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The Future of Uniform State Legislation in the Private Law Area

Fred H. Miller*

This symposium addresses problems in the filing system under Article 9 of the Uniform Commercial Code and potential reforms. No topic better illustrates the consequences of a failure in state private law uniform legislation. This Article addresses whether the proper circumstances exist for formulating future uniform legislation that can continue the general past success of uniform laws.

I. THE CASE FOR UNIFORM LEGISLATION

I begin by reviewing the premises upon which I base my observations in this Article. All of these premises, I admit, are debatable, but I believe each is more true than not.

A. UNIFORM LAWS ARE USEFUL IN THE PRIVATE LAW AREA

My fundamental premise is that uniform private laws are useful. Uniform laws on private law subjects—because of the way they are formulated and monitored—mitigate the need for private agreements to accommodate relationships and transactions to changes in technology and practices. Uniform laws also help to temper the effects of laws that are inappropriate and outdated. Using private agreements to accommodate change and avoid the consequences of an outdated or inappropriate statute is clearly inefficient and more costly than need be. Private agreements may also involve less certainty than statutorily sanctioned rules for relationships or transactions where cer-

* Kenneth McAfee Centennial Professor, George Lynn Cross Research Professor and Professor of Law, University of Oklahoma. Professor Miller was a Commissioner from Oklahoma to the National Conference of Commissioners on Uniform State Laws, and now is its Executive Director. The views expressed are Professor Miller's, based on his experience as Commissioner and Executive Director, and are not necessarily those of the Executive Committee of the Conference or any of its officers or members. This Article was adapted from a speech delivered to the Article 9 Symposium at the University of Minnesota Law School on October 29, 1994.
tainty may be desirable and, indeed, more important than the actual rules themselves. Also, to the extent that private agreements are not possible or fail to provide the requisite certainty, without a clear statutory rule to fall back upon, parties must resolve disputes through litigation, which is expensive, time-consuming, and uncertain in outcome, and which exacerbates the other problems of the dispute resolution system. Another point in favor of uniformity is that clear statutory rules facilitate structuring relationships and allow the beneficial pricing or provision of important products or services because of reduced legal costs and risks. Finally, absent uniformity of law, many relationships involve choice-of-law questions, which represent another unnecessary legal issue as well as unnecessary transaction costs.

Certainly there are alternatives to uniform laws, but the alternatives, such as a bolstered use of choice of law, although perhaps useful supplements, are not adequate substitutes. Thus, for the reasons presented above, uniform laws are here to stay.

1. Of course, the issue of choice of law exists only if the law governing a particular relationship or transaction in a state is different from the laws of other states with which the relationship or transaction may have an association.

The choice-of-law problem can manifest itself in a possible loss of business to interests in other states. In Louisiana, for example, various outside financial institutions refused to come to the aid of some of Louisiana's failing financial institutions because Louisiana's law was significantly different from other states' laws and thus added important operational costs to an interstate organization. People involved there told the author that recognition of this factor directly influenced Louisiana to enact UCC Article 9 on secured transactions to harmonize its law with the rest of the country.


3. Id. at 17-19 (advocating greater emphasis on choice of law as alternative to uniformity in many instances).

4. For example, a liberal contractual choice-of-law rule could facilitate certainty during transition periods when few states have adopted proposed uniform laws. See id. at 17 ("[A] contractual choice of law regime would involve lower information costs than a uniform-law regime in which only a few states have adopted a 'uniform' law."). Indeed, Ribstein argues that federal law could guarantee the legal effect of liberal contractual choice-of-law rules. See Larry E. Ribstein, Choosing Law by Contract, 18 J. Corp. L. 245, 283, 298-99 (1993).

