Private Legislation in the United States - How the Uniform Commercial Code Becomes Law

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Introducing foreign lawyers and law students to the commercial law of the United States is difficult enough without stumbling over the name we give to most of this law. The "Uniform Commercial Code" ("the UCC") governs the vast bulk of commercial transactions in the United States, but, for a foreign lawyer, a most curious attribute of this law must be its first name. Why the need for the word "uniform"? "Uniform" relative to what? The answers lie in a surprisingly involved mix of history, politics, and ideology, and they expose a substantial distance between the law as it is actually developed and enacted and the American ideal of participatory democracy.

The misleadingly simple answer to the name question is that the Uniform Commercial Code is state law; that is, it is enacted separately by the legislatures of each of the United States, the District of Columbia and the Virgin Islands. It is the Uniform Commercial Code in order to get the benefits of reduced legal
friction in interstate commerce while, at the same time, keeping commercial law enactment at the state level. Why we want it to be state law or permit it to remain so are questions that remain unresolved today, some fifty years after the UCC was first delivered to its sponsoring organizations.\(^4\)

From a variety of perspectives, state law seems a poor choice as the primary source for commercial law in the United States at the turn of the millennium.\(^5\) To begin with, the idea that all states will uniformly do the same thing seems conceptually at odds with some of the major premises supporting the operation of state law in our federal political system. One of the founding justifications for our federal system is the prospect that, through state-to-state experimentation with lawmaking, the United States will develop better and more effective laws.\(^6\) Another is that law should be enacted as locally as possible so that it can be most responsive to those affected by it.\(^7\) Both of these ideas suggest that variations in state law are inevitable and desirable, as states try different approaches in an effort to be responsive to their particular constituencies. Apart from our ideology of diversity, we conceive of state legislatures being autonomous in a real sense. Thus, their independence and need to be responsive to their voters means that, at a practical level, we are unlikely ever to get true legislative uniformity.\(^8\) The existence of hundreds of non-uniform amendments to the

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6. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).


8. Federal law is not uniform in a true sense, either. The existence of different federal circuits,
Uniform Commercial Code is evidence both that legislative uniformity is elusive and that the state legislatures are being responsive to their local constituents.

Second, the legislative process at the state level seems relatively ill-equipped to cope with modern commercial law. Given the millions of transactions that commercial law must deal with daily, the law is very complex. State legislators, on the other hand, sometimes work only part-time and do not have large staffs. These features combine to force reliance on private parties—bar groups and lobbyists—for a substantial amount of the legislative work. Moreover, the state legislatures often do not leave detailed records of the legislative process that would enable others to see what the legislature may have intended when it enacted a given provision. State commercial legislation developed in the traditional way, therefore, runs the risks of being insufficiently thought through, potentially unbalanced, or inadequately documented.

Solutions to these problem can be seen in the unique process of developing the Uniform Commercial Code. The UCC is kept up-to-date typically through Drafting Committees of its two sponsoring organizations: the American Law Institute (“the ALI”) and the National Conference of Commissioners on Uniform State Laws (“the NCCUSL”). Drafts of the various revised Articles of the UCC are developed over a several-year period by a Drafting Committee, then brought to the sponsoring organizations for approval. Once approved by both organizations, the Revisions are brought as a package to the state legislatures for enactment.9

When a revision to the UCC is brought to the state legislatures, the object is to obtain uniform enactment and, thus, the intent is that the state legislatures not tinker with language, policy choices, or overall thrust of the draft legislation. It is fair to say that, at the enactment stage, state legislatures are to subordinate regional differences, political differences, or the prospect of experimentation to the larger goal of national uniformity. For the most part, the sponsoring organizations have succeeded in keeping the UCC relatively uniform.

This overall process raises many questions. For example, where is political sensitivity—sensitivity to the voters—taking place? It seems clear that it does not take place at the point at which state legislators are confronted with a final draft of a proposed UCC Article. One might, of course, imagine a voter outcry blocking the enactment,10 but except for this relatively crude voter input, the

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9. See supra note 2 for articles describing the process.

10. See James J. White, Comments at 1997 AALS Annual Meeting: Consumer Protection and the Uniform Commercial Code, 75 WASH. U. L.Q. 219, 221 (1997) (stating “[i]f you tell the Commissioners that a law is not going to go through fifteen of the state legislatures, or, for example, through New York or Illinois or Texas, they will say to you, ‘We don’t want to propose that law because we don’t want to produce nonuniformity.’”). See generally Edward L. Rubin, Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4, 26 LOY. L.A. L. REV. 743 (1993) (describing process of blocking enactment of Articles 3 and 4 as proposed in California).
policy choices have been made earlier and elsewhere. Is that earlier process, more detached from the voters, adequately sensitive to political concerns? Can we rely on that process as a surrogate for a political process which may be more politically sensitive?

