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# Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code

Kathleen Patchel

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# Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code

Kathleen Patchel\*

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"There is a very considerable body of commercial law which is very largely non-political in character, and which can be put into shape to be flexibly permanent."

—Karl N. Llewellyn, circa 1940<sup>1</sup>

## I. INTRODUCTION

The Uniform Commercial Code is the greatest achievement of the National Conference of Commissioners on Uniform State Laws. Although the Code is a joint venture between the Conference and the American Law Institute, the Code idea originated with the Conference, and the process used for its drafting and enactment is in large part the Conference's uniform laws process, modified somewhat to reflect the participation of the ALI.<sup>2</sup>

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1. Memorandum from Karl N. Llewellyn to Executive Committee on Scope and Program of the National Conference of Commissioners on Uniform State Laws, Section of Uniform Commercial Acts, Re: Possible Uniform Commercial Code, (undated), *reprinted in* WILLIAM TWining, KARL LLEWELLYN AND THE REALIST MOVEMENT 524 app. E (1973).

2. ALI participation, of course, means that the ALI's members as well as the Conference Commissioners consider and approve the Code. Further, the drafting procedure developed for the Code followed "in outline" the procedure developed by the ALI in its drafting of the restatements: draft preparation by a reporter, review by a group of advisers, review by the Council of the ALI and the appropriate section of the Conference, and ultimate presentation to the general membership of the sponsoring organizations. Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 800 (1958). The primary modification to the uniform laws process based on ALI participation, however, was the creation of an editorial board to oversee the original Code project. This editorial board, composed of the chief reporter and two representatives each from the Conference and the ALI, evolved into the Permanent Editorial Board for the Uniform Commercial Code [hereinafter PEB] at the end of the initial drafting of the Code. Fred H. Miller, *U.C.C. Articles 3, 4, and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405, 406 (1991).

The Conference also has always had sole responsibility for obtaining enactment of the Code by the fifty state legislatures.<sup>3</sup>

The Code is now in the midst of a period of modification and redrafting unparalleled since the time of its original enactment, and, once again, the Conference and its uniform laws process are at center stage.<sup>4</sup> Recently, however, the adequacy of the uni-

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The PEB's responsibilities included the approval and promulgation of amendments to the U.C.C.. *Id.* These are responsibilities that in the Conference's normal uniform laws process would be overseen by the Executive Committee and President of the Conference, and carried out by a Special Committee appointed to do the drafting. *See infra* text accompanying notes 22-28. Recently, however, the Code's sponsoring organizations have modified the PEB's responsibilities in this regard so that Code drafts now are prepared through the Conference's normal uniform laws process, rather than by the PEB or a committee formed by the PEB. Miller, *supra*, at 410 & n.10.

3. Miller, *supra* note 2, at 406.

4. Every original substantive Article of the Code is either being considered for revision, is in the process of revision, or has recently been revised. An American Bar Association UCC Committee task force currently is studying the revision of Article 1, General Provisions. Fred H. Miller, *The UCC Today: Revisions, Planned Revisions, and State Enactments*, UCC BULL., Jan. 1992, at 1, 1 [hereinafter *UCC Today*]. A drafting committee has been appointed to review Article 2, Sales. *Id.* The estimated completion date for the committee's study is 1993, with promulgation of amendments in 1994 or 1995. *Id.* Revisions to Article 3, Negotiable Instruments, and Article 4, Bank Deposits and Collections, were promulgated in 1990. *See* Fred H. Miller, *1990 Articles 3 and 4: Looking to the 21st Century*, UCC BULL., June 1991, at 1, 1. A drafting committee currently is drafting a revision of Article 5, Letters of Credit, with an estimated completion date of 1993. *UCC Today, supra*, at 2. Revisions to Article 6, Bulk Transfers, were promulgated in 1989, along with a recommendation that states repeal that Article. Fred H. Miller, *Repeal or Revision of Article 6—Bulk Transfers*, UCC BULL., Sept. 1991, at 1, 1. The UCC Committee of the ABA appointed a task force in January, 1992 to consider revision of Article 7, Warehouse Receipts, Bills of Lading and Other Documents of Title. ABA Section of Business Law, *UCC Committee Update on the Activities and Focus of the Committee and Its Subcommittees 13* (June 1993) [hereinafter *Update*]. The task force's final report to the PEB is due in November of 1993. *Id.* A drafting committee currently is working on amendments to Article 8, Investment Securities. *Update, supra*, at 13; *UCC Today, supra*, at 2. *See* James Steven Rogers, *An Overview of the Current Project to Revise Article 8*, UCC BULL., May 1992, at 1, 1. A study committee has recommended significant revisions to Article 9, Secured Transactions; Sales of Accounts and Chattel Paper, and the Conference has formed a drafting committee, with completion of revisions expected in 1995 or 1996. *Update, supra*, at 13; *UCC Today, supra*, at 2. In addition, the Conference and the ALI have promulgated two entirely new Articles. Article 2A, promulgated in 1987 and amended in 1990, deals with personal property leases. Fred H. Miller, *UCC Article 2A and Its Uniform Amendments*, UCC BULL., June 1991, at 1, 1. In connection with the drafting of this Article, section 1-201(37) defining "security interest" was also amended. *Id.* A new Article 4A, dealing with wholesale wire transfers was promulgated in 1989. Historical note, 2B U.L.A. 455 (1991). *See* Fred H. Miller, *Article 4A: A Framework for Transmitting Large Amounts of Funds*, UCC BULL., July 1991, at 1, 1.

form laws process as a means of promulgating commercial law rules has been called into question. In particular, the insensitivity to the interests of consumers of bank services reflected in the 1990 revisions to Article 3, Negotiable Instruments, and Article 4, Bank Deposits and Collections, has raised concerns about whether the uniform laws process is an adequate mechanism for drafting legislation that affects consumer interests.<sup>5</sup>

This question is not a new one: the Conference always has had problems with legislation that protects consumer interests. The Conference rarely attempts to address consumer questions, and in the few instances in which it has undertaken to draft consumer-oriented legislation, its efforts have met with a poor reception in state legislatures.

The question, however, is a particularly pressing one in this time of renewed Code activity. Both the balance of federalism and the face of politics have changed dramatically since the Conference was established in 1892. In 1892, Congress had only just begun to enter the field of economic regulation,<sup>6</sup> and its regulatory efforts were severely restricted by the Supreme Court's narrow interpretations of the scope of Congress' powers;<sup>7</sup> today, national economic regulation is the norm. In 1892, a

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5. Both the Association of American Law Schools and the Business Section of the American Bar Association have recently sponsored panel discussions to explore this issue. See Tape of Program of Section on Commercial and Related Consumer Law, "The Impact of the Uniform Commissioners on Consumer Law," Association of American Law Schools Annual Meeting, AALS 9101 Tape 50 (Jan. 7, 1992); Tape of Program of Section of Business Law, "The Twain Shall Meet: Balancing Consumer Concerns and Business Interests Under the UCC," Section of Business Law of the American Bar Association Spring Meeting, ABA-239 (Apr. 11, 1992); see also, Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991) (discussing politics of promulgating the Code). Professor Rubin explores the "basic enigma" of "why a respected body of experts, supposedly operating outside the political process, produced a statute that was less satisfactory on policy grounds, than the [federal Electronic Funds Transfer Act], a statute produced by our politically-immersed and much-maligned national legislature." *Id.* at 552.

6. Congress's first major attempts at modern regulatory legislation were the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890. EDWARD L. BARRETT, JR., WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 188 (9th ed. 1993).

7. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895) (holding that the Sherman Anti-Trust Act of 1890 could not be constitutionally applied to manufacturing combinations because manufacture was a local activity reserved to the states). See generally, JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 4.5, at 143-45 (4th ed. 1991) (summarizing Supreme Court's use of 10th Amendment to restrict federal power between 1888 and 1936).

relatively small and homogeneous group held effective political power in this country; today, although significant power disparities clearly still exist, political power has become sufficiently dispersed that policy makers often must accommodate a cacophony of disparate interests in the course of legislating. Indeed, much has changed since Llewellyn made the statement quoted at the beginning of this Article—few legal scholars today would suggest that commercial law, or any law, is nonpolitical.<sup>8</sup>

An evaluation of the efficacy of the uniform laws process as a mechanism for drafting commercial law statutes in modern times thus is, if anything, long overdue. It is time for the Conference to undertake a systematic—and systemic—study of its own processes in light of the nature of modern decision-making and the role that the uniform laws process plays in the current dynamics of federalism.

This Article is an attempt to assist the Conference in that effort. The Article explores the relationship between the uniform laws process and the adequate representation of consumer interests. It places the drafting and enactment of the Code, and in particular, the drafting and enactment of Article 4, into the context in which those events occurred—that is, the dynamics of interest group politics and the dialectic of the state-federal relationship. Placing the uniform laws process as it has operated with regard to the Code into this broader political context may provide some insights into why that process consistently tends to produce legislation favoring business interests over consumer interests, and those insights in turn may point to ways in which the process can be improved to correct that imbalance.<sup>9</sup>

The Article begins with a brief description of the Conference and the uniform laws process. It then discusses the drafting and enactment history of the Code, with particular emphasis on the role that interest groups have played in that process. Next, the

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8. Given Llewellyn's status as one of the leading realists, it seems surprising that he made this statement in 1940. For an interesting explanation of Llewellyn's jurisprudential views regarding commercial law, see Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

9. Correcting this imbalance would not necessarily mean the Conference would begin producing commercial legislation that favored consumers. The issue is not one of pro-business versus pro-consumer legislation, but one of adequate representation of all interests affected by uniform laws at the point those laws are being drafted. The assumption is that if all interests were adequately represented the resulting legislation would be more balanced in its approach, reflecting neither inordinate favoritism of business interests nor of consumer ones, but rather a reasonable compromise between the two.

Article explores the amenability of the uniform laws process to representation of business and consumer interests in light of principles of interest group theory. The Article concludes that application of these principles demonstrates that the uniform laws process, as currently structured, is almost custom-made for the drafting and enactment of pro-business legislation. Finally, the Article discusses why the Conference should be particularly concerned about the pro-business bias of the uniform laws process and suggests ways in which the Conference might correct some of the inadequacies of its approach.

## II. THE CONFERENCE AND THE UNIFORM LAWS PROCESS

The Conference is a national organization, consisting of Commissioners from each of the fifty states, the District of Columbia and Puerto Rico.<sup>10</sup> Although the Conference is sometimes identified as a "state organization,"<sup>11</sup> it is more appropriately described as a private organization that has close ties to both the states and the American Bar Association. It was founded in 1892, largely through the efforts of the American Bar Association, as a mechanism for obtaining uniformity of law through voluntary state action.<sup>12</sup> Commissioners generally are appointed pursuant to enacting legislation in the states.<sup>13</sup> The Conference Constitution, however, allows the President of the state bar association to appoint Commissioners whenever a state does not have a mechanism for appointment or whenever the designated state authority fails to act.<sup>14</sup> Further, the Conference Executive Committee may terminate the membership of any Commissioner for failure to comply with Conference requirements.<sup>15</sup> The Conference Constitution requires that all Commissioners be members of a state bar and thus, that they

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10. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 459 (1986) [hereinafter 1986 HANDBOOK].

11. See, e.g., *id.* at 460.

12. Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 234, 236 (1965). The Conference's current constitution states that its object is "to promote uniformity in the law among the several states on subjects where uniformity is desirable and practicable." CONSTITUTION & BYLAWS OF NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, art. 1, § 1.2 [hereinafter CONST. & BYLAWS], in 1986 HANDBOOK, *supra* note 10, at 463.

13. CONST. & BYLAWS, *supra* note 12, art. 2, § 2.1.

14. *Id.*

15. *Id.* § 2.7.

be lawyers.<sup>16</sup>

The primary source of the Conference's funding is state appropriations.<sup>17</sup> The Conference, however, also receives annual contributions from the American Bar Association, and its major uniform laws projects tend to be funded in large part by external sources, such as foundations, interest groups, and, sometimes, even federal agencies.<sup>18</sup>

Although Commissioners normally are appointed by the states, by the Governor alone or in conjunction with the legislature,<sup>19</sup> the Commissioners have no obligation to represent the particular interests of their states. Indeed, the Commissioners' allegiance is not to the states, but rather to the Conference. Their obligation is to assist its efforts by encouraging state legislation supporting the Conference<sup>20</sup> and fostering consideration of uniform laws in their respective states.<sup>21</sup>

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16. *Id.* § 2.4. The Conference also has non-voting associate members. These members are directors or other administrative officers of state agencies, such as state legislative reference bureaus, which are "charged by law with the duty of drafting legislation at the request of the legislative or executive officers of the state." *Id.* § 2.2. The bar requirement extends to these associate members as well. *Id.* § 2.4.

17. 1986 HANDBOOK, *supra* note 10, at 460.

18. *Id.* For instance, grants from the Maurice and Laura Falk Foundation and subscriptions from various individuals, business, industrial, financial and transportation concerns, and law firms funded the Uniform Commercial Code. WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 68 (1991); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 281 (1973). The United States Department of Transportation gave the Conference a \$100,000 contract for the Uniform Motor Vehicle Repairs Act. *Id.* at 101. The Conference recently has established the Uniform Law Foundation to support its work, and begun a campaign to fund the Foundation in connection with its 100th anniversary. See Helen Lucaitis, *UCC Showing Its Age, Needs Revision*, CHIC. DAILY LAW BULL., Jan. 16, 1992, at 1, 16.

19. 1986 HANDBOOK, *supra* note 10, at 459. See, e.g., ILL. ANN. STAT. ch. 63, para. 29.7 (Smith-Hurd 1989) (providing for appointment of nine Commissioners). The Illinois statute specifies that the Commissioner appointment will be as follows: five by the governor, and one each by the president of the senate, the senate minority leader, speaker of the house, and the house minority leader. *Id.* The statute also provides for appointment of the executive director of the Legislative Reference Bureau as an ex-officio member. *Id.*

20. The constitution requires that Commissioners, *inter alia*, seek passage of state legislation providing for the appointment of Commissioners and payment of the Commissioners' expenses in attending annual meetings, and an annual appropriation from their state legislature "toward defraying the expenses of the Conference." CONST. & BYLAWS, *supra* note 12, art. 5, § 5.1(4) & (5).

21. 1986 HANDBOOK, *supra* note 10, at 459; Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts, § 7 (August 2, 1988) [hereinafter 1988 Criteria] ("Approval of an act as a Uniform or Model Act carries with it the obligation of the Commissioners from each state to



Although anyone can make a proposal for a uniform law to the Conference,<sup>22</sup> the Conference makes its own determination as to the areas of law in which "uniformity is desirable and practicable"<sup>23</sup> and in which uniform legislation is thus appropriate. Proposals for uniform acts are referred to the Conference's Committee on Scope and Program, which "makes an investigation, sometimes hears interested parties, and reports . . . whether the subject is one on which it is desirable and feasible to draft a uniform law."<sup>24</sup> The final decision to draft an act is made by the Conference Executive Committee.<sup>25</sup>

If the Executive Committee decides to draft an act, the President of the Conference assigns the subject to a Special Committee to prepare the draft.<sup>26</sup> A Review Committee, also appointed by the President, reviews the Special Committee's draft to determine if its scope conforms to the Special Committee's assignment.<sup>27</sup> The Review Committee also considers and reports the policy decisions made by the Special Committee to the Executive Committee for ultimate presentation to the Conference, and determines whether the draft is ready for submission to the Conference.<sup>28</sup> The entire Conference discusses and considers draft acts section by section at no fewer than two annual meetings.<sup>29</sup> Acts are promulgated by a vote of the state delegations. Each delegation of Commissioners has one vote. An act must receive the vote of a majority of the states represented at the annual meeting and at least twenty jurisdictions.<sup>30</sup>

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endeavor to procure consideration by the legislature of the state, unless the Commissioners deem the act unsuitable or impracticable for enactment in their state.").

22. See 1986 HANDBOOK, *supra* note 10, at 460 (Conference receives proposals for uniform acts "from many sources").

23. CONST. & BYLAWS, *supra* note 12, art. 1, § 1.2.

24. 1986 HANDBOOK, *supra* note 10, at 460; 1988 Criteria, *supra* note 21, § 6(a). The Permanent Editorial Board of the Uniform Commercial Code performs this function with regard to Code proposals. See *supra* note 2.

25. 1988 Criteria, *supra* note 21, § 6(b). The Permanent Editorial Board performs this function with regard to the Code. See *supra* note 2.

26. 1986 HANDBOOK, *supra* note 10, at 460; CONST. & BYLAWS, *supra* note 12, art. 4, § 4.2; 1988 Criteria, *supra* note 21, § 6(b). Until recently, the Permanent Editorial Board rather than the Conference had responsibility for drafting committees with regard to the Code. Code drafting committees, however, now proceed under the normal Conference procedures. See *supra* note 2.

27. 1986 HANDBOOK, *supra* note 10, at 460; CONST. & BYLAWS, *supra* note 12, art. 4, § 4.2; 1988 Criteria, *supra* note 21, § 6(b).

28. CONST. & BYLAWS, *supra* note 12, art. 4, § 4.3; *id.* art. 29, §§ 29.1-29.3.

29. 1986 HANDBOOK, *supra* note 10, at 461; CONST. AND BYLAWS, *supra* note 12, art. 8, § 8.1.

30. *Id.*; *id.* § 8.3.

Although drafting committees generally have adopted the practice begun by the Code drafters of consulting extensively with interested parties during the drafting process,<sup>31</sup> the only group the Conference procedures require drafting committees to consult is the American Bar Association.<sup>32</sup> The Conference also routinely submits uniform acts to the American Bar Association for its approval,<sup>33</sup> and the Conference President is required to present an annual report to that organization and file copies of Uniform Acts finally approved by the Conference with it.<sup>34</sup>

Thus, the Conference is representative of the states only in the sense that it draws its membership from them. The states have no official control over its procedures or over the subject matter of the laws it promulgates, and its members do not view themselves as official representatives of their states' interests in the process. Indeed, the primary defining characteristic of the National Conference of Commissioners on Uniform State Laws is that it is neither a democratically elected representative body, nor one owing allegiance, or having any accountability, to any political body.<sup>35</sup>

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31. Dunham, *supra* note 12, at 245-46; 1986 HANDBOOK, *supra* note 10, at 461.

32. CONST. & BYLAWS, *supra* note 12, art. 31, § 31.1.

33. 1986 HANDBOOK, *supra* note 10, at 461.

34. CONST. AND BYLAWS, *supra* note 12, art. 6, § 6.1.

35. Cf. James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2096 (1991). White states:

Although the Commissioners are technically public officials, they are an elite group. Most of the Commissioners are prominent lawyers not chosen on the same basis used to choose a legislator, but chosen because they have a more intellectual interest in uniform law than would a typical legislator. They are elected not by a vote of the electorate but by the single vote of the governor. This mode of election doubtless removes the Commissioners farther from the people than the typical state legislator; it also produces a group that is much more sophisticated in the law and more interested in long-range questions than they would be if they had to stand for reelection every two or four years.

*Id.*

Commissioners do make reports to the governor or legislature of their state. See, e.g., ILL. ANN. STAT. ch. 63, para. 29.7 (Smith-Hurd 1989) (requiring that report be made to the governor); CONST. & BYLAWS, *supra* note 12, art. 5, § 5.1(6) (mandating that copy of report filed with the governor or legislature of the state be filed with the president of the Conference). These reports, however, are informational and do not appear to have any effect on the continuation of the Commissioners in their posts. The Conference Handbook, for example, states that "[w]hile the usual term is three years, it is common practice for governors to reappoint, without regard to their political affiliation, Commissioners who have actively participated in the work of the Conference." 1986 HANDBOOK, *supra* note 10, at 459. The Handbook goes on to state that "[t]he organizational plan of the Conference makes its non-partisan nature self-evi-

Conference supporters have pointed to this lack of political accountability as one of the Conference's best features. Their theory is that the lack of accountability insulates the laws the Conference promulgates from political pressure. Uniform laws are the product of a neutral group of experts, whose solutions will represent the "best" way in which to regulate the particular subject matter involved, rather than the product of political compromise.<sup>36</sup>

This lack of connection to a political body, however, also means that the Conference has no ready ability to ensure that the laws it promulgates are enacted. Not only does the Conference lack legislative power, but it also does not draft its laws as the representative of a body that does. Even so, because its mission is to create uniformity among state laws, the Conference and others tend to view states' passage of uniform laws as the ultimate test of its success.<sup>37</sup> Moreover, it must convince not one state legislature to pass such laws, but fifty.

This focus on enactment, and the concomitant need to enlist the support of others in order to have its laws enacted, has been a powerful influence on the uniform laws promulgated by the Conference, including the Uniform Commercial Code. As Professor James J. White has stated, "[the] fundamental problem of [an] elite legislature that lacks the power to cause its legislation to be adopted [is]. . . . [w]hat legislation is appropriate"—that is, "[w]hat legislation can be passed?"<sup>38</sup>

At the same time, uniform laws lack the legitimacy that representation gives to the decisions of a democratic body. Uniform laws obtain their legitimacy, not from the political accountability of those promulgating them, but from the supposed neutral-

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dent. While the state Commissioners are obligated to endeavor to procure consideration of uniform acts, they represent no special interest." *Id.*

36. See, e.g., Dunham, *supra* note 12, at 244 (noting that Commissioners "have not felt obligated to the law of their state, but rather have felt duty-bound to seek the best solution"); ARMSTRONG, *supra* note 18, at 113 (quoting speech of former Conference President George C. Keely). Keely stated that the Conference is "unique" because of, *inter alia*, "the background, the knowledge, the intellectual capacity, and the intellectual independence of its members; [and] the absence of self-interest and most political pressures." *Id.*

37. See, e.g., White, *supra* note 35, at 2097. White states as follows:

If every uniform act proposed by the National Conference of Commissioners were adopted by most of the fifty state legislatures, the Conference would be a legislature in every sense. If, on the other hand, few such acts were ever adopted by more than a handful of legislatures, the Commissioners would be no more than a group of officious citizens.

*Id.*

38. *Id.*

ity and expertise of these individuals.<sup>39</sup> As the drafting history of the Code, and particularly that of Article 4, reveals, however, these two consequences of the Conference's nonrepresentational nature are not always easily harmonized. In fact, the realities of interest group politics often make them opposing forces within the uniform laws process.

### III. THE UNIFORM COMMERCIAL CODE

#### A. AT THE BEGINNING

The Uniform Commercial Code was born at an interesting time in the history of American federalism. Franklin Delano Roosevelt was president; Congress was seeking national legislative solutions to a number of the nation's problems for the first time; the regulatory state was struggling to be born.<sup>40</sup> In 1937, the U.S. Supreme Court interpreted the Commerce Clause as a broad grant of power to Congress in the commercial area and beyond, which allowed Congress to regulate in areas formally thought to be within the exclusive jurisdiction of the states.<sup>41</sup> On the other hand, in 1938, the Court struck down its 1842 decision in *Swift v. Tyson*,<sup>42</sup> which had allowed federal courts to develop their own commercial common law instead of following the decisions of the state courts.<sup>43</sup> It was a period in which—at

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39. Cf. *id.* at 2097. White notes, "the principal argument that the Commissioners can make on behalf of a uniform law when it is considered by a state legislature is its technical and substantive superiority over a law born in the back room of a state legislature and sired by a lobbying organization." *Id.*

40. See generally, JORDAN A. SCHWARZ, *THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT* (1993) (discussing the Roosevelt era).

41. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (upholding application of National Labor Relations Act to manufacturing activities). The Court held that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.* Accord, *United States v. Darby*, 312 U.S. 100 (1941) (upholding application of the Fair Labor Standards Act of 1938 to manufacturing activities). In *Darby*, the Court held that the Commerce Clause power extends to regulation of intrastate activities that have a substantial effect on interstate commerce and that are necessary and proper to regulate in order to regulate interstate commerce. *Id.*

42. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (Story, J.).

43. In *Swift*, the holder of a bill of exchange brought an action against the acceptor of the bill. *Id.* at 14. The issue was whether the holder had given value for the bill when he had taken it in satisfaction of a pre-existing debt. *Id.* at 15. The New York state courts had taken the position that satisfaction of a pre-existing debt was not the giving of value. *Id.* at 15-17. The acceptor argued

least with the benefit of hindsight—the political dialectic through which the boundaries of state and federal power are drawn was almost palpable.

It is not surprising, therefore, that the interplay of politics and federalism has been a part of the history of the Code from its inception. The impetus for developing the Code was the push

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that the federal courts were bound to follow these decisions under section 34 of the Judiciary Act of 1789, which provided, "that the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Id.* at 17. The Supreme Court, however, interpreted section 34 as applying only to: state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.

*Id.* at 18. Section 34 thus left the federal courts free to develop their own common law rules with regard to matters governed by general legal principles, such as "contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

*Id.* at 19. Applying these general principles, the Court found that satisfaction of a pre-existing debt did constitute value for purposes of negotiable instruments law. *Id.*

The ability of the federal courts to create their own rules with regard to matters governed by the general common law meant that, at least within the federal court system, many commercial law matters achieved a degree of uniformity across state lines through the development of a federal commercial common law. ARMSTRONG, *supra* note 18, at 13; *accord*, JONATHAN D. VARAT, *Economic Integration and Interregional Migration in the United States Federal System*, in *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* 28 (Mark Tushnet ed., 1990). Indeed, uniformity of the law was what Justice Story had intended:

Story envisioned the role of federal courts as putting an end to . . . uncertainty. The concept of a universal general common law had much appeal to those who wanted to rationalize and unify the law of commercial transactions. All states should agree on the content of this law, and the vehicle for unification would be the federal courts, acting under one centralized supreme court.

LEA BRILMAYER, *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* 204 (1986).

The *Swift* doctrine, however, had only limited potential as a mechanism for obtaining uniformity of commercial law—not only did it not apply when a state statute governed, but it did not bind the state courts, which declined to participate in Justice Story's unification plan, continuing instead to follow their own independent and often conflicting interpretations of commercial law. *Id.*; *see*, VARAT, *supra*, at 28. Because legal rules in state and federal court often differed, the *Swift* doctrine ultimately led to forum shopping and attempts to manufacture diversity jurisdiction. BRILMAYER, *supra*, at 204-05. *Swift* was overruled by *Erie v. Tompkins*, 304 U.S. 64 (1938).

The *Swift* doctrine nevertheless provided a means for furthering uniform-

for enactment of a federal sales bill that would have preempted the Conference's Uniform Sales Act.<sup>44</sup> That federal bill had the backing of the influential Merchants' Association of New York, the endorsement of the American Bar Association, and the support of the distinguished commercial law expert, Karl N. Llewellyn.<sup>45</sup> Nevertheless, the Conference managed to seize the initiative, lure away the federal sales bill's supporters, and not only establish state law as the primary source of private commercial law for the next forty years, but also develop that law into a comprehensive code covering most aspects of commercial transactions.

The federal sales bill was introduced in Congress in 1937, where it attracted the interest of the Merchants' Association.<sup>46</sup> Although this bill initially followed the Conference's Uniform Sales Act fairly closely, it was revised in light of changes suggested by the Merchants' Association that departed significantly from the Act.<sup>47</sup> The same year, the American Bar Association adopted a resolution urging its enactment, but the bill died in

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ity of the commercial law at a time when the other branches of the national government were not doing so, and was an important source of uniformity. VARAT, *supra*, at 28. In fact, in areas where it applied, the reach of this commercial federal common law exceeded the then-recognized scope of federal legislative power. *Id.* Indeed, Professor Varat suggests there may be a causal relationship between the expansion of Congress' Commerce Clause power and the demise of *Swift*:

The timing of the Supreme Court's rejection of this haphazard notion of federal general common law . . . was highly illuminating. The Court's conclusion that the federal courts under the regime of *Swift* had unconstitutionally usurped state lawmaking authority came just as the Court began to back away from its restrictive interpretations of the scope of Congress' power to regulate interstate commerce. Discarding a sporadic, largely ineffective judicial effort at economic integration through uniform law surely had to be easier when comprehensive power to effectively legislate uniform rules was being solidified.

*Id.* at 28-29.

44. TWINING, *supra* note 18, at 277; E. Hunter Taylor, Jr., *Uniformity of Commercial Law and State-By-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 340-41 (1978). The Uniform Sales Act was promulgated in 1906. Armstrong, *supra* note 18, at 165 app. E. It had been adopted in 34 states by 1941. Braucher, *supra* note 2, at 799.

45. TWINING, *supra* note 18, at 277-78.

46. *Id.* at 277. This was not the first time a federal sales bill had been proposed. In 1922, the American Bar Association with the help of Professor Samuel Williston, the primary drafter of the Conference's Uniform Sales Act, produced a draft federal sales bill, which modified and added to the Uniform Sales Act. *Id.* In response, the Conference amended the Uniform Sales Act, and the federal bill fizzled. *Id.*; ARMSTRONG, *supra* note 18, at 40.

47. TWINING, *supra* note 18, at 277.

committee.<sup>48</sup> The demise of the *Swift* doctrine in 1938, however, motivated the Merchants' Association to continue its effort to get a federal sales bill passed.<sup>49</sup>

Llewellyn supported the federal bill as the most efficient way of bringing about needed reforms in the law of sales.<sup>50</sup> Although Llewellyn believed that the Uniform Sales Act should be amended, he argued that the uniform laws process did not provide a workable alternative to federal legislation; he believed it would lead to the same long process of piecemeal adoption by the various states, and the consequent confusion and lack of uniformity, that had characterized the Conference's attempts to have the initial Uniform Sales Act adopted.<sup>51</sup>

Llewellyn, who was a Commissioner from New York, thought the Conference should work with those seeking a federal sales bill.<sup>52</sup> He viewed the sales bill as an opportunity for the states, through the mechanism of the Conference, to work in consort with the national government to achieve reform.<sup>53</sup> Llewellyn persuaded Hiram Thomas, Chair of the Merchants' Association, to work with the Conference on that basis, and made a motion at the Conference annual meeting in 1937 that a committee be set up to follow and cooperate in preparing a federal sales act.<sup>54</sup> A majority of the Conference's Executive Committee, however, including the Conference President, William A. Schnader, viewed the federal sales bill primarily as a threat to the Uniform Sales Act rather than as a means of reforming the

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48. *Id.*

49. ARMSTRONG, *supra* note 18, at 53.

50. TWINING, *supra* note 18, at 278; see Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 558 (1939-40) (noting "vital" need for Federal Sales Act, particularly because of international ocean commerce needs, gaps in coverage under the Uniform Sales Act, and need for uniformity).

51. Llewellyn, *supra* note 50, at 561. Llewellyn states as follows:

To prepare amendments to the Uniform Sales Act is possible, and is desirable. But merely to set those amendments on the road to adoption, State by State, is to throw new confusion into the field of interstate commerce. After thirty-four years, we still have one or another variety of non-uniform "common" law in sixteen States; the picture would, for another twenty or thirty years, be one of three varieties of basic law, with sub-varieties inside each variety. The only practicable road to real uniformity in interstate Sales transactions is by Congressional action, subject to the courts of the United States for further authoritative development.

*Id.*

52. See TWINING, *supra* note 18, at 278.

53. Llewellyn, *supra* note 50, at 561; cf. TWINING, *supra* note 18, at 278 (stating Llewellyn saw Federal Sales Act as way to promote sales law reform).

54. TWINING, *supra* note 18, at 278.

sales law.<sup>55</sup> Schnader, a supporter of decentralized government, also "was suspicious of moves which might increase the influence of Congress over commercial law."<sup>56</sup> The Conference rejected Llewellyn's motion, resolving instead that the federal sales bill should conform as closely as possible to the Uniform Sales Act.<sup>57</sup> Schnader, however, offered Llewellyn another means for carrying out his reforms: the Conference appointed Llewellyn chair of the Commercial Acts Section of the Conference, and Schnader indicated that Llewellyn could pursue plans for reform of sales law through revision of the Uniform Sales Act.<sup>58</sup>

Although the federal sales bill was reintroduced in 1939, it was never enacted; the momentum for revision of the sales law passed to the Conference after 1939.<sup>59</sup> Llewellyn had undertaken revision of the Uniform Sales Act, with the Merchants' Association's Hiram Thomas as one of the six members of his advisory committee.<sup>60</sup> In 1940, Schnader proposed the development of a comprehensive commercial code during his Presidential Address to the Conference on the occasion of its 50th annual meeting.<sup>61</sup> Llewellyn's revision of the Uniform Sales Act became a pilot project for the drafting of this comprehensive commercial code by the Conference, and Llewellyn became Chief Reporter for the Uniform Commercial Code effort.<sup>62</sup> The project officially

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (stating that the initiative for pursuing sales law reform shifted to the Conference and to preparation of a revised Uniform Sales Act). *Cf.* Taylor, *supra* note 44, at 340-41 (stating congressional consideration of federal sales act was delayed in light of conference project to revise Uniform Sales Act); Braucher, *supra* note 2, at 799 (noting proponents of federal sales act were "induced to postpone action" while Conference undertook revisions of Uniform Sales Act).

60. Soia Mentschikoff, *Reflections of a Drafter: Soia Mentschikoff*, 43 OHIO ST. L.J. 537, 538-39 (1982).

61. TWING, *supra* note 18, at 279; Braucher, *supra* note 2, at 799. Schnader may have seen the Code project in part as a way to revitalize the Conference. In discussing Schnader's proposal of the Code project, Professor Twining notes that Schnader:

had become President of the [Conference] after a period of relative inactivity by that body. He was one of a reform-minded group in the organization who were anxious to make it more effectual. The record of the [Conference] up to that time showed that the one area in which there had been a relatively consistent demand for uniformity had been commercial law.

TWING, *supra* note 18, at 279.

62. TWING, *supra* note 18, at 278-285; Braucher, *supra* note 2, at 799-800.



began with the formal agreement between the Conference and the American Law Institute to work jointly in its drafting.<sup>63</sup>

## B. INTEREST GROUPS AND THE CODE

One "cardinal policy" of the Conference and the ALI in drafting the Code was to produce a law that most, if not all, states would adopt.<sup>64</sup> This guiding principle shaped both Code process and Code substance in several ways. First, concerns about the ultimate goal of enactment restricted the initial scope of the Code. Most fields that could be expected to cause political controversy were excluded or treated as severable.<sup>65</sup> Second, Llewellyn established a drafting process that encouraged input from interested industries. Indeed, the Code was the first uniform laws project to make extensive use of consultation with interested groups at the drafting stage.<sup>66</sup> This consultation was both formal, through advisory committees appointed to advise the drafters of each article,<sup>67</sup> and informal, through extensive and ongoing contact between the drafters and representatives of interests whose transactions would be governed by particular articles of the Code. There seems little doubt that Llewellyn appreciated the political efficacy of involving these business inter-

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63. TWINING, *supra* note 18, at 282.

64. Fairfax Leary, Jr. & Michael A. Schmitt, *Some Bad News and Some Good News from Articles Three and Four*, 43 OHIO ST. L.J. 613, 614 (1982).

65. TWINING, *supra* note 18, at 290. For instance, insurance, although a logical subject for inclusion in a commercial code, was excluded from the Code for political reasons. *Id.* at 330.

66. See Soia Mentschikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A. J. 419, 419 (1950) (describing the Code drafters' extensive consultation with interested groups as a "unique contribution to the methods of statutory drafting"). That feature subsequently was incorporated into the uniform laws process. See, e.g., Dunham, *supra* note 12, at 245-46. Dunham describes the failure to involve interested groups at the drafting stage as an early weakness in the uniform laws process, but notes that "[s]ince the Uniform Commercial Code, where extensive use of advisory committees was made, the Conference has moved toward the appointment of expert advisers for most of its major subjects." *Id.*

67. Six-member advisory committees, with the Conference and the ALI each selecting three members, were set up as part of the basic agreement between the Conference and ALI. See TWINING, *supra* note 18, at 282 (setting out key provisions of the Treaty between the Conference and ALI). These advisory committees were composed of "experts in the field of law concerned, experts in the field of business or finance concerned, and also lawyers or judges of general experience." Karl N. Llewellyn, *Statement to the Law Revision Commission: A Simple Case on Behalf of the Code*, reprinted in TWINING, *supra* note 18, app. E at 530. The use of formal advisers apparently was a feature adopted from the ALI procedure for drafting its Restatements. See *supra* note 2.

est groups in the drafting process;<sup>68</sup> their involvement, however, also reflected his basic beliefs about the nature of a commercial code.

Llewellyn believed that the rules of commercial law were best developed by looking at how situations actually were handled in commercial practice.<sup>69</sup> The primary purpose of a commercial code was to facilitate economic activity,<sup>70</sup> and, in order to do this, that code should reflect actual practice. Moreover, the code should be drafted in terms of business concepts so that it would be intelligible to businessmen.<sup>71</sup> The logical source for determining actual practice and business concepts was those who were engaged in commercial transactions.<sup>72</sup>

Thus, reporters for the various articles, some of whom were

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68. See TWING, *supra* note 18, at 302-03. Twining states that Llewellyn's activities with regard to the Code were carried out in the context of a clear recognition that "if a code was to have a good chance of being enacted it would have to satisfy three principal groups of people: the lawyers in the sponsoring organizations, the more organized pressure groups outside the legislatures, and the legislators themselves." *Id.*

69. Danzig, *supra* note 8, at 626.

70. TWING, *supra* note 18, at 307.

71. *Id.* at 304.

72. Llewellyn also had a basic belief in the integrity of the business community—in their capacity "to act with good faith, decency and commercial reasonableness." *Id.* at 310. This belief is reflected in the basic structure of the Code itself. Section 1-102(2)(b) of the Code states that one purpose of the Code is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." U.C.C. § 1-102(2)(b) (1989). This provision reflects Llewellyn's recognition that a commercial code should be drafted with the expectation that it will last without major legislative amendment for a number of years, while, at the same time, business practices will constantly evolve. TWING, *supra* note 18, at 305.

Section 1-102(2)(b) also reflects Llewellyn's solution to this problem of flexible permanence, which was to employ flexible standards in the Code, such as "commercial reasonableness" and "usage of the trade" that would allow courts interpreting the Code to tie its provisions to changing business conditions. *Id.* at 335-36. Such an approach is not only founded on "a faith in judges to make honest, sensible commercially well-informed decisions once they have been given some base-lines for judgment," but also on a "faith in the capacity of the business community for satisfactory self-regulation within a framework of very broadly drafted rules." *Id.* at 336.

Llewellyn's faith in the business community, however, was not blind. Allison Dunham relates the following anecdote:

He [Llewellyn] would do this empirical research . . . He sat in a bank in New York in the foreign department for a couple weeks in order to get a feel for the way banks did things. When he came out we all said to him, "Well, what did you discover?" And he said, "I discovered the only thing dumber than the domestic bank is the foreign bank."

Allison Dunham, *Reflections of a Drafter: Allison Dunham*, 43 OHIO ST. L.J. 569, 569 (1982).

non-experts on the subject matter of the articles they were assigned to draft,<sup>73</sup> solicited informal contacts with the affected industries to find out how commercial transactions operated in the field,<sup>74</sup> and generally maintained these contacts throughout the drafting process.<sup>75</sup> Indeed, Llewellyn stated that "[t]here was constant correspondence and consultation with any outside experts in the business or law concerned who could be discovered and who would give time."<sup>76</sup> Business interest groups, such as the Association of American Railroads, The American Bankers' Association, the National Canners Association, and the American Warehousemen's Association also were asked to comment on the completed draft of the Code.<sup>77</sup>

The solicitation of interest group participation not only provided the drafters with technical information and an understanding of business practices, but also created a mechanism for the affected industries to access the drafting process and a barometer for the drafters to gauge how potential Code provisions would be received by those industries. As a result of this interaction, the drafters made compromises within the subject matter covered by the Code "to eliminate opposition with strong legislative clout."<sup>78</sup> To the extent possible, these compromises

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73. TWINING, *supra* note 18, at 284. Probably the most famous of these "non-experts" was William Prosser, the torts guru, who was appointed as Reporter for Article 3, Negotiable Instruments. See Rubin, *supra* note 5, at 553 ("Prosser was an acknowledged genius in the field of torts; with respect to commercial law, however, he was pretty much at sea.")

74. TWINING, *supra* note 18, at 286. For example, Professor Fairfax Leary, Jr., gives the following description of the way in which he began the task of drafting Article 4:

Well, what I felt reading through the bank collection material in the literature was the need to know how the banks in fact operated. The first thing I did was to go down to a large bank in Philadelphia that did a lot of check collection work, and I said, "I'd like you to attach me to a check and let me just go through the way you process it to see what banks in fact do."

Fairfax Leary, Jr., *Reflections of a Drafter: Fairfax Leary*, 43 OHIO ST. L.J. 557, 559 (1982). Llewellyn himself engaged in similar behavior:

After meetings of Code committees [Llewellyn] could be seen in the bar cross-examining distinguished bankers or businessmen tenaciously . . . His questioning tended to be specific, guided principally by a concern with function and process. "If I were a cheque and I arrived in our bank where would I go? . . . What would be done to me first? Why?"

TWINING, *supra* note 18, at 316.

75. See Twining, *supra* note 18, at 286.

76. Llewellyn, *supra* note 67, app. E at 534.

77. TWINING, *supra* note 18, at 286-87. Comments also were solicited from other sources including bar associations, law firms, and official state committees. *Id.* at 287.

78. Leary & Schmitt, *supra* note 64, at 614.

took the form of exclusions of certain subject matter from the Code. For instance, the drafters excluded certificate of title provisions from Article 9 because the National Association of Motor Vehicle Commissioners threatened to block the Code if they were included; in addition, car-trusts and insurance were exempted from Article 9 coverage to pacify, respectively, the railroad interests and the insurance industry.<sup>79</sup>

Because exclusion was not always an option, however, some policy choices were made in light of the concerns of an interest that could block enactment. Thus, the drafters chose to deny buyers of farm products the protection given to buyers in the ordinary course of business in light of the need to "placat[e] the Farm Credit Administration and the Grange."<sup>80</sup> The decision to promote the interests of secured over unsecured creditors reflected the belief that a code that did not provide for secured credit could not be enacted.<sup>81</sup> And the decision not to include affirmative consumer protection provisions, such as disclosure provisions in Article 9, was influenced by the belief that those provisions might cause the Code to become "bogged down indefinitely in a fight between consumer spokesman and finance company spokesman . . . and the whole Code would be held up."<sup>82</sup>

### C. ARTICLE FOUR PAST

Banking interests were a crucial group in obtaining enactment of the Code. The Code's provisions touched banking interests in a number of ways, and the banks powerful state lobbies clearly had the potential to make or break the Code.<sup>83</sup> Thus, it is not surprising that Article 4, dealing with bank collections, "became the bloodiest battleground in the entire history of the Code."<sup>84</sup> As Professor Fairfax Leary, Jr., the original reporter for Article 4, explained the situation: "[T]here's no way you can have a Bank Collection Code and exempt banks. Hence that part of the Code had to be drafted so as not to produce

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79. Leary, *supra* note 74, at 557-58.

80. Leary & Schmitt, *supra* note 64, at 615.

81. Homer Kripke, *Reflections of a Drafter: Homer Kripke*, 42 OHIO ST. L.J. 577, 578-79 (1982).

82. *Id.* at 582-83.

83. See Leary & Schmitt, *supra* note 64, at 615 ("[I]t was clear that the Code affected the banking industry in so many ways that without its concurrence passage of a Code in most legislatures would be improbable, perhaps even impossible.").

84. Donald J. Rapson, Book Review, 41 BUS. LAW. 675, 677 (1986) (quoting Letter from Grant Gilmore to Donald J. Rapson (Oct. 8, 1980)).

united opposition."<sup>85</sup>

The material covered by Article Four had never before been the subject of a uniform law. Although a draft of a proposed Uniform Bank Collections Law had been prepared, the Conference had never adopted it.<sup>86</sup> The American Bankers' Association, however, had drafted a model Bank Collection Code in an effort to bring uniformity to the check collection process, and that model code had been enacted in nineteen states.<sup>87</sup> Leary's draft of Article 4 departed significantly from the Bank Collection Code and succeeded in evoking the united and adamant opposition of the banks.<sup>88</sup> Negotiation with the banking interests ensued but was unsuccessful.<sup>89</sup> Leary left the project in 1950, and in May 1951, the Conference and ALI voted to delete Article 4 from the Code "because on three or four issues, thought to be crucial, it had proved impossible after years of negotiation to reach a solution which was acceptable both to the sponsoring organizations and to the group of bank counsel . . . which had participated in the discussions."<sup>90</sup>

The most important of these issues was the extent to which Article 4's provisions would be subject to agreement otherwise.<sup>91</sup> The banks argued that they needed to be able to contract out of Article 4's provisions in order to allow the bank collection process to change over time as conditions of collection changed.<sup>92</sup>

85. Leary, *supra* note 74, at 558.

86. Leary & Schmitt, *supra* note 64, at 617.

87. Rubin, *supra* note 5, at 553. For a summary of the state of the law with regard to bank collections prior to Article 4, see Leary & Schmitt, *supra* note 64, at 615-17.

88. Professor Edward Rubin gives the following description:

Article 4 had a storm[y] history. Leary produced a draft that represented a reconceptualization of the field, and thus a significant departure from the American Bankers Association's Bank Collection Code. It reflected a thorough knowledge of the check collection process, and combined a realistic recognition of industry needs with a rare sensitivity to consumer interests. But the New York Clearing House Association reacted with fury, promptly informing Llewellyn that it would oppose the passage of the entire U.C.C. if Article 4 remained.

Rubin, *supra* note 5, at 555 (citations omitted).

89. *Id.*

90. Grant Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 *YALE L.J.* 364, 374 nn.22-23 (1952).

91. *Id.* at 374 n.23.

92. *Id.* at 375-76. Gilmore states:

The principal defense of Section 4-103 runs along these lines: Bank collections is a highly technical field; the operation, because of the enormous number of items handled by banks, must be routinized; as conditions change, new operating procedures become necessary—it would therefore be unwise to freeze any particular procedure by stat-

Leary's original draft of Article 4 had restricted freedom of contract, and although subsequent drafts contained fewer and fewer restrictions on agreement otherwise,<sup>93</sup> none of them provided sufficient freedom to satisfy the banks.

