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THE UCC PROCESS—CONSENSUS AND BALANCE

Carlyle C. Ring, Jr.*

Although it has been around for 103 years, the National Conference of Commissioners on Uniform State Laws (NCCUSL) is still relatively unknown. While lawyers are well acquainted with uniform laws, they generally know little about their source and much less about the process by which they are drafted.

From 1892 to the present, a debate has raged as to the need and desirability for uniform laws among the various states. Today that debate has centered around two questions:

1. Is "instant" uniformity by federal preemption a better and superior method of achieving universal rules where they are required?
2. Are uniform acts not better drafted by "experts" or in the legislative process where diverse voices might have a greater opportunity to be heard?

Has modern technology, expanding federal jurisdiction, and the growth of the domestic and international economy passed the NCCUSL by? The purpose of this Essay is to demonstrate that the NCCUSL and the American Law Institute (ALI) in partnership still have a significant and important role in achieving improvement of commercial law. Some background is needed, however, on the process by which uniform acts, and in particular the Uniform Commercial Code (UCC) and its revisions, are formulated.

I. EVOLUTION OF THE NCCUSL PROCESS

Under the charter between the ALI and NCCUSL, it is agreed that the NCCUSL process for drafting uniform acts¹ will be followed

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¹ The Agreement describing the relationship between the ALI, the NCCUSL, and the Permanent Editorial Board (PEB) with respect to the UCC provides: “The drafting
for the UCC. Over the 103-year history of the NCCUSL, the drafting process has evolved from drafting by correspondence, to drafting by committees meeting together, to including a broad group of advisors and participants.

The NCCUSL meets annually, usually a week in advance of the American Bar Association (ABA) Annual Meeting. In its earliest days, commissioners traveled to the annual meeting by train. The drafting effort, of necessity, was largely focused on one individual who carried on correspondence between annual meetings, receiving input and suggestions by return correspondence. At the week-long annual meeting, an opportunity existed to review the drafts face-to-face in the give and take of spirited discussion among the commissioners. In its earlier days the number of commissioners was 100 or less, which afforded opportunity for in-depth participation in the deliberations. The commissioners included some outstanding legal scholars, including Wigmore, Williston, Pound, Llewellyn, Prosser, and others, as well as twenty-one presidents of the American Bar Association, three Supreme Court Justices—Rutledge, Brandeis, and Rehnquist—and President Woodrow Wilson.

Air transportation after World War II afforded the opportunity for drafting committees to meet over weekends several times during the year. Then, as now, drafting committee meetings began on Friday morning and extended through Sunday noon, with the active participation of all members of the committee and its advisors. Initially the chair often served as the drafter, or sometimes a member of the committee. Over time, it has become increasingly appropriate to retain an outside reporter who generally receives a nominal stipend for his or her services. Under the ALI process, the reporter makes the primary substantive contribution to the final product. In contrast, under the NCCUSL process, the reporter, as the title implies, reports and commits to draft form the policy and specific statutory wording developed by the drafting committee in its deliberations. The reporter makes a
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major contribution in the research and analysis of the issues and presents the various alternatives for policy and drafting choices.

Originally and to the present, decisions have been made by commissioners who are members of the drafting committee. However, in recent years—in particular with the UCC—the NCCUSL has recognized the need for greater breadth and depth of participation to formulate successful uniform acts. Through the offices of Commissioner Schnader, the NCCUSL reached out to the ALI to include its scholarly resources and the experience of its larger group of members. That partnership continues today through the Permanent Editorial Board (PEB), half of which is appointed by the NCCUSL and half by the ALI. All revisions to the UCC are considered jointly by the NCCUSL and the ALI. In addition, the ABA has played a substantial and important role; subcommittees of the ABA have undertaken major studies identifying problems and concerns that need to be addressed in revisions and provide detailed comments on drafts. The PEB has designated study groups, such as the 348 Committee, to develop suggestions for revisions in the payment system and for securities, in an effort to embrace new technology and changing practices.

However, the 348 Committee-type approach was not completely successful in formulating uniform acts that could achieve universal enactment. For example, the first endeavor of the 348 Committee to amend Article 8—to make provisions for uncertificated securities—proved too narrow in concept without more active input from participants as to market developments. Congress thereafter enacted legislation authorizing the Securities and Exchange Commission (SEC) to adopt regulations for certain security transactions covered by the UCC, provided that the SEC concluded that necessary uniformity, essential to the securities market, could be achieved only by such pre-emption. That action resulted in another rewrite and revision of Article 8. This time, however, the normal NCCUSL process was used, not only to cover uncertificated securities of the issuer, but to provide rules with respect to indirect holdings of securities by such custodians as the Depository Trust Corporation. This effort has been aided and supported by members of the SEC Market Transactions Advisory Committee (MTAC) and a broad array of advisors, and has developed an improved procedure that is likely to be promptly enacted by the states, and enjoy broad acceptance by all participants in security trans-

actions. This endeavor followed the inclusive deliberative process developed by the NCCUSL and discussed below.

