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Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda

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Why is the Uniform Commercial Code ("U.C.C." or "Code") so "nonuniform?" Might the Code be better understood and characterized as a patchwork of unorthodox local variations rather than a "uniform" statute? Are matters getting better or worse? And does it matter?

These questions have come up perennially since the beginning of the Uniform Commercial Code project in 1940, and the recurrence of these questions surely signals our perceived lack of success in dealing with lack of uniformity within the Code. The persistent nature of the problem could suggest either that the affected interests lack the will to solve the problem or that the problem defies solution.

The Subcommittee on Relation of the U.C.C. to Other Law began as a project to consider the impact of "other law" on the desirably smooth operation of the U.C.C. Its recent assumption to Subcommittee status suggests that the problem is important enough to think about in an organized way. As such, the Subcommittee is charged with looking at those aspects of "other law" that impede the smooth, efficient operation of the U.C.C. as a statute designed to address commercial law matters on a national scale.

The most obvious type of "other law" that might impede a smoothly functioning U.C.C. is the nonuniform state amendment, that is, the statute that replaces the orthodox U.C.C. provision with a local one.[1] We are all familiar with nonuniform amendments of all types—from the kind that serves the needs

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1. William A. Schnader reported some 775 amendments to the U.C.C. as of 1967, Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code,* 22 U. Miami L. Rev. 1, 10 (1967). The Permanent Editorial Board noted 337 nonuniform amendments to article 9 alone. Permanent Editorial Board for the Uniform Commercial Code Rep. ("P.E.B. Report") 3 (1967). The tendency for state legislatures to amend the proposed drafts seems to have led, in large part, to the creation of the Board, *see* P.E.B. Report 1, XXVII, and motivated it later to adopt the 1972 Amendments, P.E.B. Report 3 (1967). *See also* Schnader, *The Uniform Commercial Code—Today and Tomorrow,* 22 Bus. Law. 229 (1966).

of identifiable political constituencies[2] to the amendments that improve on the orthodox.[3] What do these many amendments suggest about "uniformity" and about the uniform law approach to commercial law?

Code "uniformity" is a matter worth considering on two grounds: first, a principal end of the Code project was to bring national uniformity to the commercial law;[4] second, the project arguably has failed in that particular.[5] Whether and to what extent the U.C.C. has failed in its promise of uniformity; whether that failure is inevitable or can be reversed; and whether such a failure is worth reversing, are questions the Subcommittee has been considering.

It is undeniable that the Code has not brought a literal uniformity to the law of commercial transactions.[6] Not all states even have the same version of the U.C.C., and nonuniform amendment of Code provisions occurs so commonly that individual instances scarcely capture our attention.[7] We could, of course, guarantee textual uniformity by enacting the U.C.C. at the federal level—a notion that the drafters considered and that emerges from time to time—but this approach has received only vacillating support.[8] Since there is no apparent

2. An example of this kind might be the nonuniform amendments which eliminate the farm products exception from U.C.C. § 9-307(1). The amended version subordinates the pre-existing secured lender to the "ordinary course" buyer of encumbered farm products; the orthodox rule calls for the opposite priority. Examples of the nonuniform approach include California, Kansas (partial), Minnesota, and Tennessee. The Federal Food Security Act, 7 U.S.C.A. § 1631-1632 (West 1988), has replicated the dissenters' policy choice. *See* Clark, *U.C.C. Survey of Secured Transactions,* 42 Bus. Law. 1333, 1334–40 (1987).

3. California's proposed amendments to U.C.C. §§ 9-501(3), 9-502(2), and 9-504(2) make more clear the implications of a secured party's failure to sell the collateral in compliance with part 5 of article 9. These amendments may well clarify confused prior law and thereby effect improved predictability in this area.

4. U.C.C. § 1-102(2)(c) provides that an underlying purpose of the U.C.C. is "to make uniform the law among the various jurisdictions." *See also* Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 58 (1940).

For an extensive listing of the legal literature on the history of the Code, see Mooney, *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.,* 41 Bus. Law. 1343, 1344 n.4 (1986). Mooney also provides a brief drafting history of the Code. *Id.* at 1344–47.