Perhaps the even larger question is “why does commercial law, with its increasing need for uniformity, remain state law?” Since at least the 1950s, there have been proposals to bring commercial law under federal law. Under federal law, there would be the obvious benefit of legislative uniformity and, at least in theory, the prospect of more political sensitivity and inclusiveness.

One can get a sense of these issues and form some tentative conclusions only by understanding the nature of the process by which the UCC becomes law.

I. THE UCC REFORM PROCESS

The UCC Revision Process begins, as many other legislative processes undoubtedly begin, with lawyers. The American Bar Association’s Business Law Section maintains a Uniform Commercial Code Committee, and lawyers on that Committee meet semi-annually to discuss the workings of various parts of the UCC. The Committee’s focus typically will be on perceived malfunctions of the law—statutory ambiguity, wrongly decided cases, or unintended implications of parts of the statute. As the perceived problems accumulate, pressure develops for a revision of the statute. Individuals and groups will redirect the pressure to leaders in the sponsoring organizations, who eventually will begin the Revision Process.

A preliminary step often taken in the Revision Process is the creation of a Study Group. This group will be drawn, typically, from lawyers known to be active in the relevant field. In due course, the Study Group will make detailed recommendations—often concluding with the final recommendation to create a Drafting Committee to begin a UCC Revision. The sponsoring organizations will then decide to create a Drafting Committee, which will be appointed by the NCCUSL. Additionally, in response to an outcry in the early 1990s about the absence of consumer voices on the Drafting Committee, one or two “consumer

11. Robert Braucher was one of the first to advance the proposal in 1951. Braucher, supra note 5, at 113.
12. Miller, Observations, supra note 2, at 712-13; Scott, supra note 2, at 1804-05.
13. Scott, supra note 2, at 1805.
14. Id.
15. Id.
16. See generally Mark E. Budnitz, The Revision of UCC Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action, 43 MERCER L. REV. 827 (1992) (arguing state enactment of Articles 3 and 4 is flawed because consumer payment systems are national in scope); Corrine Cooper, The Madonnas Play Tug of War with the Whores or Who is Saving the UCC?, 26 LOY. L.A. L. REV. 563, 566 (1993) (stating that withholding special interests is key to UCC survival); Gail Hillebrand, Symposium, The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?, 28 LOY. L.A. L. REV. 191 (1994) (arguing Article 9 must take steps similar to those taken in Article 2 to address consumer problems); Donald B. King, Major Problems With Article 2A: Unfairness, “Cutting Off” Consumer Defenses, Unfiled Interests, and Uneven Adoption, 43 MERCER L.
representatives" may obtain funding from the sponsoring organizations to become part of the process.

The Drafting Committee will create a series of drafts of the proposed legislation. These successive drafts receive comments and suggestions from the sponsoring organizations and anyone else who takes the time to make them; the drafts, at least in theory, eventually incorporate the good and reject the bad. Final drafts ultimately are presented to the sponsors, which approve them and take them to the state legislatures for enactment "as is."

II. THE CRITIQUES AND REJOINDERS

A. Capture

Perhaps the most obvious problem with this process is the possibility that a group that represents or reflects narrow interests will come to dominate the process.\(^{17}\) A subtle form of this may result as a natural consequence of the self-selection that occurs from the point of assessing a need for a UCC revision through the final product.

Involvement in the Business Law Section of the American Bar Association is a voluntary activity aimed either at professional development or as a type of pro bono service. There are obviously many different levels of involvement, ranging from simply reading the literature that accompanies membership in the Section, to passively attending meetings to satisfy continuing legal education (CLE) needs, to presenting programs, writing articles, and actively working on Committees. Active levels of involvement can be very time-consuming; most would agree that becoming active will require one to physically attend at least one, but preferably two or more, meetings a year. While it may be better to think of such service as altruistic and dedicated to the public good, it does have self-interest components as well. Becoming well-known within the Section brings the prospect of acquiring a broader reputation as a national expert and, with that reputation, may come new legal business. Furthermore, one can serve his clients by influencing the law to move in the direction of the clients' interests. Occasionally, some forms of involvement resemble lobbying.\(^{18}\)

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\(^{17}\) The first—and best—discussion of the direct influence of participant background on the Revised UCC that eventually emerges is Scott, supra note 2, at 1818.

\(^{18}\) One example of this latter phenomenon that comes to mind took place during an "Article 1 Task Force" discussion about moving the principle of "unconscionability," currently found in the Sales of Goods provisions (U.C.C. § 2-302) into the General Article (Article 1), which states principles applying across the entire UCC. The question had been on the Task Force's agenda and was scheduled to be discussed at the meeting. If this statutory move were made, secured lending and other financing contracts—contracts whose terms often seem onerous and are presented on a take-it-or-
However one conceives of Bar Association work, suffice it to say that active involvement does not come cheap. Meetings typically last three or four days, at least some of which otherwise would be dedicated to work directly billable to clients. Writing, drafting, participating in conference calls, and other non-meeting work also detracts from the time one can spend directly on client matters. In practice, these realities may result in a process of self-selection in which lawyers with particular backgrounds and client interests predominate.