The 348 Committee also undertook a revision of Articles 3 and 4 by a proposed comprehensive New Payments Code. The reporter, Hal Scott, laid out a conceptually brilliant analysis of principles for such a code that would make choices between payment methods, not on the basis of the peculiarity of the legal rules, but on the inherent virtues of each payment system. The breadth of participation, however, was limited to review by the members of the 348 Committee and two Williamsburg Conferences. No interest group—consumers, bankers, or corporate users—was happy with the principles evolved.

Based upon these experiences, it became clear to the NCCUSL that participants in the payment system had to be brought into the active deliberations of the drafting committee. This would ensure that the drafting committee and its reporter truly understood the available technology, the day-to-day practices, and the feasibility of the industry to accommodate reforms and improvements which theoretically might be desirable.

In the last decade and a half, the NCCUSL has not only relied upon active participation and input from the ALI and the ABA and its committees, but has undertaken to enlist other advisors, and to encourage attendance and participation by interested observers at meetings of the drafting committees. This blend of experts, operations people, academics, and generalists, has made the process more open and deliberative. More important, it has encouraged participants to become intimately familiar with the concerns and problems of other participants and to become partners in formulating revisions and improvements that are balanced and advance the public interest. A two-way communication with the constituencies has developed, providing input to the drafting committee on problems and concerns and reporting back the problems and concerns of others. This understanding has enabled the formulation of better solutions. In the eyes of any one participant group, the ultimate product is “relative perfection” by providing, on balance, substantial improvements in the law while avoiding any major disruption and confrontation with the legitimate concerns of any particular participant.

6. See Brandel & Geary, supra note 3, at 1073.
II. Case Example: Article 4A

Article 4A is the phoenix that rose from the ashes of the demise of the New Payments Code. While there was near unanimity in the dialogue following the second Williamsburg Conference that the New Payments Code should not proceed, it was clear that a more limited and focused project should be undertaken. As president of the NCCUSL at the time, I undertook to meet and correspond with various interested groups.

One dialogue was with William Edgerly, Chief Executive Officer of State Street Bank and President of the Association of Federal Reserve Banks. As I recall it, William Edgerly was the first to suggest a project limited to and focused on wholesale wire transfers. Twice Geoffrey Hazard, Director of the ALI, and I met in New York with William Edgerly and Robert Moore, who chaired the Committee of the American Bankers Association on Electronic Transfers. Those discussions led to the agreement that the banking community would support and participate in a project to draft a new article for wholesale wire transfers, with a secondary objective to address perceived problems in Articles 3 and 4.

I was simultaneously engaged in discussions and correspondence with the three representatives of consumer interests that had participated in the 348 Committee. Consumer interests had not been satisfied with the direction of the New Payments Code. The representatives supported the undertaking for a wholesale wire transfer statute and more modest revisions of Articles 3 and 4. They were not sure how much support they could receive from their consumer groups to attend drafting committee meetings, but they agreed to be on the circulation list and to provide input in the drafting process in that manner.

Also of considerable concern to the NCCUSL and the ALI was whether the Federal Reserve System would exercise its existing authority—or request additional statutory authority—to preempt state law on wholesale wire transfers or the rules with respect to checks. My first meeting with the Federal Reserve occurred in 1984 and we obtained assurance from the staff and the Board that they would participate in the effort. With that encouragement and the development of dialogue with other interested groups, the PEB, the ALI Council,

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and the Executive Committee of the NCCUSL decided in 1985 to appoint a drafting committee and commence the undertaking. Phillip Carroll, my successor as president of the NCCUSL, appointed Robert Haydock and me as co-chairs of the drafting committee. Later, in the early development of the draft, I met again with the Federal Reserve Board to explore the committee’s progress, and again to seek assurance that the Federal Reserve did not intend to preempt our efforts by regulation unless completion of the project and efforts to achieve prompt enactment were not successful. These assurances were given.