Despite the vote to drop Article 4, a group of bank counsel headed by Walter Malcolm was given authorization to prepare another draft of Article 4 over the summer of 1951.<sup>94</sup> According to Professor Grant Gilmore, who had taken over the Article 4 project after Leary left, Malcolm "understood that it was his function to do whatever was necessary to placate the New York group [of bank counsel]."<sup>95</sup> Not surprisingly, the draft that Malcolm's group produced resolved all the issues that had caused the initial stand off in the way the banking representatives had argued they should be resolved.<sup>96</sup> This draft was approved at a joint meeting of the Conference and ALI in September, 1951, although no member of the Code drafting staff had participated in its creation and although it "was presented to the joint meeting with almost no opportunity for preliminary study by anyone outside the banking group."<sup>97</sup>

The influence of the bank lobby over the substance of Article 4 provoked the now-famous accusation by Professor Frederick K. Beutel that "Article 4 on Bank Deposits and Collections is an unfair piece of class legislation maneuvered through the American Law Institute and the Commission on Uniform Laws by pressure groups favoring the bankers over their customers."<sup>98</sup> According to Beutel, Article 4 was "a deliberate sell-out" by the sponsoring organizations and had given the banks "a piece of class legislation more favorable to their interests than the American Bankers Association Bank Collection Code which their [own] lobby failed to put over on the legislatures."<sup>99</sup>

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ute; bankers are the only people with a sufficient understanding of the technical processes to establish reasonable rules; it is absurd, fanciful and professorial to imagine that banks would ever take undue advantage of their customers.

*Id.* at 376.

93. See Leary & Schmitt, *supra* note 64, at 617-19 (discussing successive drafts regarding freedom of contract).

94. Rapson, *supra* note 84, at 677 (quoting Gilmore letter).

95. *Id.*

96. Gilmore, *supra* note 90, at 374 n.23.

97. *Id.* at 374.

98. Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 335 (1952). Professor Rubin suggests that Beutel's article "could be regarded as the first publication of the Critical Legal Studies movement." Rubin, *supra* note 5, at 555.

99. Beutel, *supra* note 98, at 362-63.

Perhaps more significantly, Gilmore, who was co-reporter for Article 9 and, in general, an important defender of the Code, agreed with Beutel.<sup>100</sup> In his response to Beutel's article, he stated that the drafting of Article 4 had involved "undue concessions to special interest groups" and that "Article 4 as it now reads should not be enacted, as part of the Code or in any other guise."<sup>101</sup> In private, Gilmore stated that the arrangement by which bank counsel drafted the final version of Article 4 was "tantamount to appointing a committee of dogs to draw up a protective ordinance for cats."<sup>102</sup> Gilmore particularly objected to the final resolution of the issue of the extent to which banks would be allowed to contract out of Article 4, which he described as "carrying a good joke too far," and which he suggested might cause the courts to declare the Article unconstitutional "as an

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100. Gilmore's comments seem particularly significant not only because he was reporter for Article 4 in the period between Leary's departure and the decision to drop the Article, and thus intimately familiar with what was going on, but also because of his status as a crucial member of the Code drafting team. One can imagine that there would be a certain reticence on the part of those on the drafting team of the Code to criticize its provisions lightly, much less to make statements suggesting that one of its articles had been hijacked by a special interest group. Indeed, Homer Kripke reported that he was eventually called to task for criticizing Article 9:

Three of the early draftsmen, Gilmore, Coogan and Kripke, as they rode the hustings and participated in lawyers' institutes to introduce the Code in state after state, were somewhat free in pointing out that Article 9 was less than perfect. . . . We persisted despite rumors that we were making the political arm of the Code unhappy.

Then, at the American Bar Association Annual Meeting in Chicago in 1963, General Schnader summoned Coogan and me to his hotel room and told us that he wanted us to stop criticizing the Code. His reason was that admissions by draftsmen that the Code was not yet perfect and perhaps not yet finished made enactment difficult. We asked him when we would be free to function as scholars and he answered "1967," by which date he foresaw universal enactment except in Louisiana.

Kripke, *supra* note 81, at 581-82.

101. Gilmore, *supra* note 90, at 377. Indeed, Gilmore seemed primarily concerned with distancing the rest of the Code process from Article 4. Noting that the drafters could easily sever Article 4 from the Code, he states the following:

Beutel does not suggest that the baleful influences which presided at the final delivery of Article 4 operated over the rest of the Code. Nor did they. The banks were principally concerned, as they had every right to be, with Articles 4 on Bank Collections and 5 on Letters of Credit. On the Letters of Credit Article a solution satisfactory to all parties was eventually arrived at, of which even Beutel seems to approve. On no other part of the Code did there ever develop a situation comparable to the Article 4 imbroglio or one which led to the making of such undue concessions to special interest groups.

*Id.*

102. Rapson, *supra* note 84, at 677 (quoting Gilmore letter).

improper delegation of legislative power to private interests.”<sup>103</sup>

Beutel and Gilmore, however, turned out to be voices crying in the wilderness. The banks got their way: the bank counsel version of Article 4 became the current Article 4 of the Code with relatively few alterations,<sup>104</sup> was adopted as the law of all fifty states, and reigned unchallenged in the area of bank collections until passage of the federal Expedited Funds Availability Act of 1987.<sup>105</sup>

The story, however, has an epilogue, because the influence of the bank interests over the fate of the Code was far from over. The New York group that Malcolm had been assigned to placate still had problems with the Code.<sup>106</sup> The Chase National Bank and its in-house counsel, Emmett F. Smith, sought to block passage of the Code in Pennsylvania, the first state to bring the Code to a vote.<sup>107</sup> When unsuccessful in that endeavor, they persuaded the Association of the Bar of the City of New York and the New York State Bar Association to issue a joint report recommending that the Code be referred to the New York Law Revision Commission for a full-scale study.<sup>108</sup>

103. Gilmore, *supra* note 90, at 375-76.

104. Rubin, *supra* note 5, at 555.

105. Pub. L. No. 100-86, §§ 601-613, 101 Stat. 552, 635-52 (1987) (codified at 12 U.S.C. §§ 4001-4010 (1988)). See Edward L. Rubin, *Uniformity, Regulation and the Federalization of State Law: Some Lessons from the Payment System*, 49 OHIO ST. L.J. 1251, 1251 (1989) (stating rules governing checking system remained matter of state law despite extensive federal regulation of other aspects of financial service industry until Expedited Funds Availability Act).

106. See Rapson, *supra* note 84, at 677 (quoting Gilmore letter which states the New York group “refused to be placated”).

107. TWINING, *supra* note 18, at 290.

108. *Id.* at 293. Professor Braucher gives the following description of Mr. Smith’s efforts on behalf of Chase:

Late in 1952 [Smith] began a one-man campaign to defeat the Code, circulating far and wide over the nation two mimeographed memoranda of forty-odd pages each. Far more effective than the Beutel attacks [in the Yale Law Journal], the Smith memoranda provoked a printed reply from the Conference. Opposition by other groups seems to be traceable at least in part to the Smith memoranda, and it seems a fair guess that Smith was largely responsible for the fact that no state except Pennsylvania enacted the Code before 1957.

Braucher, *supra* note 2, at 802 (footnotes omitted). One of these groups was the American Bankers Association, which issued a report in 1954 that was critical of the Code. *Id.* at 802 & n.29. This report led the Indiana Bankers Association to block passage of the Code in Indiana in 1957. *Id.* at 804. See also HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 137 (Lord Baltimore Press 1953) [hereinafter HANDBOOK] (stating that Smith’s memoranda “undoubtedly did damage in Indiana and elsewhere.”). The HANDBOOK notes that Chase opposed the Code “notwithstanding the fact that the Chase National Bank was the highest bank contributor to the project and cer-



The Code was referred in 1953 to the New York Law Revision Commission, which issued its report almost three years later, after conducting hearings, considering the reports of consultants, and producing very detailed studies of each of the articles.<sup>109</sup> During the New York study a moratorium was called on further attempts to enact the Code.<sup>110</sup> The study concluded that New York should not adopt the Code without extensive revision, a conclusion that "had a pronounced chilling effect upon efforts for its acceptance in other states."<sup>111</sup> A new version of the Code adopting most of the Commission's recommendations was produced nine months after the Commission's report was issued.<sup>112</sup> New York's final adoption of the Code in September 1962 constituted the "great breakthrough" that assured the Code would become successful.<sup>113</sup>

#### D. ARTICLE FOUR PRESENT

With the recent revision of Article 4 and its companion Arti-

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tainly approved the idea when the Code was first proposed and when the money was raised to finance it." *Id.*

109. TWINING, *supra* note 18, at 293. It appears that Chase's primary objection to the Code during these hearings was the definition of good faith contained in section 3-302. Braucher, *supra* note 2, at 813 (noting that this provision "was perhaps the item most vigorously discussed in the New York hearings"). As originally drafted, Section 3-302 included in the definition of good faith "the observance of the reasonable commercial standards of any business in which the holder may be engaged." *Id.*

Chase opposed this provision on the grounds that it established an objective standard for good faith. *Id.* In response to this objection, the U.C.C. editorial board deleted the reference to "observance of reasonable commercial standards." *Id.* This deletion left the definition of "good faith" to the Code's general definition of that term, which contains a subjective standard. *Id.*; U.C.C. § 1-201(19) (1989) (defining "good faith" as "honesty in fact in the conduct or transaction concerned"). *See id.* § 3-302(1)(b).

The revisions to Article 3 adopt an objective standard for good faith. Section 3-103(a)(4) states that "[g]ood faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 3-103(a)(4) (1990). That standard, however, is not the same as the one to which Chase objected, for it relates not to the applicable standard of care, but rather to the "commercial decency" of the transaction. *Cf.* Braucher, *supra* note 2, at 813 (explaining definition of good faith with regard to similar "fair dealing" language contained in section 2-103(1)(b)).

110. TWINING, *supra* note 18, at 293-94.

111. ARMSTRONG, *supra* note 18, at 77. The Report stated that the Uniform Commercial Code "is not satisfactory in its present form, and cannot be made satisfactory without comprehensive re-examination and revision in the light of all critical comment obtainable." STATE OF NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 68 (1956).

112. TWINING, *supra* note 18, at 296.

113. *Id.* at 298.

cle 3, dealing with negotiable instruments, history seems in large part to have repeated itself. The original project to revise Articles 3 and 4 began in 1974 as part of a larger project to revise Articles 3, 4 and 8.<sup>114</sup> The purpose of the project was to reflect changes in ways of doing business in the banking and securities industries since those Articles were promulgated, including the increasing use of electronic systems.<sup>115</sup> The Article 8 drafting committee completed its work fairly quickly; the Conference and the ALI approved the amendments to Article 8 in 1977 and included them in the 1978 official text of the Code.<sup>116</sup> The revisions to Articles 3 and 4 took a more tortuous route. The sponsoring organizations did not finally promulgate those revisions until 1990.

Professor Hal Scott was appointed Reporter for the revisions and, like his predecessors, he began his effort by gathering "empirical evidence from bankers and bank counsel concerning the operation and problems of payment systems."<sup>117</sup> Based on this information, he produced a study report setting out proposed changes.<sup>118</sup> The banking industry considered this report at a two-day invitational conference in Williamsburg, Virginia in April 1978.<sup>119</sup> After that Conference, the U.C.C. Permanent Editorial Board instructed the drafting committee to draft proposed amendments.<sup>120</sup> Instead of drafting piecemeal amendments to Articles 3 and 4, the committee prepared a draft that set forth rules for all payment mechanisms other than cash—checks, credit cards, and electronic fund transfers.<sup>121</sup> This effort to provide a unified set of rules for the payment system, as Article 9 before it had unified the rules for the various forms of security instruments, came to be known as the New Payments Code ("NPC").<sup>122</sup>

In addition to its reorganization of the law relating to payment systems, the NPC contained a number of consumer protection provisions. As a practical matter, consumer protection was required in any comprehensive code seeking to apply the same

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114. Miller, *supra* note 2, at 406-07.

115. *Id.*

116. *Id.* at 407.

117. *Id.*

118. *Id.*

119. *Id.*

120. Miller, *supra* note 2, at 407.

121. Miller, *supra* note 2, at 407-08; Rubin, *supra* note 5, at 557.

122. Rubin, *supra* note 5, at 557.

rules to all payment systems because both credit cards<sup>123</sup> and consumer electronic fund transfers<sup>124</sup> were already subject to federal legislation containing extensive consumer protection provisions.<sup>125</sup> Thus, the NPC included the following consumer protection provisions: "(1) limitations on the ability to vary the effect of NPC provisions by agreement; (2) limitation of due course rights; (3) full consequential damages for wrongful dishonor or debit; (4) limited liability for unauthorized orders under \$500; (5) an error resolution procedure; (6) a right of reversibility; and (7) disclosure requirements."<sup>126</sup>

The NPC, however, pleased no one. Banking interests objected to a unitary payment systems code, "[p]erceiving that the effort to meld check, credit card, and electronic funds transfer law would impose some of the consumer protection features of the federal legislation on the checking system."<sup>127</sup> Representatives of consumer interests were concerned that the Code "seemed to dilute existing protection afforded for credit cards."<sup>128</sup> Banking interests and others also feared that they were not being given adequate participation in the formulation of the policy choices reflected by the NPC.<sup>129</sup> Although the drafts were submitted to interested groups for comment, the actual meetings of the drafting committee were only attended by committee members and representatives of the Conference and the ALI.<sup>130</sup> The industry interest groups apparently became suspicious that the drafting committee was not considering their comments because substantive provisions that they "perceived as extreme" were nevertheless "continued in future drafts notwithstanding [their] adverse comments."<sup>131</sup>

In an attempt to alleviate the concerns of the banking inter-

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123. See Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (1988). For a discussion of this legislation, see John C. Weistart, *Consumer Protection in the Credit Card Industry: Federal Legislative Controls*, 70 MICH. L. REV. 1476 (1972).

124. See Electronic Fund Transfer Act, 15 U.S.C. § 1693-1693r (1988); Rubin, *supra* note 5, at 579-86 (comparing provisions of EFTA to provisions of revised Articles 3 and 4).

125. Cf. Miller, *supra* note 2, at 409 & n.6. (stating that consumer protection provisions were product of compromise necessitated by fact some payments systems had extensive consumer protection provisions while the check system did not).

126. *Id.*

127. Rubin, *supra* note 5, at 557-58.

128. *Id.*; see Miller, *supra* note 2, at 408-09.

129. Miller, *supra* note 2, at 408.

130. *Id.* at 408 n.5.

131. *Id.* at 408 & n.5.

ests, the Permanent Editorial Board for the U.C.C. sponsored another invitational conference for the bankers in Williamsburg in 1983, at which the New York Clearing House led a strong bank protest against "the proposition that Articles 3 and 4 should be cast aside in favor of a comprehensive payments code covering all payments systems."<sup>132</sup> As a result of this conference, the consumer protection provisions were dropped from the NPC. Professor Fred H. Miller, now Director of the Conference, explains:

It is sometimes true that a statute no one likes is a good one, and that may have been true of the NPC, but such a statute also is not one that is likely to be enacted. Thus, in an attempt to address the concerns and reservations expressed, a decision was made by the [drafting] Committee to remove the affirmative consumer protection provisions that had been included in the NPC. These provisions necessarily were a result of compromise and pleased no one on either side of the issue. The result of this decision was to leave consumer protection issues to other law and return the NPC to the traditional posture of the U.C.C.<sup>133</sup>

Neither the sacrifice of the consumer protection provisions, nor a structural reorganization of the NPC, however, proved sufficient to save it.<sup>134</sup> The NPC and its Reporter suffered the fate of Professor Leary and his version of Article 4. The Conference and ALI terminated the NPC project in 1985 and created two new projects: a revision of Articles 3 and 4 with "the more modest goal of cleaning up conflicting interpretations and incorporating desirable substantive improvements to take account of technological developments and changes in business practices" and a project to draft a new Article 4A to govern wholesale wire transfers.<sup>135</sup> Professors Robert L. Jordan and William D. Warren became the reporters for these projects.<sup>136</sup>

Despite these actions, "leaders in the banking industry seemed unconvinced that the Conference really intended to make a fresh start," and, thus, a third meeting was held in Alexandria, Virginia at the suggestion of the Executive Director of the Conference so that "leading bankers [could] . . . air their views."<sup>137</sup> At the end of this three day meeting, the official history of the Conference states that "confidence in the processes of

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132. ARMSTRONG, *supra* note 18, at 121; Miller, *supra* note 2, at 408.

133. Miller, *supra* note 2, at 408-09 (footnote omitted).

134. *Id.* at 409.

135. *Id.* at 409-10.

136. Robert L. Jordan & William D. Warren, *Introduction*, 42 ALA. L. REV. 373, 373 (1991).

137. ARMSTRONG, *supra* note 18, at 121.

the Conference had been restored.”<sup>138</sup>

Thus, as with the original Article 4, banking interests once again got their way. Professor Edward L. Rubin, who was involved in these events as Chair of the Subcommittee on Articles 3 and 4 of the American Bar Association Ad Hoc Committee on Payment Systems,<sup>139</sup> states that “[t]he sponsors agreed that the balance between banks and consumers in Articles 3 and 4—the balance that Beutel attacked as class legislation and Gilmore said he did not have the heart to defend—would not be changed.”<sup>140</sup> In fact, the revisions to Articles 3 and 4 that emerged from the drafting process do change that balance—the revised Articles 3 and 4 are even more pro-bank than were their predecessors. Not only do they lack “affirmative” consumer protection provisions, like disclosure requirements and bank services pricing controls, but in the course of resolving the conflicting interpretations of certain provisions, the interpretation favorable to the banks is almost always chosen, and, in the course of accommodating the Code to technological advances in the bank collection process, little regard is given to the impact of this accommodation on bank customers.

A detailed analysis of the impact of the revisions to Articles 3 and 4 on consumers is beyond the scope of this Article.<sup>141</sup> The following discussion of unauthorized signatures and the bank’s duty of care, however, gives a flavor of the policy choices made in the revisions. It also provides a certain symmetry to this discussion of the drafting history of Article 4, as it relates to the banks’ ability to alter the provisions of Article 4, the issue banks considered so crucial when they blocked the original Article 4.

#### E. UNAUTHORIZED SIGNATURES AND THE BANK’S DUTY OF CARE

The banks’ ability to alter the provisions of Article 4 was embodied in section 4-103, which allowed the provisions of the Article to be varied by agreement, with the proviso that a bank could not disclaim responsibility for its lack of good faith or fail-

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138. *Id.*

139. Rubin, *supra* note 5, at 551.

140. *Id.* at 558.

141. For two excellent discussions of this issue, see Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA. L. REV. 679 (1991) (giving a section by section analysis of the impact of the revisions on consumers); Rubin, *supra* note 5 (analyzing the policy choices with regard to consumers made in the Article 3 and 4 revisions in terms of social policies of efficiency and equity).

ure to exercise ordinary care, or limit the resulting damages.<sup>142</sup> Such an agreement is binding on all parties with an interest in the item, even if they are not parties to the agreement, or are not even aware of it.<sup>143</sup> Section 4-103 further provides:

[a]ction or non-action approved by this Article or pursuant to Federal Reserve regulations or operating letters constitutes the exercise of ordinary care and, in the absence of special instructions, action or non-action consistent with clearing house rules and the like or with a general banking usage not disapproved by this Article, prima facie constitutes the exercise of ordinary care.<sup>144</sup>

Comment 4 to section 4-103 indicates that "general banking usage" means "a general usage common to banks in the area concerned."<sup>145</sup> General banking usage is only prima facie evidence of ordinary care, in recognition of the fact banks may not be under outside control of regulatory authorities with regard to these practices and, thus, "the courts [have] the ultimate power to determine ordinary care in any case where it should appear desirable to do so."<sup>146</sup> The Comment concludes by stating that "[t]he prima facie rule does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary or unfair."<sup>147</sup>

Because Gilmore read section 4-103 as giving banks the power to define ordinary care for themselves, he described its policy (with the pun no doubt intended) as that of "writ[ing] a blank check to the order of [a] private interest group."<sup>148</sup> As discussed above, he thought the courts might declare this section unconstitutional; even if they did not, he believed there were sufficient potential loopholes in its language to allow the courts to impose limits on the scope of the permitted variation by agreement.<sup>149</sup>

After enactment of the Code, a split of authority arose in the courts over whether certain "banking usages" constituted ordinary care in the context of the bank's liability to its customer for paying an unauthorized or forged check. One of the most ancient and fundamental duties imposed in the negotiable instruments law is the duty of the entity upon which a check is drawn

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142. U.C.C. § 4-103(1) (1989).

143. *See id.* § 4-103(2).

144. *Id.* § 4-103(3).

145. *Id.* § 4-103 cmt. 4. *See also* U.C.C. § 1-205(2) (1989) (defining "usage of trade").

146. U.C.C. § 4-103 cmt. 4 (1989).

147. *Id.*

148. Gilmore, *supra* note 90, at 376.

149. *Id.* at 375-76.

to know its drawer's signature.<sup>150</sup> One implication of this duty is that a bank may charge its customer's account only for items that are authorized.<sup>151</sup> Thus, in general, a bank must recredit its customer's account if it pays a check drawn on that account that does not bear the customer's authorized signature. Negligence on the part of the customer, however, can alter this basic rule of bank liability for unauthorized checks. Under section 4-406, if the customer fails to check her statement and report any unauthorized signatures promptly to the bank, she will be estopped from having her account recredited with regard to certain of the improperly paid checks *if* the bank has exercised ordinary care in its payment of the checks.<sup>152</sup> If the bank has not exercised ordinary care in paying, then the estoppel does not apply, and the bank is still liable.<sup>153</sup>

With the advent of computerized processing based on the

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150. See *Price v. Neal*, 3 Burr. 1354, 97 Eng. Rep. 871 (1762) (Mansfield, L.J.); U.C.C. § 3-418 cmt. 1 (1989).

151. This obligation is more implied from, than stated in, section 4-401(1) which reads as follows: "As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft." U.C.C. § 4-401(1) (1989). Because an unauthorized signature is "wholly inoperative as that of the person whose name is signed," *id.* § 3-404(1), a check bearing an unauthorized signature is not properly payable under section 4-401. *Id.* § 3-404(1). The revised section 4-401(a) makes the duty explicit. Section 4-401(a) provides the following:

A bank may charge against the account of a customer an item that is properly payable from the account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

U.C.C. § 4-401(a) (1990).

152. U.C.C. § 4-406(1)-(3) (1989). The preclusion applies with regard to all unauthorized checks by the same wrongdoer paid by the bank "after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days" and before the customer notified the bank. *Id.* § 4-406(2)(b). The preclusion also applies to the first unauthorized item if the bank "also establishes that it suffered a loss by reason of such failure." *Id.* § 4-406(2)(a). Section 4-406, both in its original and revised form, also covers material alterations. *Id.* § 4-406(1); U.C.C. § 4-406(c) (1990). This discussion of that section, however, is limited to its treatment of unauthorized signatures.