5. Mooney tells us "[T]he U.C.C. is not 'uniform' and, no doubt, never will be. The late S and early S may have represented the high point of uniformity." Mooney, *supra* note 4, at 1346.

6. Professor Taylor states that although the U.C.C. has been unanimously adopted in every state but Louisiana, local amendments and judicial interpretations have resulted in "likeness rather than exactness." Taylor, *Recent Developments in Commercial Law, Forward: Federalism or Uniformity of Commercial Law,* 11 Rut-Cam. L.J. 527, 531 (1980) (*"Recent Developments in Commercial Law"*).

7. Perhaps, as Mooney suggests, " . . . such tinkering by the legislatures might have been expected in such a broad and important codification." Mooney, *supra* note 4, at 1347.

8. Justice Robert Braucher and William A. Schnader were early advocates of a federal U.C.C. to be enacted by Congress coincident with state enactment. *See* Braucher, *Federal Enactment of the Uniform Commercial Code,* 16 Law & Contemp. Probs. 100 (1951); Schnader, *The Uniform Commercial Code—Today and Tomorrow,* 22 Bus. Law. 229, 231 (1966). In *Federalism and the Uniform Commercial Code,* Professor Kennedy briefly discusses the positions of Braucher and Schnader on this score. Professor Kennedy likewise quotes Ray D. Henson to the effect that "[f]ederal enactment of the Uniform Commercial Code will become a necessity if various states

ground swell of support for a federal U.C.C., textual uniformity may continue to be elusive.[9]

Does the lack of literal uniformity (in the sense of textual identity) amount to a significant failure of the U.C.C. project? Surely it is appropriate, 50 years after the U.C.C.'s beginnings, to raise again some basic questions about uniformity in the commercial law context. What do we mean by it? How important is it and why? Is it attainable? Grappling with these questions has convinced members of the Subcommittee that there are no easy answers and that research would contribute to the validity of our answers to many of the issues. We now pose some of these questions to encourage discussion and also suggest how much we ought to find out to continue the improvement the Code has brought to commercial law.

UNDERLYING PREMISES

Apart from economy in drafting, uniformity in the law of commercial transactions has nothing to recommend it as an end in itself. Uniformity is a thing of real value only to the extent it advances other Code goals and purposes. These rest upon readily identifiable, and generally agreed-upon, major premises of commercial law. To decide what we mean or should mean by uniformity in the commercial law, we begin by recalling these premises and goals.

While there is no end of ways to order the premises underlying commercial law, central in the array must be the objective that commercial law should make doing business easier for business people.[10] To put the matter more precisely, commercial law should not get in the way of wealth-making through voluntary exchange transactions.[11] Any rule of, or appeal to, commercial law that fails in this may be antithetical to the fundamental premise and should be justified on some special and compelling grounds. Uniformity, one assumes, advances this

persist in adopting peculiar local variations." Kennedy, *Federalism and the Uniform Commercial Code,* 29 Bus. Law. 1225, 1226 (1974).

A federal version of the Code was, in fact, under consideration in 1951. The draft was criticized, however, on a number of planes by prominent legal scholars, among them Justice Braucher, otherwise a proponent of a federal Code. *Id.* at 1230. One significant weakness in the draft was its failure to include article 6 on Bulk Sales and article 9 on Secured Transactions. *Id.* at 1227. *See also* Taylor, *supra* note 6, at 529–30, 546–50; Taylor, *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions,* 30 Hastings L.J. 337, 361–63 (1978) (*"Uniformity of Commercial Law"*).

9. Historically, uniform acts adopted by all, or a majority of, states have faced the same lack of success in remaining uniform. While the Uniform Negotiable Instruments Law, the Uniform Warehouse Receipts Act, and the Uniform Stock Transfer Act were adopted by all states and the Uniform Sales Act was adopted by 34 states, all faced similar inability to attain uniformity because of local amendments and interpretational differences. *See* Taylor, *Recent Developments in Commercial Law, supra* note 6, at 529–30.

10. *See* Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules,* 100 Harv. L. Rev. 465, 494 (1986).