A. The Problem

At the time the Article 4A project was conceived, there was no law or significant regulation of wholesale wire transfers anywhere in the world. In 1985, I first heard through Thomas C. Baxter Jr., associate counsel for the Federal Reserve Bank of New York, at a meeting of the ABA UCC Committee, that a major systemic risk existed in the event a major bank participant in the wholesale wire transfer system should fail. Ernest T. Patrikis, deputy general counsel for the Federal Reserve Bank of New York, wrote in 1987:

Most U.S. banks are asked to transfer funds internationally at one time or another, and most have had the experience of receiving payments from abroad for a customer’s account. Each time an institution gets involved in such activity, it risks entering a legal snake pit: What are the legal rights and obligations of the banks handling a transaction at its various stages? Do the laws of more than one country apply—and if so, do they differ substantially?

E. Gerald Corrigan, President of the Federal Reserve Bank of New York, writing about the need for new structures, pointed out:

The day-to-day operation of these large-dollar payments entails very sizable amounts of credit exposure by all participants—including the Federal Reserve Banks—to a wide array of institutions in every part of the world . . . . [A]s we have seen, even a significant computer or mechanical problem at a major institution can be highly disruptive and, if extended over more than a day, could force these systems to grind to a halt, throwing into question contractual and other obligations associated with hundreds of billions of dollars in

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payments. Therefore, even with mechanical problems, but especially with credit problems, the large-dollar payments systems—because of their size, speed and interconnections—have the potential to trigger the feared chain reaction whereby a problem at one major institution can all too quickly cascade to other institutions and markets.10

When Article 4A was first conceived, funds transferred on a daily basis totaled over 500 million dollars.11 By 1989, when the drafting project was complete, there were peak days of over two trillion dollars of transfers.12 On the average day, there was one trillion dollars transferred13 with an average transfer of five million dollars.14 In 1993, on an average day, there were 277 Fedwire funds transfers at an average daily value of over 824 billion dollars.15 Clearing House Interbank Payments System (CHIPS) transfers, in 1993, averaged 167,000 funds transfers with an average daily value of 1.005 trillion dollars per day.16 Thus, both systems average nearly two trillion dollars daily, with an average transaction of about four million dollars.17 Obviously, if something goes wrong in an individual transaction, there is something worth fighting over and the potential risk from such dollar volume in the system is significant. Until 1989 there were no legal rules to clearly define responsibility and liability and control the risks. Because the participants could not agree, it was estimated that only ten percent of the transfers—in terms of dollars—were governed by a private contract between the bank and the customer.18 Of even more concern was the systemic consequences if one or more major banks should fail.
B. Achieving Balance

In the NCCUSL process described above, the drafting committee makes the ultimate decisions itself and, therefore, careful effort was made to assure a balanced composition for the Article 4A Drafting Committee. Three drafting committee members were law professors, one was a judge, and six were practicing attorneys. Two of the attorneys were general counsel of users of the payment system. Another attorney had no financial institution clients. Three attorneys were employed by firms that, among other clients, represented financial institutions. In short, the composition of the drafting committee was thirty percent professors, ten percent judges, thirty percent lawyers who had only clients who were users, and thirty percent lawyers whose clients included, among others, financial institutions. The President of the NCCUSL, after consultation with the ALI, made the appointments to the drafting committee.

The NCCUSL also sought extensive input from advisors knowledgeable in the various aspects of funds transfers. On behalf of the conference, I wrote hundreds of letters and made numerous telephone calls to encourage participation and to obtain the suggestions of advisors who would attend all meetings, contribute to the drafting process, and maintain the two-way dialogue between their constituency and the drafting committee. Initially, it was difficult to obtain adequate representation from users of the payment system, but ultimately the advisors included eleven persons who represented the views of users; seven were from financial institutions, and four were regulators.19

In addition, there were twenty-three observers who regularly attended our drafting committee meetings. These observers were more

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or less equally divided between persons representing the views of financial institutions and users of the payment system. A number of these advisors and observers were active participants in the operation of funds transfers, and brought a great deal of practicality and reality to the discussions of the drafting committee.

C. Scholarly Participation

The role of reporters for the NCCUSL is limited to implementing the policy judgments and the specific statutory formulations approved and directed by the drafting committee, yet the reporters are major contributors to the research and analysis that is critical to presenting the options and alternatives to the drafting committee. The Executive Director of the NCCUSL, William Pierce, appointed William Warren and Robert Jordan of the UCLA School of Law, and they proved to be outstanding choices. The first trial meeting, to ascertain whether the project could be successfully undertaken, was held in Alexandria, Virginia, in 1985. Up to that point, there had been deep skepticism as to whether the strong divergent interests could be brought together. William Warren and Robert Jordan did an outstanding job then and throughout the project—not taking sides, but presenting crisply the policy choices to be made with an even-handed outline of the consequences of each policy choice. As a result, they won the complete confidence of the participants.