In the case of the revision of Article 9 of the UCC, Dean Scott has asserted that lawyers from the secured financing industry came to dominate the Study Group process and, inevitably, influenced it.\textsuperscript{19} His is an impressionistic treatment,\textsuperscript{20} as hard empirical data are unavailable.\textsuperscript{21} Nonetheless, it seems reasonably evident that the "experts" that emerge within the subcommittees of the UCC Committee do not, typically, include: (1) public interest lawyers; (2) lawyers who service indigent or poor clients through governmental or quasi-governmental agencies, such as the Legal Services Corporation;\textsuperscript{22} (3)

\begin{quote}
leave-it basis—could be subjected to the unconscionability principle. Several lawyers whose clients were equipment lessors covered by the Article on leases (Article 2A) appeared at the meeting to state that their clients and industry were inalterably against such a move and would vigorously oppose it.

20. \textit{Id.} at 1809.
21. The Business Law Section Office did supply me with some data about Section members that are worth recording here:
  
  Average Age—46
  Gender—18.4\% Women

Practice Setting
  Retired—3.9\%
  Private Practice—66\%
  Corporate Law Department—23\%
  Government—1\%
  Judiciary—3\%
  Law School—1.2\%
  Other—4.6\% (legal service, military, non-law related)

Practice Size
  Solo—9.8\%
  2-5 lawyers—14.9\%
  6-9 lawyers—7.6\%
  10-19 lawyers—11.0\%
  20-49 lawyers—23.4\%
  50-99 lawyers—22.1\%
  100+ lawyers—11\%

E-Mail from Sue Daly, Assistant Section Director, ABA Section of Business Law, to William J. Woodward, Jr., I. Herman Stern Professor of Law, James E. Beasley School of Law of Temple University (March 10, 1999) (on file with author). The Section is engaged in a serious, long-term commitment to diversifying its membership and has made considerable progress in the past several years.

22. The proposition that lawyers who represent low income clients or consumers are not usual members in the process is substantiated by the fact that the Business Law Section, to its great credit, underwrites the attendance of "consumer fellows" at its meetings.
government lawyers; (4) lawyers who represent small businesses; or (5) lawyers who represent lower-middle or middle class consumers. Many of these lawyers' practices are too diversified for them to develop the necessary technical expertise, and many have practices or client demands that virtually foreclose the regular attendance at meetings, which is necessary to gain a well-known voice. To the extent that lawyers involved in the process tend to represent such clients as large corporations, it is very difficult for them to "leave their clients at the door."23

Later, when the Revision Process becomes more formalized and the NCCUSL creates a Drafting Committee, those who might have some interest in the final product are invited to enter the process and participate.24 The objective is not only participation in a democratic sense but, more practically, to ensure that the final product does not encounter interest group opposition later at the enactment stage.25 Representatives from some interest groups attend most or all of the Drafting Committee meetings and, if the process is working as designed, their views are taken account and, at least occasionally, implemented.26 While the openness of the process is to be applauded, even here it is likely that participation is skewed in the direction of some interests to the detriment of others. In this context, like the one that precedes it, perceived expertise, interest, and work gain influence; half-hearted or occasional participation is unlikely to have much effect on the final product. Since this is a voluntary effort, participants who are likely to acquire influence are only those who are independently wealthy or are subsidized by interest groups, clients, or law firms. In this process, those who can afford to pay lobbyists for the considerable work of active involvement will gain influence; those without such resources will have less influence.

So much for the "capture" critique. An answer to the critique is for the NCCUSL and the ALI to promote broader participation in the Revision Process. While they have moved in this direction,27 this is not as simple a process as it may sound. To begin with, much of the thinking and initial agenda-setting for the Revision Process begins in the UCC Committee of the ABA. While the Business Law Section is making efforts to broaden its membership28 and subsidize members with a consumer law perspective,29 discussions at meetings

23. Richard B. Smith, An Underview of the Principles of Corporate Governance, 48 BUS. LAW. 1297, 1304 (1993) (discussing that while President of American Law Institute reminded members, when voting on new law formulations, to "leave their clients at the door," such is not possible because practice and experience dictate lawyers' views). As I sometimes tell my students, "You are what you do."

24. Miller, Future, supra note 2, at 868.

25. Id.

26. Id.

27. Id. at 873-74.

28. See supra note 21 for data about Business Law Section members of the American Bar Association.

29. See supra note 22 noting that the Business Law Section underwrites the attendance of "consumer fellows" at its meetings.
will continue to be dominated by lawyers from a relatively narrow band of practice who tend to have large or wealthy clients. If the Revision agenda is set at that early point, more formal participation later, when the drafting process is underway, may be too late.  