5. Modern choice-of-law theory embodies rules that, in the absence of private agreement, are particularly uncertain of application. Even where private agreement is possible, some parties are unable to reach an agreement on the applicable law, and some courts may not uphold the parties' agreement.
B. Uniformity Through Federal Legislation Is Often Undesirable

My second premise is that federal legislation to achieve private law uniformity is presumptively undesirable. Uniformity in the private law area may derive from one or both of two sources: federal legislation or state level cooperative law. Federal law is generally not the preferred choice. Most legislatures, including Congress, are politically focused, reactive groups. Their members have many tasks—such as handling constituents’ requests, formatting budgets, and overseeing governmental operations—that take precedence over formulating the details of legislation. Thus, with exceptions, such as where the particular subject matter of a bill interests a legislator, most legislators rarely formulate, draft, or extensively study the legislation themselves. Their role is to receive the general suggestion for legislation from a constituent or other source, determine or generate support for the proposed legislation, and ensure its legislative progress. Legislators need to be visible and newsworthy; bill preparation involves neither. Publicity occurs when a bill is introduced and passed. The task of turning suggestions for legislation into detailed bills falls to the legislative staff. Unfortunately, due to budget constraints, the legislative staff tends to be small, and staff members are typically overworked, young, and inexperienced. They are, for the most part, bright people who nonetheless have limited real experience, and whose knowledge of and experience with economics, institutions, and legal processes comes largely from books, the classroom, or other more knowledgeable sources.

An arguable result of these circumstances is that Congress does reasonably well on technical matters when its staff gets adequate input from a governmental agency, a study commission,

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6. See Ribstein & Kobayashi, supra note 2, at 14 (noting that “[s]ome strong advocates of uniform state laws view federal law as the great evil that uniform laws help avert”).
8. See id. For illustration, a senior member of the United States Senate has assumed the presidency of a major university, and law schools are looking at hiring his senior staffer. Since graduating from law school in 1988, the senior staffer has been a law clerk, a legal advisor to a judge on the Iran-United States Claims Tribunal, and an advisor to the Senator on legislative drafting, strategy, and policy concerning tax, budget, and welfare reform issues. That person became legislative director for the Senator in 1993. There is a lot of governmental experience here, but nothing beyond that experience to any significant degree.
or even an interest group. Bankruptcy legislation, for example, tends not to be a disaster.  
Congress also does reasonably well when it merely sketches the outlines of legislation and delegates the details to a competent federal governmental agency.

Reasonable minds may differ, however, over how well Congress normally formulates substantive legislation. The workings of Congress often produce an amalgamation of independent provisions derived from the proposals of various groups, rather than synthesized legislation that is compatible with other laws or circumstances. Some believe that Congress is unable to produce balanced and fair legislation due to the influence of special interest groups with specific agendas. Most would also agree that when congressional staff drafts legislation largely on its own or pursuant to inadequate advice, the result is a technical nightmare that produces unacceptable costs that far outweigh the benefits from any policy change.

Of course, all this may be said as well about state legislative operations, but one significant difference exists on the state level: Congress has nothing like the National Conference of Commissioners on Uniform State Laws (NCCUSL).


11. Miller, supra note 7, at 706. For example, in regulating the availability of funds from deposits in the EFAA, Congress only dimly perceived the ramifications for the check collection system as a whole. Id. at 705-06. Consequently, the Federal Reserve has since been operating as a quasi-legislature, trying to accommodate congressional mandates with other laws and policies. Id. at 706 n.17 (citing 12 U.S.C. § 4008(c)(1) (1988)).

12. See Warren, supra note 9, at 815-16 (arguing that the substantive result is often flawed, even when the information received may be technically adequate, because “issues [are] . . . publicly aired but privately brokered”).

C. Uniformity Through State Legislation Works Well

My third premise is that due to the described deficiencies at the federal level, the quality of work done by NCCUSL, and the improved enactment record for uniform state laws, future uniform legislation in the private law area is more likely to be developed and enacted at the state level rather than by Congress.

1. Working Through NCCUSL

One benefit of state-level, private lawmaking is that NCCUSL provides a time-tested method for cooperative state action to produce uniform legislation. Negotiated agreements among the states, because of the number of legislative bodies involved, have long been viewed as presenting almost insuperable difficulties. And, although concerted action by significant interest groups occasionally achieves more-or-less uniform state laws in response to pressing needs, such effort cannot consistently produce uniformity and consensus—only NCCUSL has demonstrated an ability to do that.

