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Perspectives of a New Executive Director

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PERSPECTIVES OF A NEW EXECUTIVE DIRECTOR

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In Professor Harrell's kind introduction,[1] he indicated that I have "succeeded" Professor Miller as Executive Director of the National Conference of Commissioners on Uniform State Laws (NCCUSL), and the word he used is exactly right. I recently read David McCullough's extraordinary book on John Adams, and he tells of the following exchange during Thomas Jefferson's first visit as Ambassador to France with the French Foreign Minister, the Comte de Vergennes:

"You replace Mr. Franklin, I hear," said Vergennes.

"I *succeed*," said Jefferson. "No one can replace him."[2]

I succeed Fred Miller as Executive Director. No one can replace him.

It goes without saying that a national economy cannot function efficiently without a core set of commercial laws to provide a stable base. Can you imagine the added costs of doing business if common transactions were governed by truly idiosyncratic laws in the various states? We had just such a situation in secured-finance law before the widespread adoption of Article 9 of the Uniform Commercial Code. Creditors seeking to use personal property as security faced a bewildering array of devices—pledge, chattel mortgage, conditional sale, assignment of accounts receivable, trust receipt, equipment trust, factor's lien, etc. Some of the devices were statutory in origin while others sprang from the common law. Some nonpossessory devices required a public filing as a means of avoiding problems stemming from a debtor's ostensible ownership of collateral, others did not. The rules governing a

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1. Alvin C. Harrell, *Introduction to the Symposium Honoring Fred H. Miller and Exploring the Uniform Law Process*, 27 OKLA. CITY U. L. REV. 497, 498 (2002).

2. DAVID MCCULLOUGH, JOHN ADAMS 330 (2001).

particular device were often unclear, and the consequences of making a mistake, either in choosing or implementing a device, were draconian. The system routinely imposed high transaction costs on lenders. These costs were reduced dramatically by the nationwide success of a uniform law—Article 9 of the Uniform Commercial Code.

The need for uniformity does not mean that there is no room for states to assert their individual interests in matters that do not go to the core of a particular law. Federal legislation provides uniformity, but it must of necessity be one-size-fits-all. The genius of the uniform law process is that it creates general uniformity while providing the states with an escape valve for the promotion of local interests. It is my view that this process is essential to the functioning of our federalist system, particularly at a time when Congress, largely through its use of the commerce clause of the Constitution,[3] has assumed extraordinarily broad legislative authority.

I share the views expressed by Professor Miller regarding the strength of the uniform laws process as compared with the process by which legislation is developed at the federal level. However, the fact that the Conference turns out a superior product, while important, does not fully justify its existence as an organization. The greater justification, in my mind, stems from the Conference's role as a bulwark of federalism.

As Professor Miller indicated, too much nonuniformity can turn our strength into a weakness—in his words, the uniform laws process "contains [within it] the seeds of its own demise."[4] Too much nonuniformity burdens the marketplace with unjustifiable transaction costs, and this in turn increases the pressure for a federal solution. This theme—that a strength can become a weakness—applies as well to the process of modernizing the Uniform Commercial Code. The strength in this instance is our historic success in enacting the original Code in all fifty states (although we never could get Louisiana to adopt Article 2). The weakness stems from the fact that, because the Conference has, with the Code, achieved its goal of uniformity, it hesitates to promulgate a Code revision unless there is a prospect of near-universal enactment. To do so would create nonuniformity, and this runs counter to our constitutional mission—"to promote uniformity in the law among the several states on subjects as to which uniformity is desirable and

3. U.S. CONST., Art. I, § 8, cl. 3.

4. Fred H. Miller, *The Significance of the Uniform Law Process: Why Both Politics and Uniform Laws Should Be Local: Perspectives of a Former Executive Director*, 27 OKLA. CITY U. L. REV. 507, 516 (2002).

practicable."[5] I have heard presidents of the Conference say many times that we can afford to send out a free-standing act that is controversial, but we cannot afford to do so with a revision of the Uniform Commercial Code.

A recent example of such a free-standing act is the Uniform Computer Information Transactions Act (UCITA). UCITA, which has probably generated more controversy than any act in Conference history, was promulgated in 1999 and has since been adopted in only two states—Maryland and Virginia. In 2001, the Conference initiated a process to review UCITA, and that process has led to a series of recommendations for change that will be debated at the 2002 Annual Meeting.[6] In the final analysis, the Conference may or may not succeed in gaining widespread adoption of UCITA, but even if the act itself is a relative failure as measured by the number of enactments, it may nevertheless promote uniformity by serving as a model for other legislation or by being applied by analogy in the courts.

Promulgating a controversial revision of the Uniform Commercial Code puts at risk more than the uniformity that has already been achieved. There is today a sense among legislators that adoption of a revision of the Code is inevitable. The best example of this is the recent revision of Article 9, which was promulgated in 1998 and is today in effect in all states. This aura of inevitability is important political capital that the Conference will not spend lightly.