There was also substantial scholarly support from law professors who were on the drafting committee, advisors, and observers. Even more significantly, those who were members and participants of the ALI Consultative Group continually reviewed the progress and mem-

20. The observers who regularly participated were: Dean Bitner, Sears, Roebuck & Company; Henry N. Dyhouse, U.S. Central Credit Union; Robert Egan, Chemical Bank; Paul T. Even, National Gypsum Company; James Poorman, First Chicago Corporation; Richard M. Gottlieb, Manufacturers Hanover Trust Company; Douglas E. Harris, Morgan Guaranty Trust Company of New York; Shirley Holder, Atlantic Richfield Company; Paul E. Homrichausen, Bankers Clearing House Association and National Automated Clearing House Association; Gail M. Inaba, Morgan Guaranty Trust Company of New York; Richard P. Kessler, Jr., Credit Union National Association; James W. Kopp, Shell Oil Company; Donald R. Lawrence, Citibank NA; Robert M. McAllister, Chase Manhattan Bank NA; Thomas E. Montgomery, California Bankers Association; Samuel Newman, Manufacturers Hanover Trust Company; Nena Nodge, National Corporate Cash Management Association; Robert J. Pisapia, Occidental Petroleum Corporation; Deborah S. Prutzman, Arnold & Porter; James S. Rogers, Professor of Law, Newton, Massachusetts; Robert M. Rosenblith, Manufacturers Hanover Trust Company; Jamileh Soufan, American General Corporation; Paul S. Turner, Occidental Petroleum Corporation; Irma Villarreal, Aon Corporation; and Suzanne Weakley, Atlantic Richfield Company. UNIF. COMMERCIAL CODE, 2 U.L.A. 6 (1990); UNIF. COMMERCIAL CODE, 2B U.L.A. 456-57 (1989).
bers of the American Bar Association UCC Committee and its Ad Hoc Committee on Payment Systems, held discussions on the progress of the draft two or three times a year, and solicited valuable input from the members.

D. In-depth Direct Dialogue

The most unique aspect of the drafting process is the in-depth and lengthy dialogue among the various interested participants. The drafting committee meetings typically begin on Friday morning and continue until noon on Sunday; in total there are about twenty hours of debate and discussion at each drafting meeting. The average attendance for Article 4A Drafting Committee meetings was fifty or more, representing the balance and participation referenced above. The drafting committee for Article 4A held sixteen meetings, with six presentations to general meetings of the ALI and the NCCUSL. Altogether fifty-seven days of debate and consideration were given to the project as it progressed.

The drafting committee meetings are distinct from other legislative forums. In both the Congress and in the state legislative arena each party has an opportunity to present formal statements, but as a rule there is little dialogue between the participants and with the legislators. The real effort to mold and shape the legislative product is by lobbying, conducted largely in private dialogues and heavily influenced by access through Political Action Committee (PAC) dollars or personal contacts with influential legislators.

By contrast, the NCCUSL process is fully open and meaningful dialogue occurs in the drafting committee meetings. Each participant is recognized and given an opportunity to voice opinions and concerns. The magic of the process is that there is direct debate among the interested parties; points are made directly, and they are responded to directly. At times the debate is heated. However, over time, an appreciation grows for the perspective of others and the collective result of the deliberations is influenced by the merits of the arguments made. Often, suggestions evolve for a different approach that accommodates the concerns of each party. The accommodation is real rather than forced. As the relationships and respect grow, the objective increasingly becomes not to win, but to find a solution that advances the public interest as well as the perspective of the particular participant. That free and open exchange is often very difficult to achieve in the tight schedules of legislators, where decisions have to be forced or the resolution of difficult problems is left to staff people,
many of whom may be inexperienced and lacking practical understanding of the business to be regulated.

It is not always possible to find a unique or alternative solution to competing interests and needs, but in the case of Article 4A, the goodwill and good faith of the fifty-seven days of debate and dialogue did lead to a consensus that could be embraced by all. None of the participants were completely happy with the ultimate result, but all could embrace uniform adoption as a highly necessary improvement in the law.

E. Effective Critique

The drafts for each meeting of the drafting committee were prepared in advance and widely circulated to all those who requested a copy. Thus, those who did not have an opportunity to regularly attend the drafting committee meetings, nonetheless had an opportunity—which many seized—to call or write the reporters directly. In addition, as noted, the ABA UCC Committee and Ad Hoc Committee on Payment Systems generally reviewed the current draft at its spring meetings as well as at the annual meeting of the ABA. Reports on the progress of the draft were regularly included in The Business Lawyer. Consequently, informed and substantive critique also was provided to the reporters and the drafting committee through the ABA. The ALI Consultative Group, composed of interested and informed members of the ALI, met twice with the reporters and some of the members of the drafting committee to review the draft and to provide their criticism and direction.