11. *Cf.* Taylor, *Recent Developments in Commercial Law, supra* note 6, at 552–53 where the author suggests that a federal Code would benefit business interests with better overall prosperity and risk allocation.

goal by making the law more accessible and less confusing and thereby reduces the transaction costs of contracting.

One might identify at least three subsidiary policies or goals of commercial law calculated to promote the central premise. Thus, we facilitate voluntary exchange transactions where the law: (i) tends to follow business practice rather than prescribing it;[12] (ii) encourages and embraces emerging forms that follow from the natural evolution of business practices;[13] and (iii) is predictable, such that commercial endeavors may be undertaken with confidence.[14] With these policies in focus, we can turn our attention to some implications of the uniformity goal.

BUSINESS PRACTICE AND DIVERSITY

It is a simple matter to decree that commercial law, specifically, the Code, will follow business practices, and that a single, rational set of uniform rules memorializing such practices should be decided upon and articulated. Indeed, the Code as drafted, in some measure at least, sought to do as much.[15] Carrying out such a program is, however, a different matter. The fact is that no formal mechanism exists to discover what business people actually do for purposes of drafting rules to embrace that practice.[16] Our familiarity with business practice more likely comes filtered through the eyes of lawyers, and is incorporated into the drafting process anecdotally and sporadically. Beyond that, the notion that any but the simplest, most routinized transactions are conducted identically in, for instance, Sacramento and Atlanta, seems counter-intuitive. Of course, interstate and international commercial transactions doubtless follow certain general patterns of practice, and perhaps a set of practices might be identified upon which may be constructed an ideal transaction and uniform rule.[17] At the

12. Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 Yale L.J. 1341 (1948). Of course, the law also has an important role to play in how business develops by, for example, channeling business behavior in certain directions. Commercial law history is, however, riddled with situations (such as the persistence of nonpossessory security interests in personal property) in which business interests doggedly sought to avoid legal constraint and eventually prevailed. This history makes us skeptical of the law's ability to force business people to do things its way.

13. Taylor, *Recent Developments in Commercial Law, supra* note 6, at 548.

14. *Id.*, at 552–53; Taylor, *Uniformity of Commercial Law, supra* note 8, at 367–68.

15. Llewellyn, *Why a Commercial Code?*, 22 Tenn. L. Rev. 779 (1953); Llewellyn, *Problems of Codifying Security Law*, 13 Law & Contemp. Probs. 687 (1948). Professor Wiseman says that Llewellyn believed that "commercial realities, rather than general abstract concepts, should form the basis for the law." Wiseman, *supra* note 10, at 494. Compare U.C.C. § 1-102(2)(b) which states that an underlying policy is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."

16. The drafting process attempts to include persons with diverse experience and interests and seeks the views of interest groups prior to enactment. Most recently, the process of drafting article 4A included nonlawyer business people in the drafting and sought their comments throughout the process. Nonetheless, while there are signs of improvement, the process seems inevitably anecdotal and ad hoc. *Cf.* Mooney, *supra* note 4, at 1355.

17. Presumably, as Professor Kennedy observes, where the law is uniform among the states, local and national interests would be mainly in accord. Kennedy, *supra* note 8, at 1229.

national level, a practice-based set of uniform rules could arguably constitute the fulfillment of the first goal we described for the commercial law.

Yet national uniform rules of commercial law, however derived, may present us with a paradox. To the extent local business practices deviate from the ideal transaction upon which rest the uniform rules, the law no longer follows business, but prescribes it in a form that is at variance with the local business practice.[18] Under these circumstances, to follow business at the national level is to depart from it at the local level.[19] To the extent local interests wish commercial law to reflect their way of doing things, tension can arise from the imposition of a national uniform set of rules derived from the ideal transaction.[20]

Once one recognizes this paradox of the uniform commercial law movement, one is struck by the void of hard data on the nature of American business practice for lawmaking purposes. For example, do we have more interstate business than local? How much variance is there from state to state or area to area in business practice? To the extent business practice turned out to be largely interstate, one might argue that uniform rules would be worth the costs of necessarily deviating from local practice. On the other hand, if most relevant transactions are local, the data might support a quiltwork Code that can be tailored to fit various local interests.[21]

Yet permitting (or encouraging) local variations might not move us closer to the goal of allowing the law to be flexible enough to follow business practice. This is because the Code, as a state statute, necessarily proceeds along political (state) boundaries. Business practices may change with state boundaries, on the other hand, only coincidentally. For instance, data might well support one's intuition that business practices in Philadelphia are more like those of Camden, New Jersey than like those in Altoona, Pennsylvania. Thus, state law variations in the Code designed to fit local practices may, in fact, relate only coincidentally to such practices in other locales within the state.