153. U.C.C. § 4-406(3) (1989). Section 4-406 thus established a contributory negligence standard with regard to bank negligence. The revisions have altered Section 4-406 to create a comparative negligence standard. U.C.C. § 4-406(e) (1990). This alteration represents another choice of bank over customer. See Rubin, *supra* note 5, at 569-70 (discussing way in which comparative negligence standard reduces likelihood that customer will bring suit against the bank). The revisions also add the requirement that the customer establish that the bank's lack of ordinary care in paying the check "substantially contributed to [the] loss." U.C.C. § 4-406(e) (1990). See Hillebrand, *supra* note 141, at 688-89

Magnetic Ink Character Recognition (MICR) line printed on checks, developed by the banks to deal with the ever-increasing volume of checks, many banks stopped examining the customer's signature on all checks. It became a common practice among many banks to program their computer to kick out only checks over a certain amount for actual human inspection and to pay all other checks—the vast majority—without signature inspection.<sup>154</sup> Presumably, the amount selected reflected the bank's assessment of the point at which the potential costs to the bank from improper payment outweighed the savings in efficiency from computer processing.<sup>155</sup> Nevertheless, in cases in which customers sought to have their accounts recredited for improper payment, and in which the bank made an assertion of customer negligence through lack of prompt reporting under section 4-406, banks argued that their own failure to check their customer's signature did not constitute a lack of ordinary care on their part. Indeed, they argued that the failure to check signatures on all checks was a general banking usage because most banks did not do so, and, thus, that this failure was in fact a *prima facie* exercise of ordinary care.<sup>156</sup>

Courts split on this issue. Some, focusing on the language of section 4-103, and the policy of flexibility in order to accommodate technological change that underlies it,<sup>157</sup> agreed with the banks and placed on the customer the burden of showing that this practice was arbitrary or unfair.<sup>158</sup> Others, emphasizing

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(discussing "substantially contributed" requirement and comparative negligence standard).

154. See, e.g., *Wilder Binding Co. v. Oak Park Trust & Sav. Bank*, 552 N.E.2d 783, 785 (Ill. 1990) (stating bank did not inspect checks under \$1,000, or approximately 93% of total checks processed); *Medford Irrigation Dist. v. Western Bank*, 676 P.2d 329, 331 (Or. Ct. App. 1984) (no inspection of checks under \$5,000).

155. See, e.g., *Medford*, 676 P.2d at 332 (explaining that bank adopted policy of not reviewing checks below \$5,000 after concluding that cost of reviewing checks for unauthorized signatures greatly exceeded benefits).

156. E.g., *Rhode Island Hosp. Trust Nat'l Bank v. Zapata Corp.*, 848 F.2d 291, 294 (1st Cir. 1988); *Wilder Binding*, 552 N.E.2d at 786.

157. See U.C.C. § 4-103, cmt. 1 (1989). The comment states as follows:

In view of the technical complexity of the field of bank collections, the enormous number of items handled by banks, the certainty that there will be variations from the normal in each day's work in each bank, the certainty of changing conditions and the possibility of developing improved methods of collection to speed the process, it would be unwise to freeze present methods of operation by mandatory statutory rules.

*Id.*

158. E.g., *Wilder Binding*, 552 N.E.2d at 786 (holding evidence that automatic payment of checks under \$1,000 was consistent with general banking us-



the bank's statutory duty not to pay unauthorized checks, found that the failure to provide any procedure for the examination of checks below a set amount constituted a lack of ordinary care on the part of the bank as a matter of law.<sup>159</sup> Still other courts upheld procedures that did not involve sight verification of all items below a certain dollar amount but did involve random review of some of these items, although these courts suggested that they might decide otherwise if no verification procedure had been provided.<sup>160</sup>

The Revisions explicitly address this issue. Section 3-103(a)(7), defining "ordinary care" for purposes of revised Articles 3 and 4, provides a special rule regarding the bank's duty to examine checks processed for collection by automated means.<sup>161</sup> After defining "ordinary care" as "observance of reasonable commercial standards, prevailing in the area in which [a] person is located, with respect to the business in which the person is engaged," section 3-103 states as follows:

[i]n the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking us-

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age created a genuine issue of material fact regarding ordinary care making summary judgment improper); *cf.* *Vending Chattanooga, Inc. v. American Nat'l Bank & Trust Co.*, 730 S.W.2d 624, 629 (Tenn. 1987) (forged checks paid over the counter without close comparison to signature card) (where bank followed customary banking practices, burden is on plaintiff to show methods of banking industry are "so careless as to show the lack of ordinary care on all banks").

159. *E.g., Medford*, 676 P.2d at 332 (ruling that bank must adopt procedure that reasonably meets its responsibility to use ordinary care in paying only checks with authorized signatures). The *Medford* court held that the practice of automatically paying checks below a certain dollar amount, while it "may be a prudent business decision and followed by most banks, . . . does not meet the bank's responsibility under the statutes" as a matter of law. *Id.* *Cf.* *Hanover Ins. Co. v. Brotherhood State Bank*, 482 F. Supp. 501 (D. Kan. 1979) (alteration of payee's name). In *Hanover*, the court held that, "no matter what minimal standards are suggested by local banking usage [such usage] cannot amend the statutory requirement of ordinary care." *Id.* at 506.

160. *E.g., Zapata Corp.*, 848 F.2d at 294. In *Zapata*, the court found that banking usage involving sight examination of checks over \$1000, checks with which there was some reason to suspect a problem, and a randomly chosen one percent of checks between \$100 and \$1,000 constituted ordinary care. *Id.* The court distinguished contrary authority as involving "practices more obviously unreasonable than those presented here." *Id.* *Cf. Medford*, 676 P.2d at 332 (stating that bank need not adopt a particular procedure such as sight review in order to comply with its statutory duty, but procedure must reasonably relate to the detection of unauthorized signatures).

161. U.C.C. § 3-103(a)(7) cmt. 5 (1990).

age not disapproved by this Article or Article 4.<sup>162</sup>

Talk about writing a blank check for an interest group! This definition of "ordinary care" apparently does not even require the bank to establish that the procedure it followed constituted a "general banking usage." All section 3-103 seems to require is that a bank follow its own normal procedure and that the procedure "not vary unreasonably" from what other banks in that area do.<sup>163</sup> Clearly there is little left under this standard of the bank's obligation to provide a procedure to ensure that it pays only authorized checks.<sup>164</sup> Instead, the Code, in effect, shifts the

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162. *Id.* § 3-103(a)(7).

163. The comments, however, seem to suggest otherwise. Comment 4 to revised section 4-406 states that section 3-103(a)(7) means that "sight examination by a payor bank is not required if its procedure is reasonable *and* is commonly followed by other comparable banks in the area." *Id.* § 4-406 cmt. 4 (emphasis added). This is not, however, what the language of section 3-103(a)(7) actually provides.

164. Comment 5 to section 3-103 does state: "[n]othing in Section 3-103(a)(7) is intended to prevent a customer from proving that the procedures followed by a bank are unreasonable, arbitrary, or unfair." *Id.* § 3-103 cmt. 5. Additionally, revised section 4-103 still provides that "a general banking usage" is only prima facie evidence of the exercise of ordinary care. *Id.* § 4-103(c). Further, the comments to section 4-103 still provide that the prima facie rule means that "the party contesting the standards" has the burden "to establish that they are unreasonable, arbitrary or unfair." § 4-103 cmt 4. The comment, however, may clarify this burden somewhat by adding "as used by the particular bank." *Id.*

Nevertheless, these statements seem difficult to reconcile with section 3-103(a)(7) itself. If as section 3-103(a)(1) seems to state, a procedure that does not "vary unreasonably" from a general banking usage satisfies the reasonable commercial standards requirement and thus *is* ordinary care, then it makes little sense to say that the general banking usage from which it varies is only "prima facie" evidence of ordinary care. It also seems unclear how a customer could establish that a bank's compliance with a procedure that constitutes ordinary care under the Code's express definition of that term could nevertheless be "unreasonable, arbitrary, or unfair" short of establishing that section 3-103(a)(7) is itself those things. Indeed, although the comments clearly indicate that the drafters did not intend this, a procedure that complies with section 3-103(a)(7) arguably constitutes "[a]ction or non-action" approved by Article 4, and thus is not even subject to the prima facie rule. *See id.* § 4-103(c) ("Action or non-action approved by this Article . . . is the exercise of ordinary care . . .").

Professors White and Summers have noted that the Code comments sometimes depart from the actual text in an attempt to restrict or narrow its meaning. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4, at 13 (3d ed. 1988). They also suggest that the explanation for this is "partly political" in that "[w]hen opponents of a draft section prevailed against the draftsman, the draftsman would sometimes revise the draft accordingly, but seek to preserve the old draft in the comments." *Id.* Although one can only speculate about whether this is the reason for the disparity between section 3-103(a)(7) and its applicable comments, it seems clear that a distinct tension between them exists.

One wonders if by analogy to section 3-103(a)(7), a customer could argue

burden of compliance with the bank's duty from the bank to its customers; they must either promptly discover and report unauthorized checks to the bank or be precluded from recovering for improper debits to their account under section 4-406, even though the bank paid the checks without any review.<sup>165</sup> Instead of banks absorbing losses caused by their failure to verify signatures as a cost of doing business, those losses now are borne by individual customers who fail to detect unauthorized signatures with the requisite degree of promptness.

The comments give little explanation of why the sponsoring organizations made this important policy choice. Comment 4 to section 4-406 states the following:

The effect of the definition of "ordinary care" on Section 4-406 is only to provide that in the small percentage of cases in which a customer's failure to examine its statement or returned items has led to loss . . . a bank should not have to share that loss solely because it has adopted an automated collection or payment procedure in order to deal with the great volume of items at a lower cost to all customers.<sup>166</sup>

This comment suggests, first, that only a "small percentage of cases" come under section 4-406 and thus will be affected by this definition of ordinary care. The fact that a provision will impact only a limited number of individuals, however, hardly seems a persuasive explanation of why it should exist.

In addition, the comment seems to suggest that this defini-

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that she was not negligent in failing to examine her bank statement within the thirty days that the revised section 4-406 seem to provide for examination, if she could establish that her failure to do so did not "vary unreasonably" from what the majority of bank customers in her neighborhood did with regard to their bank statements. The "general banking customer usage" in this regard might turn out to be fairly favorable to her position, particularly as there is no requirement in section 4-406 that banks tell their customers of the duty under section 4-406 to examine their bank statement or of the potentially serious consequences that may flow from their failure to do so. Nevertheless, this argument probably would not fly. The customer's duties with regard to bank statements have always been spelled out explicitly in section 4-406, while the bank's duties with regard to proper payment have always been stated in murky terms at best. Thus, a customer general usage that did not involve prompt statement examination would undoubtedly constitute one "disapproved by this Article" by analogy to the terms of sections 4-103(c) and 3-103(a)(7). Bank wins.

165. Cf. *Wilder Binding v. Oak Park Trust & Sav.*, 552 N.E.2d 783, 789 (Ill. 1990) (Calvo, J., dissenting) ("Defendant is, in effect, relying on its customers' duty of review to fulfill its own duty of ordinary care."); *Hanover Ins. Co. v. Brotherhood State Bank*, 482 F. Supp. 501, 509 (D.Kan. 1979) (rejecting banks contention "that the demands of modern banking justify an interpretation of the banks' and customers' duties under the code that would place the full responsibility of detecting payee alterations upon the customer").

166. U.C.C. § 4-406 cmt. 4 (1990).

tion of ordinary care will benefit all customers, at the expense of the few it affects, because the use of automated check processing keeps the cost of accounts down. One can quibble with this argument on several grounds. First, because individuals are willing to pay a small amount to avoid a small chance of a large loss,<sup>167</sup> one can argue that, given the choice, customers would rather pay slightly more for their accounts in exchange for leaving the primary obligation for discovering unauthorized signatures on the banks.<sup>168</sup> Further, an allocation of liability that left the primary obligation on banks to discover unauthorized signatures would be both more efficient, because the bank is in a better position to spread the loss resulting from a forged check than is the average customer,<sup>169</sup> and preferable from a policy standpoint, because it would be more likely to encourage the development of procedures that would result in the detection of forged checks.<sup>170</sup> Finally, as a practical matter, one can be somewhat skeptical of any suggestion that this new definition of "ordinary care" will result in a lower cost for customers. After all, current customer account charges were established under a regime in which banks in a number of jurisdictions still faced potential liability for their failure to verify check signatures and in which

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167. Rubin, *supra* note 5, at 564-65.

168. For instance, in *Zapata*, the bank paid \$109,247.16 of forged checks from depositor's account, while the bank's evidence showed that abandoning its sight verification procedure had resulted in savings of \$125,000 annually. *Rhode Island Hosp. Trust Nat'l Bank v. Zapata Corp.*, 848 F.2d 291, 292, 294 (1st Cir. 1990). Certainly a reasonable customer might be willing to pay a small share of \$125,000 in order to avoid the possibility of bearing the entire burden of a \$109,000 loss. As Rubin notes, "the cost to customers of such losses is greater, in a real sense, than the cost of spreading the loss to all customers." Rubin, *supra* note 5, at 565.

169. According to Rubin, an efficient allocation system normally would allocate to the customer only enough loss to encourage the customer to take reasonable precautions. Rubin, *supra* note 5, at 564. The bank should bear the rest of the loss "because the financial institution can spread it through the price it charges to all users of the system, and because the institution is in the best position to decide how much money to spend on avoiding the loss." *Id.*

170. "Consumers virtually never devise long-range loss avoidance strategies, and they have no opportunity to alter the nature of the check collection system;" banks, on the other hand, "design the system, and banks can avoid losses by restructuring it, by training their employees, or by developing new technologies." *Id.* at 568. For instance, banks currently are experimenting with optical scanning devices that could allow them to verify their customers' signatures on checks consistently with an automated check processing system. *Id.* at 568-69. The revisions' allocation of the burden of verification to individual customers, however, leaves the banks with little incentive to pursue this technology. Instead, the revisions seem to encourage banks to reduce signature verification procedures to an absolute minimum.

banks had assumed that risk as a cost of doing business. It seems unlikely that the banks will now *lower* account charges because they no longer have this potential liability. Certainly, the Code provides no motivation for banks to pass these particular savings along to their customers instead of their shareholders.

The Prefatory Note to the revisions provides a more straightforward explanation: it lists the addition of section 3-103(a)(7) as one of the benefits of the revisions to the banking community, stating that the section is designed to lower the costs of collection and to reduce the banks' risks under federal requirements regarding expedited funds availability.<sup>171</sup>

One might suppose that although this particular provision favors banks over customers in the interest of reducing the banks' costs, it would be offset by other risk-of-loss provisions reflecting similar accommodation of bank customer concerns. This, however, does not seem to be the case. Indeed, at the same time that the revisions lessen the banks' burden of compliance with its duties under section 4-406, revisions to section 4-406 itself make it more difficult for the customer to comply with her bank statement inspection duties under that section, again in the interest of accommodating technological advances that reduce the banks' costs.

The bank collection process contemplated by the original Article 4 was one that involved the physical transfer of checks from depositary to payor banks. Advances in technology, however, have made it more cost efficient for banks merely to forward the payment information contained on the MICR line of the check electronically to the payor bank, rather than sending the checks themselves.<sup>172</sup> Accordingly, the revisions specifically allow electronic presentment.<sup>173</sup> Use of electronic presentment, however, means that checks are no longer available for return to the payor bank's customers along with their statements. Thus, the customer loses the service of return of her checks, and for purposes of compliance with her obligations under section 4-406, the most important piece of information from which she can discern unauthorized checks. Nevertheless, section 4-406(a) provides that the customer receives sufficient information to trigger her obligations under section 4-406 if she receives a statement containing the information that can be obtained by the payor

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171. *Prefatory Note*, U.C.C. Art. 3, Negotiable Instruments (1990).

172. Rubin, *supra* note 5, at 574.

173. U.C.C. § 4-110 (1990).

bank's computer: the item number, the amount, and the date of payment.<sup>174</sup> The comments recognize that this so-called "safe harbor" rule, which is designed to facilitate the banks' ability to lower the costs of check processing through the use of check retention plans, creates a hardship for bank customers who keep less than perfect records.<sup>175</sup> The substance of revised section 4-406, however, does not reflect this recognition. It contains no provision designed to alleviate the recordkeeping burden placed on customers by loss of return of their canceled checks—not even a provision so seemingly innocuous as, for instance, requiring a bank to provide its customers with checkbooks that make carbon copies of checks before the bank may take advantage of the safe harbor rule. Although section 4-406 provides a "safe harbor" for banks, it lets customers fend for themselves.<sup>176</sup>

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174. U.C.C. § 4-406(a) (1990). Conspicuously absent from this list are the name of the payee and the date the check was written.

175. Comment 1 states as follows:

A customer who keeps a record of checks written, e.g., on the check stubs or carbonized copies of the checks supplied by the bank in the checkbook, will usually have sufficient information to identify the items on the basis of item number, amount, and date of payment. But customers who do not utilize these recordkeeping methods may not.

*Id.* cmt. 1. *See also* Hillebrand, *supra* note 141, at 686-87 (discussing U.C.C. § 4-406(a)).

176. Comment 1 states:

[t]he policy decision is that accommodating customers who do not keep adequate records is not as desirable as accommodating customers who keep more careful records. This policy results in less cost to the check collection system and thus to all customers of the system.

U.C.C. § 4-406 cmt. 1. This is an inadequate justification even in its own terms. Although lower system costs may justify the decision to encourage banks no longer to return canceled checks, it does not justify the failure to include provisions to accommodate the customer's loss of return of her checks.

The most helpful provision would be one requiring that, in addition to the information listed in the safe harbor rule, the bank also must provide the name of the payee and the date the check was paid.

Hillebrand notes that "[e]ven the National Association of Cash Managers, a corporate 'user group,' commented during the drafting process that the names of the payees and the dates of checks should be included on a bank statement when the checks are not returned." Hillebrand, *supra* note 141, at 687. Comparable entities in other payment systems, such as credit card issuers provide this information.

Nevertheless, even a provision such as that suggested in the text would have gone a long way towards alleviating the recordkeeping burdens that this section creates for customers. Indeed, even a requirement in section 4-406 that the bank provide a disclosure on the customer's bank statement informing her of her duties under section 4-406 and the consequences of her failure to comply, similar to the disclosure currently contained on bank statements with regard to electronic funds transfers, would be helpful. *See id.* at 700-03 (discussing other consumer protection provisions necessitated by truncation). The policy decision

Thus, at the same time that the revisions to Articles 3 and 4 relieve the banks of the obligation to employ the signature verification procedures most likely to fulfil their duties under section 4-406, these revisions place an additional burden on customers to develop more stringent recordkeeping procedures so they can continue to fulfil their duty of prompt inspection and reporting without the benefit of their canceled checks. Bank wins.<sup>177</sup>

#### IV. SOME LESSONS FROM HISTORY?

Review of the Code's drafting history reveals some consistent themes regarding the influence of interest group politics on the Code, and, more broadly, the role that interest groups play in the politics of the uniform laws process itself.

##### A. INTEREST GROUP INFLUENCE

First, it is clear that interest groups have affected the Code from its inception in a number of different ways. The needs of an interest group—the Merchants' Association of New York—were, at least indirectly, the catalyst for the Conference to undertake the Code project, and the Code is not alone among uniform laws in this regard.<sup>178</sup> Interest groups also were a primary

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reflected in the safe harbor rule does not seem to be so much a choice to accommodate customers who keep careful records at the expense of customers who do not as a choice to accommodate banks at the expense of both these groups.

The revisions to section 4-406 do lengthen the period that is presumed to be a reasonable time in which to examine one's bank statement from fourteen to thirty days. Compare U.C.C. § 4-406(2)(b) (1989) with U.C.C. § 4-406(d)(2) (1990). That this provision deserves mention as a significant consumer benefit, however, is only further evidence of how little consideration the revisions to this section give to the interests of bank customers. Instead, they focus almost exclusively on accommodating the banks in their desire to change their ways of doing business with the minimum amount of cost or potential liability.

177. This epigram apparently is known, at least by some who have taken a bar review course, as the "Epstein Rule." See Marianne M. Jennings, *I Want to Know What Bearer Paper Is and I Want to Meet a Holder in Due Course: Reflections on Instruction in UCC Articles Three and Four*, 1992 B.Y.U. L. REV. 385, 394. Professor Jennings states:

David Epstein used to say the fundamental rule of law on Bank Deposits & Collections (Article 4) is "Bank Wins." Banks can decide if they want to take a check and, if they do, and it turns out to be no good, they can take it out of your account anyway.

*Id.*

178. For instance, lenders instigated the drafting of the Uniform Consumer Credit Code, one of the Conference's most consumer-oriented pieces of legislation because they saw it as an opportunity to bring uniformity to state usury laws and to do away with restrictive state licensing requirements that pre-

source of information about the operation and needs of the industries affected by the Code. To the extent that the Code drafters did research beyond studying decided cases and utilizing the knowledge of the sponsoring organizations' members, they looked to the business interests affected by the Code as the primary sources of their information.<sup>179</sup> In addition, these interest

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vented their entry into certain local markets. White, *supra* note 35, at 2130 n.160. These creditor interests subsequently abandoned the UCCC when it became more consumer-oriented because of input from consumer interest groups. *Id.* Powerful interest groups sometimes view the uniform laws process as a way to take advantage of opposing interests. Consider, for example, the following anecdote, told by Allison Dunham, the first Executive Director of the Conference, about another instance of political lobbying by the banks:

Then I became associated with the uniform commissioners as executive director, and I got back into Article 9 when a banker in Denver made a representation to me as executive director that the commissioners ought to draft a uniform real estate security act; by which he really meant that the commissioners should, if they could, seek the repeal of the Mechanic's Lien Act.

The banker told me a story that brings me back to Article 9. He had a bill that he had presented to the Colorado legislature, trying to make the bank loans on security of real estate construction, in particular, easier. He, in effect, was repealing the Mechanic's Lien Act, and he hired a lawyer in Denver to go handle the bill and get it through. And the lawyer said, "We're proceeding along fine." And then suddenly they hit a roadblock and it didn't pass to their surprise. So then he hired another lawyer to find out why it didn't pass, and the lawyer came back and said, "Well, the reason it didn't pass is because another vice-president of your bank in charge of commercial loans decreed that it would not pass."

Now, why were the commercial people interested in the mechanic's lien? Very simple; the lumber yards could give good credit and sell their accounts receivable if they could assure the bank that the accounts receivable were secured by mechanics liens. And that brought it back to reality.

Dunham, *supra* note 72, at 570.