From its earliest days, the practice of the NCCUSL has been to read word-by-word every section of the draft and to discuss the draft section-by-section at a minimum of two annual meetings. For instance, Article 4A was read at three annual meetings, consuming substantial floor time with questions, comments, and motions from the floor on specific elements. Similarly, at the annual meeting of the ALI in 1989, the draft was considered by the full membership of the ALI for their input, questions, and critique.

F. The Result

Article 4A was completed and promulgated by the ALI and the NCCUSL in 1989 and was first available for legislative enactment in 1990. As of June 1, 1994, forty-nine of the fifty states have enacted Article 4A and, with the exception of Tennessee, have done so without significant amendment.

On June 1, 1990, the Federal Reserve System, which had been an active participant in the drafting process, issued proposed Revised Subpart B of Regulation J, incorporating Article 4A into the regulation governing Fedwires. In October 1990, the Federal Reserve Board


23. Total enactments to date: 50.

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approved the comprehensive revision of Subpart B of Regulation J, stating:

For many years, the Regulation J provisions on funds transfers handled by the Federal Reserve Banks constituted the only codified body of law applicable to these payments. Although Subpart B of Regulation J specified the rules applicable to the funds transfers handled by Federal Reserve Banks, there were no codified rules for the wholesale funds transfers handled by other banks, or by private funds transfer systems. Further, Regulation J did not provide comprehensive rules for the relationship between banks and their customers that were parties to the funds transfers handled by the Federal Reserve Banks.

Article 4A provides comprehensive rules governing the rights and responsibilities of parties to wholesale funds transfers.

Although many of the concepts embodied in the current version of Subpart B of Regulation J are similar to those embodied in Article 4A, a number of the Subpart B provisions are inconsistent with the structure of Article 4A and the terminology of Subpart B and Article 4A differs substantially.

The Board has revised Subpart B of Regulation J substantially as proposed in June so as to apply Article 4A to funds transfers handled by the Federal Reserve Banks, subject to a limited number of modifications and clarifications.

Revised Subpart B incorporates Article 4A. In the event of any inconsistency between the provisions of the Sections of Subpart B and the provisions of Article 4A, the provisions of the Section of Subpart B will prevail. Article 4A will apply to transactions involving Federal Reserve Bank, even if the state in which the Federal Reserve Bank is located has not yet adopted Article 4A. The Board believes that this incorporation is necessary to ensure that the law applicable to funds transfers, involving Federal Reserve Banks, is uniform for all Fedwire funds transfers, regardless of the location of the banks involved in the funds transfer.\(^\text{24}\)

\(^{24}\) Federal Reserve, Press Release 0, 1-3 (Oct. 1, 1990) (on file with the \textit{Loyola of Los Angeles Law Review}).
In addition, CHIPS, a major private funds transfer system, as well as National Automated Clearing House Association (NACHA), a bank-owned electronic payment system, incorporated Article 4A into their rules.\textsuperscript{25} Since most major international banks participate in CHIPS the effect is to make Article 4A international in its scope and coverage.\textsuperscript{26}

Paralleling the effort by the ALI and the NCCUSL is a United Nations Commission on International Trade Law (UNCITRAL)\textsuperscript{27} international funds transfer model act. The delegation from the United States included many who were active participants in the drafting of Article 4A. As a result most of the concepts and terminology of Article 4A are embraced by the UNCITRAL Model Act.

The prompt, universal enactment of Article 4A has enabled and responded to rapid expansion of safe, prompt, and inexpensive use of electronic funds transfers. Large companies are increasingly using funds transfers to make payroll payments and payments to suppliers with much more efficiency, savings on discounts, and more supporting data.\textsuperscript{28} NACHA points out that the check system for payments entails $50 billion in costs for printing, mailing, and clearing sixty billion checks a year that can be reduced by appropriate use of funds transfers.\textsuperscript{29} The federal government, as part of the "reinventing government" initiative, is planning a nationwide electronic transfer system that is expected to save $195 million per year by 1999 for programs dispensing food stamps, Aid to Families with Dependent Children (AFDC), social security, veterans and military compensation, and unemployment benefits.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{25} Fred H. Miller, \textit{Analysis of New UCC Article 4A}, in \textit{The Emerged and Emerging New Uniform Commercial Code} at 235, 237 (ALI-ABA Course of Study No. C812, Nov. 12, 1992).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Ron Suskind, \textit{U.S. to Begin Issuing Benefits Electronically}, \textit{WALL ST. J.}, June 1, 1994, at A16.
\end{itemize}
III. OTHER UCC PROJECTS

A number of revisions to the UCC have been initiated by the PEB, the NCCUSL, and the ALI to accommodate changed technology and practices. These include revised Articles 3 and 4, and revised Article 6. In addition, projects to revise Article 2, Article 5, Article 8, and Article 9 are presently underway. In each of these projects, the process described above has been employed in an effort to achieve the balance and consensus essential for uniform enactment among the various states, and to forestall possible federal preemption. Article 2A has been enacted in forty-four states and the District of Columbia; the repeal or revision of Article 6 has been enacted in thirty-three states and the revisions to Articles 3 and 4, completed in 1990, have been enacted in thirty-six states.