The point is that without data with which to approach these questions of local business practices, it seems foolhardy to predict confidently that either national uniformity or state diversity will better ensure that the law reflects, rather than dictates, commercial behavior.

We currently have a state law approach to the U.C.C. that permits a blending of national and local interests in a working example of the federal system. Although the goal has been textual uniformity, our approach allows state-by-state development of commercial law and grudgingly permits local experimentation in the form of nonuniform amendment and local judicial

18. Again, we really have no systematic way to make this determination except to the extent that local amendments tend to memorialize a local practice or viewpoint.

19. *But see* Taylor, *Recent Developments in Commercial Law, supra* note 6, at 550–51 suggesting that "[v]ery few states have any important commercial law interest that is not shared by other states."

20. *But cf.* Taylor, *Recent Developments in Commercial Law, supra* note 6, at 551–52.

21. To some extent, the tension implicit in a nonuniform approach may be relieved by thoughtfully drafted choice-of-law provisions. *See* Mooney, *supra* note 4, at 1357 for an illustration of this point in the context of multi-state transactions within article 6 on Bulk Sales.

interpretation. Without data, it remains to be seen whether our current approach has helped reconcile the tensions that might exist between local and national (and international) practices, or whether the approach is simply oblivious to it.

BUSINESS PRACTICE AND CHANGE

Flexibility in the law to permit, even encourage, emerging transaction forms is related to the notion that the law should not unnecessarily constrain business. The evolution of new transaction forms requires some measure of flexibility in the law.[22] Where the applicable rules—the Code—fail to acknowledge and embrace emerging business practice, the rules, not the new practice, will eventually wither. If newly-emerged transactions are economically valuable, that is to say, if they make doing business easier for business people, they will survive and prosper and eventually force change in the law.[23] From its onset, maintaining adaptability—preventing textual obsolescence—has been a central focus in the Code drafting effort.[24] The Code preserved flexibility in most of its text through a broad general drafting style that allocated more discretion to the courts to develop specific rules than business people might have liked.[25]

22. It may not be much of an understatement to suggest that the Code was built on this proposition. U.C.C. § 1-102 Comment 1 provides in part that "this Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices."

23. Where, for instance, forms of collateral appear in the marketplace against which lenders agree to extend credit, absent compelling policies to the contrary, article 9 must be there to embrace them. *See generally* Knippenberg, *Tacit Exclusion: Defining Code Terms Using Extraneous Referents*, 39 Syracuse L. Rev. 1261 (1988). For historic examples of this process of commercial law change, *see* Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. Miami L. Rev. 351 (1983) and Gilmore, *On Statutory Obsolescence*, 39 U. Colo. L. Rev. 461, 465–71 (1967) discussing the development of the Negotiable Instruments Law and the Uniform Sales Act.

24. *See* Bane, *supra* note 23; Gilmore, *supra* note 12.

25. Professor Gilmore put it this way:

> "By preference, perhaps for jurisprudential reasons, law professors, whether they are working on Restatement or Code, draft in a style of loose and vague generality; they are not much concerned with providing specific answers to specific questions; they are concerned with the erection of a conceptual framework which will at most, when a specific question is posed, serve as a guide to the range of possible answers. Practical men seem to have become aware of the Code and to have decided that they should do something about it only toward the end of the 1940's. A practitioner's instinctive preference, in drafting style, is at the opposite pole from the preference I have attributed to my own breed. He quite naturally wants the statute to answer, clearly and unequivocally, the questions which he wants to put. So far as the Code was concerned, the practitioners came too late to have much effect on those parts which, like the Sales Article, had been finished and, so to say, put on the shelf."