Second, the NCCUSL is justifiably proud of its efforts to involve diverse interests in an open process. Giving those with interests an opportunity to participate, however, may not be good enough. As long as participation is costly to those being represented, there will be a disproportionate number of “haves” represented in the drafting effort. This may appear no different from the lobbying scene with federal legislation. Yet there is surely a greater perception that non-moneyed interests have friends in Congress. Why does the idea of “A March on the NCCUSL” sound so absurd?  

Finally, the version of the “capture” critique I have advanced is one in which a point of view, rather than some particular interest, will be

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30. For example, the ABA Study Group Report, which led to the creation of a Drafting Committee to revise UCC Article 9 on secured financing, has very little focus on consumer issues. See A.B.A. PEB STUDY GROUP, Uniform Commercial Code Article 9, Report (December 1, 1992) (recommending Article 9 revisions). Difficulties in dealing with consumer issues were not evident until late in the drafting process; those problems might have been resolved differently had the Study Group attacked the problems early in the process, before the project had substantial momentum.  

31. Miller, Future, supra note 2, at 873.  

32. One feature of the process, the tradition of conducting successive Drafting Committee meetings in different cities, further skews the process in the direction of the “haves.” Any participant, wherever located, must travel to a different city to attend all Drafting Committee meetings, except for the occasional meeting that may be held in her city. Steady participation thus requires a considerable travel budget and puts such participation out of the reach of participants who are not subsidized. Holding all meetings in one city would, at least, make steady participation possible for unsubsidized participants in that city.  

33. This is graphically illustrated by the appearance of five letters from distinguished law professors apparently hired by Gateway, Inc., to challenge draft provisions of UCC Article 2 intended to reverse Gateway’s victory in Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (holding that consumer is bound by terms that arrive on the computer box after the customer has bought and paid for computer), cert. denied, 118 S. Ct. 47 (1997). Letter from Douglas G. Baird, Harry A. Biglow Distinguished Service Professor of Law, The University of Chicago Law School, to Lawrence Bugge, Esq., Chairman UCC Drafting Committee, National Conference of Commissioners on Uniform State Law (March 9, 1999) (on file with author); Letter from Randy E. Barnett, Austin B. Fletcher Professor of Law, Boston University School of Law, to Lawrence Bugge, Esq., Chairman UCC Drafting Committee, National Conference of Commissioners on Uniform State Law (March 8, 1999) (on file with author); Letter from Clayton P. Gillette, Perry Bowen Professor of Law and John V. Ray Research Professor of Law, University of Virginia Law School, to Lawrence Bugge, Esq., Chairman UCC Drafting Committee, National Conference of Commissioners on Uniform State Law (March 8, 1999) (on file with author); Letter from Alan Schwartz, Sterling Professor of Law, Yale Law School, to Lawrence Bugge, Esq., Chairman UCC Drafting Committee, National Conference of Commissioners on Uniform State Law (March 8, 1999) (on file with author); Letter from Hal S. Scott, Nomura Professor of International Financial Systems, Harvard Law School, to Lawrence Bugge, Esq., Chairman UCC Drafting Committee, National Conference of Commissioners on Uniform State Law (March 10, 1999) (on file with author). While consumers have managed to obtain representation in the UCC Revision Process, it seems quite unlikely that consumer (and other “have not” interests) can mount the kind of lobbying effort of which Gateway, Inc. or similar businesses are capable.
disproportionately represented. This is far more difficult to detect or combat than is the absence of identifiable interest groups. When the ABA advances its goal of diversity, it means, primarily, gender and racial diversity. Given the expense of active participation, it cannot mean economic diversity and, moreover, no one has advanced a way for the ABA or other organizations to measure—much less solicit—a diversification in points of view.

B. Ideological Bias, Sort of

A central reality of the Uniform Laws process is that if the proposed uniform law is not widely enacted, the reform effort will have been wasted. With the Uniform Commercial Code, it is even worse because we presently have a more-or-less uniform commercial code. If a Revision were promulgated that only some states enacted, we would reach the very undesirable outcome of converting a uniform law into a non-uniform one. Enactment is the raison d'être of the entire Revision Process.

The ultimate need for enactment or "enactability" permeates—and may bias—the entire process. The concern about enactability stems from the fact that (1) no one has the power to cause all state legislatures to enact a given law at once and (2) a given interest group could block enactment in a given state without too much sustained effort. The phenomenon has a leveling effect on the substance of proposed Revisions, as it clearly tends to prevent controversial provisions from making it into a Revision. This can be seen as a good thing inasmuch as those who develop the law are not politically accountable and, as suggested earlier, state legislatures, by design, are not to tinker with the proposed statute handed to them.

