough time and effort, it would of course be possible to "improve" Article 2A or any other proposal.⁹⁰ Nonetheless, the Committee concluded that ultimately, certain nonuniform amendments had to be made before Article 2A could be acceptable for enactment in California. The Committee recommended a number of such amendments, primarily to Part 5 on remedies, to some

1992), Oklahoma, OKLA. STAT. ANN. tit. 12A, §§ 2A-101 to 2A-532 (West Supp. 1992), and other early enacting states also adopted the 1990 amendments.

89. See Jeffrey B. Ritter, *Scope of the Uniform Commercial Code: Computer Contracting Cases and Electronic Commercial Practices*, 45 BUS. LAW. 2533, 2534-35 (1990).

90. See *Report of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California on Proposed California Commercial Code Division 10 (Article 2A)*, 39 ALA. L. REV. 979, 982-83 (1988). The Committee also recognized that even if California did "improve" Article 2A, there was no assurance other states would follow that lead.

of the finance lease provisions, and to some of the provisions dealing with the rights of third parties in relation to the lease contained in Part 3.⁹¹ What the Committee apparently did not fully appreciate, however, is that the result of these recommendations would be largely to destroy their earlier adherence to the goal of uniformity because amendments in an important state like California are likely to be seriously considered elsewhere, and indeed they were.⁹² Moreover, the existence of some nonuniform amendments in any state inevitably lends validity to the temptation to make other nonuniform amendments in other states⁹³ and also perhaps leads to what happened in the case of Article 2A—a reluctance to act in the remaining states and postponement of action until the controversy is resolved. If the desire to “improve” or rephrase the product is to be foregone, the questions remain: What then should be the function of a legislative or bar study committee or a law revision commission with respect to a uniform law, what about any defects, and what of the idea that the states are experimental laboratories?

To answer the latter two queries first, the slogan of NCCUSL suggests a beginning response—diversity of thought, uniformity of law. States must realize that each uniform law is shaped by the input, through Commissioners and other participation, of each state, which shares its experience with the legal subject under the diverse state laws that existed up to that point. In short, the experimentation has occurred before a uniform law is formulated, and the best of that experimentation goes into the uniform product.⁹⁴

91. *Id.* at 984-85, 1006-09, 1016-27, 1034-46.

92. Of course, since some states had already acted earlier, or later adhered to the uniform text, nonuniformity developed as one line of states followed the divergent text or parts thereof and others remained true to the uniform version. In short, exactly what the California Bar Committee recognized could happen, did happen. *See supra* note 90.

93. Several states, seeing imperfect uniformity for Article 2A, recommended their own but different improvements to Article 2A, and thus the nonuniformity increased even further. Whether this would have occurred had California held the line for uniformity can never be known, but the experience in the case of Article 4A, where there have been no serious nonuniform amendments and where California and other early enacting states did resist nonuniform amendments, suggests that if each state resists tinkering, all will do so because there is greater long term gain from uniformity than there is short term gain in the “improvement.”

94. Also, to the extent the end product nonetheless is perceived to have some arguable defects, legislative and bar study committees and law revision commissions further may learn from the Article 2A experience. Instead of designing their own cures, which are unlikely to be uniformly accepted and which are likely to lead to more nonuniformity, they should bring the problems to the attention, while it is in existence, of the NCCUSL and A.L.I. Standby Committee for the Article, to the Permanent Editorial Board, and NCCUSL's Uniform Commercial Code Committee. This process was used by some state groups in connection with Article 2A, and it produced amendments to Article 2A beyond the Cali-