Gilmore, *supra* note 23, at 473.

The result often has been adaptability through judicial decision.[26] What impact would moving to a strictly uniform text have on adaptability? How, for example, would a federally enacted U.C.C. operate if states lacked the power to tailor it to local needs?

If a centrally-enacted law were to retain the ability to adapt to developing regional business practices, a single uniform text, free of the confusion of the state nonuniform amending process, would likely be very general and allocate significant responsibility for developing more specific rules to the courts.[27] There is no reason to think that such an approach with its explicit expansion of judicial power would be more politically palatable today than it was before. On the other hand, a single uniform text that tended to state hard-edged, predictable rules would quickly become out of date both regionally and nationally. Such specificity contrasts with the core idea of the current Code as a commercial constitution whose fundamental tenets and underlying principles have something to offer under changing and changed business conditions.[28] The drafters' challenge continues to be that of developing a single, nationally uniform text that is flexible enough to adapt to changes occurring not only on a grand scale (broad shifts in behavior that occur nationally or internationally) but also to those changes which evolve in a piecemeal fashion, or on a jurisdiction-by-jurisdiction basis.

In theory, at least, it certainly seems that a single yet flexible Code is possible. Yet the many nonuniform amendments added to the current Code by legislatures already may signal that the drafters achieved something less than the ideal. The problem with a broad and general text that would allow for local variation in practice and the evolution of new transaction forms over time is that such a text seems to compromise predictability, a goal for commercial law that is itself a powerful incentive for voluntary exchange transactions.[29]

26. The chief instrumentality of adaptation according to the drafters is the courts. *See* U.C.C. § 1-102, Comment 1. It has been suggested that strict judicial adherence to a congressionally enacted national text would achieve uniformity at too great a cost in terms of adaptability. *See* Kennedy, *supra* note 8, at 1234.

27. One alternative to adaptability through generality is having a legislative amendment process that could keep pace with developing business practice. This seems unlikely: our experience at the federal and state levels has been to the contrary. *Cf.* Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 Vt. L. Rev. 203 (1979).

28. *See* Gilmore, *supra* note 23.

29. The rigidity and specificity in article 9 of which Professor Gilmore complains, *see* G. Gilmore, The Ages of American Law 85 (1977) was, according to Professor Kripke "not so much a desire to *compel* decision as a need to be able to *predict* decision. . . ." Kripke, *Some Reflections After a Quarter-Century of the Uniform Commercial Code and on the Inception of a New Bankruptcy Code*, 87 Com. L.J. 124, 124 (1982). That need "impelled [practicing lawyers] to demand that answers to real-life problems be found in the Code and suit the needs of lawyers and their clients, not leave matters to the sort of speculation out of which law school socratic dialogues are made." *Id.*

The current Code is somewhat less open-textured[30] and appears to accommodate local practice partly through judicial gap-filling and partly through the nonuniform amendment process. Instead of being a practice to be condemned, this state amendment process might be viewed as being in the best federal tradition and could in fact be the best way to allow local variation[31] while advancing predictability. One's view on the matter probably depends in part on the nature of the nonuniform amendments legislated into the Code and the extent to which they advance the more general objectives of commercial law.

It is possible, for example, that many nonuniform amendments are driven by a demand for "certainty" and that, as enacted, they eliminate the flexibility that was built into a provision in its orthodox form.[32] Consider, for example, U.C.C. section 9-504(3) providing, in part, that all aspects of a sale of repossessed collateral must be commercially reasonable. Let us assume that based upon peculiarly local business considerations, a legislature amends the Code to state that a sale that does not occur within 30 days of repossession is not commercially reasonable. The result is a nonuniform amendment imposing a fixed 30-day period within which the collateral must be sold. Should the commercial conditions that rendered sales past 30 days from repossession commercially unreasonable disappear, the amending jurisdiction must modify its provision, or the provision in its original amended form (30 days) will fail again to reflect and fit local commercial preferences.[33] State legislatures have not shown great success in keeping their statutes current.