The string of successful enactments at a rapid rate is attributable in large measure to a new program initiated in 1979 by the NCCUSL entitled Planning and Coordinating Enactments (PACE). While the drafting process is under way, either the chair or another member of the drafting committee is appointed as the PACE representative. That person is obligated to develop a plan for the enactment of the final product which is presented to the legislative committee of the NCCUSL. The plan includes the identification and, if possible, the formal endorsements of various groups and participants in the drafting process. The plan also identifies particular states for early enactment and the development of materials and information that will explain the need for and the benefits of enactment by the states.

As part of the PACE program, the legislative committee has developed a program for targeted acts which are to be given special emphasis by the commissioners from the individual states for introduction and consideration by their legislatures. Since 1915, it has always been the responsibility of commissioners to ensure that uniform acts are considered by the legislatures in their state. Targeted acts are given the highest priority, and revisions to the UCC are always included as targeted acts. The limited staff of the NCCUSL in Chicago assists the commissioners by providing materials and re-

31. UCC Scorecard, supra note 23, at 6-7.
32. Id.
33. Id.
35. See id.
sources for their legislative efforts. The staff, along with members of the drafting committee and reporters are made available to appear as witnesses before legislative committees throughout the country.

The PACE program was formulated by a committee chaired by Judge Charles Joiner, and has substantially enhanced the rate of enactments by the NCCUSL. This is evidenced by the adoption of Article 4A by all but one state within five years,\textsuperscript{36} and the rapid adoption of recent revisions and amendments, including Article 2A, revised Articles 3 and 4, and the repeal or revision of Article 6.\textsuperscript{37} It is anticipated that the same rapid rate of adoption can be achieved with respect to the next UCC acts to be completed—revised Articles 5 and 8.

IV. WHAT IS THE PUBLIC INTEREST?

As part of this Symposium, Donald J. Rapson poses the question, “Who is looking out for the public interest?” He argues for a change from the present “open” process of the NCCUSL\textsuperscript{38} because that process “may inadvertently be inhibiting the attainment of complete objectivity and fairness in the emerging drafts.”\textsuperscript{39} As stated herein, I believe in the “open” process and wish to comment on how I differ with Mr. Rapson, with whom I served on the drafting committees for Articles 3, 4, and 4A, which I chaired. I also differ with some of his observations on the Article 5 Drafting Committee,\textsuperscript{40} which I also chair, and upon which Mr. Rapson has not served.

The “public interest” is in the eyes of the beholder. I share his view that the public interest encompasses “fairness,” “efficiency,” and “fair dealing,” but fairness also is in the eyes of the beholder, as are efficiency and fair dealing. Not only is Mr. Rapson right that the public interest means different things to different people, but even agreement on the principles of what constitutes the public interest leaves us with reasonable differences of opinion as to what is fair, fair dealing, or efficient.

Mr. Rapson suggests that the practicality of uniform enactment by the states should not be a criterion for the public interest.\textsuperscript{41} I think

\begin{thebibliography}{41}
\bibitem{36} UCC Scorecard, supra note 23, at 6-7.
\bibitem{37} Id.
\bibitem{39} Id.
\bibitem{40} Id. at 268-82.
\bibitem{41} Id. at 262. In addition, Mr. Rapson states:
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there are a number of things wrong with that view. First, it suggests that the marketplace of ideas is not an indicia of the "rightness" of the policy. But if an idea will not sell, it may be flawed. Second, it presumes that a distant view of what is right is superior to that of those who daily deal with the realities of commercial transactions. The changes occasioned by an "ivory tower" solution may not be workable. In drafting Article 4A and revised Article 4, the realities of available technology had to be taken into account.42

Third, rather than bringing interested and knowledgeable parties into the process, Mr. Rapson's proposal would—to a degree—shut them out or push them to the fringe in order to facilitate the expression of the "ideal view." That has two adverse effects. It creates suspicion and resentment that the excluded views are not given equal opportunity for participation. It also forces people into the advocate role, rather than the role of a co-searcher for a solution. That assures opposition in the legislative arena and nonuniformity or non-enactment.