NCCUSL has been in existence since 1892. NCCUSL receives funding primarily from state appropriations solicited by NCCUSL’s commissioners from state legislatures in a manner

14. See Warren, supra note 9, at 813-16 (describing the benefits of state action versus federal action in commercial law).

15. Whether due to residual concerns about the federalism principle of the Tenth Amendment or recognition of the inherent limitations on the federal level, Congress has never been inclined to act in private law areas where the states have traditionally acted. When Congress does act, it often seeks to accommodate potential enactments by the states. See, e.g., Expedited Funds Availability Act § 608, 12 U.S.C. § 4007 (1988) (providing that relevant state law supersedes the Act); Market Reform Act of 1990 § 5(3), 15 U.S.C. § 78q-1(f)(3) (1988 & Supp. II 1990) (allowing states to enact statutes that differ from Securities and Exchange Commission rules); see also Robert C. Mendelson, Investment Securities Review, 46 Bus. Law. 1697, 1705-06 (1991) (discussing Congress’s concerns in drafting § 5 of the Market Reform Act). In addition, because all new or revised Articles of the Uniform Commercial Code have been enacted by more than one half the states within two or three years of promulgation—and universal adoption seems certain—it is reasonable to assume that the state level may only occasionally experience significant future preemption.


17. Many states have enacted legislation regulating credit services organizations and so-called “rent to own” transactions in more or less the form pushed by the interested industries. See, e.g., Scott J. Burnham, The Regulation of Rent-to-Own Transactions, 3 Loy. Consumer L. Rep. 40, 42 (1991) (providing examples of credit regulations favoring credit providers).
similar to any other state agency budget. The governors of each state appoint commissioners who represent the state, usually for a set term, and in many states legislative sources make additional appointments. Commissioners serve without pay—and are able to do so because they are usually people whose experience and position allow adequate flexibility to do pro bono work. They are usually politically experienced, and have records reflecting good judgment and the ability to furnish astute advice. In short, they are people who have gotten things done and have the capacity to get things done.

2. The Nature of the NCCUSL Product

The uniform legislation that NCCUSL prepares must fall within certain criteria. First, the subject matter must be appropriate for state legislation in view of federalism. Thus, for example, NCCUSL does not draft bankruptcy legislation, an area of law that the U.S. Constitution reserves for Congress. Second, within the subject matter appropriate for state legislation, a uniform act must constitute a practical step toward uniformity, or at least toward minimizing diversity. In other words, a proposed law must be perceived to have a reasonable probability of enactment in a substantial number of jurisdictions or the potential to promote uniformity indirectly through case law or legal education.

Third, proposed uniform legislation must ensure that subject matter uniformity will produce significant benefits through improvement in the law (e.g., facilitating

18. At times the expense of the work of NCCUSL, as in the case of the UCC, outstrips the available appropriated funds. Thus, several years ago, the Uniform Law Foundation was created to solicit and accept contributions to assist NCCUSL in its work. The income generated by the Foundation, however, only serves to supplement the funds appropriated by legislatures, which remain NCCUSL’s primary source of income.


22. For example, the Uniform Rules of Evidence have had a major impact on case law and teaching materials.
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interstate economic relations) or avoid significant disadvantages that often arise from diverse state law, such as inconvenience to citizens who move between states. Fourth, NCCUSL generally does not consider legislation on novel subjects or in areas where experience is largely unavailable. Rather, uniform laws tend to distill the experience of early experimentation in the various states. Finally, subjects that are controversial because of disparities in social, economic, or political policies among the various states are seldom suitable for a uniform law.

Past experience indicates that application of the above criteria will channel successful uniform legislation into one or more of the four following categories: (1) acts to facilitate the flow of commercial transactions, such as the Uniform Commercial Code; (2) acts to help resolve conflicts of laws when the laws of more than one state may apply, such as the Uniform Certification of Questions of Law Act; (3) acts to provide reciprocity as to rights and remedies between states and residents of different states, such as the Uniform Interstate Family Support Act; and (4) acts that fill state legislative needs by modernizing concepts or codifying the common law, such as the Revised Uniform Partnership Act and the Uniform Principal and Income Act.