One might wonder, however, whether much change is possible at all. The somewhat surprising answer is probably yes, as enactability restricts only some kinds of large changes, those that are perceived to increase government intervention in the contracting process. Changes that are perceived to decrease governmental intervention, on the other hand, are freely embraced.

The antipathy to governmental regulation is often disguised with the rhetoric of "freedom of contract" or "efficiency." In this context, however,

34. To illustrate, one lawyer who has been very active in the UCC process for a long time once asked me, only somewhat rhetorically, why consumers needed warranty protection. In his personal life, he certainly didn't have time to pursue sellers; when something he owned stopped working, he simply threw it out, perhaps resolved not to buy from that seller again, and bought a substitute. This lawyer was not "representing" sellers and probably did not have many sellers as clients. Nonetheless, it would be difficult for this person to imagine the reaction of a low-income buyer whose new toaster stopped working a month after he bought it. His point of view will affect his judgment about the correct measure of warranty protection.

35. This point is developed at length in William J. Woodward, Jr., The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process, 82 CORNELL L. REV. 1511 (1997).

37. White, supra note 10, at 221.
neither "freedom of contract" nor "efficiency" is a conceptually pure concept. A recent controversy arising in the context of the Article 2 Revision suggests that provisions designed to increase the efficiency of buyer choices come under fire from business interests if perceived to involve governmental intervention.\textsuperscript{39}

The provision in question would have required that vendors disclose to prospective customers the terms of the deal before the customers enter into the deal.\textsuperscript{40} This was based on bedrock contract—and economic—theory that no one should be bound by a contract unless he knows, or can find out, what he is agreeing to before he is bound. This provision was developed in response to \textit{Hill v. Gateway 2000},\textsuperscript{41} a decision holding, contrary to the bedrock theory, that a customer could be bound by terms that came inside the box containing a computer that the customer bought and paid for over the telephone.\textsuperscript{42} Through the abracadabra of legal documents, the vendor in \textit{Gateway} was able to bind the customer to an arbitration clause because the customer did not repack the computer and documentation and ship it back to Gateway within the time period that Gateway allowed him through the documents in the box.\textsuperscript{43}

The draft provision would have reversed \textit{Gateway} and would have made post-sale terms invalid unless the vendor made those terms available to the customer in advance of the sale.\textsuperscript{44} This, in theory, would have permitted

\textsuperscript{39} Draft UCC Article 2 was in considerable flux when the author gave this lecture and may, by the time of publication, be dead. The March 1999 Draft changed as it went to the American Law Institute in May 1999. It was approved by the ALI, and a “Draft for Approval” was created for the NCCUSL’s July 9 meeting. After some floor discussion, the Draft was removed from the agenda and not acted on. The Reporters then resigned and the prior Drafting Committee was replaced by a new one.

On August 18, 1999, the NCCUSL and the ALI issued a joint press release explaining that “[a]t the annual meeting of the NCCUSL in July, opposition to certain sections of Article 2 . . . led the leadership of [the] NCCUSL, which has sole responsibility for seeking enactment of UCC revision in the state legislatures, to conclude that the prospects for uniform adoption throughout the country required additional review of some provisions. Accordingly, the NCCUSL annual meeting took no action with respect to . . . Article 2.” Press Release, available at http://www.law.upenn.edu/library/ulc/ulc.htm#ucc2. Many observers believe that the presence of consumer protection drew the “opposition” referred to in the press release.

As a result of these events, the discussion of the proposed statutory provisions in the text may be only of historic interest. Given the involvement and wealth of business interests in the NCCUSL process, consumer protection provisions seem highly unlikely to make it into a new Article 2.

\textsuperscript{40} Proposed U.C.C. § 2-207(d) (March 1999 Draft). Citations are to the March 1999 Draft and Annual Meeting Draft, which can be found on the World Wide Web at http://www.law.upenn.edu/library/ulc/ulc.htm.

\textsuperscript{41} 105 F.3d 1147 (7th Cir. 1997), \textit{cert. denied}, 118 S. Ct. 47 (1997).

\textsuperscript{42} \textit{Id}.

\textsuperscript{43} \textit{Id}.

\textsuperscript{44} Proposed U.C.C. § 2-207(d) (March 1999 Draft). The proposed revision, in its March 1999 form, read as follows:

[(d) If at the time of full or partial payment for goods by a buyer, a seller intends the agreement to contain additional terms and after payment but not later than delivery of the goods those terms are proposed to the buyer, the following rules apply:

(1) If it was reasonable under the circumstances for the seller to disclose or make available [a source of] the terms to the buyer at or before the time of payment and it fails to
customers to know what the seller was offering before they bought the product and, thereby, would have allowed them to make more intelligent buying decisions. The draft provision thus would have brought the aberrant decisional law within traditional, basic, contract theory. The proposal was, in fact, a market-enhancing mechanism since it reduced the chances that customers would be bound by terms to which they did not, in fact, agree. The provision imposed "regulation" of sorts (make your terms available to your customers in advance of the sale) that enhanced both "freedom of contract" and "efficiency," by increasing the available information on which a customer could make a purchase decision.