Fourth, Mr. Rapson looks at the glass as half empty. Improvements in the law are, and will continue to be, incremental. It is in the public interest to have significant improvements enacted as opposed to ideal drafts which, though better in the view of some, never see enactment.

The issue then is how to most effectively fulfill the mission of the UCC revision process, i.e. improving in-place statutory law. For me, the answer is relatively clear—the drafting process must be separated from the legislative process. NCUSL has the responsibility to submit proposed revisions to the existing UCC, which it and ALI in their judgment believe, best serve the public interest. Whether or not those revisions will be enacted is the ultimate concern and decision of the legislature. In making that decision, the legislature is entitled to be assured that the proposals represent the best and soundest means for improving the law. I submit that the chances of enactment will be enhanced if the legislature is confident that the proposals reflect an independent judgment which, after fully considering the views of all interested parties, is based solely on the merits. In contrast, if the legislature perceives that the proposed legislation merely reflects a filtered consensus of conflicting interest group views, rather than such an informed judgment on the merits, the likelihood of enactment will lessen because the legislature cannot then be confident that the proposals represent the best and soundest means for improving the law.

Letter from Donald J. Rapson to Richard Hite, President, NCCUSL (June 23, 1994) (on file with the Loyola of Los Angeles Law Review).

42. In drafting revised Article 4-406, for example, the "safe harbor" provision for truncated statements was necessarily limited to the available technology for encoding checks which does not include payee or date. Ideally, inclusion of payee and other information on items not returned would be best, but the available technology did not make it feasible to require more until both the technology advanced and the Federal Reserve (and banks) had the resources and authorizations to invest in new capital equipment.
Lastly, Mr. Rapson’s proposal misconceives the whole purpose of “uniform acts.” The objective simply is not accomplished if no enactments occur. Other groups can think great thoughts and pontificate at length. The NCCUSL and the UCC effort with the ALI has a very practical goal—achieving uniformity of state law where it is needed. It is in the public interest to achieve what is achievable.

The experience with Article 2A, I believe, supports an “inclusive” process and consideration of the practicality of enactment. The Article 2A project did not have fully inclusive participation of interested groups on a balanced and comprehensive basis. Article 2A was introduced in California at an early date. The California Commissioners were overwhelmed with opposition from over twenty different groups, many of whom complained that they were not a part of the process. Significant amendments were necessary to secure enactment of Article 2A. A lengthy dialogue and debate of inclusion ensued to draft uniform amendments that accommodated the expressed concerns of interest groups in California. Meanwhile, enactment of Article 2A languished as other states awaited the outcome of the discussions with parties who were not included initially. It appears far more efficient and productive to include full participation up front in an “open” process rather than repair the product after reactions and positions have hardened because participation was foreclosed by lack of invitation or process.

Mr. Rapson supports his thesis that objectivity and fairness are inhibited by the open process with examples of what he perceives to be wrong policy choices by the Article 5 Drafting Committee and because the drafting committee’s “statements and votes are publicly made in the glare of the interest groups.” He argues that the NCCUSL procedures be revised to permit drafting committees to function “in a quieter and more deliberative professional environment.”

Mr. Rapson correctly points out that the drafting process for Article 5 is continuing. He is also correct that the NCCUSL, the ALI, and the drafting committee have been known to change their minds.

I can attest to the fact that the drafting committee, its advisors, and other participants honestly believe that the policy choices that Donald Rapson challenges are in the public interest. The drafting committee members do not seem to be intimidated. Based on the discussions I have had with them, their judgments have been made hon-

43. Rapson, supra note 36, at 265.
44. Id. at 267.
45. Id. at 279-82.
estly on the merits of the policy arguments presented. Indeed, to cite one example, I have had many discussions with one participant who is as sure the definition of good faith adopted by the drafting committee is as correct a policy as Mr. Rapson believes it is wrong. Simply because one differs with the choices made does not make that view “right” and in the public interest, and the view of others “wrong” and not in the public interest. It simply means that reasonable people disagree as to what is the public interest.

As chair of the committee, I avoid voting wherever possible and abstain from most debate except when I believe I can assist in clarifying issues or bring agreement on solutions. Thus, my personal views on the policy choices challenged by Mr. Rapson are unknown. I probably would have made some changes if the decision had been mine alone. Since the process is not complete and the purpose of this Essay is not to discuss Article 5 policy issues but rather the UCC process, I will not undertake here to defend or explain those policy judgments. However, I do agree with Mr. Rapson that they, as well as the significant choices not adopted, should be explained.