179. See TWining, *supra* note 18, at 316-317. Professor Twining associates the Code drafting process with what he calls "the committee room model" of legislative drafting, a model that rejects independent empirical research in favor of "a general willingness to accept as an adequate substitute the undifferentiated opinion-evidence of experts, interest groups and others." *Id.* at 313-14, 319. Under the committee room model:

[A] committee or commission, consisting mainly of "experts," all or most of whom are lawyers, considers an area of law which is thought to be in need of reform and makes recommendations which may or may not be embodied in the form of a draft bill. Typically, "evidence" is invited from interested parties, from experts and, sometimes, from the public at large. Such evidence may be mainly factual, but may well be a mixture of fact, opinion and prescription, based on the experience of the witnesses, their conception of their own or the public interest, and judgments by lawyers about what would be technically feasible and desirable. Typically, little or no systematic research is undertaken by the committee itself and, if research is undertaken, it is nearly always armchair or library research, which rarely goes further than an in-



groups did not simply remain suppliers of technical knowledge; rather they used their access to the drafters and the sponsoring organizations to make their views about the preferred substance of the law known. Indeed, with regard to banking interests, the history of the Code shows that they have tended to demand—and often have received—an active role in the actual drafting of Code articles that affected their interests.

In fact, Professor Miller states that one of the “lessons” the Conference learned from the NPC experience was that drafts were more likely to be accepted if “drafting meetings [were] public and representatives of groups interested in the proposed legislation [could] and indeed [were] encouraged to attend.”<sup>180</sup> With regard to the Article 3 and 4 revisions, the interested groups encouraged to attend were largely banks and bank interest groups. Official advisers to the drafting committee included representatives from the Federal Reserve Bank of New York, National Westminster Bank USA, the American Bankers Association, the Federal Reserve Bank of Boston and the New York Clearing House Association.<sup>181</sup> Informal advisers who regularly participated in the drafting meetings included representatives of U.S. Central Credit Union, Chemical Bank, Manufacturers Hanover Trust Company, the Bankers Clearing House Association, Morgan Guaranty Trust Company of New York, the Credit Union National Association, Citibank, N.A., Chase Manhattan Bank, N.A. and the California Bankers Association.<sup>182</sup> These advisors,

communicated to the drafting committee the pressing operational problems and other concerns, and how particular draft provisions were likely to be accepted by various constituencies. . . . Moreover, the advisors contributed to the prevention of provisions that otherwise would have surfaced as “trial balloons” for reaction and thus could have been

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quiry into the existing state of the law. Typically, systematically gathered empirical data are not considered as a necessary basis for making recommendations and there is generally a faith in the adequacy of experience and common sense to provide sufficient relevant information which is sufficiently reliable. Rigorous empirical research involving accepted social science techniques is not considered necessary or even relevant.

*Id.* at 314.

180. Miller, *supra* note 2, at 410.

181. *Prefatory note*, U.C.C. Art. 3, Negotiable Instruments (1990). The remaining official advisers were from the American Bar Association, the Board of Governors of the Federal Reserve System, the Association of the Bar of the City of New York, and the National Corporate Cash Management Association. *Id.*

182. *Id.* The only participants representing bank customer interests were individuals from corporations and from the National Corporate Cash Management Association, which represents corporate bank customers. *See id.*

perceived as giving the project a more radical cast than was actually intended.<sup>183</sup>

Miller indicates that “[t]he consensus thus earned has produced the rapid and widespread enactment of Article 4A, [the new article drafted to deal with wholesale wire transfers] and hopefully will do the same for the revisions of Articles 3 and 4.”<sup>184</sup>

Finally, the history of the Code shows that interest groups are one of the primary sources of support for the passage of the Code in the state legislatures.<sup>185</sup> Interest groups, and bank lobbies in particular, were prime players in determining the fate of the Uniform Commercial Code as it moved through the state legislatures.<sup>186</sup> The experience of the Code, vividly illustrated by the drafting history of Article 4, is that a powerful business lobby like the banking industry can and will block a uniform law that does not meet its expectations.

## B. DISPROPORTIONATE REPRESENTATION

That interest groups play an important role in the drafting of laws, including uniform laws, is not a revolutionary concept. Interest groups are, and always have been, an important dynamic in American politics.<sup>187</sup> The participation of special

183. Miller, *supra* note 2, at 410-11.

184. *Id.* at 411.

185. Again, this is true of the uniform laws process in general. See PARRIS N. GLENDENING & MAVIS MANN REEVES, *PRAGMATIC FEDERALISM: AN INTERGOVERNMENTAL VIEW OF AMERICAN GOVERNMENT 193-94* (1977):

The success of the Conference in pushing uniform legislation rests principally on the support that the drafts receive from groups equipped to pressure for legislation in the states. The Conference has no difficulty getting the drafts introduced, but it does not function as an organized pressure group for their adoption. . . . Legislation on which those involved—such as the industry itself—disagree . . . stands little chance of adoption.

*Id.* Cf. Varat, *supra* note 43, at 29 (“States can, of course, independently decide to adopt similar regulations, and they will often be pushed to do so by interstate enterprises for whom diverse sets of regulations are costly or burdensome.”).

186. When unhappy with the substance of the Code, banks demonstrated their ability to block its enactment in the state legislatures. See *supra* note 108. Once satisfied with the Code, banking interests such as the American Bankers Association supported its introduction in various state legislatures. Philip Monypenny, *Interstate Relations—Some Emergent Trends*, 359 ANNALS AM. ACAD. POL. & Soc. Sci. 53, 57 (1965). Thus, it is not surprising that the propaganda campaign for original enactment of the Code “was directed almost solely at financing institutions with their powerful state lobbies.” TWINING, *supra* note 18, at 292.

187. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *THE TRANSFORMATION IN AMERICAN POLITICS: IMPLICATIONS FOR FEDERALISM 207* (1986) [hereinafter ACIR REPORT] (“[I]nterest groups have been a pervasive part of the

interest groups in the uniform laws process is thus probably inevitable. It also is not necessarily bad. The functions that interest groups serve in that process—initiation of drafting efforts, provision of technical information, substantive input, and political support for enactment—facilitate the effective functioning of the uniform laws process and help ensure that the laws drafted reflect the real needs they are designed to address.

The history of the Code, however, also reveals a more troubling aspect to the influence of interest groups on the Code. That history shows that some interests consistently wield a great deal more influence over the substance of the laws produced than do others. The Code drafters have attempted, when possible, to deal with the demands of special interest groups by excluding subject matter. In situations when exclusion is not viewed as feasible, however, and when push comes to shove, certain interest groups seem consistently to get their way at the expense of others. In particular, with regard to the history of Article 4, past and present, banks fairly consistently win out at the expense of their customers.

Indeed, the history of the Code raises the concern that the uniform laws process simply may be unable to accommodate the interests of consumers at all because provisions protecting consumer interests routinely have been excluded to avoid the possibility that their inclusion would impair enactment. Thus, for instance, Professor Miller has stated that the Conference's experience with the NPC "clearly taught that consumer provisions may preclude or destroy the necessary consensus on the commercial law."<sup>188</sup> Moreover, Professor Miller's solution to this problem is the one normally adopted by the drafters—he suggests that consumer protection provisions are more appropriately left to other state law or federal law.<sup>189</sup>

The solution, however, is not that simple. Ignoring consumer interests does not make them go away—consumer issues are an integral part of much of commercial law today. For instance, the revisions to Articles 3 and 4 do not exclude consumer transactions from their coverage; indeed, given the volume of transactions covered by Articles 3 and 4 that could be labelled "consumer," such an exclusion probably would be impractical.<sup>190</sup>

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American political scene since the nation's founding."). For a general discussion of evolving theories of interest group politics, see *id.* at 207-43.

188. Miller, *supra* note 2, at 413.

189. *Id.* at 415-16.

190. Application to both consumer and business transactions is a feature that Articles 3 and 4 share with the Code generally. Unlike continental com-

The revisions, however, also fail to distinguish between consumer and nonconsumer transactions with regard to the rules applied. Instead they deal consumer interests a double blow. Not only do the revisions lack "affirmative" consumer protection provisions, such as disclosure requirements and regulation of banking fees and charges,<sup>191</sup> but they also substantially ignore the interests of consumers in the provisions they do contain, while making those provisions fully applicable to consumer transactions.<sup>192</sup>

Thus, by ignoring consumer interests, while at the same time sponsoring legislation that covers consumer transactions, the Conference does not avoid the problem; rather, it exacerbates it. A more logical approach would be to try to correct the problem by studying the uniform laws process to determine why it tends to produce legislation that favors business interests over those of consumers.

### C. SUCCESS

A final theme that emerges from the history of the Code, however, is that the strategy of accommodating the interests of powerful business groups, such as bank interests, that can block enactment to the detriment of consumer interests is a strategy that works. The Uniform Commercial Code is the Conference's greatest success; the Uniform Consumer Credit Code, its most "pro-consumer" piece of legislation, was at least from the standpoint of state enactment, largely a failure.<sup>193</sup> Despite the biting

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mercial codes, which, in accordance with the original "law merchant," apply only to "merchants," the U.C.C., while in some circumstances containing special provisions for merchants, "does little to undermine the long established integration of the common law and the law merchant." TWING, *supra* note 18, at 311-12. Instead, "it treats the merchant and non-merchant alike, and subjects the occasional transaction of the farmer or college professor, if it is of a type covered by the Code, to the same rules which govern the commercial deals of professional traders." STATE OF NEW YORK LAW REVISION COMMISSION, 1 STUDY OF THE UNIFORM COMMERCIAL CODE 109 (1955).

191. Miller, *supra* note 2, at 412, 415.

192. See *id.* at 409 n.7. Miller acknowledges that despite the decision to leave consumer protection issues to other law, many provisions remain "that affect[] both consumers and commercial transactions alike, such as those governing stop payment orders and liability for unauthorized instruments," and these provisions "still furnish a ground for debate." *Id.*

193. Only eleven states enacted the U.C.C.C., usually with substantial non-uniform amendment. Seven states and Guam enacted the 1968 version of the U.C.C.C. 7 U.L.A. 225 (1993). Four states enacted the 1974 version of the Act. 7A U.L.A. 1 (1993). The U.C.C.C. often is pointed to as evidence of the Conference's inability to get uniform legislation containing consumer provisions enacted. See, e.g., Miller, *supra* note 2, at 414 n.21; White, *supra* note 35, at 2130

criticism of Beutel and Gilmore, every state enacted the original Article 4, and the revisions to Articles 3 and 4 are moving through the state legislatures with astonishing speed and little amendment.<sup>194</sup> Once satisfied, powerful interest groups become powerful allies in pushing uniform legislation through the state legislatures. Thus, in arguing that this feature of the uniform laws process should be changed, one is arguing with success.

## V. INTEREST GROUP THEORY AND THE UNIFORM LAWS PROCESS

Why does the uniform laws process tend to produce commercial laws that fail to protect consumer interests effectively? What accounts for the insensitivity to consumer concerns so vividly illustrated by the history of Article 4? Certainly, there is little evidence to suggest that the favoring of business interests over those of consumers is an intended result of that process, at least in the sense of malice aforethought on the part of the drafters. There is no reason—other than, perhaps, the substance of some of the laws they produce—to doubt that the Code drafters really do view themselves as neutral experts attempting to develop the “best” laws to govern commercial transactions.

Rather, the answer seems to lie in the absence of adequate consumer representation in the uniform laws process. Even the most well-meaning decision maker is limited by the perceived universe of possible choices. Thus, to the extent that an affected interest is absent from the decision-making process, that interest's perspectives on the problem and the solutions their inclusion might inspire are likely to be absent as well. The central question, therefore, seems to be why consumer interests do not receive adequate representation in the uniform laws process. Review of that process in light of interest group theory may provide some of the answers to this question.<sup>195</sup>

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n.160; Kripke, *supra* note 81, at 583. Another of the Conference's pro-consumer uniform laws, the Uniform Consumer Sales Practices Act, has been adopted in only three states. JONATHON SHELDON, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* § 3.4.1.2.2, at 79 (2d ed. 1988).

194. As of June 1, 1993, twenty-six states had enacted the Revised Articles 3 and 4: Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Utah, Virginia, Washington, West Virginia, and Wyoming. *Update, supra* note 4, at 14-15.

195. For a good discussion of the major theories of interest group behavior in the political process, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991).

First, interest group theory indicates that consumer interests are, in general, less likely to receive adequate representation than are business interests in an environment dominated by interest groups because of the greater barriers to collective action encountered by consumers. Second, it suggests this is particularly true when the legislation involved deals with a subject matter, such as bank regulation, that is complex, unfamiliar to the general public, and politically unexciting. Third, interest group theory suggests that the dominance of business interests over consumer interests is even more likely to occur when the governmental entity legislating is a state rather than Congress.

#### A. THE NATURE OF SUCCESSFUL INTEREST GROUPS

The very nature of consumer interests versus those of business interests such as the banking industry makes it less likely that consumer interests will receive adequate representation, even in representative bodies, such as the state legislatures and the Congress. "Consumers" is a broad category of individuals—almost as broad as the public itself. Interest group theory, however, indicates that smaller groups are those most likely to form an effective coalition to advance their collective interests.<sup>196</sup>

Large, broad-based interests find it difficult to organize to secure collective benefits for several reasons. First, because the larger the group, the smaller the portion of the total group benefit any member receives, there is less incentive for any individual member of a large group to undertake collective action than there is in a smaller group, where the benefit to any individual group member may be sufficient to motivate that individual to take the initiative.<sup>197</sup> Large groups also suffer from "free rider" problems in attempting to gain support for collective action. Because a collective good inures to the benefit of all without regard to any individual's efforts to obtain it, and because the contribution of any individual member is insignificant in a large group, there is a tendency among individuals sharing a broad-based interest to assume that others will pay the cost of obtaining the good, while they will still share in the benefits.<sup>198</sup> Everyone assumes that someone else will do it; therefore, nothing tends to get done.<sup>199</sup> On the other hand, in smaller groups, the contribu-

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196. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 52 (1971).

197. *Id.* at 48.

198. *Id.* at 44-45.

199. *Id.* at 50.

tions of each member are more obvious and each member is subject to pressure from the other members to participate.<sup>200</sup> Larger groups also face higher organizational costs than smaller groups, for the larger the group, the more agreement and organization it will need.<sup>201</sup> Because of these characteristics, groups with broad-based interests are much less likely to engage in collective action than are smaller groups representing "special interests."<sup>202</sup>

In the decision-making process, the organizational advantages possessed by smaller, more cohesive special interest groups translate into a prediction that "regulation will divert wealth from relatively diffuse groups towards more organized groups whose members have strong individual interests in the regulation's effects."<sup>203</sup> Those large groups, such as consumers, "who are not in a position to make themselves heard will not be registered in the calculus that produces the final outcomes generated by the policy makers."<sup>204</sup> Therefore, the interests of the industry affected by the decision tend to prevail.<sup>205</sup>

Thus, interest group theory suggests that consumer interests suffer from inherent organizational disadvantages even in representative, politically accountable decision-making bodies

200. *Id.* at 62-63.

201. *Id.* at 46, 48.

202. *Id.* at 166.

203. Jonathan R. Macey, *The Political Science of Regulating Bank Risk*, 49 OHIO ST. L.J. 1277, 1279 (1989).

204. *Id.*

205. Thus, for instance, Professor Jonathan R. Macey, discussing regulation of bank risk, states that:

[B]anking law and policy often do not bear even the appearance of public-spiritedness. . . . [for] reasons . . . rooted in the collective action problem that faces the highly variegated consumers of banking services, who are not in a position to press for laws that benefit overall societal welfare. The well-organized special interest groups that dominate the legislative process, as it pertains to the banking industry, do not appear to benefit by pressing for regulations that increase efficiency. Rather, these special interest groups appear to benefit most from rules that transfer wealth from less organized consumers to more organized producers.

*Id.* at 1279-80. The Code's allocation of risk of loss under revised section 4-406, discussed *supra* Part III. D, is another illustration of Professor Macey's point. Although 4-406 may not provide the most efficient allocation of risk of loss, it does provide one that results in a wealth transfer from bank customers to banks. Banks can use less expensive automated check processing procedures, while individual customers normally will bear the losses resulting from the inability of those procedures to detect forged checks. Customers must either detect and report such forgeries promptly and force the bank to recredit their account through litigation if the bank does not do so voluntarily, or bear the loss of the funds represented by the forged check.

based, somewhat ironically, upon the fact that these are interests shared by a large number of individuals. Because the Conference is less visible and less accessible than representative institutions, use of the uniform laws process to draft legislation increases this organizational disability in several ways.

First, most people have never heard of the National Conference of Commissioners on Uniform State Laws. Indeed, many lawyers may have little idea what that organization is. Still fewer could say which uniform laws the Conference is in the process of drafting at any given time. Uniform laws do not even reach the full body of the Conference until a draft has been completed. Thus, to the extent consumers do organize, their collective action efforts are not likely to be addressed to the Conference. One may call one's Congressional or state representative to voice concerns, but few people are likely to call their NCCUSL Commissioner.

In addition, the drafting procedures of the uniform laws process do not contain any provisions designed to insure, or even encourage, representation of affected interests. Not only is there no formal, structured way for public concerns to be voiced—there are, for instance, no public hearings held regarding proposed uniform laws—there is not even a formal procedure for obtaining input from all affected industry groups or any requirement that the drafters do so. As discussed in Part II, the only group that drafting committees are required to consult is the American Bar Association.

Of course, as the history of the Code illustrates, this lack of a formal consultation requirement has not prevented extensive consultation by the Conference with interested groups—indeed, the Conference learned from the Code experience the value of consultation with affected industries, both informally, and more formally through placing industry representatives on advisory committees, and since that time has routinely included such consultation in the drafting process. To the extent that one can find a pattern in the Code drafters' affirmative contacts with interest groups, however, those contacts appear to have been driven more by the need to obtain information regarding commercial practices, and to anticipate potential sources of support or opposition to enactment, than by the desire to be deliberately representational. As a consequence, the drafters' affirmative contacts have for the most part been directed at the business interests that will be regulated by the legislation, rather than those who will deal with that industry. It is the industry whose



transactions will be regulated that can supply the drafters with the technical information they need, and that industry also is likely to have a powerful lobby that must be dealt with anyway in the course of having the uniform law enacted.

Further, to the extent the Conference is motivated by a desire to be deliberately representational during the drafting process, it too is hampered by its lack of visibility and accessibility in achieving that goal. Because of the Conference's low profile, the drafters of uniform laws may not even know of all interested constituencies at the drafting stage. The failure of a particular group to become involved in the drafting process does not necessarily mean that the group is uninterested in the law being drafted; the group may merely be unaware of the Conference's activities.<sup>206</sup>

Therefore, the drafters must resort to the somewhat haphazard procedure of guessing, based on their own experience, which interests should be involved and who should be contacted to represent those interests, with the consequent danger that significant interests may not be heard. Although this weakness in the uniform laws process can result in the exclusion of important business interests as well as consumer interests,<sup>207</sup> the

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206. Cf. White, *supra* note 35, at 2130. White states that, "the Commissioners must draft a law without explicit current input from interested constituencies, and, in some cases, without even a clear understanding of the identity of all the interested parties." *Id.*

207. For instance, at the time of the original drafting of Article 9, dealing with secured transactions, finance companies rather than banks were the primary industry engaged in asset-based financing. Kripke, *supra* note 81, at 578. Yet finance companies apparently were not consulted with regard to the initial drafting of Article 9.

Homer Kripke, then an attorney for CIT Financial Corporation, found out about the Article 9 project when he was given a first draft of Article 9 by another lawyer who received the draft at a Conference meeting. *Id.* at 577. Kripke happened to know Allison Dunham, who was co-reporter for Article 9. *Id.* He contacted Dunham and had him arrange a meeting with Llewellyn to discuss the draft. *Id.* At this meeting, Kripke reports Llewellyn "was very ready to admit mistakes and he told me that he was particularly glad to have someone who knew something practical about the business, because he knew that all of the reportorial staff then lacked that information about secured chattel transactions." *Id.* Kripke was appointed to the drafting committee, *id.*, where he became an influential voice for the position of secured creditors.

A more recent example relates to Article 4A, the new article dealing with wholesale wire transfers. The National Corporate Cash Managers Association, which represents corporate bank customers, a primary consumer of wholesale wire transfer services, was not consulted during the initial drafting of Article 4A. Rubin, *supra* note 5, at 590. When the initial drafts of Article 4A, which included provisions allocating loss to bank customers rather than to banks (who, of course, had been consulted) later came to that organization's attention

problem seems particularly acute with regard to consumer representation. First, those involved in the drafting committee and in the Conference are most likely to be lawyers representing commercial clients; thus, those clients are both more likely to be aware of Conference activity affecting their interests and more likely to have those interests adequately represented by existing participants in the process than are consumers.<sup>208</sup> In addition, the variegated nature of "consumer" interests means that finding adequate representatives for those interests may be more difficult than finding an adequate representative for a more cohesive group.<sup>209</sup> If the uniform laws process were more open,

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"[t]he cash managers appeared in force at the next meetings on Article 4A." *Id.* The final version of Article 4A contains loss allocation provisions representing a compromise between banks and users. *Id.* at 591.

These two examples illustrate that the Conference's current method of obtaining input can cut out important business interests as well as consumer interests. They also illustrate that the substance of the laws the Conference drafts is significantly influenced by the interests represented.

208. Compare Professor Twining's description of the nature of the interests represented during the original drafting of the Code:

[T]he "democracy" of the process was a qualified democracy. Despite extensive consultation and public discussion the project was inevitably under the control of a tightly knit group. Moreover, the membership of the [Conference] and ALI was composed very largely of judges, leading private practitioners, whose main clientele would tend to be capitalist enterprises, and a sprinkling of established academic lawyers. Lawyers of all kinds tend to have a vested interest in the *status quo*; a reasonably high proportion of the members of both organizations, especially the ALI, could be expected to be moderately "liberal," but without seriously challenging established institutions and ways of doing things. The overwhelming majority of those consulted could also be expected to share similar values: bar associations, large law firms, banks, commercial interest groups, and individual lawyers. The voices of organized labour, small consumers and opponents of the capitalist system were muted or inaudible. Two classes of people who might have been advocates of a different viewpoint, the ordinary politician and radical-minded academic lawyers, had limited scope.

TWINING, *supra* note 18, at 291.

The importance of increased participation by lawyers who represent consumer interests in the Code drafting process was an issue raised in both the AALS and the ABA Business Section panel discussions. *See supra* note 5. At the AALS discussion, the suggestion was made that academic lawyers should be encouraged to become more actively involved in Code drafting projects to serve as representatives of consumer interests. At the ABA discussion, lawyers working for consumer groups were encouraged to become actively involved. Somewhat less sympathy, however, was expressed for the concerns voiced that consumer advocate lawyers are likely to be somewhat disadvantaged in their ability to participate in Code drafting projects by the practical realities of time and money.

209. Cf. ANDREW S. MCFARLAND, *Public Interest Lobbies Versus Minority Faction*, in *INTEREST GROUP POLITICS* 324, 342 (Allan J. Cigler & Burdett A.

adequate consumer representatives might appear through a process of natural selection. Because it is not, the Conference runs the risk in selecting consumer representatives of finding that the representatives it has chosen do not represent the views of a sufficient number of consumers.<sup>210</sup>

Beyond the interests that are obvious sources of information and political support, the informal procedure for obtaining advisors means that groups who become involved in the drafting process tend to be those who are familiar with the Conference or with its members, and are thus in a position to hear about the project "through the grapevine." Again, these are more likely to be business interests than consumer ones.