30. *Cf.* Rubin, *Uniformity, Regulation, and Federalization of State Law: Some Lessons from the Payment System,* 49 Ohio St. L.J. 1251, 1262 (1989) states that:

> [t]he U.C.C. adopts the useful strategy of stating its rules on two levels: a formal rule that is intended to have binding force and a more chatty commentary that serves as an interpretive guide. This indicates a fair degree of sophistication, but it has not eliminated the variability of interpretation. Reality has a way of presenting problems that the rule-maker did not and often could not have anticipated, while words have an annoying tendency to liquefy and flow under the pressure of events.

31. *But see supra* text accompanying notes 20–22.

32. A report from California's U.C.C. Committee, for example, states:

> [c]ommercial reasonableness is not defined in the Commercial Code. The drafters of the Commercial Code declined to define that concept, in order to allow flexibility in dealing with each distinct situation and the peculiarities of particular collateral. All too often, however, such flexibility has become a trap for the secured party. Without structured guidelines, the secured party acts subject to review on a "hindsight" basis.

Report of the Uniform Commercial Code Committee of the State Bar of California on Proposed Amendment to California Uniform Commercial Code Sections 9501(3), 9502(2) and 9504(2) at 1–2.

33. As originally enacted, the nonspecific commercially reasonable standard would automatically accommodate the new circumstances through judicial decisions, since the standard follows commercial practices.

One author has suggested an alternative to generally-drafted provisions that might yield adaptability over time. The proposal was that legislatures provide that their laws lose their statutory force after 20 years and that the statutory subject matter at that point be given to the courts for further development with the guidance of the statute but without its binding force. *See* Davies, *supra* note

Moreover, such a local amendment that met local business demands for a predictable rule may not agree with perceptions in other jurisdictions of the specifics of commercial reasonableness in this context. If that is the case, the freedom to amend and the resulting lack of uniformity will produce tension between distinctly local and interstate transactions, and particular confusion when there is doubt about whose law applies to the transaction. In short, there simply is no guarantee that the federal experiment, expressed as the freedom of states to make nonuniform amendments to the Code, advances the law's adaptability to local and evolutionary business practice; research may show that it retards it.

We thus might well consider the nature of the nonuniform amendments to date to see what they can teach us about the Code we have and the Code we should have. Are nonuniform amendments typically specific corrections in frustrated reaction to vagueness or flexibility? If the number of specific corrections by nonuniform amending of flexible Code provisions is significant, we might, for example, conclude that the parties engaged in Code-governed transactions are disenchanted with a generalized, though adaptable and flexible, approach to commercial law. If business demands specificity, should we have a different sort of Code, one with many fixed standards to foster predictability? Is it possible for a Code of this kind to survive long in a shifting commercial market? Or could we build with it an administrative or other apparatus designed to discover new business practices and legislate based on them?[34] It remains to be seen, of course, whether it is possible to quantify data concerning nonuniform amendments and organize it around these inquiries in a meaningful way.

If we are concerned about uniformity, an inquiry solely into the Code texts may be too narrow. Even where texts are uniform, might courts view provisions parochially?[35] Of course, the more flexible and open-textured a provision, the

27. In the commercial area, one suspects that the obsolescence of hard-edged rules will occur much more rapidly.

34. A third possibility would be to permit—even encourage—states to insert nonuniform, specific, predictable rules and focus attention at the national level on predictable conflicts of law rules rather than uniformity. Predictability of result might, on balance, be better under this approach than under a relatively more open-textured law that was uniform across states. This approach would, however, lack adaptability unless it were combined with sleek amendment processes at the state level to keep the specific rules in touch with contemporary business practices.

35. What courts do with the Code is a matter that has received considerable scholarly attention, not all of it in agreement. Writing in 1974, Professor Kennedy told us:

> "The perverseness of judges has often been thought to be more of an obstacle than the resistance of legislators to any effort to attain uniformity of the laws among American jurisdictions. Judge Friendly speaks of the difficulties of getting legislatures to cooperate by adopting uniform laws and adopting them uniformly but refers to 'the sheer impossibility of getting unruly judges to interpret them uniformly.' The performance of the courts in construing the Uniform Commercial Code seems, however, to have provoked only one published protest that characterizes the disparate judicial construction of the Code of sufficient seriousness to warrant federal enactment. A survey was made in 1969 of approximately one thousand Code decisions and there were thirteen issues on which inconsistent answers had been given.