The provision drew fire and, as the quoted Draft provision indicated, was "under review."°45 A letter to the Chair of the Drafting Committee from University of Virginia Law Professor Clayton Gillette, written "at the request of Gateway 2000, Inc.," gives the flavor of the opposition:

Section 2-207(d)... imposes significant obligations on sellers to disclose, prior to the time of payment, either all the terms of the agreement or the fact that additional terms will subsequently be proposed. These obligations would deviate substantially from current practices in which sellers include terms with goods that are shipped and allow buyers an opportunity to reject those terms after perusal. . . . One would imagine that there could be some basis for imposing these obligations on sellers if there were a reasonable belief that buyers are

do so, the terms provided after payment do not become part of the agreement [contract] unless the buyer expressly agrees to them;

(2) If it was not reasonable under the circumstances for the seller to disclose the terms or make available a source of the terms to the buyer, the seller shall inform the buyer at or before the time of payment that additional terms will be proposed.

(A) If the buyer is not informed by the seller, the subsequently proposed terms do not become part of the agreement [contract] unless expressly agreed to by the buyer.

(B) If informed by the seller, the buyer may either accept the subsequently proposed terms by agreement or reject them by promptly notifying the seller. If the terms are rejected, the buyer, subject to paragraph (3), must return the goods within a reasonable time.

(3) Upon returning goods to the seller under subsection (2)(B), the buyer has:

(A) a right to a refund of the price;

(B) a right to reimbursement of any reasonable expenses incurred related to the return and in compliance with any instructions of the seller for return or, in the absence of instructions, return postage or similar reasonable expenses in returning the goods;

(C) the rights and duties of a buyer who has rightfully rejected goods under Section 2-704 and 2-829(b);

(D) [Should paragraph (3) also state that (1) the goods, after the terms are rejected, are not subject to claims of the buyer's creditors and that claims of the seller's creditors are subject to the buyer's rights under this subsection and that (2) if the seller has not paid and reimbursed the buyer within a stated period of time after the goods are returned that the buyer may recover punitive damages and attorney fees?] [Under review.]

The March 1999 and Annual Meeting Drafts can be found on the World Wide Web at http://www.law.upenn.edu/library/ulc/ulc.htm. The latter deletes the entire section; as discussed in the text, a well-financed industry campaign explains the deletion.

45. The most recent drafts can be found on the World Wide Web at http://www.law.upenn.edu/library/ulc/ulc.htm.
disadvantaged by the current business practice, but were unable to alter that practice... I see no basis, however, for any such paternalistic legal intervention.\footnote{46}

As the foregoing comment suggests, proposed market intervention is a recipe for enactability problems in revising the UCC, even when its underlying justification is to increase freedom of contract for both parties in a given contract. As one might have predicted, Gateway had its way with the NCCUSL leadership, as the provision was deleted from the Annual Meeting Draft.

Proposals to limit business freedom can also suffer from a predictable lack of consensus among state legislatures. Often there is no common ground among either participants or state legislatures (1) about the kinds of limits on the use of non-negotiated printed form contracts or on contracts with consumers, (2) about minimal quality expectations for products, (3) about mandated disclosure of terms, and (4) about a host of other issues. Outside the Revision Process and, to some extent within it, there are strongly differing views on whether the unregulated market is more desirable than a regulated one.\footnote{47} Due to the broadly differing opinions of the participants and state legislatures on the need for and content of contract regulation, proposals that tend to limit what businesses can do are perceived to have enactability problems.

The net effect of the enactability restriction is to limit substantive changes to those that advance a deregulatory agenda. While participants cannot agree on the substance of regulation to impose (or whether it is necessary in the first place), they can generally agree to reduce the regulatory impact of the UCC. Thus, even big changes, if perceived on balance to result in less regulation of businesses, can make it beyond the enactability restriction. An excellent contemporary example of how enactability problems press UCC Revision in a deregulatory direction can be seen in the history leading to recent revisions to UCC Article 9.\footnote{48}

UCC Article 9 governs secured financing. Lenders who take "security interests" in their borrowers' property and who follow the rules in Article 9 will be paid from the secured assets before other claimants are paid on their claims. In order to obtain this preferred status, secured lenders generally have to file "financing statements" in the appropriate state filing offices. If they file the correct form in the correct place, their claims will be paid first from the collateral that secured the loan.