## B. THE NATURE OF THE ISSUES

The likelihood that consumer interests will be under-represented in the decision-making process is even greater when the issues involved are complex—dealing with subjects requiring specialized knowledge—and politically unexciting. In areas involving technical knowledge, the public generally will "find it irrational to obtain the information necessary to identify their interests on any given issue and moreover will be ill-equipped to interpret any information they do obtain."<sup>211</sup> Obtaining such information is costly for the general public, and at the same time "the probability that such information can be used to affect legislative outcomes is very low" for any given consumer.<sup>212</sup> Further, technical issues, such as those involved in banking regulation, are not politically exciting to the average person. Unlike civil rights or foreign policy, they are not the kinds of issues in which members of the general public might become in-

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Loomis eds. 1983) ("[A] claim to represent 'the public interest' can be accepted or rejected according to a wide range of political and social values.").

210. Consider, for example, Professor Kripke's description of the Conference's difficulties with regard to the Uniform Consumer Credit Code:

I was right [that consumer provisions would hinder enactment of the Code] because when (years later) we drafted the Uniform Consumer Credit Code (UCCC), even then it proved too soon to reach a consensus on consumer credit issues, and that Code bogged down in legislature after legislature. Even our efforts during the drafting period of the UCCC to bring consumer representatives into the drafting process proved to have been a failure, because the representatives Allison [Dunham] and others carefully selected were later repudiated by some more radical consumer spokesmen.

Kripke, *supra* note 81, at 583.

211. Macey, *supra* note 203, at 1289 (quoting MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 69-70 (1981)).

212. *Id.*

volved because they “provide people with the feeling of satisfaction from participating in the political process.”<sup>213</sup> Consumers are less likely, therefore, to become involved with complex issues and those deciding the issues thus are less likely to receive consumer input into their decisions.<sup>214</sup>

By contrast, the business interests involved have both ready access to the necessary information—it is part of their ordinary business operations—and a real interest in pursuing these issues.<sup>215</sup> When the issues involved are complex, therefore, it is even more likely that the only voices policy makers will hear are those of the industry special interest groups, who understandably present to those policy makers “the version of the facts that is most favorable to their point of view.”<sup>216</sup> Consequently, the policy course followed is likely to be the one “preferred by special interest groups because such groups will dominate the flow of information” received by the policy makers.<sup>217</sup>

Thus, added to the inaccessibility of the drafting process to the average person is the nature of the commercial law issues with which the drafters are dealing. The very complexity of technical issues such as those involved in the check collection process makes it unlikely that consumers will become involved on their own initiative. If, for example, consumers knew that under the revised Articles 3 and 4 the bank need not recredit money it debited from a customer’s checking account because of the bank’s failure to honor a valid stop payment order unless the customer first sues the bank and establishes the validity of her claim against the holder of the check,<sup>218</sup> those consumers might

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213. *Id.* at 1280.

214. *Id.* at 1289-90.

215. *Id.* at 1289.

216. *Id.* at 1290.

217. *Id.*

218. Section 4-403(3) provides: “The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer.” U.C.C. § 4-403(3) (1989). This provision was inserted in the Code “as a trade-off for the banks when the drafters decided to allow customers to give oral stop orders.” WHITE & SUMMERS, *supra* note 164, § 18-6, at 796. Courts have split on the issue of what this language requires the customer to prove in order to establish her prima facie case: is it sufficient for the customer to establish the bank’s payment over a valid stop payment order or must the customer also establish that she had a defense to payment of the check, and thus, that she had suffered loss by failure of the bank to stop payment? See *id.* § 18-6, at 798-99.

Initial drafts of the Article 4 revisions amended section 4-403 to provide that the bank must recredit its customer’s account when it has paid over a valid stop payment order; the bank would then have to prove that the customer had

be concerned. If they knew that, despite the signature card that they sign and the bank's duty to pay only on an authorized signature, they are the ones who bear the burden of determining whether one of the checks the bank has paid has been forged,<sup>219</sup> they might want to voice a contrary opinion. If they knew that these revisions mean they probably no longer will receive their canceled checks with their statement, and thus will be required to discover forged checks from their statements alone,<sup>220</sup> while at the same time their banks will be able to charge them whatever they like for the privilege of getting a copy of checks they need,<sup>221</sup> consumers might get a little hot under the collar. If consumers knew these sorts of things, perhaps they would start to get a little excited about Articles 3 and 4. The Confer-

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not suffered any loss because of its error. Rubin, *supra* note 5, at 578. The initial draft also required the customer to provide an affidavit regarding the reasons for stopping payment as a condition of having her account recredited. *Id.* The banks, however, objected to this revision, arguing "that they usually recredit a customer's account anyway, so no legal requirement was necessary." *Id.* The revisions ultimately left section 4-403(3) essentially unchanged. *Id.* Compare U.C.C. § 4-403(3) (1989) with U.C.C. § 4-403(c) (1990).

As Professor Rubin notes, requiring a customer to sue the bank to have her account recredited, even though the bank admittedly has debited the account despite a valid stop payment order, "vitiates the entire value of the stop order when such an error occurs." Rubin, *supra* note 5, at 577. From the customer's point of view, she is left at the mercy of the bank—relying on its good will to recredit her account for the amount debited by virtue of its mistake. See WHITE & SUMMERS, *supra* note 164, at 798 (noting the "importance to the customer of the bank's decision to re-credit or not re-credit after paying over a stop order"). If the bank refuses to recredit, the requirement that she bring suit will be a practical matter, make it highly likely that the only affordable course will be to "lump it." Rubin, *supra* note 5, at 569-70, 577-78. On the other hand, the banks' opposition is hard to understand—if banks normally recredit an account anyway, why should they object if this particular "usage of the trade" is reflected in the applicable legal rule?

219. See discussion *supra* Part III. E.

220. *Id.*

221. Revised section 4-406 provides that if items are not returned to customers, the items, or a copy of them, must be retained for seven years. U.C.C. § 4-406 (1990). Section 4-406 further states that: "[a] customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item." *Id.* § 4-406(b). It does not, however, set forth any penalty for the bank's failure to provide the item within "a reasonable time." Further, in keeping with the revision policy of avoiding "affirmative" consumer protection provisions, the section is silent on the issues of whether the bank may charge the customer for providing the check and the appropriate limits on such a charge. Rubin, *supra* note 5, at 575; see Hillebrand, *supra* note 141, at 702-03 (recommending that states adopting the Article 3 and 4 revisions also adopt pricing controls and a penalty provision for failing to supply copies of checks).

ence, however, is never likely to have consumers breaking down its doors to provide input into the uniform laws process without some education of consumers about the impact of these technical and rather boring statutes upon their lives. Indeed, it is hard enough to get law students to slog through them, even with an examination ax hanging over their heads.<sup>222</sup>

Thus, interest group theory suggests that consumers confront inherent obstacles in organizing to represent their collective interests which business interests do not face. This theory further suggests that, for complex issues involving specialized knowledge, like those the Code often addresses, the high cost of obtaining the information necessary to understand and appreciate the policy choices involved presents additional disincentives to consumer input.

The history of the Code, however, suggests that the uniform laws process reflects a very different view of group dynamics. That process seems to be based on the logical assumption that those who care enough about an issue will take affirmative steps to make their views known; therefore, those who do not make their views known simply do not care enough. If this were an accurate description of group dynamics, then the type of information and enactment driven process reflected in the history of the Code might make perfectly good sense. One could assume that the information provided accurately reflected the views of those most concerned with the subject matter involved, and that the strength of opposition or support for particular provisions voiced accurately measured the actual strength of feeling of those most affected.<sup>223</sup>

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222. No doubt anyone who has ever taught or taken a commercial paper course needs no support for this statement; nevertheless, see generally, Jennings, *supra* note 177 (discussing students' confusion over negotiable instruments). Although the provisions of these articles are still technical and obtuse, the articles now are at least set forth in a fairly straight-forward style. Professors Jordan and Warren deserve commendation, because their revisions have substantially cleaned up the language of Articles 3 and 4.

223. Indeed, similar beliefs about group behavior prevailed in the 1950s:

In the 1950s, political scientist David Truman and other "group theorists" argued that the panoply of organized interests was a roughly accurate measure of the interests held by individuals. Groups theorists believed that (1) people know their own interests; (2) they are able without inordinate difficulty to organize these interests into political groups; (3) American political institutions provide numerous opportunities for organized interest groups to influence the political process; (4) the resulting public policy is usually representative, because it reflects the balance of power among organized interests, whose relative strength in turn is a measure of the relative incidence of interests among individual citizens.

As the discussion above illustrates, however, this is not an accurate picture of group dynamics. Modern interest group theory suggests, somewhat counterintuitively, that the voice of the few is the one most likely to be heard loudest, to the detriment of the many. The Conference's lack of visibility and accessibility leads to the conclusion that this is even more likely to be true in the drafting of uniform laws.

### C. STATE ENACTMENT AND THE CODE

So far, this analysis has focused on the drafting process by which articles of the Code are developed and revised. One might argue, however, that whatever the deficiencies of the drafting process in representing all interests concerned, that process has no impact on any interests unless its final product is enacted by the state legislatures, which are representative, politically accountable bodies. Thus, one might assert that even if representational deficiencies exist at the drafting stage, they are subject to correction through the political process of states' enactment of the legislation.

There are, however, a number of countervailing forces at work during the enactment stage of the uniform laws process that make the fact of state enactment an inadequate mechanism for the correction of whatever imbalances between business interests and consumer interests have occurred during the drafting process. Some of these factors have already been discussed in connection with the drafting process; some are inherent in the nature of state versus federal policy making; and some are peculiar to the uniform laws process itself. Together, they lead to the conclusion that consumer interests whose concerns are not reflected in the draft legislation presented to the state legislatures are not likely to be able to change that legislation to reflect their concerns at the enactment stage.

#### 1. Interest Groups and Decentralized Decision Making

First, the organizational problems of collective action by consumers discussed above apply as well to their ability to organize effectively to represent their interests in the state legislatures. These are problems inherent in the nature of large groups, burdening their efforts at collective action in every forum. In addition, to the extent consumer interests do overcome

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McFARLAND, *supra* note 209, at 337 (footnote omitted). Modern group theory, however, has discredited these assumptions. *Id.*

these burdens and organize, their lobbying efforts are more likely to be focused at the federal, rather than the state level. It is less expensive to obtain passage of one federal statute than to obtain passage of fifty state statutes because a different legislature must be lobbied in each state.<sup>224</sup> Thus, an interest group is likely to prefer federal over state legislation unless the benefits from a series of local statutes outweigh the transaction costs of obtaining state legislation.<sup>225</sup> For consumer groups, who have higher organizational costs than smaller, more cohesive groups, federal legislation is likely to remain the most efficient means of obtaining uniform legislation. Further, as discussed below, political theory indicates that federal legislation also is more likely to reflect consumer interests.

Business interests, on the other hand, have long and well-established lobbying organizations at the state level. This is particularly true for banking organizations such as the American Bankers Association, whose members are accustomed to interacting with both state and federal regulators because of the dual system of bank regulation.<sup>226</sup> Such a group also has the type of structure that makes it well-suited for supporting a campaign for enactment of the same legislation in fifty state legislatures—it is “organized from the top down,” and therefore can provide centralized guidance for lobbying efforts at the state level to promote a uniform policy solution across state lines.<sup>227</sup>

Thus, while the existence and strength of consumer lobbies varies widely from state to state,<sup>228</sup> groups such as the American Bankers Association have strong lobbies in every state. Indeed, as the history of the Code illustrates, it is the recognition

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224. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271 (1990).

225. *Id.*

226. The American Bankers Association, organized in 1875, is one of the oldest trade associations in the United States, and representing banking views of proposed legislation always has been one of its important functions. *ENCYCLOPEDIA OF BANKING AND FINANCE* 33 (Glenn G. Munn & F.L. Garcia eds., 8th ed. 1983). Over 90% of the nation's commercial banks are members. *Id.* at 32. Its working groups are organized into four major divisions: “the National Bank Division, dealing with banks holding charters from the federal government; the State Bank Division, working with banks holding state charters; the Savings Division, concerned with savings banking; and the Trust Division, which works particularly with matters relating to the trust business.” *Id.* at 33. In addition, there is a “State Association Section, the membership of which consists of the executive officers of state bankers associations.” *Id.*

227. See ACIR REPORT, *supra* note 187, at 239.

228. See Rubin, *supra* note 105, at 1274.



of the legislative clout that a business interest such as the banking industry has with the state legislatures that gives them much of their influence over the Code at the drafting stage.

Added to the stronger organizational position that business interest groups have with state legislatures is the support of those involved in the uniform laws process itself. The Conference extracts a commitment from its commissioners to have uniform laws introduced in their states, although it does not require them to work for the laws' enactment.<sup>229</sup> Further, those who assist in drafting the uniform laws do work actively for their enactment, and the Conference also works to enlist local bar association support to assist in the lobbying efforts to have uniform laws passed.<sup>230</sup> Indeed, because uniform legislation promulgated by the Conference is passed through the American Bar Association for approval, at the enactment stage it bears the imprimatur of that organization as well.<sup>231</sup> The efforts of the Conference and its contacts, therefore, are added to those of interest groups who support uniform laws like the Code in the push for their enactment in any given state.

Thus, at the enactment stage of the uniform laws process, consumer groups face not only the organizational disadvantages they generally encounter in attempting collective action, but also certain other organizational disadvantages created by the uniform laws process itself. Special interest groups like banks, with their inherent structural advantages and the support of the Conference and the bar associations, are much better equipped to lobby for the passage of a proposed uniform commercial law in state legislatures than are consumer groups to organize against enactment without amendment to better reflect their interests.

## 2. The State Legislatures and the Uniform Laws

Added to the organizational disadvantages that consumer groups face in lobbying against passage of a uniform law are certain pressures on state legislatures that tend to make amendment in favor of consumer interests at the enactment stage unlikely. First, the goal of proponents of uniform legislation is enactment by the states *without amendment* to preserve the con-

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229. See *supra* note 21 and accompanying text.

230. See GLENDENING & REEVES, *supra* note 185, at 193-94 (noting that state bar associations are particularly important in the enactment of uniform laws).

231. See *id.* ("When the organized legal profession is united behind a proposal, the chances of Conference drafts receiving a favorable legislative reception are enhanced.").

cept of uniformity. After all, the whole idea behind the uniform laws process is for the states all to enact the *same* law. Thus, built into the concept of uniform laws is an inherent bias against their amendment by the state legislatures during the enactment process. The “success” of a uniform law is measured not only by its enactment in a number of states, but by its enactment with as little amendment as possible.

Further, this pressure to avoid amendment tends to translate into an argument that the state legislatures should rely on what the drafters of the proposed law have done—to trust that their expertise and knowledge of the area have produced the “best” solution to the problem—and not conduct a substantial, independent inquiry into the appropriateness of the legislation.

There are good reasons for supporters of uniform legislation to make this argument. First, the drafters no doubt believe it to be true, and the draft law they have prepared may very well reflect the “best” solution based on consideration of the interests that have been represented during the drafting process. In addition, the two criticisms commonly leveled at the uniform laws process are that it takes too long and that non-uniform amendments by the individual enacting states tend to dilute its effectiveness in providing uniform national rules.<sup>232</sup> The history of the Code’s enactment reveals that both of these weaknesses of the process are exacerbated by independent investigation on the part of enacting state legislatures. Pennsylvania, the first state to enact the Code, enacted it quickly and without amendment. Pennsylvania also enacted it without independent investigation on the strength of the recommendation of Conference President William Schnader, who had served as that state’s attorney general.<sup>233</sup> When the New York Law Revision Committee decided to conduct an independent study of the Code, however, it not only held up enactment in New York for almost ten years but also seriously slowed the momentum for Code enactment in other states. In addition, its study resulted in substantial

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232. Indeed, as discussed earlier, these concerns initially caused Llewellyn to reject the uniform laws process as a mechanism for reforming sales law. See *supra* note 51 & accompanying text. See also Taylor, *supra* note 44, at 337 (“State-by-state enactment is an invitation to local amendments because it gives each state legislature an opportunity to deviate from the ‘uniform’ act.”).

233. Peter Coogan, *Reflections of a Drafter: Peter Coogan*, 43 OHIO ST. L.J. 545, 546 (1982); Kripke, *supra* note 81, at 580 n.14 (“Pennsylvanians assert that the vital first enactment of the Code in Pennsylvania occurred because the legislature accepted General Schnader’s assurances as to its merits without independent study.”).

amendment of the Code.<sup>234</sup>

A number of factors also make the reliance argument a fairly persuasive one from the point of view of the state legislators. First, the drafters of uniform laws are experts in their fields—often highly respected experts—and the laws they draft tend to display a high degree of technical competency. Certainly, this is true of the current revisions to Articles 3 and 4. The reporters for that project are respected commercial law professors, and the drafts of Articles 3 and 4 they have produced are of a very high technical quality. Further, as discussed above, at the enactment stage the major industries regulated by the law are behind it, as are most of the lawyers. Thus, it is logical for legislators to accept uniform laws as proposed.

Second, the same considerations that discourage consumers from becoming interested in laws involving complex issues requiring technical knowledge also tend to make the average legislator defer to the experts. Legislators “cannot come close to mastering all of the detail of the incredible array of issues with which they are confronted on a daily basis.”<sup>235</sup> Thus, like the general public, legislators are unlikely to have knowledge of the technicalities of complex commercial transactions and are likely to find that “it simply does not pay . . . to inform themselves about such issues in sufficient detail to make informed judgments about what is in the best interests of their constituents.”<sup>236</sup>

For instance, Professor Macey argues that the complexity of banking issues explains the great deference Congress gives to congressional committees dealing with these issues:

In large part, the evidence shows that the ability of legislative committees to formulate the agenda of a proposed legislative package gives the committee extraordinary power. Although the complexity of the issues already gives the legislative committee a virtual monopoly on the relevant information about the pros and cons of a proposed legislative package, the committee's power is further enhanced because it does not pay for other lawmakers to become informed about the intricacies of the policies under the command of the relevant committee.<sup>237</sup>

Similar considerations no doubt incline state legislators toward reliance upon the drafters of complex uniform commercial law statutes, such as Article 4. Legislators logically can assume that the drafters of uniform laws have obtained the relevant informa-

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234. See *supra* notes 109-113 and accompanying text.

235. Macey, *supra* note 203, at 1288.

236. *Id.*

237. *Id.* at 1289 (footnotes omitted).

tion about the pros and cons of the legislation during the drafting process, consulted with the relevant interest groups, and produced a final product that appropriately reflects the relevant considerations.<sup>238</sup> These assumptions seem particularly reasonable because uniform laws are drafted by representatives of "neutral" and distinguished sponsoring organizations, rather than drafters representing a particular interest group. Thus, there is likely to be considerable reliance upon the judgment of the drafters by state legislators who have neither the time nor, perhaps, the inclination to master the details of banking law.

Indeed, Professor Homer Kripke has suggested that the Conference's purpose should be not only to obtain uniformity of state laws but also to encourage delegation of the process of drafting and codifying the law in complex, technical areas such as those covered by the Code—what he terms "lawyers' law"—to "select groups of lawyers with specialized knowledge, as distinguished from leaving it to the generally trained lawyers and non-lawyers of the legislatures."<sup>239</sup> Kripke asserts that the drafters should "train the legislatures to realize that they do not have the time or the competence to interfere with 'lawyers' law,' and they should be willing to accept almost automatically both original statutes and amendments thereto put forth by highly qualified select drafting groups."<sup>240</sup>

Finally, the pressure not to alter a uniform law as proposed is enhanced by "the threat of preemption"—if the states do not pass uniform laws in an area, then the federal government will step in and take over the field. This "threat of preemption"—or, to put it another way, this invocation of states' rights—has been used by Code supporters as an argument to persuade the states to avoid amendment of the Code during the enactment process

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238. Professor Philip Monypenny has suggested that one purpose of the Conference in drafting commercial legislation is to reach accord among the various special interest groups concerned with the legislation at the drafting stage. Monypenny, *supra* note 186, at 57. According to Monypenny, the Conference's adjustment of conflicts among these interest groups enables state legislatures "to act with confidence in highly technical fields not only with respect to their legal aspects, but also with regard to the interests which had to be adjusted in the course of the drafting." *Id.* At the enactment stage, the legislature is presented with a "carefully drawn project[] which ha[s] the united support of appropriate organizations and interests." *Id.*

239. Homer Kripke, *A Reflective Pause Between UCC Past and UCC Future*, 43 OHIO ST. L.J. 603, 604 (1982).

240. Kripke, *supra* note 81, at 584. Kripke suggests that one way to obtain legislative reliance is to develop a broad consensus on laws before they are presented to the legislatures by utilizing advisors and involving the relevant committees of the American Bar Association. *Id.*

so that the commercial interests who need uniformity will not have to resort to federal legislation in order to obtain it.<sup>241</sup>

The pressures against amendment associated with the drive for uniformity, of course, have not prevented nonuniform amendment by the states at the enactment stage. Indeed, Pennsylvania was the *only* state to adopt the original Code without any amendment,<sup>242</sup> and New York was not alone in pursuing a course of independent study of the Code before deciding to enact

241. Indeed, Schnader himself, although known as a strong supporter of decentralized government, played the preemption card in an attempt to convince the states to enact the Code without amendment. Noting that the states had not followed Pennsylvania's lead in enacting the Code without amendment, Schnader continued:

I think that the time has come for making *extraordinary* efforts to have State Legislatures eliminate from their Codes all non-uniform variations, except those made necessary to conform to local procedure. . . .

If the State and other jurisdictions having the Code on their books fail to render their Codes uniform by the end of 1968, it may become necessary to have Congress enact the Code in order to have the commercial law of the United States uniform throughout the nation.

Perhaps the very proposal to prepare the Code for federal enactment will expedite the *cleaning up of the Codes* of the states and other jurisdictions so as to make the Code substantially uniform everywhere and thus render federal action unnecessary.

William A. Schnader, *The Uniform Commercial Code—Today and Tomorrow*, 22 BUS. LAW. 229, 230-32 (1966) (emphasis in original). Compare the recent statements of John M. McCabe, Legislative Director and Legal Counsel of the Conference, urging the commercial law community to support the Article 3 and 4 revisions:

The specter of federal preemption does not abate, but continues to grow as the United States approaches this final decade of the 20th Century . . . .

Everybody who reads this Symposium should take into account the question, what happens if this enterprise of revision does not succeed? Can we rely upon the federal government?

. . .

In the matter of reliance over time, there is no alternative to the Uniform Law Commissioners and the state legislatures.

The prospect suggests substantial reliance upon the institutions that have deigned to bring these revisions before you . . . . Reliance and forbearance must be your watchwords. We must allow uniformity to become the primary value in evaluating the work on Articles 3, 4 and 4A. Otherwise, the unthinkable may be thought, and the commercial law be uniform no more.

John M. McCabe, *Foreword*, 42 ALA. L. REV. 367, 370-71 (1991).