23. A good example of allowing states to experiment prior to adoption of a uniform law is the Uniform Limited Liability Company Act passed by NCCUSL in 1994.

24. Thus, “regulatory” acts, such as insurance codes and banking laws, are usually not amenable to the uniform laws process because states have differing social and economic goals and policies. Subjects of purely local or state concern, such as taxation statutes, are also normally excluded from consideration for uniform laws. Areas of law are not excluded from consideration, however, merely because they are “controversial.” Witness the recent establishment of a drafting committee by NCCUSL to consider a uniform punitive damages act—an area of law that generates much controversy in the legal profession and among politicians. See, e.g., Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U. L. Rev. 1393 (1993) (arguing that “tort explosion” is exaggerated and that punitive damages are necessary for social justice); Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1 (1992) (citing empirical studies to support argument that punitive damages in product liability cases fulfill social functions of punishment and deterrence); Richard B. Schmitt, Group of House Republicans asks Gingrich for Broader Legal Reform, WALL ST. J., Feb. 15, 1995, at B3 (reporting that first-term Republicans are supporting legislation to impose stricter controls on punitive damage awards).

25. See RIBSTEIN & KOBAYASHI, supra note 2, at 28-32, 48-52 (reaching similar conclusions based on a study of the enactment records of uniform acts).
3. How NCCUSL Operates

The uniform legislation that NCCUSL promulgates is not prepared in isolation.26 When a uniform or model act is begun, the NCCUSL president selects a drafting committee composed of six or more commissioners. Some committee members are selected for their expertise on the subject, but others are deliberately selected for a generalist's ability to ask questions uninhibited by a specialist's viewpoint.27 Most drafting committees also include a reporter, who advises the drafting committee as to policy issues and possible resolutions, and then attempts to record the decisions of the committee in legislative language.28

Each drafting committee is also responsible for implementing a "PACE" plan.29 Under a PACE plan, the drafting committee attempts to identify all outside interests that the proposed act may affect, and solicits their input as to its provisions. Interest group representatives participate by commenting on drafts or, more directly, as observers around the drafting table. The consensus built here will also assist in the enactment phase; the PACE work is largely responsible for NCCUSL's good enactment record.

Finally, an American Bar Association (ABA) advisor, or perhaps an ABA Section advisor, normally serves each drafting committee. The ABA's participation aids the development of a proposed act by exposing the proposal to discussions at ABA meetings and broadening the participation of non-commissioners in the formulation of the proposed act.

Clearly, the development of a uniform law is an open process: NCCUSL arrives at decisions in public, after visible discussion, and accords virtually every affected group or interested constituency an opportunity to participate. In one situation, the reporter for Revised UCC Article 8 showed up on his own during the later meetings of the committee working on Revised UCC

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26. The public process associated with promulgation of uniform laws has become very controversial. See infra notes 40-44 and accompanying text (describing recent criticisms that special interest groups now dominate the uniform laws process).

27. In the case of the UCC, one or more representatives of the American Law Institute are also appointed.

28. The reporter is selected by the NCCUSL executive director based on legal expertise, legislative drafting ability, and cooperative skills. The reporter does not determine the agenda or the content of the proposed act.

29. "PACE" stands for Planned and Coordinated Enactments. This planning requirement demonstrates that drafting is only part of the job for the drafting committee.
Articles 3 and 4. He so impressed everyone with his comments that not only do Revised Articles 3 and 4 reflect some of his ideas, but he later was solicited to be the reporter for the Revised Article 8 project.

II. THE FUTURE OF UNIFORM STATE LEGISLATION IN THE PRIVATE LAW AREA

A. DOUBTS ABOUT THE NCCUSL RECORD

If we reasonably assume that most future uniform laws in the private law area will come about on the state level through NCCUSL, can we also assume that NCCUSL's successes of the last one hundred years will be replicated? Over the years, but particularly of late, some serious questions have been raised about an affirmative answer to that question.