Two features of secured financing are relevant here. The first is a general

\footnote{46. Letter from Clayton P. Gillette, Perry Bowen Professor of Law and John V. Ray Research Professor of Law, University of Virginia Law School, to Lawrence Bugge, Esq., Chairman U.C.C. Drafting Committee, National Conference of Commissioners on Uniform State Law (March 8, 1999) (on file with author).}

\footnote{47. Cf. Kenneth N. Klee, Barbarians at the Trough: Riposte in Defense of the Warren Carve-out Proposal, 82 CORNELL L. REV. 1466, 1476 (1997) (analyzing whether expansion of U.C.C. Article 9 is necessary or wise).}

\footnote{48. The Revision has been approved by the sponsoring organizations and is in the process of being introduced in the state legislatures. The most recent draft is available on the World Wide Web at http://www.law.upenn.edu/library/ulc/ulc.htm.}
one: by definition, secured financing has distributional consequences. A borrower may distribute dangerous products that cause injury, fail to pay its employees, or fail to make required payments into the employees' pension funds. That business's secured lender though, provided it followed the rules, will be paid from the borrower's assets before the tort claimants or employees get anything. This distributional phenomenon grows to the extent that secured lending is more pervasive.49

The second is a feature of the current UCC Article 9. To qualify for preferred treatment in one transaction, the lender often has to make multiple filings in several different offices within a particular state (each county in each state has a UCC filing office) and often take the same action in several different states. Each mandated filing adds both expense to the lender or borrower and adds corresponding revenue to the clerk's office that receives the filing. Across the entire Article 9 system, the requirement of multiple filings is both a regulatory drag on secured financing and a huge source of employment and revenue for the governmental offices charged with processing UCC filings.

A major thrust of the Article 9 Revision project was to reduce the cost of secured lending—to make it more "efficient." The predictable distributional consequence would be to make secured lending more pervasive and thereby exacerbate the distributional consequences outlined above. One of the obvious ways to make the system more "efficient" was to reduce multiple filings and thereby trigger a potentially substantial revenue loss for the state offices that now handle UCC filings.

To cope with the anticipated distributional problems that would arrive with more pervasive secured lending, a group of scholars made a substantial effort to incorporate into the new statute a provision that would have mitigated some of those distributional consequences. Early academic support existed for the general idea that there should be some reversal of the distributional consequences of Article 9,50 and a proposal was developed to "carve out" some of the borrower's assets and reserve them for unsecured creditors. The idea had an analog in German law and became a focal point of several programs and a symposium.51 The proposal was debatable, to be sure, and, arguably, would have been a substantial change to the regime of secured financing. Yet it raised core issues in secured credit that one might expect a Drafting Committee to consider.

49. Professor LoPucki analyzes this and similar efforts to protect assets from general creditors. See Lynn M. LoPucki, Death of Liability, 106 YALE L.J. 1, 23-30 (1996) (arguing that civil liability system will soon disintegrate because entities that incur liability will have no money with which to satisfy it).


51. Among the programs at the national level devoted to the subject were: (1) The Unsecured Creditor and Article 9: Bambi Meets Godzilla (again) and Is Better Off (ex ante), Association of American Law Schools, Section on Commercial Law, January 1996; (2) Symposium on the Priority of Secured Debt, Harvard University, Boston, MA, February 14, 1997; and (3) The Death of Secured Credit, National Conference of Bankruptcy Judges, Philadelphia, PA, October 17, 1997.
Nonetheless, when it was presented to the Drafting Committee, the Committee had no interest. 52

The opposite proved to be true about eliminating duplicate filings and, with them, the local filing offices. Although reformers were aware at an early point of the problem of multiple filings and an obsolete filing system in the age of computers and the Internet, 53 the Study Group Report did not recommend some of the major changes that eventually found their way into the Draft Statute. 54 By changing the place to file from the location of the collateral to the location of the borrower, 55 the Revision reduced the required filings in any case where the collateral is located in more than one state. By eliminating local filing, the statute eliminated the necessity for local filing offices. 56 The effect of these two changes in the Revision will be a massive shift of filing revenue from the offices that now receive the fees to lenders and their debtors. Yet, this very substantial change, recognized as one that could generate political opposition within each of the state legislatures, has become part of the Revision.

While this may oversimplify things, what ties the action on these two proposals together is that the decision on each proposal was anti-regulatory. A vote against the "carve out" proposal was a vote against governmental regulation; a vote in favor of the filing changes was also a vote to reduce governmental intervention.