242. See WHITE & SUMMERS, *supra* note 164, § 3, at 7 (discussing nonuniform amendment and noting that "[t]he Uniform Commercial Code is not uniform"); Handbook of the National Conference of Commissioners on Uniform State Laws 152 (1966) (report of William Schnader) ("[T]he fact is that as the Code stands on the statute books of 49 jurisdictions, it is not a uniform Code.").

it.<sup>243</sup> Nevertheless, these pressures do place an additional burden of persuasion on anyone seeking to amend the uniform law at the enactment stage, a burden that is particularly heavy for consumer interests when coupled with the organizational disadvantages under which those interests already operate in that process.

### 3. State versus Federal Legislation

To the above-mentioned considerations, which work against the ability of consumer interests to change the content of a uniform law at the enactment stage, must be added the general tendency observed by political scientists for state legislation to favor business interests over those of consumers. State government "tends to be dominated by corporate, professional, and bureaucratic lobbies for the status quo,"<sup>244</sup> and, thus, the legislation states pass tends to be less effective in protecting the interests of consumers vis a vis these business interests.<sup>245</sup> A "state legislature has a narrower set of interests within its area of jurisdiction, whereas the national legislature is responsible to the vast array of interests spread among the entire United States."<sup>246</sup> Consequently, special interests often find it possible to maintain a position of strength at the state level that they could not maintain at the national level where they would have to compete with a broader range of other interests and thus would have less influence.<sup>247</sup> Further, "some large corporations have financial resources greater than many state governments," and "many states lack the necessary administrative machinery to provide thorough supervision" with regard to regulation of businesses.<sup>248</sup> Therefore, it is not surprising that "[o]ften . . . corporate interests find it more compatible with their goals to advocate the expansion of state jurisdiction at the expense of the

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243. See, e.g., Braucher, *supra* note 2, at 805-06 (describing enactment of the Code in Massachusetts).

244. McFARLAND, *supra* note 209, at 348-49.

245. *Id.* at 330 (citing KAREN ORREN, CORPORATE POWER & SOCIAL CHANGE (1974)). This is, of course, only a tendency. State legislatures sometimes have taken the lead in passing legislation to correct imbalances between business and consumer interests in the commercial law area. For instance, several state legislatures already had passed statutes prescribing funds availability periods at the time Congress passed the Funds Availability Act of 1987. Rubin, *supra* note 105, at 1257. Most of those states, however, also had strong consumer movements. *Id.*

246. HARMON ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY 44 (1964).

247. *Id.* at 46.

248. *Id.*

national government."<sup>249</sup> Indeed, the tendency of special interest groups to dominate at the state level has led some political scientists to conclude that "[t]he decentralized and fragmented nature of American political institutions frequently helps the few defeat the many."<sup>250</sup>

The above considerations suggest that the enactment process for uniform laws often will not provide a sufficient antidote for inadequacies in representation of consumer interests that occur at the drafting stage. Indeed, it appears that the uniform laws enactment process is more likely to perpetuate any inequities between consumer and business interests present in a uniform law. Because that process requires the concerted lobbying effort of an interested group in the legislatures of fifty states, it is fraught with high transaction costs for consumer groups. It is well-suited, however, to the already existing lobbying structures of a business group such as the American Bankers Association. Further, the bias against amendment of proposed uniform legislation and concomitant tendency to dissuade state legislatures from independent study and evaluation of that legislation built into the process create additional burdens for a group seeking to change the draft at the enactment stage. Finally, the audience to whom uniform laws are addressed—the state legislatures—is the one most likely to be favorably disposed to the interests of business groups.

Thus, modern principles of group theory suggest that in both of its phases—drafting and enactment—the structure of the uniform laws process creates a bias in favor of business interests and against effective representation of consumers. Indeed, viewed in light of these principles, the uniform laws process seems almost custom-made for the creation and enactment of pro-business legislation. The private and inaccessible process by which uniform laws are drafted is the method probably least likely of all to obtain input from consumer interests, and the product of that drafting process is then presented as a *fait accompli* for enactment by the legislatures most likely to favor business interests. At the same time, the result of the process is the largely uniform national commercial standard that business interests need to function effectively in an integrated national economy. It is no wonder, therefore, that drafters of uniform legislation find business interests to be those most interested in the uniform laws process, or that they find that

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249. *Id.*

250. MCFARLAND, *supra* note 209, at 333.

favoring those interests over consumer interests produces successful uniform commercial laws—"successful" at least in the sense that they are laws capable of enactment.

## VI. WHY SHOULD THE CONFERENCE CARE?

The concepts of interest group theory discussed above demonstrate that the design of the uniform laws process tends to result in legislation that favors business over consumer interests. They also show, however, that there is a tendency for consumer interests to lose out to business interests in representative legislatures—after all, these theories were developed to describe interest group behavior in the context of democratic institutions, not in the context of the uniform laws process. Thus, it might be suggested that arguments based on interest group theory prove too much. In other words, a defender of the uniform laws process might argue that interest group theory does not so much suggest that the uniform laws process is flawed as suggest that our political system is flawed. Why should the Conference in particular be concerned?

### A. THE LACK OF POLITICAL ACCOUNTABILITY

First, of course, the fact that consumer interests are likely to be disadvantaged in representative as well as non-representative institutions merely indicates that all policy-making bodies need to be sensitive to these concerns in designing and implementing decision-making structures. Further, because the structure of the uniform laws process creates additional obstacles to consumer collective action not encountered by consumers in political fora, it seems that drafters of uniform commercial laws need to be even more consciously aware of these considerations.

In addition, the non-representative, politically unaccountable nature of the organizations involved in the uniform laws process both deprives that process of an important protection against undue influence and makes the laws it produces particularly vulnerable to such a charge. The greater visibility and openness built into the structure of political bodies, and the ultimate political accountability of their members to the general public, not only give them some incentive to consider the interests of the general public in a consciously representational manner, but also provide them a constituency upon which to draw to



counteract the influence of special interest groups.<sup>251</sup> Indeed, representative government has been pointed to as a primary countervailing force to special interests.<sup>252</sup> These "political" protections against the influence of special interests are not present in the sponsoring organizations of uniform laws.

Further, although some political analysts are quite skeptical that representative government actually provides an effective check on special interests, it certainly is true that the theory of representative government, whether it always works in practice or not, provides a type of legitimacy to the decisions made by politically accountable bodies that the Conference's decisions lack. The Conference gains legitimacy for its laws, not from their democratic origins, but from the neutrality of their drafters and the nonpolitical nature of the drafting process that produces them. The idea is that these laws are not the product of the pressures of politics, but politically neutral "best" solutions to the problems with which they deal.

Thus, even if it were true that a state legislature drafting a law to allocate loss between banks and their customers would come up with an allocation just as pro-bank as that of Articles 3 and 4, the law nevertheless would have a certain legitimacy merely because the state legislature had produced it, and even though it was clear to everyone that it favored a particular group. On the other hand, such favoritism on the face of a uniform law undercuts the major source of legitimacy the sponsoring organizations of uniform laws have—their neutrality.

#### B. THE ROLE OF THE UNIFORM LAWS PROCESS IN THE DYNAMICS OF FEDERALISM

Perhaps most importantly, the Conference has a particular duty to consider the effect of interest group politics on the uniform laws process because of the unique position that process occupies within the scheme of U.S. federalism. The uniform laws process has always existed within the interstices of federalism. Its position there, however, has changed over the years, as our conception of the appropriate balance between federal and state power has changed. When the Conference was created in

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251. Cf. McFARLAND, *supra* note 209, at 345 (discussing way in which politicians come to advocate the ideas of public interest groups).

252. See, e.g., *id.* at 335-37 (discussing impact of elections on minority faction dominance); FARBER & FRICKEY, *supra* note 195, at 20 ("Responsiveness to broad constituencies is not only an important aspect of representation, it also helps ameliorate the influence of special interests . . .").

1892, the uniform laws process was viewed as a method for obtaining uniformity in subject matter areas considered outside the powers of the national government.<sup>253</sup> The Conference filled the power vacuum left by the pre-New Deal Supreme Court's refusal to interpret national power as commensurate with the need for nation-wide solutions. It operated in the area in which the national government could not legislate and in which legislation by individual states disrupted the economic and political integration of the nation.

Thus, for example, in *Carter v. Carter Coal Co.*,<sup>254</sup> Justice Sutherland rejected the notion that Congress should be able to "legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."<sup>255</sup> Instead he stated:

There are many subjects in respect of which the several states have not legislated in harmony with one another, and in which their varying laws and the failure of some of them to act at all have resulted in injurious confusion and embarrassment. The state laws with respect to marriage and divorce present a case in point; and the great necessity of national legislation on that subject has been from time to time vigorously urged. Other pertinent examples are laws with respect to negotiable instruments, desertion and non-support, certain phases of state taxation, and others which we do not pause to mention. In many of these fields of legislation, the necessity of bringing the applicable rules of law into general harmonious relation has been so great that a Commission on Uniform State Laws, composed of commissioners from every state in the Union, has for many years been industriously and successfully working to that end by preparing and securing the passage by the several states of uniform laws. If there be an easier and constitutional way to these desirable results through congressional action, it thus far has escaped discovery.<sup>256</sup>

A year after the decision in *Carter Coal*, however, the Supreme Court made the discovery that had eluded Justice Sutherland.<sup>257</sup> The Supreme Court's expansive interpretation of the Commerce Clause and the concomitant expansion of federal regulatory power filled the void once occupied only by the uniform laws process with the power of the national govern-

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253. Dunham, *supra* note 12, at 236.

254. 298 U.S. 238 (1936) (Sutherland, J.) (striking down Bituminous Coal Conservation Act of 1935 as outside Congress' power).

255. *Id.* at 292.

256. *Id.* at 292-93.

257. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act as a valid exercise of the commerce power despite its regulation of manufacture and production activities because of the economic effect those activities have on interstate commerce).

ment. The Conference moved from being a facilitator in an area where no government entity could operate effectively to being a competitor with national legislative action.<sup>258</sup> It thus is not surprising that the Conference often promotes the uniform laws process as an alternative to federal legislation—a way to obtain nation-wide uniformity of the substantive law while avoiding the federal intervention that normally would accompany that result—and, thus, as a means of protecting state autonomy and state's rights.<sup>259</sup>

As the discussion of interest group theory in Part V illustrates, however, the consequences from the choice of state over federal legislation go beyond merely maintaining state control over a subject area. The choice of a state or a federal forum also may affect the substance of the law that is produced. State legislatures tend to be more susceptible to special interest groups representing business interests. This phenomenon is reflected in the substance of state legislation, which tends to favor these interests over those of consumers.<sup>260</sup> On the other hand, since

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258. The Conference's position thus became one primarily located within the area of concurrency, where both the national and state governments have power to legislate. See 1988 Criteria, *supra* note 21, at § 1(a). As Section 1(a) provides:

The subject matter must be appropriate for state legislation in view of the powers granted by the Constitution of the United States to the Congress. If it properly falls within the exclusive jurisdiction of the Congress, it is obviously not appropriate for legislation by the several states. However, if the subject matter is within the concurrent jurisdiction of the federal and state governments and the Congress has not preempted the field, it may be appropriate for action by the states and hence by the Conference.

*Id.*

259. See, e.g., Dunham, *supra* note 12, at 237; White, *supra* note 35, at 2102; ARMSTRONG, *supra* note 18, at 129. Dunham states:

From the very beginning, . . . it has been a theme that uniformity of law by voluntary state action was a means of removing any excuse for the federal government to absorb powers thought to belong rightfully to the states. As the power of the federal government has expanded, the presidents' reports of the Conference have more often emphasized this "states rights" objective.

Dunham, *supra* note 12, at 237. White argues: "With the removal of the constitutional barriers against federal laws governing most elements of a private citizen's life, the same fear that caused the constitutional barriers in 1789 should again trouble the citizens, now exposed to federal power." White, *supra* note 35, at 2102. He asserts that the Conference "may find this new-found fear of federal power to be a reason for their organization," as they can "be a rallying point for the states against federal encroachment." *Id.* Armstrong also states, "The voluntary enactment of uniform state laws by the state legislatures seems to be generally accepted as more desirable and more feasible than an expansion of federal power." ARMSTRONG, *supra* note 18, at 129.

260. See *supra* Part V. C. 3.

the founding of the nation, federal legislation has been suggested as the cure for undue influence by factions, as the greater number of interests represented in the national legislature tends to operate to dilute the power of special interest groups.<sup>261</sup>

Further, because of the potential effect of the choice of legislative forum on substantive outcomes, a common political strategy of special interest groups with influence at the state level is to try to narrow the "scope of conflict" by arguing for state rather than federal regulation of areas affecting their interests in the hope that this strategy will avoid the influence of public interest groups on the resulting policy decisions.<sup>262</sup> Indeed, some have suggested that "federalism does not involve a struggle between the nation and the states, but rather a struggle among interests who have favorable access to one of the two

261. See THE FEDERALIST, NO. 10, at 83-84 (James Madison) (Clinton Rossiter ed., 1961). Madison states that:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; . . . Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. . . .

[I]t clearly appears that the same advantage . . . enjoyed by a large over a small republic is enjoyed by the Union over the States composing it. . . .

The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A rage for . . . any . . . improper or wicked project will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

*Id.* Because he believed minority factions in a state would be checked by the principle of majority rule, Madison primarily was concerned with the undue influence of majority factions at the state level. *Id.* at 80. His comments regarding the protections against factions afforded by the broadened range of interests represented at the national level, however, seem equally pertinent with regard to protection against those who, while not a numerical majority, nevertheless wield a majority of political power in a particular state.

262. Scope of conflict theory says:

the breadth of participation in resolving political issues is central to politics. If the scope of conflict is narrow, if participation is very restricted, then specialized economic interests will triumph. On the other hand, if the scope of conflict is broad, if many groups participate in the resolution of an issue, then the political outcome is likely to be very different. Accordingly, much of the art and strategy of politics consist of manipulating the scope of conflict to determine the outcome of a political issue.

McFARLAND, *supra* note 209, at 329. McFarland states that "well-organized special interests will manipulate the context of political conflict to prevent 'public interests' from manifesting themselves in the conflict." *Id.* at 333.

levels of government,"<sup>263</sup> and that, in this context, "the cry of 'states' rights' [can] become an important part of the struggle among pressure groups."<sup>264</sup>

Normally, however, the geographic boundaries of a state's legislative jurisdiction limit what a state legislature can do for a business interest operating on a national scale.<sup>265</sup> As James Madison wrote in *The Federalist No. 10*, federalism reflects the notion that state governments and the national government should serve different functions.<sup>266</sup> Its genius is in creating different levels of government to more effectively deal with different types of issues: national representatives address issues of concern to the nation as a whole, whereas state representatives address issues of interest to a particular state.<sup>267</sup> Delineation of

263. ZEIGLER, *supra* note 245, at 48.

264. *Id.* at 46-47. Zeigler notes that because it appeals to our basic federalist values, the use of a states' rights argument by an interest group seeking to avoid national regulation can be very effective: "the 'specter of a centralized federal bureaucracy invading the reserved rights of the states' is invoked on the assumption that our values are biased toward a commitment to 'grass roots' democracy." *Id.* at 47 (quoting Robert J. Harris, *States' Rights and Vested Interests*, XV J. OF POL. 466 (Nov. 1953)).

265. This is not, however, always the case. Sometimes choice of law rules can be used to manipulate applicable law so that the law of one state is all a national corporation needs. Consider, for instance, Delaware corporate law. Because state choice of law rules say internal affairs of a corporation are governed by the law of the state of incorporation, Eugene F. Scoles, & Peter Hay, *Conflict of Laws*, § 23.2 (2d ed. 1992), the favorable rules of Delaware law are all any corporation needs.

The sponsoring organizations of the Code have tried a similar strategy with regard to Article 4A, dealing with wholesale wire transfers. That Article's choice of law provision allows a funds transfer system to select by private rule the state's law that will govern wholesale wire transfers any part of which utilize its system. U.C.C. § 4A-507(c). Parties to the transfer are bound by the system's choice of law if they have notice that the funds transfer system may be used in connection with their funds transfer. *Id.* The law of the jurisdiction selected need not bear a reasonable relation to the matter in issue. *Id.* The idea behind this provision was "that adoption of Article 4A by New York and the selection of New York law by the [New York Clearing House Association] CHIPS rules would result in Article 4A being applied to all CHIPS transactions regardless of jurisdiction." David B. Goldstein, *Federal Versus State Adoption of Article 4A*, 45 BUS. LAW 1513, 1516 n.15 (1990). As CHIPS is one of the major wire transfer systems, New York's version of Article 4A could have a very significant extraterritorial impact, not only nationally, but internationally.

266. THE FEDERALIST PAPERS, *supra* note 260, at 83.

267. Madison states as follows:

It must be confessed that in this [issue of the appropriate size of a republic], as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too

the precise point at which a particular issue becomes primarily one of national rather than local concern is not easy, particularly in the area of commercial law. Indeed, that demarcation is one of the perennial struggles of our system—a struggle that in recent times, the Supreme Court has left largely to the political processes.<sup>268</sup> Nevertheless, although the application may be subtle and complex, the theory at least is clear: at some point issues are no longer local, and at that point, the appropriate policy-maker is the national government. At the point when this occurs—when for our purposes business interests find that a single state's law is ineffective in providing the climate that they need for efficient commercial interaction—those interests are motivated to seek federal legislation.

Thus, when the Merchants' Association of New York found that the state law of sales had not provided the uniformity necessary for business to operate effectively in the common market of the United States, and the previously existing federal judicial mechanism for obtaining uniform commercial laws had been destroyed, they turned to the Congress and sought a federal sales

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much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

*Id.*

268. With regard to Congress's regulation of private commercial interests, the Supreme Court has long deferred to Congressional determinations of an activity's impact on interstate commerce, and thus to Congress's power to regulate that activity under the Commerce Clause. *See, e.g.,* *Perez v. United States*, 402 U.S. 146 (1971) (finding Congress may regulate a class of activities that has a substantial economic effect on interstate commerce without proof that a particular incidence of that activity has any interstate effect); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding Congress may regulate if Congress had a rational basis for finding that the regulated activity has a substantial economic effect on interstate commerce); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding Congress may regulate any activity which in the aggregate has a substantial economic effect on interstate commerce).

Even with regard to Congressional regulation of activity of the states pursuant to the Commerce Clause, the Court currently takes the position that the states' primary protection from congressional overreaching is not the judiciary, but rather the protections of state interests inherent in the national political process. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)). The Supreme Court, however, may be changing direction once again on this issue. *See* *New York v. United States*, 112 S.Ct. 2408 (1992) (striking down a provision of the federal Waste Policy Amendments Act of 1985 as violative of the Tenth Amendment); *Gregory v. Ashcroft*, 111 S.Ct. 1069 (1991) (adopting plain statement rule with regard to federal legislation that appears to regulate the states).

bill to provide the necessary uniformity.<sup>269</sup> In the normal course of state and federal interaction, the need for uniformity in interstate commercial transactions logically leads to federal legislation and the concomitant broadening of the scope of conflict that national decisionmaking entails.

As it did in the case of the federal sales bill, however, the uniform laws process interjects itself into the dynamics of this state-federal interaction, providing an alternative mechanism for obtaining uniformity that does not require business interests to give up any political advantage they may have over consumer interests in the state legislatures. In doing so, the uniform laws process gives business interests the best of both worlds: they get the benefit of uniform commercial law rules on a national scale without having to broaden the scope of conflict by going to the national legislature to obtain them. Thus, they benefit from uniformity without incurring the risk that the strength of their position will be diluted by the broader representation of other interests at the national level.<sup>270</sup> At the same time, the current structure of the uniform laws process makes it even more likely that the narrowed scope of conflict will result in pro-business legislation than would the normal state legislative process.

The impact of the uniform laws process on the dynamics of federalism, however, goes beyond merely providing an alternative to federal legislation for interest groups that find state legislatures more amenable to their position. Because the law resulting from that process is likely to endure, the uniform laws process can delay effective formation of national policy in areas of national concern for significant periods of time—even, as in the case of the Code, for decades.

The Uniform Commercial Code has been the dominant law in the areas it covers for over forty years. Some of the laws that it replaced, such as the Negotiable Instruments Law, had dominated their subject matter for years before enactment of the U.C.C.<sup>271</sup> It hardly seems likely that these laws have domi-

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269. See *supra* Part III. A.

270. Cf. ZEIGLER, *supra* note 245, at 46-47 (quoting DONALD C. BLAISDELL, *AMERICAN DEMOCRACY UNDER PRESSURE* 50 (1957)) ("As . . . has [been] noted: Federalism is particularly pleasing . . . to the managers of industrial enterprise. While their charters to do business are obtained not from the federal but from state government, under federalism they get the benefits of a trade area of continental proportions, at the same time escaping effective national regulation.").

271. The Conference promulgated the Negotiable Instruments Law in 1896. ARMSTRONG, *supra* note 18, at 25. Every state had adopted it by 1924. Braucher, *supra* note 2, at 799.

nated because an area like negotiable instruments is one primarily of "local" concern or because commercial law is an area "traditionally left to the states." The very fact that uniform laws were found desirable on these topics refutes their "local" nature.<sup>272</sup> The commercial law was traditionally, if anything, a law that did not even know national boundaries.<sup>273</sup>

A more likely explanation for the enduring quality of these laws seems to lie in their impact upon the motivation of either the states or the national government to legislate further in the areas they cover. The passage of a uniform law has a decided dampening effect on further innovation by the states. The pressure for uniformity that biases the enactment process against amendment also places pressure on the state legislatures not to freely amend the law after its enactment.<sup>274</sup> Further, the exist-

272. See, e.g., 1988 Criteria, *supra* note 21, at § 3(3). "As a general rule, the Conference should avoid consideration of acts on subjects that are . . . of purely local or state concern and without substantial interstate implications unless conceived and drafted to fill emergent needs or to modernize antiquated concepts." *Id.*

273. The "law merchant" was a form of international law, whose fundamental elements were the ease with which it permitted binding contracts, its stress on security of contracts, and the variety of devices it contained for establishing, transmitting and receiving credit. . . . [It] was, at least in theory, uniformly applied to dealings between merchants of every nation.

MICHAEL E. TIGAR & MADELEINE R. LEVY, *LAW AND THE RISE OF CAPITALISM* 49 (1977); accord Braucher, *supra* note 2, at 811 ("[T]he law merchant is a tradition transcending both state and national boundaries."); Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) ("The law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the commercial world.").

274. Frank E. Horack, Jr., *The Future of Uniform Laws—The Commercial Code*, 9 OHIO ST. L.J. 555, 557 (1948) ("[U]niformity may frequently imply excessive stability in that it places a heavy sanction on the retention of the uniform law and an avoidance of experimentation with new and perhaps better legal controls."). Indeed, Professor White makes an interesting point about the durability of uniform laws, based on the differences in regulation at the state and federal level, which suggests another reason why business interests might choose state over federal law. In suggesting that the Conference may find a *raison d'être* as a rallying point for those fearing excessive federal intervention, he states the following:

this fear of federal power may be enhanced because the power is exercised not by a ponderous, deliberative body such as the Congress, but by agencies of the federal government . . . . For example, bankers seeking a particular set of rules to determine the banks' liability to customers might have more confidence in the stability of those rules if they were stated in a uniform state law that could be changed only by the acts of state legislatures than if the rules were found in regulations authorized by Congress, but promulgated by the Federal Reserve Board. Under federal agencies, such regulations can be changed on short notice and with modest debate.



ence of a comprehensive state law dealing with a subject matter area is also likely to delay any federal enactment in the area. The interest groups that are most able to organize effectively are satisfied with current law, and thus there is no push by them for federal legislation. The burden of overcoming legislative inertia thus is shifted to consumer interests—those least able to organize.