1. Is Federal Enactment Superior?

As UCC Article 4A drafting was being concluded, strong and long-standing arguments were made in favor of federal, as opposed to state, enactment of uniform laws. Proponents of federal action argued that state-by-state enactment takes much too long, citing the enactment records for the 1972 and 1977 amendments to Articles 9 and 8. As revised in the last ten years, however, NCCUSL enactment procedures have largely eliminated this argument. As evidence, fifty jurisdictions have en-

30. NCCUSL’s successes include the Uniform Commercial Code (enacted in substantial part in all states except Louisiana, which did not enact Articles 2 or 2A on sales and leases), the Uniform Partnership Act (enacted in 51 jurisdictions), the Uniform Limited Partnership Act (enacted in 48 jurisdictions), the Uniform Anatomical Gift Act (adopted in 52 jurisdictions), and the Uniform Child Custody Jurisdiction Act (adopted in 52 jurisdictions). UNIFORM LAWS ANNOTATED, DIRECTORY OF UNIFORM ACTS AND CODES: TABLES—INDEX 9 (1994) [hereinafter U.L.A. TABLES].

31. See generally David E. Goldstein, Federal Versus State Adoption of Article 4A, 45 Bus. Law. 1513 (1990) (arguing that wire transfers under Article 4A are interstate or international events suited for federal, rather than state, regulation). Use of the federal approach, however, has been advocated in some quarters from the beginning. See ARMSTRONG, supra note 16, at 22.

32. Revisions include targeted acts for commissioners to concentrate on and the PACE program, which seeks broad participation and consensus in the uniform laws process. See supra note 29 and accompanying text (discussing PACE program).
acted Article 4A since its promulgation in 1989. Other UCC products are not far behind.

2. Inevitability of Non-Uniform Amendment

A second argument against state-level cooperative law making is the inevitability that states will adopt non-uniform amendments to the uniform product. There is no question that nonuniformity has been a continuing problem, and one that will probably never be entirely eliminated. In the case of the UCC, however, the consensus-building procedures described above have minimized the tendency for non-uniform amendment. As a result, the current UCC is mostly uniform, except for relatively minor amendments focusing on consumer and particular local issues. Indeed, as experience with revising the UCC accumulates, a plan of appropriate work for bar association and other local study groups that does not involve reinventing the wheel has emerged. As a consequence, local groups now work in partnership with NCCUSL to a greater extent than ever before.

3. Inflexibility in Relation to Change

A third argument against working through NCCUSL is that enactment by fifty states creates an inflexible legal system for substantial periods of time. If uniform laws are not heavily amended in a non-uniform manner, they risk being bypassed by the pace of changing circumstances. Again, recent experience challenges the force of this observation. Although the observation appears to have some historical basis, today most major blocks of uniform acts have joint editorial boards. Joint editorial boards are charged with making recommendations for uniform amendments, revisions, or additions to accommodate new or de-

33. See U.L.A. Tables, supra note 30.

34. As of November 1994, 46 jurisdictions have enacted UCC Article 2A; 36 have enacted revised UCC Articles 3 and 4; and 33 have enacted revised UCC Article 6 or repealed the prior version. See id.

35. The tension between uniformity and state autonomy has a long history. See ARMSTRONG, supra note 16, at 13-22.

36. See supra notes 27-29 and accompanying text (describing efforts to include experts, generalists, interest groups, and the ABA in the drafting process).