It is doubtful whether a project on the scale of the Uniform Commercial Code could be successful in today's environment. In large measure, this is a result of our own processes, which require that we reach out to various constituencies that might be affected by a uniform law, coupled with the remarkable ability of interest groups, using modern methods of communication, to organize swiftly in order to bring pressure to bear. These interest groups are often so at odds with one another that they cannot reach a satisfactory compromise. It may also be that there is less willingness to compromise today—to see the picture whole—than in an earlier time.

Take for example the project to update Article 2 of the Code. That project began with a strong recommendation from a study committee and

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5. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 2001-2002 REFERENCE BOOK, 92 (2001).

6. In July, 2002, after these remarks were made, the Conference finally approved thirty-eight amendments to UCITA. *See*, William Henning, Fred Miller, and Michael Kerr, UCITA revisited, 48 UCC Bulletin 1 (Nov. 2002).

progressed over a decade ago to the drafting stage. Any number of representatives of various industries attended meetings of the drafting committee, as did representatives of consumer organizations. It should come as no surprise to anyone that the interests of these groups do not always converge.[7] In general, the consumer representatives prefer a regulatory approach to the law. In their view, the increased protection to individual consumers provided by what they see as appropriate regulation outweighs any resulting increase in transaction costs. Their industry counterparts generally prefer a facilitative approach, one that legitimates common business models without dictating behavior. In their view, the increased efficiency derived from this approach lowers the cost of goods, and the resulting benefit to consumers generally outweighs any injustice that might befall a particular individual. Moreover, in their view a greater level of regulation would not provide the protection sought by the consumer representatives because it would not prevent bad actors in the marketplace from continuing to take advantage of those least able to protect themselves.

Let me use the debate over standard-form contracts as an example to make this discussion concrete. From the perspective of the consumer representatives, standard-form contracts are either evil in themselves or provide a platform from which evil springs. Although the doctrine of unconscionability has been around for quite a while, it is not, in their view, sufficient to police the marketplace. They prefer that standard-form contracts be subjected to an additional test; perhaps based on a higher threshold for finding assent by the particular consumer, perhaps based on the reasonable expectations of the average consumer. From the standpoint of the industry representatives, standard-form contracts are a critical part of the engine of mass-marketing. Far from being a source of evil, they are a significant factor in making high-quality consumer goods available to buyers at all income levels. The industry representatives recognize that standard forms will occasionally go too far, but in their view the doctrine of unconscionability provides buyers with sufficient protection. Any new test would inevitably inject a higher level of uncertainty into the enforcement of their contracts, and this would inevitably raise costs.

Although I have focused on standard forms, the same arguments played out over the effect of merger clauses, the efficacy of terms not

7. This is not to suggest that industry views on each issue are monolithic, but the focus here is on the general approach of industry and consumer groups to laws that are regulatory in nature.

revealed until after payment, the ability of merchants to disclaim the implied warranty of merchantability, and on and on. More recently, the debate has centered around the extent to which the scope of Article 2 should encompass software that is contained in or otherwise associated with goods. As I stand here today, the project to revise Article 2 is between a rock and a hard place. If we do not adopt a scope provision that is minimally acceptable to the high-tech sector of our economy, we have been assured that Article 2 will face a concerted lobbying effort to defeat it in the states. We face the same problem with the consumer organizations if we fail to adopt a provision that is minimally satisfactory to them. Thus far, we have been unable to thread the needle, although efforts are continuing.[8] In the final analysis, we and our partners in all Code projects—the American Law Institute—may face the excruciating dilemma of whether to cease our efforts, thereby sacrificing over a decade of hard work, or to send to the states a revision of the Code that is unlikely to achieve near-universal adoption.

Regardless of the outcome, there are important lessons to be drawn from our experience with Article 2. In my view, by far the most important lesson is that we ought not take on a Code project unless there is a strong need for reform such that there is a likelihood that interested parties will have a powerful incentive to see the project succeed in the states. In the case of revised Article 9, advances in technology and changes in secured-financing techniques created a powerful incentive for lenders to support a modernization effort and to compromise with other interest groups, particularly those representing consumers. Put another way, the Article 9 project succeeded in large part because there was a strong wind in its sails. By contrast, the need for reforming Article 2 is not nearly so strong.[9] With the exception of the scope issue, industry and consumer groups are generally satisfied that the draft does insufficient harm to their interests to make it worth opposing, but as of today not a

8. In July, 2002, after these remarks were made, the Drafting Committee to Amend UCC Article 2 proposed that the amendments not address the issue of scope directly but that the definition of "goods" be amended to exclude "information." The proposal was accepted by the Conference which then finally approved the amendments. In October, 2002, the ALI Council unanimously recommended final approval at the Institute's 2003 Annual Meeting. If that occurs, the drafting process will be over. Whether the amendments will then face opposition in the states remains to be seen.

9. This is not to suggest that the study committee miscalculated when it recommended the drafting project. At that time, Article 2 needed to be revised to accommodate electronic contracting, a need that has since been satisfied by the Uniform Electronic Transactions Act and the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq.* (2000).

single interest group has been willing to affirmatively endorse its enactment. There is no wind in Article 2's sails, but perhaps we can yet avoid the storms of opposition and bring the project safely into port. Stay tuned!