However, it is too restricted a response to mandate the continued initial uniformity that adherence to the above plan would produce. After a period of experience under a uniform law, new issues will arise that clearly call for some legislative redress.⁹⁶ Should the above-mentioned committees and law revision bodies continue to refrain from nonuniform amendment at this stage? It is submitted that at this stage, while problems necessitating possible amendment of the U.C.C. should be brought to the attention of the Permanent Editorial Board and NCCUSL's Uniform Commercial Code Committee for possible national action,⁹⁶ that some nonuniform experimentation can be desirable. After all, without that experimentation any attempt at a later uniform amendment to deal with the issue will have little experience to go on and thus, will be less likely to work well.⁹⁷ Even with such experimentation, what can be termed "core uniformity" normally will still exist, either because the problem arises because the present law does not address new technology or practices at all and thus contains no uniform law to be impaired, or

fornia generated ones, thus better facilitating uniform enactment of Article 2A rather than a state by state series of diverse nonuniform amendments.

It also must be recognized that it is unlikely in the future that we will be limited to 20 to 30 year cycles for Code amendments. Such long periods invite nonuniform amendments in profusion or lead to a statute that increasingly is out of step with technology and commercial practices. In the future, periodic uniform U.C.C. amendments are likely to be proposed as needed for enactment in smaller packages at more frequent intervals.

95. Not all experimentation is necessarily precluded by the Code, however. One immediately thinks of the Article 9 filing rules in § 9-401 and the Article 2 and Article 2A privity rules in §§ 2-318 and 2A-216 as examples of experimentation in the Code that may later provide a basis for a more uniform rule. A more recent example is revised Article 6 on bulk sales. While the preferred recommendation is repeal, there also is an alternative revised Article 6 provided by NCCUSL and the A.L.I. for states not wishing to repeal Article 6. As of the end of 1991, ten states have repealed Article 6 and four have enacted the revision. A uniform rule, revision, or no law at all is inevitable; whether ultimately all states will have the same rule is the object of the experiment. See generally 2C U.L.A. 1-2 (1991) (Table of Jurisdictions Adopting Uniform Commercial Code).

Interpretations of the U.C.C. in cases also can cause nonuniformity. However, the commentary process of the Permanent Editorial Board exists to explain the correct interpretation of the Code and to amend comments to remove ambiguities and resolve differences in interpretation. To date eight commentaries have been issued and additional commentaries are under discussion. For a description of the process, see Fred H. Miller & Ralph J. Rohner, *Introduction to the Uniform Commercial Code Annual Survey*, 43 *BUS. LAW.* 1255, 1257-58 (1988). There are limits to this process, of course. For example, it is unlikely that the divergent opinions as to the consequences of a failure to act in a commercially reasonable manner under § 9-504 can be reconciled by a commentary.

96. See *supra* note 94. The experience to date is that a problem recognized by one state usually has been identified by other states as well, and thus, a uniform solution probably is desirable at some point.

97. Recall that of the original articles to the Code, the one with the least prior experience, Article 9, was the first to be amended.

because the perceived problem may not be clearly addressed under the unamended law and thus that law often may and will be interpreted in accord with any reasonable solution provided by a nonuniform amendment.⁹⁸ Even when neither of these situations exists, if the problem arises because law outside the U.C.C. is unclear and the nonuniform amendment brings the transaction under the Code in an attempt to provide clarity, uniformity is not really harmed and experimentation is served.⁹⁹ The results of this experimentation ultimately can be used to produce a uniform amendment to the Uniform Commercial Code by NCCUSL and A.L.I.

Now to turn to the first inquiry: What should a legislative or bar study committee or a law revision commission do if they do not review a Code amendment for style or substantive improvement? To enact any statute, persuasive answers to three matters must be furnished to a legislature: What does the statute do, why is it needed and how would it change present law? While any amendment to the U.C.C. often comes with the first two matters addressed,¹⁰⁰ only a local group can address the third matter and the second matter in context.¹⁰¹ Thus, this is one necessary function that may be performed by a legislative or other study group. A second necessary function that such a group may perform is to appropriately select any necessary options, which may require considerable analysis to do

98. This now occurs where a uniform amendment to the U.C.C. is used to interpret the meaning of the unamended U.C.C. in a particular jurisdiction. *See, e.g., In re Cole*, 114 B.R. 278 (N.D. Okla. 1990).