37. See, e.g., Miller, supra note 7, at 706-13 (1993) (advocating preparation of local reports to explain why statute is needed, what it will accomplish, and how it would change existing state law). See generally Fred H. Miller & Robert T. Luttrell, Local Comments to Uniform Laws: A Winning Combination, 48 CONSUMER FIN. L.Q. REP. 60 (1994) (arguing that local studies help facilitate uniform enactment).
veloping technology and practices. Joint editorial boards also prepare and publish supplemental comments to uniform acts in order to reflect the correct interpretation of the acts.\textsuperscript{38}

The accomplished record of fine-tuning amendments to some of the uniform real property acts and the Uniform Probate Code indicates that it is possible to develop and enact minor periodic amendments without promulgating major revisions or amendments. Moreover, when courts react favorably to a joint editorial board’s supplemental comments, they demonstrate that interpretative fine tuning works in lieu of statutory amendment.\textsuperscript{39} Finally, many uniform acts that do not have a joint editorial board still fall under the NCCUSL Act Manager program, under which a commissioner assumes many of the duties performed by joint editorial boards with respect to larger groups of acts.

B. Doubts About the NCCUSL Process

In addition to doubts arising from NCCUSL’s record, critical questions about process have also come forth within the past five years. These criticisms are being taken seriously. The agendas for the Fall 1994 meetings of the UCC Committee of NCCUSL and of the Permanent Editorial Board for the UCC included discussion of these criticisms. In addition, the Executive Committee of NCCUSL, in January 1995, considered the criticisms and what, if any, procedural changes could be of benefit. Individual drafting committees are also responding where appropriate.

What are some of the criticisms? One assertion is that the participatory process of the PACE program, in which representatives of significant interest groups attend the drafting sessions, may detract from the ability of the drafting committee members to arrive at provisions that reflect the \textit{true} public interest.\textsuperscript{40}

\textsuperscript{38} See 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 ¶ B(5)(a)-(b) (July 31, 1986) (on file with author).

\textsuperscript{39} See, e.g., Utility Contractors Fin. Servs., Inc. v. AmSouth Bank (In re Joe Morgan, Inc.), 130 B.R. 331, 334 (Bankr. S.D. Ala. 1991) (referring to UCC Permanent Editorial Board commentary to UCC § 9-309 regarding priority status of holder in due course over prior perfected security interest), rev’d in part on other grounds, 985 F.2d 1554 (11th Cir. 1993).

\textsuperscript{40} See, e.g., Kathleen Patchel, Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code, 78 Minn. L. Rev. 83 (1993) (arguing that certain powerful interest groups wield more power and win more drafting controversies than others); Donald J. Rapson, Who Is Looking Out for the Public Interest? Thoughts About the UCC Revi-
Proponents advance several reasons. I will address them in turn.

1. Too Much Cooperation

The first reason stems from the perceived tendency of lawyers to adopt and to identify with positions of groups that the lawyer commonly represents. This, of course, is premised on the assumption that such groups predominate in the drafting process. Arguably, however, this observation is blunted to the extent that most concerned interests are represented at the drafting sessions. Consequently, all viewpoints acquire some adherents.

2. Too Much Compromise

Some critics argue that an excessive concentration on enactment leads to an unhealthy catering to interests that could block passage of the uniform law in important states or in a large number of states. This argument, however, is flawed. Even if

sion Process in the Light (and Shadows) of Professor Rubin's Observations, 28 Loy. L.A. L. Rev. 249 (1994) (arguing that consumer representatives should be involved in drafting process, but that such representation does not assure fair or efficient outcome). For a similar view based upon observations of the Article 9 Study Committee, see Robert E. Scott, The Politics of Article 9, 80 VA. L. Rev. 1783 (1994) (projecting outcome of Article 9's revision). To the extent the composition and dynamics of the Article 9 Study Committee differ from those of the drafting committee (and they do), the foundation for Scott's argument is incomplete in a significant respect.

41. See Edward L. Rubin, Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4, 26 Loy. L.A. L. Rev. 743 (1993); see also Warren, supra note 9, at 811 (characterizing UCC process as "consensus approach"). Rubin's observations seem accurate: As one experienced participant noted, even if a lawyer forgets particular clients, "it is not possible for a lawyer to 'leave at the door' the effect that one's practice or experience has on informing and shaping one's views." Richard B. Smith, An Un-