The carve-out proposal would have limited "free" secured lending and was

52. See Woodward, supra note 35, at 1512 n.8 (discussing drafting committee's lack of interest in Article 9's proposal).
54. Importantly, the Study Group did not recommend the elimination of the local filing offices. See Study Group Report, supra note 30, at 10-11. The Article 9 Filing Task Force, however, did recommend that local filing be reevaluated. See Study Group Report, supra note 30, Appendix at 13. In 1992, Professor LoPucki described the sorry state of the filing system as follows:

Differences in Filing Requirements. The more than 4,200 filing offices in the United States enforce a variety of filing requirements and procedures. For example, the fee for filing a financing statement differs from state to state and from county to county. Some states require that filings be on particular forms, but not all states use the same forms. A mistake in the amount of the fee or the form of the filing can result in rejection by the filing officer. The ABA Task Force reported that "[i]n most states, approximately 10 percent to 15 percent of the filings are rejected, although California reported rejecting 49 percent of filings offered on form U.C.C.-2."

LoPucki, supra note 53, at 11-12.
56. Proposed U.C.C. § 9-501. Cf. U.C.C. § 9-401. The new statute's decision is clarified by a Comment which reads, in part:

Local filing increases the net costs of secured transactions also by increasing uncertainty and the number of required filings. Any benefit that local filing may have had in the 1950s (e.g., ease of access to local creditors) is now insubstantial. Accordingly, this Article dictates central filing for most situations, while retaining local filing for real-estate-related collateral and special filing provisions for transmitting utilities.

at odds with the prevailing view of what the UCC should do. Banks, one would anticipate, would oppose it. And if brought to the state legislatures, such a revision would have required a regulatory justification on which we could anticipate a division of opinion in state legislatures. In short, the carve-out proposal had severe enactability problems. The filing change, on the other hand, had the support of the banks (they and their customers benefit directly from it) and could be articulated in terms of “efficiency” in secured lending. Even though the filing change represents a substantial revenue loss to state governments, the deregulatory (or “efficiency”) characteristics of the filing change are, apparently, sufficiently attractive to make the sponsors believe that the changes are “enactable.” If the changes are enacted, the net effect will be more pervasive secured lending, with the wealth distribution changes that implies, and less governmental intervention in secured lending at the state level.

CONCLUSION

If business interests substantially influence the UCC Revision Process, as many have alleged, a solution is to increase involvement of those unrepresented others whose lives will be affected by the changes. This has become an important goal of the UCC Revision Process and one on which some progress has been made in recent years. Ultimately, however, even this may be insufficient. If business support is essential to enactability of a commercial statute, businesses may well hold a veto power over proposals that are not to their liking, thereby distorting whatever democratic features we otherwise might get through broader participation. If I am correct that the process is structurally biased due to concerns over enactability, then enhanced participation will not solve the problems.

This seems an unsatisfactory state of affairs. Commercial law has always been an amalgam of free contracting and governmental intervention—free contracting and free markets are not possible without some level of governmental regulation. Yet, if concerns over enactability tend to keep regulatory provisions out of the UCC, then only part of commercial policy can be made by the UCC process and the remainder—the regulatory part—must come from elsewhere. This means that necessary regulation will come via non-uniform state legislation or federal legislation. Indeed, this has been the case during the last thirty years. Federal statutes, such as the Magnuson-Moss Warranty Act and the Fair Debt Collection Practices Act, uniformly inject


limits into the contracting process; at the state level, "Lemon Laws"\textsuperscript{61} illustrate state legislatures' reactions to perceived abuses in otherwise "free" contracting. An implication of my analysis is that uniform regulation of the commercial process can come only from Congress. The fact that the 1974 Uniform Consumer Credit Code has been enacted in only a handful of states\textsuperscript{62} lends some credence to this view.

This essentially balkanized lawmaking process seems an extremely inefficient and complicated way to make commercial policy. Non-uniform state regulation of business is costly and inefficient. Additionally, by splitting our uniform commercial policymaking between the States and Congress, we have created a tit-for-tat law-making process that is unlikely to arrive at sound, comprehensive policy choices.

Congress may not be much better, although the "have nots" may have a slightly better chance of influence in Congress than in the UCC Revision Process.\textsuperscript{63} Congress, however, shows little inclination to tackle the immensely complex task of enacting general commercial law and the relatively recent trend has been in the direction of less federal legislation, not more.

We are thus left with the general inefficiencies and, perhaps, incoherence of the divided government that is the supposed genius of the American system. Whether the regulatory side of such a system can keep up with a fast-moving, increasingly international commercial law is anyone's guess. If this cumbersome law-making system cannot keep pace, we can be quite sure—if not certain—of the outcome. The "Haves [will] come out ahead."\textsuperscript{64} Again.

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\textsuperscript{61} The different lemon laws of all 50 states and the District of Columbia are collected in Louis J. Sirico, Jr., \textit{Automobile Lemon Laws: An Annotated Bibliography}, 8 LOY. CONSUMER L. REP. 39 (1995).
\textsuperscript{62} See 7A U.L.A. 1 (Supp. 1999) (listing jurisdictions that have enacted uniform consumer Credit Code).
\textsuperscript{63} This may help explain why businesses have shown no inclination to move commercial lawmaking to the federal level.
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