Thus, to the extent the uniform laws process is effective, it can delay the development of national legislation in areas that have become areas of interstate concern for significant periods of time. As a result, it also can delay the creation of national policy with regard to those issues.<sup>275</sup> Until an opportunity arises to reassess the policy choices made by the uniform state legislation, either because some particular problem galvanizes an interest group,<sup>276</sup> or because some other piece of related legisla-

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White, *supra* note 35, at 2103. Cf. Rubin, *supra* note 105, at 1265 (identifying need for regulatory structure as driving force behind "federalization" of law).

Innovation by state courts is another matter. State courts, for instance, sometimes have provided protection of consumer interests lacking in uniform commercial laws as originally enacted through judicial interpretation. For interpretation of the Negotiable Instruments Law, see, e.g., *Unico v. Owen*, 232 A.2d 405 (N.J. 1967) (denying holder in due course status to lender affiliated with seller); *Mutual Fin. Co. v. Martin*, 63 So.2d 649, 653 (Fla. 1953) ("We think the buyer—Mr. & Mrs. General Public—should have some protection somewhere along the line.").

Indeed, one premise behind the structure of the Code was the idea that courts, rather than legislatures, would have a primary role in allowing the Code to change over time. See *supra* note 72. On the other hand, disparate judicial interpretations of the Code destroy uniformity and thus have led some to call for federal commercial legislation. E.g., Harold A. Hintze, Note, *Disparate Judicial Construction of the Uniform Commercial Code—The Need for Federal Legislation*, 1969 UTAH L. REV. 722; Taylor, *supra* note 44 (discussing various causes of nonuniformity, including nonuniformity because of disparate judicial interpretation).

275. Cf. ACIR REPORT, *supra* note 187, at 243 (noting that ability of interest groups with national concerns to lobby at the state level may lead to the "localization of national issues"); GLENDENING & REEVES, *supra* note 185, at 199 (discussing interstate compacts). Glendening and Reeves argue that interstate compacts often are instigated by special interests who feel more competent to deal with the states rather than the national government. *Id.* The use of interstate compacts "to maintain state control of economic matters is not necessarily detrimental to the national interest; but it could delay coordinated national action in dealing with problems of nationwide concern." *Id.*

276. One example is the problem of excessive hold periods on customer deposits, which caused consumer interests to lobby the national government for the Expedited Funds Availability Act of 1987, Pub. L. No 100-86, 101 Stat. 635 (codified as amended at 12 U.S.C. §§ 4001-4010 (1988)). See Rubin, *supra* note 105, at 1257. This Act not only dealt with funds availability, but granted the Federal Reserve Board the power to issue regulations "to regulate . . . any aspect of the payment system, including the receipt, payment, collection, or clear-

tion comes up for consideration at the federal level<sup>277</sup> the uniform legislation remains. Thus, the balances struck by the drafters of uniform laws between competing interests are likely to be balances that will endure.

These effects of the uniform laws process on the operation of federalism place a significant responsibility on the Conference to act wisely in proposing and drafting uniform laws. For, by delaying the formation of national policy in an area, the uniform laws process delays consideration of that area at the level of government most likely to take into account the interests of all affected groups. For instance, Code supporters have justified the failure of the original Code to include consumer provisions by noting that consumer protection was in its infancy at that time and there was no consensus.<sup>278</sup> Indeed, some point to the lack of support for the Uniform Consumer Credit Code as further evidence that no consensus existed on these issues years later.<sup>279</sup> One must consider, however, which is the cause and which the effect. If the Code had not covered the field of commercial law so comprehensively at the state level, business interests might have sought uniformity of the commercial law through national legislation; in the atmosphere of broadened representation at the national level, issues of consumer protection might have been raised much earlier.

## VII. WHAT CAN THE CONFERENCE DO?

It is always much easier to criticize what exists than to make suggestions for change. For that reason, it seems somewhat unfair to do the former without at least making some preliminary attempt to do the latter. What follows are merely tentative suggestions—as an outsider to the Conference, I am not privy to a number of the considerations that necessarily will

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ing of checks,” and thus gave it the power to preempt most of Articles 3 and 4. *Id.* at 1258-61.

277. For example, the revision of the bankruptcy laws altered the balance that had been struck in Article 9 between secured and unsecured creditors. See Kripke, *supra* note 81, at 579. Kripke states:

Despite having won in state law on the proposition that secured credit ought to be facilitated because it is the means by which small business finances itself, we find ourselves today operating under the new Bankruptcy Code in which there is [a] whole series of provisions which are intended to limit secured credit, permit the debtor-in-possession or the trustee in effect to disregard it . . . .”

*Id.*

278. *E.g., id.* at 582-83.

279. See, *e.g., id.*; White, *supra* note 35, at 2131.

influence the Conference's decisions about the desirability and feasibility of any given alteration to its present process. Further, every organization has an ethos known only to those familiar with it. Thus, those who are involved with the uniform laws process are in the best position to decide how to address its problems. Nevertheless, several areas for consideration suggest themselves.

#### A. OPEN UP THE DRAFTING PROCESS

It seems clear that the Conference and, to the extent it becomes involved in this process, the ALI, need to open up the uniform laws process—to make it more visible and accessible to a wider range of interests—at the drafting stage. Adequate representation of all affected interests is crucial if the Conference is serious about its goal of drafting the “best” legislation with regard to a given subject matter:

Representation not only affects the information available and the assessment of that information, but also affects the kinds of solutions that are developed and considered. Drafting a statute is not simply a matter of choosing between existing approaches on the basis of one's political predilections. It also involves the development of new ideas and new statutory devices to deal with perceived problems. . . . To trigger this process of innovation, the representation of opposing groups . . . need[s] [to] be sufficient to present both perspectives forcefully, and strong enough to motivate the drafters to seek new solutions.<sup>280</sup>

The drafting stage is thus the critical stage at which to obtain adequate input from all affected interests. As a practical matter, it also seems to be the only stage at which the input of consumer interests is likely to make any difference—once the law is promulgated by the sponsoring organizations, the forces described in Part V. C work against its change to reflect consumer interests not previously included.

Further, interest group theory suggests that opening the drafting process is going to require affirmative action on the part of the sponsoring organizations to actively seek the participation of consumer representatives. The obstacles consumers face in organizing for collective action, particularly with regard to technical statutes, coupled with the Conference's lack of visibility and accessibility to the general public, indicate that the Code's sponsoring organizations cannot assume that consumer representatives will appear of their own initiative.

The diversity of consumers also suggests that having one

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280. Rubin, *supra* note 5, at 591.

consumer representative, while it is better than having none, is not likely to present the full range of consumer views on an issue. Just as the Conference would not consider all business interests affected by the Code to be adequately represented by the appointment of one "business" representative, it must recognize that multiple consumer representatives may be required as well. In addition, just as the Code drafters have actively solicited input from nonlawyers with regard to the concerns of business groups, they also should include nonlawyers with consumer views in the process.<sup>281</sup> The sponsoring organizations also need to take a broader view of when uniform commercial laws affect consumer interests. The drafters cannot remove consumer interests from the Code simply by deciding not to include affirmative consumer protection provisions. Unless the drafters feel comfortable including a provision in the draft of a uniform commercial law that "This Article does not apply to consumer transactions," then consumer interests are involved, and should be provided with adequate representation.

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281. As discussed in Part III. B, Llewellyn and his fellow drafters recognized early on that in one sense, the real commercial law experts were the businessmen, not the lawyers. See *supra* notes 64-77 and accompanying text. It was the businessmen who knew what was required for commercial transactions to operate in practice, although they lacked the specialized training necessary to translate their knowledge into legal concepts. Similarly, one can argue that the true experts regarding consumer problems are the consumers themselves—those individuals who deal with the commercial system in the course of their daily lives without the benefit of any specialized knowledge of the way that system operates or of the legal concepts that govern it. Because these individuals, along with the businessmen, are those whose daily transactions are most affected by the rules ultimately chosen, it seems imperative that their perspective be included.

In determining how to structure its drafting process to achieve effective representation, the Conference may want to study the procedures developed by other drafting bodies—for instance, administrative agencies—to obtain input from interested groups in carrying out their rulemaking functions. See, e.g., 5 U.S.C.A. § 561 note (Supp. 1993) (setting out procedure for negotiated rulemaking); 1 C.F.R. §§ 305.82-4, 305.85-5 (1993) (Administrative Conference recommendations regarding procedures for negotiating proposed regulations); *id.* § 305.68-5 (Administrative Conference recommendations regarding representation of the poor in agency rulemaking).

The Article 9 Study Group, appointed by the PEB to determine whether Article 9 should be revised, has taken the approach of creating a special task force to evaluate the Study Group's "recommendations from a consumer-protection perspective and to identify additional consumer protection issues related to secured credit." PERMANENT EDITORIAL BOARD FOR THE U.C.C., PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ART. 9, Report 3 n. 9 (Dec. 1992).

## B. PROVIDE THE STATES WITH A BASIS FOR INDEPENDENT DECISION

The sponsoring organizations also need to make the state legislatures more aware of the policy choices that have been made in the course of drafting a uniform law presented to those legislatures for enactment. The drafters of uniform legislation do not view themselves as the proponents of a particular interest. When they make a policy choice it is presumably for reasons other than favoritism to one interest or the other. The choice made, the alternative positions rejected, and the reasons for the decision all need to be clearly articulated for the benefit of the state legislatures. It is not enough to present them with the text of the statute—particularly for complex statutes like Articles 3 and 4, the text of the statute is not likely to make the policy choices that it represents obvious to the average legislator.<sup>282</sup> The comments, at least as currently drafted, are also insufficient. They are not always available, and sometimes not even drafted, at the time a state's legislature is considering a uniform law.<sup>283</sup> Moreover, the comments tend to be technical themselves, as they are designed to guide courts in the appropriate interpretation of the Code rather than to guide legislators in their enactment decision.<sup>284</sup> What is needed is the drafters' detailed explanation of the major policy choices that have been made—and the alternative choices that have been rejected—during the drafting process, set forth in plain language and human terms.

Although the drafters of uniform legislation understandably are proponents of the laws they have drafted in the state legislatures, they need to be willing to persuade the legislatures of the merits of those laws on the basis of full information, and they also need to be willing to allow those legislatures to reach opposite conclusions, particularly in light of the Conference's own lack of political accountability. If the uniform laws process is in fact to serve as a means of maintaining state autonomy in our federalist system, then the states need to be able to make an informed choice in deciding whether to enact a proposed uniform law.

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282. See Macey, *supra* note 203, at 1289 (noting that the language of complex statutes can hide the ways in which they benefit special interests).

283. WHITE & SUMMERS, *supra* note 164, § 4, at 13-14.

284. See *id.* at 14. Professors White and Summers argue, "If the average legislator who voted to enact the Code in a given state did not understand the intricacies of Article Four or Article Nine at the time of enactment, it is likely that he did not grasp the relevant comments either." *Id.*

### C. PLACE THE IMPORTANCE OF ENACTMENT IN PERSPECTIVE

The sponsoring organizations also need to change their attitude about the importance of the enactment of proposed uniform laws as the measure of their success. The history of the Code clearly reveals that the need to gain the support of powerful interest groups that otherwise might block enactment of a uniform law makes the uniform laws process vulnerable to the influence of these groups at the drafting stage. Further, at the enactment stage, the desire to have uniform laws passed quickly and without amendment works against allowing legislatures to give them independent, informed consideration.

Thus, at the drafting stage, the drafters of uniform laws need to be particularly concerned that the need to satisfy business interests with the political power to block a uniform law at the enactment stage does not become the driving force behind the substance of uniform laws. "Consensus" should not be obtained by cutting out the interests of those with opposing views but less political clout. In addition, as discussed above, at the enactment stage, the sponsoring organizations need to be willing to allow the legislatures to determine the merits of the policy choices represented by the uniform legislation for themselves—and, in fact, need to assist them in their ability to do so—even if this creates a greater likelihood that the uniform law will be amended, or not enacted at all.

If the Code drafters are successful in making the drafting process truly representative of all interests, perhaps consensus will be reached by all affected parties at the drafting stage, and enactment will not present a problem. The resulting legislation will represent policy choices satisfactory to all interests and thus, presumably, satisfactory to even the most informed state legislature. In addition, to the extent sponsors of uniform legislation are successful in educating the state legislatures about the merits of uniform laws, they may be less dependent upon the support of special interest groups for enactment.

Nevertheless, if true consensus cannot be reached, the Conference should either abandon the project, or in an appropriate situation, draft the law that it considers to represent the better position, even though adopting that position may cause a politically influential group to oppose the law in the state legislatures. As the Conference itself has recognized, uniform laws can have value apart from their "enactability," through their influence on other state legislation that is enacted, as well as through

their impact on case law and teaching practices.<sup>285</sup>

#### D. CHOOSE THE APPROPRIATE LEGISLATIVE FORUM

Given the position that the uniform laws process occupies within our federal structure, the sponsoring organizations need to consider when deciding whether to draft a uniform law whether the subject matter of the proposed law is one better dealt with by state rather than federal legislation.<sup>286</sup> The rationale for using the uniform laws process rather than allowing uniformity to occur through federal legislation should be explicitly articulated as part of the decision to undertake a drafting project. A vague reference to states rights is an insufficient justification—the states never were intended to be the source of law on all subjects. The fact that the area has been addressed through a uniform law in the past should not, of itself, be sufficient either. The changed conditions that have led the sponsoring organizations to conclude that the uniform law must be revised may also indicate in a given situation that such revision should occur through federal legislation.<sup>287</sup> Moreover, given the broadened scope of conflict available at the federal level, the Conference must consider whether the uniform laws process is going to provide an adequate forum for all affected interests to

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285. See ARMSTRONG, *supra* note 18, at 109-10; 1988 Criteria, *supra* note 21, § 2(c). The 1988 Criteria state that, “[a]cts may promote uniformity indirectly as well as by substantially verbatim adoptions,” for instance, by “extensive adoptions in principle,” through “impact on case law and teaching practices,” and by “gradually increasing adoptions, either in statutes or in case law, of particular sections or parts of a Uniform or Model Act addressing specific problems within the larger area to which the act is directed.” 1988 Criteria, *supra* note 21, § 2(c).

286. In 1965, Allison Dunham, coreporter for Article 9 and first Executive Director of the Conference, pointed out that:

As the limiting effect of the federal constitution on congressional power has steadily declined through judicial interpretation . . . the work of the Conference, particularly as reflected in the reports of the president, does not indicate any major attempt to work out a theory as to when uniformity of law should be obtained by voluntary action [through the uniform laws process] and when it should be obtained by direction [through federal legislation].

Dunham, *supra* note 12, at 237. The Conference apparently still has not made any major attempt to do so.

287. For an example of the kinds of considerations that should go into the Conference’s analysis of the appropriate legislative forum, see Goldstein, *supra* note 264 (concluding that wholesale wire transfers would be more effectively regulated at the federal rather than the state level). See also Rubin, *supra* note 105, at 1265-73 (discussing need for a regulatory scheme with administrative agency rulemaking and enforcement as a driving force behind the choice of federal over state legislation).

present their views and reach consensus about the substance of the law. If the answer to this question is "no," then the project should not be undertaken.

The sponsoring organizations also may want to consider whether they have taken too narrow a view of their role. It has been suggested from time to time that the Conference should draft uniform laws for enactment at the federal level as well as laws for enactment by the states. Indeed, the Code itself was originally planned as legislation that could be enacted at either the state or the federal level.<sup>288</sup> The Conference, however, has rejected these suggestions on the grounds that drafting laws for federal enactment would go beyond its statutory mandate and be inconsistent with its emphasis on preserving state autonomy.<sup>289</sup> It may be time to reconsider this position. State interests are represented in our federal system in numerous ways other than through the passage of state legislation.<sup>290</sup> In fact, several commentators—including Karl Llewellyn—have argued that adoption at the federal level of a law that has been developed with input from the Conference is an accommodation of state interests rather than an invasion of state sovereignty.<sup>291</sup> Certainly, to the extent that the Conference views itself as representative of the views of the states, this seems a logical conclusion. To the extent that the Conference views itself primarily as a mechanism for providing quality drafting of uniform laws, it seems that the expertise of the Conference's drafters would be just as beneficial at the federal as at the state level. In any event, whether the Conference chooses to view itself as limited to promulgating laws for state adoption or not, it seems clear that an organization devoted to uniformity of law cannot afford

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288. Schnader, *supra* note 240, at 231.

289. Dunham, *supra* note 12, at 237-38.

290. See, e.g., Taylor, *supra* note 44, at 364-66 (discussing ways in which federal commercial code might be structured to take into account state interests); ROBERT P. STOKER, *RELUCTANT PARTNERS: IMPLEMENTING FEDERAL POLICY* 10-11 (1991) (explaining ways in which state interests are represented in the implementation of federal policy).

291. E.g., Llewellyn, *supra* note 50, at 561 (arguing that adoption of a federal sales bill would be "No trespass on States' Rights, but rather builds . . . on State experience [and] capitalizes [on] the States' initiative" in the Uniform Sales Act); Horack, *supra* note 273, at 564. Horack argues:

It is clear that the Code presents the best thinking of the Commissioners of the several states; if Congress adopts their proposal it is much more logical to say that Congress is following the wishes and the lead of the states than that Congress has entered the field to interfere with state autonomy.

*Id.*



to ignore the possibility that uniformity may best be furthered through federal rather than state legislation. Given the impact of the uniform laws process on the dynamics of federalism, it would seem irresponsible for the Conference to do so.

### VIII. CONCLUSION

The National Conference of Commissioners on Uniform State Laws celebrated its one-hundredth anniversary in 1992. If it is to continue to have a significant impact on the development of commercial law in its second century, then it needs to offer not only the group of intelligent and dedicated experts that always have been associated with the Code effort, but also a process for the creation and enactment of commercial law designed for the present and the future, rather than the past.

Consideration of the uniform laws process in light of modern group theory demonstrates that, as currently structured, the process is an inadequate mechanism for drafting commercial legislation designed to reach reasonable accommodation among the interests of all affected groups. Grounded in outmoded notions of group dynamics and the workings of federalism, the current uniform laws process, rather than providing a means for drafting laws that represent neutral, best solutions to commercial law issues, tends instead to produce only solutions that are the most amenable to the business special interests that largely dominate it.

The uniform laws process, at both its drafting and its enactment stage, exacerbates the inherent organizational disadvantages under which consumer interests operate. At the drafting stage, its lack of visibility and accessibility to the general public, combined with the absence of any formal structure for obtaining input from all affected groups, means that consumer interests are not likely to receive effective representation. At the enactment stage, the pressures associated with the drive for uniformity in the fifty states discourage independent consideration by the state legislatures of the drafters' policy choices; these pressures thus may deprive the states of the opportunity to make truly informed and autonomous decisions about the appropriateness of those policy choices, and rob the policy choices themselves of the legitimacy that the approval of a democratically elected, politically accountable body otherwise might give them. At the same time, the Conference's largely uncritical acceptance of a states' rights rationale for utilizing the uniform laws process with regard to every issue ignores the considerable impact that

process has on the dynamics of federalism, and consequently, on the development of policy at the appropriate representative level.

It is not surprising that a process developed one hundred years ago needs revision. Moreover, revision of the uniform laws process at this point would not be the first time the process has been altered to reflect changing conceptions of decision-making processes. When the Conference was founded in 1892, formalism still was the dominant legal paradigm.<sup>292</sup> In a jurisprudential structure in which legal principles had an independent existence, and thus correct solutions were waiting to be “found” through a process of deductive reasoning, employing a group of experts to find them made good sense.

By the time the Code project came along, however, the Realist movement had largely undermined formalism. Deductive reasoning did not “find” right answers; rather, it merely provided solutions based on the initial premises chosen by the reasoner—the important thing was how one picked the premises. Llewellyn believed that these premises could be discovered in the patterns of commercial practice,<sup>293</sup> and he altered the uniform laws process accordingly to reflect this belief by involving in it those business interests in whose collective practices he thought the appropriate rules of commercial law lay waiting to be found.<sup>294</sup>

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292. White, *supra* note 35, at 2098 (“Originally the Commissioners held the naive assumption that the law could be ‘found’ and stated.”).

293. Danzig, *supra* note 8, at 624-26. Llewellyn viewed law neither as a body of deduced rules nor “as an instrument chosen by social planners from among a universe of alternatives,” but as “an articulation and regularization of unconsciously evolved mores,” mores that could be discovered in the patterns of current commercial practice. *Id.*

294. Professor Danzig notes:

This view has strikingly negative implications for an active legislative role. If law exists and needs only to be discovered, it is not necessary or helpful (but indeed probably only burdensome) that the law-articulating agency be democratically elected and politically responsive; to proceed effectively, a lawmaker needs only a capacity for detecting the “situation sense” and a good faith commitment to exercise that capacity.

*Id.* at 625. According to Danzig, this explains Llewellyn’s choice of the courts, rather than the legislatures, as the primary agencies for the development of specific legal rules in Article 2. *Id.* See also *supra* note 72. It may also explain why Llewellyn was comfortable with the uniform laws process as a method for enacting commercial legislation, once the process was altered to provide the drafters with the technical information they needed about commercial transactions through the inclusion of representatives of the business interests whose transactions were to be covered by the Code. Just as the courts could ascertain the relevant commercial practices necessary to their decision in specific factual

Modern jurisprudential concepts, however, have moved beyond the notion that the development of law involves the discovery of preexisting legal principles, whether found in the abstract through deductive reasoning or in the concrete through ascertainment of commercial practices. Rather, "[w]e have learned to view legal rules, particularly in the commercial area, as an instrument of social policy rather than an autonomous body of doctrine reflecting general and apolitical principles of law."<sup>295</sup> Legal rules represent choices from among a number of alternatives—choices that involve policy decisions to value some interests more than others. When presented with a law that purports to represent the "best" solution to a given problem, the natural question to be asked is, "Best for whom?"

Modern theories of decision making are the standards by which the uniform laws process will and should be judged, and under those standards it does not, as currently structured, make the grade. It seems the Conference is faced with a choice: it must either alter its process to make it truly representative, or abandon its assertion that the commercial laws it drafts are the "best" solutions for the problems with which they deal. If it does nothing, it runs the risk not only of tarnishing its reputation as a neutral body of experts, but also of becoming a marginal player in the future development of the commercial law.

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situations from the evidence presented at trial, the drafters could ascertain the relevant rules to include in the commercial code to guide the courts' decisions from the information about commercial operations provided by business interests.

295. Rubin, *supra* note 5, at 560.