As a matter of process, the question is fundamentally whether an “individualized” definition of public interest or a “collective wisdom” of what is in the public interest is to prevail. I believe it should be the latter. But the open process has its price. The meetings are long and the debate at times contentious. It takes patience to develop an understanding of divergent viewpoints, an appreciation of the realities of the marketplace, an understanding of the limits of technology, and the evolution of a common goal of doing what is right rather than advocating a parochial interest. However, in the long run, this process does build the balance and consensus that advances the public interest as collectively perceived.

V. Other Routes to Uniformity?

At the outset I posed two fundamental issues, namely whether uniformity by federal preemption or drafting by experts in the legislative arena is superior to the UCC process of the NCCUSL and the ALI. No doubt, the appropriate answer is that it depends upon the particular subject matter. There will always be a significant number of topics that are best addressed and handled by the federal government. Nonetheless, there is much to commend the UCC process as a thoughtful and substantive process for state enactment.

The agenda of Congress is full and overflowing. It is difficult to obtain the attention and focus of Congress until there is a genuine
crisis. Crisis legislation often tends to be a patchwork rather than the result of deliberative and careful assessment. Rarely are the members of Congress themselves deeply involved in legislative drafting. That role is delegated to staff, whether serving the legislator directly or working indirectly on the staffs of the various committees. While the staff consists of bright and ambitious young people, their knowledge of economics, institutions, and legal process is largely academic and they have very limited hands-on experience. Most political observers would acknowledge that the congressional lawmaking process is shaped, and perhaps even corrupted by, special interests. The hearing process is often for making statements, rather than for sorting out the facts and framing a genuine dialogue between knowledgeable participants. Despite the possibility of speed, the congressional process is often slow and imperfect. The process often conspires to result in a stalemate.

As part of the Article 4A project, the NCCUSL Drafting Committee considered what could and should be done to diminish the risk of systemic failure in the event of a large bank failure or a series of large bank failures. The CHIPS rules for unwinding all transactions for the day in which a large bank failed would be lengthy and litigious. Article 4A's solution was not only to provide a degree of certainty with respect to the liabilities, but to reinforce legislatively the Federal Reserve's requirement for added security—in effect, self insurance—to cover large failures, and to statutorily permit netting for settlements rather than the unwinding of all transactions. During these discussions in 1986 and 1987, the committee observed that there was no federal law clearly authorizing netting, despite its obvious advantage of avoiding systemic paralysis. A draft of federal legislation was circulated and discussed at the drafting committee meetings and presented to Congress by the New York Clearing House. Nonetheless, Article 4A was substantially enacted by most of the states and incorporated into the rules of the payment systems long before Congress ever got around to considering the federal legislation. This aspect of the Article 4A process perhaps shows the benefits of the state process, but also shows that some topics can and should be addressed on the federal level.

Nor is the congressional product always as sound as it could be. The participants in the process are often confrontational in Congress. Through lobbying efforts, they push their respective viewpoints with the members of Congress and their staffs. In contrast, the NCCUSL process affords opposing points of view an opportunity for open and
extended debate that brings understanding, reflection, and consideration of the alternatives that better advance the public interest. The dialogue affords opportunity for a consensus on a balanced product that all can reasonably embrace. This advantage in and of itself warrants maintaining and fostering the uniform state law approach. And, as discussed, that product is arrived at openly in a broad participatory process that leaves out no interested group that desires inclusion. Finally, while theoretically one might assume that experts could best draft a near-perfect product, several heads are, in fact, better than one. The exchange and dialogue between generalists and experts, particularly with the participation of the pragmatists acquainted with the day-to-day operations of the business, can contribute significantly to the simplicity, quality, and more importantly, the workability of the final product. The UCC process of the NCCUSL provides that opportunity for equal participation of the experts, the day-to-day operators, and the generalists. The toughest questions to the experts often come from the generalists.

Moreover, it should not be forgotten that ultimately each uniform act must be enacted state-by-state, and thus is subjected to review by experts and interested members of the public in that process. But if the NCCUSL has done its job well, the commissioners from each state have worked to make the act suitable for enactment in their state, and recognizing that uniformity must be a compromise consensus that grows from diversity of thought and experience, the act should be appropriate for enactment without amendment.

VI. CONCLUSION

The Uniform Commercial Code has been a major contribution to American law by the ALI and the NCCUSL. The current revisions make significant and important changes to accommodate changing technology and practices within commercial law.

While federal preemption offers the advantage of a one-time enactment to achieve universality, the uniform state law process generally provides a more carefully crafted product. This process fosters genuine participation and meaningful discussion, debate, and consideration by all interested groups, and forges a consensus that all can embrace in the public interest.

Last, but hardly least, uniform acts preserve our federal system, the division and balance of powers, and the continued vitality of our representative form of government.