greater the opportunity for judicial localizing of the uniform text. This poses interesting political questions about the allegiance of the judiciary. The Code itself states the interpretive goals in section 1-102: (a) to simplify, clarify, and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (c) to make uniform the law among the various jurisdictions.[36]

The question remains whether the courts in fact follow these mandates or whether they solve problems with a more parochial approach.[37] Like the questions posed earlier concerning the nature of nonuniform amendments, the question whether state courts can or do interpret the U.C.C.—a state statute—in a nonparochial way is worth examining for what it might reveal about our current Code and for what we might reasonably expect of our ongoing or future codification efforts.

THE PROCESS OF ADDRESSING COMMERCIAL LAW VARIANCE

There may be a way to strike an acceptable balance between flexibility and predictability, and between the interests of parochial and national commerce as well; the expectations we have for uniformity and the processes by which we seek to achieve it could have a role in striking that balance. The process our system currently employs in addressing local variation is most important in developing an optimal balance of uniformity that accommodates flexibility and predictability. We might consider, for example, what the Permanent Editorial Board, local or national bar groups, or others do about especially insightful and well-drafted nonuniform amendments which arguably improve upon the uniform law.[38]

Some regard California's unorthodox version of U.C.C. article 2A, for example, as enlightened and some consider that state's amendments to article 9 to be insightful as well. That state's process included a long lead-time in considering the official drafts proposed for adoption, and the amendments

> Not only are the conflicts charted unimpressive in quantity, but none appears to rise to a sufficient significance to be a cause for national concern."

Kennedy, *supra* note 8, at 1228 (footnotes omitted). At page 1233, Professor Kennedy continued, "[T]he country is deriving the benefits that inhere in some of the features of the Code that are productive of divergence in judicial construction, including the use of general concepts like 'unconscionability' and 'commercial reasonableness'. . . ."

By way of contrast, Mooney, writing in 1986, stated: "More nonuniformity among states and more 'bad' commercial law result from inconsistent and poorly reasoned judicial interpretations than from deficiencies in the U.C.C. text and unwise or poorly conceived statutory and regulatory intervention." Mooney, *supra* note 4, at 1352–53.

36. U.C.C. § 1-102(2).

37. An older treatment of this issue is Note, *Disparate Judicial Construction of the Uniform Commercial Code—The Need for Federal Legislation,* 1969 Utah L. Rev. 722.

38. Study might show that very few nonuniform amendments are sufficiently well-drafted and integrated into the Code to be considered "enlightened." Such a discovery might undercut some of the justifications we might otherwise have for permitting state-to-state variation in the Code text.

themselves were developed by a high-level state U.C.C. committee. Surely, super-amendments can be a positive aspect of the federal system of Code law that argue powerfully for the "federal experiment." Where states are willing to devote sufficient resources to improving the law, the official uniform drafting process may thereby become informed.[39] The state experiment and effort can thereby become a part of the uniform drafting process, rather than an act of departure from it. The problem is, however, that even nonuniform amendments that are the product of the most stalwart efforts and driven by substantial resources may not be—or be acknowledged to be—improvements on the national text.

A well-drafted, nonuniform amendment may amount to a true improvement only at the local level by facilitating or validating local commercial practices. In this sense, local interests might well decide all local amendments to be superior to the orthodox text however inappropriate they might be for commercial activity at the interstate or international level.[40] But even an amendment's "true" improvement over the national text does not ensure its prompt incorporation into the official text or its adoption by other enlightened states. The pace of the Code revision process and interim demands for uniformity will typically prevent even an enlightened amendment from improving the law between major national drafting efforts. If a legislature believes its process has yielded an improvement, can it justifiably await incorporation into the Official Text? Should the state lobby for the change at the national level to encourage uniformity? Should it encourage other states to follow its lead and thereby create pressure for national reform? A major justification for permitting state-to-state diversity is that experimentation and legal innovation at the state level can yield overall improvement in the law better than would a single system that precluded state diversity.[41] If this serves as a justification for the U.C.C. as a state statute, perhaps we can do much better than we now do in using the state experience to improve the law.[42]

39. The state-level processes may, however, be subject to greater political pressures and different proportionate representation than those at the national level. Did, for example, the California committee that worked on article 2A reflect all relevant interests or was there a disproportionate share of lessor-secured party (or lessee-debtor) interests on the committee? Are particular interest groups more likely to have influence at the state than at the national level? If state amendments are the product of narrow political pressure—if nationally powerful interests are left out of the local process—the result will be "corrective" legislation at the national level which will increase complexity and the costs of doing business.