42. See Patchel, supra note 40; Rapson, supra note 40; Scott, supra note 40. Of course, the American Law Institute's participatory process has also been criticized for catering to powerful political interests—even though Restate-
ments need not be enacted. Thus, this factor may not be significant; indeed, some commentators argue that including powerful interests is praiseworthy. Compare Alex Elson & Michael L. Shakman, The ALI Principles of Corporate Governance: A Tainted Process and a Flawed Product, 49 Bus. Law. 1761 (1994) (arguing that powerful special interests could shatter the ALI's commit-
ment to a common good) with Jonathan R. Macey, The Transformation of the American Law Institute, 61 Geo. Wash. L. Rev. 1212 (1993) (arguing that ALI has improved since evolving from quiet, elite academic group to the very public and democratic institution it is today).
this factor represents an important consideration, it is how democracy works. It puts a premium on compromise between opposing views. Although compromise may never entirely please everyone, it best reflects consensus and dialogue.\textsuperscript{43}

3. Too Much Self-Interest

A third observation is that during the drafting process committee members may have too much at stake personally to disagree significantly under the watchful eye of representatives of powerful interest groups. In reality, this criticism holds little currency. Drafting committee members are commissioners who have experience with this sort of pressure. In the end, the evidence in support of the objection that the process leads to results not in the public interest is not persuasive.\textsuperscript{44}

4. Inadequate Representation of Interests

A perhaps more serious objection to NCCUSL lawmaking is that the participatory and adversarial process produces a flawed product if not all affected interests are represented. Of course, although this may be true for litigation, it never has been a fatal objection to law making in the legislative arena unless the lack of representation is due to deliberate exclusion. It is the opportunity to participate and not the fact of participation that is important in the legislative context. Certainly, all interest groups have had the opportunity to participate in uniform law making and, indeed, have been solicited to participate.\textsuperscript{45} Moreover, commissioners on the drafting committees or at NCCUSL's annual meetings\textsuperscript{46} often take positions advocated by one or more inter-

\textsuperscript{43} See Carlyle C. Ring, Jr., The UCC Process—Consensus and Balance, 28 Loy. L.A. L. Rev. 287 (1994). Ultimately, the objection that the drafting committee did not reach a position in the public interest may mean no more than it did not agree with the position of the person criticizing the process.

\textsuperscript{44} Even the author who argued that a drafter's personal interests would favor powerful interest groups said that he was able to ignore the pressure as a drafter and do what he considered was right. Rapson, supra note 40, at 264-65.

\textsuperscript{45} For example, consumer groups did not fully participate at drafting committee meetings in the revision of the UCC's payment provisions despite requests to do so. See Ring, supra note 43, at 291 (noting consumer representatives' own doubts about the willingness and ability of consumer groups to participate). Later solicitations have borne fruit, however, as these groups have realized the need for greater participation. There is now substantial consumer participation at the drafting table in the revision process for UCC Articles 2 and 3.

\textsuperscript{46} No uniform law is promulgated until the entire Conference discusses it at two annual meetings, and commissioners on the floor commonly disagree with and overturn the position of the commissioners on the drafting committee.
est groups, even if those groups have no representation or have declined representation. This has been particularly true of consumer issues. In addition, the commissioners who are not specialists, but rather generalists, are clearly not biased and often raise the same questions or objections that representatives of absent interest groups might raise. Nonetheless, there is no disagreement that a better product and a stronger consensus usually result from more informed participation, i.e., when each group has the enhanced opportunity through participation at drafting meetings to understand positions expressed by the representatives of various other groups.\textsuperscript{47} Thus, every effort is made and will be made to encourage participation by under-represented interests.

5. No Incentive for Early Participation

Another criticism of the current process is that the full input needed to improve quality and achieve consensus inevitably will not occur until people are forced to consider a final product as opposed to only a proposal.\textsuperscript{48} If people really believe the product will eventually be completed and presented for enactment, however, it can be assumed that they will try to provide input before that time. In short, the task is to educate them to the schedule. For example, when consumer interests first participated in the enactment process of Articles 3 and 4 in California, they had a somewhat limited impact because they had entered the process too late. They now participate from the beginning because they correctly perceive that they can make a greater impact at the earlier stages of the process.\textsuperscript{49} There is also no reason to assume that people who are several years tardy during

\textsuperscript{47} See Ring, supra note 43, at 289-90, 294-98 (noting that NCCUSL has realized the need for greater breadth and depth of participation to formulate successful uniform acts).