99. An example is provided by the extensive amendments Louisiana made to Article 9 to include many transactions excluded under uniform Article 9. L.A. REV. STAT. ANN. §§ 10:9-101 to 10:9-605 (West Supp. 1992) (particular attention to *Historical and Statutory Notes*). These nonuniform amendments, and the experience gained from the problems experienced with them, are furnishing, along with similar experience from nonuniform amendments on some of the same issues from California, valuable information for the Article 9 Study Committee. Another example is the Louisiana experiment allowing local filing without restriction with central information deposit. Uniformity was never achieved under Article 9 in this area, and so the experiment seemingly can only provide valuable knowledge. Similar experience is furnished by nonuniform amendments expanding the period to perfect purchase money security interests in many states and was furnished by nonuniform amendments to Article 4 deleting the process of posting in some states, a position followed by revised Article 4.

100. *See, e.g.,* Prefatory Notes to U.C.C. arts. 3, 4A, reprinted in 2 U.L.A. 7-11, 2B U.L.A. 456-63 (1991); *see also* U.C.C. § 2A-101 cmt. (1990).

101. *See, e.g.,* Commentary on Uniform Commercial Code Article 2A—Leases as Enacted in Oklahoma, OKLA. STAT. ANN. tit. 12A, §§ 1-101 to 2-725 (West Supp. 1992); Commentary on Revised Uniform Commercial Code Articles 3 and 4—Negotiable Instruments and Bank Deposits and Collections, As Enacted in Oklahoma, OKLA. STAT. ANN. tit. 12A, §§ 3-101 to 6-111 (West Supp. 1992).

properly,¹⁰² and to determine how the U.C.C. amendment fits within the local jurisprudence.¹⁰³ A final function that a legislative or other study group is well-suited to perform is an elaboration of how other local law relates to the new amendment.¹⁰⁴ If these tasks are competently performed, they will more than occupy the time of the study group and will return greater dividends than a review of the style or substance of the amendment that almost inevitably will result in nonuniform changes that destroy the national consensus reached.

In conclusion, the answer to the question posed by the title of this Article—*Will the Experiment With the U.C.C. Continue*—is an affirmative one, but only if the lessons learned from the past experience in amending the U.C.C. are followed. The experiment will continue only if the states determine that they really wish to preserve their role in the area of commercial law and take such steps, or refrain, as are necessary to do it. Hopefully this will occur, because a failure to do so will not only be an unfortunate development for commercial law in the United States, but also for its form of government in that one of the best evidences of the viability of state government, and thus of the reason for the existence of that government, is the continued viability of its most successful experiment.

102. See, e.g., Comment to § 2A-216, OKLA. STAT. ANN. tit. 12A, § 2A-216 (West Supp. 1992).

103. See, e.g., Commentary on Uniform Commercial Code Article 2A—Leases as Enacted in Oklahoma: What Article 2A Replaces, OKLA. STAT. ANN. tit. 12A, §§ 1-101 to 2-725 (West Supp. 1992). A particularly good example of what can happen when this function is not performed occurred in a state that enacted Article 4A and that had legislation similar to that in the federal Electronic Fund Transfers Act (15 U.S.C. § 1693 (1982)) limiting liability for unauthorized transfers, but which was not limited to consumer transfers. The existing statute was not amended, and severely conflicts with the pattern that exists in §§ 4A-201 through 4A-204. The matter now will have to be resolved by subsequent amendment. Meanwhile, a basic purpose of Article 4A, to bring certainty to these types of transactions, is severely hampered.

104. See, e.g., Commentary on Uniform Commercial Code Article 4A—Funds Transfers as enacted in Oklahoma, OKLA. STAT. ANN. tit. 12A, §§ 3-101 to 6-111 (West Supp. 1992), discussing the relation between the provisions of Article 4A and the Oklahoma law of mistake and restitution which supplements certain Article 4A provisions.