40. Mooney suggests an "Environmental Impact Report" submitted for consideration by the National Conference before the legislative enactment of a nonuniform amendment. Mooney, *supra* note 4, at 1356.

41. *See* Taylor, *Uniformity of Commercial Law*, *supra* note 8, at 362.

42. Discussing congressional adoption of the Food Security Act which reverses article 9's farm products exception, *see supra* note 2, in which Professor Clark noted: "[u]nfortunately, the Permanent Editorial Board of the U.C.C. did nothing about the farm products problem. It failed to suggest any changes in section 9-307(1) that would stem the tide of litigation and nonuniform state modifications. . . . In light of this confusion, . . . it is not surprising that buyer groups turned to

Much might be learned from a broad look at the state-by-state amending and enacting process itself.[43] This is a matter distinct from the issue of whether the amendments that flow from the process are tolerable or not from the national perspective. We might wish to know, for instance, whether some states follow others in formulating nonuniform amendments. We might also wish to learn something of the nature of the demands of the people who are often behind state amendments. Such information about the amending and enacting processes may allow us to respond with meaningful conclusions to such questions as to whether we can ever expect local interests to embrace a policy of national uniformity over local improvements worked by nonuniform amendments. We might conclude from this that some aspects of uniformity should bend to other goals.

At a broader level, further study might inform us about the kind of uniformity in commercial law that is best to seek. When we call for a uniform Code, should we mean a single, highly specific, nationally identical text? If so, to what extent, if any, should we tolerate nonuniform amendments to the national draft to allow for tailoring of the law to local diversity and to the evolution in business practices over time? And to what extent are we willing with such a Code to expedite and streamline the national amendment process so that the law keeps in reasonable touch with business development?[44] Alternatively, should we prefer a very open-textured Code that is variable by the judiciary to accommodate local interests and changing conditions and preferences, that would require few amendments, but which would cost much in predictability at all levels? If we opt for this kind of Code, what impact will the perceived inability to predict results have on commercial activity?[45]

It seems to us that answers to such questions can be obtained only with considerably more data than we have now. Such information might reveal that we are incorrect in our most basic assumptions concerning nonuniformity. It is certainly not well-known, for instance, the extent to which U.C.C. texts are or are not uniform, nor is the rate of nonuniform enactments a matter of any great certainty. Are they on the increase as we suppose them to be? Are there any identifiable patterns within and among states in the amending process that might show some of the driving considerations behind them?

From data of the kind we have described, we might draw important conclusions. We might conclude, for example, that strict uniformity is a worthwhile goal but that it competes unacceptably with others. It is theoretically possible, at least, to determine and seek some optimal level of uniformity, one that would promote an acceptable balance of predictability, concordance of business practices and the law, and flexibility for local adaptation and evolution over time. It may be that the current federal experiment will produce the optimal balance

Congress." Clark, *U.C.C. Survey: Secured Transactions Forward: Growing Federal Presence in the Law of Secured Transactions,* 42 Bus. Law. 1333, 1335–36 (1987).

43. "The process of change . . . ," Mr. Mooney states, "has received too little attention." Mooney, *supra* note 4, at 1348.

44. *Cf.* Mooney, *supra* note 4, at 1355–57.

45. *See also supra* note 34.

naturally by pressures within the system itself. Or we might discover that parochial self-indulgence is leading us in the direction of 52 Codes, and that an optimal balance of all interests and goals involved simply cannot be had under a uniform-state-law system.

We hope that in raising provocative questions and pursuing the research avenues that those questions suggest, this Subcommittee can contribute to a better understanding both of what we have in the U.C.C. and of what we need to make it better.