\textsuperscript{48} Harry C. Sigman, \textit{Improving the UCC Revision Process: Two Specific Proposals}, 28 Loy. L.A. L. Rev. 325 (1994). Under this proposal, the final product would be only “tentatively” final. Instead, there would be a period of repose after an act is completed during which “late” comments would be accepted and then considered on their merits. This is essentially a proposal to withhold a completed uniform act from enactment for several months to give people time to become familiar with it. Of course, some states might go ahead regardless of the “repose” period. And, if they did not, there is no guarantee that parties would comment during this time rather than waiting for actual introduction in state legislatures: Interested parties may not consider the “final” act to be final.

\textsuperscript{49} Gail Y. Hillebrand, \textit{Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective}, 42 Ala. L. Rev. 679 (1991); Yvonne W. Ros-
the drafting process would not also be tardy during a proposed repose period. The proposed repose period could be a tiring series of negotiated revisions to a product that already represents an acceptable balance between adequate law and undue allocation of resources.\textsuperscript{50}

6. Hidden Policy Choices

One legitimate criticism of NCCUSL law making is that the reasons behind significant policy choices in a uniform act are not always adequately identified. Critics assert that if they were better identified, legislators and others would be better able to assess the validity of the choices made. As a result, consensus-based uniform enactment would gain greater acceptance, and non-uniform amendments would decrease.\textsuperscript{51} Although such detail might overburden the comments to an act, policy papers could be included in the legislative materials developed for each act that would contribute greatly to understanding the act. Policy papers would be similar to the "prefatory notes" attached to new uniform acts and the lists of significant issues regarding proposed acts distributed to commissioners at annual NCCUSL meetings. This appears to be a suggestion worth implementing.

7. Committee on Review of Conference Acts

NCCUSL is a volunteer organization with a long history. Because volunteer time is at a premium, focus tends to be more on substance and less on process, and things tend to get done as they have always been done. Although the criticisms discussed here have tended to make business-as-usual more difficult, that is their true value—not just the details of the suggestions made. The criticisms have prompted both long-time and relatively new commissioners to think more about how their organization runs, and this has resulted in the revitalization and expansion of one of NCCUSL's most important committees: the Committee on

\textit{marin, Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process, 35 WM. & MARY L. REV. 1593 (1994).}

\textsuperscript{50} Some experience with the Revised Uniform Partnership Act is instructive in this regard. The American Bar Association disagreed with some provisions and, as a negotiation tactic, claimed that the provisions had been prepared too late in the process for adequate evaluation. Negotiations thus ensued even after NCCUSL had promulgated the act, and two more years went by before final amendments to the act as promulgated were approved. There is no question the act is better as a result of this delayed further consideration, but the improvement may not have been worth the extra resources required. Moreover, this sort of flexibility may simply encourage late participation.

\textsuperscript{51} See Patchel, \textit{supra} note 40; Rapson, \textit{supra} note 40; Scott, \textit{supra} note 40.
Review of Conference Acts. This committee determines what, if anything, is wrong with an act and how to remedy it. Good will come of all this. There is no doubt that NCCUSL will come to view its critics as its friends (if it does not already do so).

CONCLUSION

The future of uniform state legislation in the private law area appears bright. Despite other proposals, such as private agreements on choice of law or federal legislation, most observers recognize a need for uniform state laws. It appears that NCCUSL is the only viable delivery vehicle for well-prepared, state uniform legislation. This perception is evidenced by continued state monetary support for NCCUSL and a better-than-ever enactment record for its products. The present uniform laws process generally must be considered sound: Why else would so many commentators devote so much time to discussion of it? As long as NCCUSL continues to listen to serious suggestions for improvement—and allows the process to evolve and adapt to changed circumstances—there is no reason to believe that the success of the last one hundred years cannot be carried forward.