2002

The Uniform Law Process: Observations of a Detached Participant

Andrew C. Spiropoulos, *Oklahoma City University School of Law*

ESSAY: THE UNIFORM LAW PROCESS: OBSERVATIONS OF A DETACHED PARTICIPANT

ANDREW C. SPIROPOULOS*

I. INTRODUCTION

The oddity of this essay's title is deliberate; it seems difficult to be both detached and a participant in a process, particularly as a reporter for a uniform act, a job that guarantees deep involvement in the nuts and bolts of the unique legislative process managed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). My detachment results first from the fact that NCCUSL's work generally concerns private law, and I work in public law.[1] So before becoming a reporter, other than teaching family law for several years and my relatively brief experience as a commercial litigator, I had little experience with the work, never mind the intimate details, of the NCCUSL process.

More importantly, I also am detached—and, thus, hopefully capable of objective observation and commentary—because, in general, I am

---

* Professor of Law and Director, Center for the Study of State Constitutional Law and Government, Oklahoma City University School of Law. A version of this paper was first presented at the Symposium on the Uniform Law Process held at Oklahoma City University School of Law on January 25, 2002. I would like to thank those I worked with in my capacity as Reporter for the Interstate Enforcement of Domestic-Violence Protection Orders Act, particularly the Drafting Committee chaired by Justice Marian P. Opala of the Supreme Court of Oklahoma.

1. When Fred Miller called me to ask if I was interested in being a reporter, he assured me that my public law orientation would suit me well in working with the NCCUSL process. In doing research for this essay, however, I came upon the following statement by Professor Miller: "Primarily, the Conference works in the area of private law, and it has eschewed public law and regulatory law." Fred Miller, *The View from Experience*, 52 HASTINGS L.J. 621, 622 (2001). It is a tribute to the persuasive powers of Fred that, even after informing me that the job required hard, painstaking work done on a short time frame, while balancing the demands of well-organized, highly committed and often hostile interest groups, for what Fred characterized as a "pitiful" honorarium and little thanks that I was persuaded to accept the job offered. Seriously, of course, I accepted the honor–and it is an honor–because serving as a reporter was an unparalleled opportunity for a professor of legislation to be intimately involved in one of the most interesting and important legislative processes in our legal system.

skeptical of the work of legislatures, particularly state legislatures.[2] In the age-old debate between nationalism and state rights,[3] I am an unabashed nationalist. Following the jurisprudence of John Marshall, I believe the Constitution should be interpreted to afford the federal government extensive powers because, in large part, the Framers meant for the authority of the federal government to displace that of the states, particularly in the commercial context.[4] The Framers preferred that the federal government, in matters that affected people in more than one state, exercise supreme regulatory authority because its structure, both in how its legislature is constituted and how its powers are separated, is superior to that of the state governments.[5] As (at least the early) Madison explained in Federalist No. 10, because in an extended republic, each member of the federal legislature, whether a member of the House or Senate, must represent a large group of people, that representative is less likely to be the captive of a selfish faction, or what we would call special interest groups; state legislators, on the other hand, are far more likely to be the willing agents of powerful interests who seek to benefit themselves at the expense of the majority.[6]

Thus, someone of my views should be receptive to a critique of any legislative process that relies on working through state legislatures because any such process must run a high risk of special interest group capture. Indeed, in recent years, there has been a cottage industry of scholarship criticizing, often sharply, the NCCUSL process for its vulnerability to special interest group capture.[7] As one scholar has put it, the NCCUSL process is "a public choice nightmare."[8]

In this essay, I will discuss my experience as a uniform act reporter in the context of this public choice critique of the NCCUSL process.

---

2. My critique of the product of legislatures, and how courts might improve it, is contained in Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915.

3. For a survey of this debate, consult FORREST MCDONALD, STATES' RIGHTS AND THE UNION (2000).

4. ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 105-06 (1968).

5. *See* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 45-68 (1984).

6. THE FEDERALIST No. 10, at 51-52 (Clinton Rossiter ed., 1999).

7. The most recent spate of scholarship critiquing the NCCUSL process has arisen in response to the controversies swirling about the proposed revision to Article 2 of the Uniform Commercial Code. *See* Symposium, *Perspectives on the Uniform Laws Process*, 52 HASTINGS L.J. 603 (2001).

8. Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 612 (2001).

Despite my general inclination to concur with this conception of the state legislative process, I will defend, as compared to its competitors, the soundness of the NCCUSL lawmaking process. I will define soundness as do the supporters of the NCCUSL process—the tendency of a lawmaking process to produce laws that benefit the common good, as opposed to a particular interest.[9] My argument defending the NCCUSL process will have a negative and a positive component. First, after I both set out the foundation of the public choice critique of the process and concede that some of this criticism is justified, I will show that the NCCUSL is not significantly more influenced by these groups than is Congress and far less than any individual state legislature would be. Second, I will make the positive case that the advantages of the NCCUSL process in making sound law outweigh any problems caused by the influence of special interest groups in the process.

II. THE PUBLIC CHOICE CRITIQUE OF THE NCCUSL PROCESS

The public choice critique of the NCCUSL process is founded on the simple idea that if you need a large, diverse number of groups to agree on something to accomplish your goal, the only way to obtain this agreement is give the most powerful groups what they want—or at least avoid imposing something they do not want. The pressure to cave into special interests arises from the necessary emphasis of NCCUSL on the enactibility of a proposed law—meaning how likely the law will be enacted by all, or at least a significant, majority of the states. After all, what is the point of a uniform law process if states will not enact the law? As Fred Miller has written, "[t]he function of [NCCUSL] is to facilitate uniformity of the law among the States, thereby producing benefits to the public through consistent legal rules as well as improvements in the law. It is also its function to avoid significant disadvantages that may arise from diversity of state law."[10]

The problem, however, with valuing uniformity—and hence enactibility—is that any group (or, as Madison would put it, a faction) with significant power in a significant number of state legislatures can threaten to derail the law if it does not get its way in the drafting process.

---

9. *See* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 92 (1993) ("Uniform laws are the product of a neutral group of experts whose solutions will represent the 'best' way in which to regulate the particular subject matter involved, rather than the product of political compromise.").

10. Miller, *supra* note 1, at 622.

This problem becomes especially acute when dealing with laws that will either affect a large number of groups who together represent a sizable number of constituents or a few groups that are especially powerful in the legislative process. Laws that regulate commercial activities would seem, for example, to involve precisely the kinds of policy decisions that will invite special interest maneuvering.[11]

One example of this phenomenon is the troubled proposed Article 2 revision, in which, after twelve years of work, a draft that was approved by the American Law Institute (ALI) and placed on the agenda for consideration at the 1999 NCCUSL annual meeting was withdrawn, because, it has been speculated, of objections by large companies with potentially great influence in state legislatures.[12] (The companies involved were so called "strong sellers," companies who, in relation to their customers, are in a superior bargaining position.) The former reporter for the revision, Richard Speidel, has alleged that

> [d]espite losing before the Drafting Committee and the ALI (and, in all probability, before NCCUSL membership), the strong sellers opposed the revision, and it appears, threatened to oppose it when proposed for enactment by the States. At this point, NCCUSL leadership knuckled under and pulled the draft that they and the ALI concluded had "gotten it right."[13]

The "strong sellers" killed the revision, Speidel believes, because their pure economic self-interest (as opposed to any concern for the common good) led them to prefer the current Article 2 to any revision that would arise out of the NCCUSL process (at least as it was then headed).[14] He concludes, "[g]iven this preference for the status quo (and with no interest group lobbying for revision), the strong sellers were

---

11. *See* Patchel, *supra* note 9, at 162 (discussing, in particular, the strength of business special interest groups compared to consumer groups in the NCCUSL process).

12. Scott J. Burnham, *Foreword,* 52 HASTINGS L.J. 603, 604 (2001) (stating that the former reporter for the revision has alleged that "the prime suspects in the death of Revised Article 2 were the 'strong sellers' who convinced an accommodating NCCUSL leadership that even if they got it right on the law, they would never be able to get it enacted by the States.").

13. Speidel, *supra* note 8, at 618.

14. *Id.* (Speidel argues, "Limited only by the porous doctrines of unconscionability and good faith, strong sellers are able to shape the contract to fit their interests, particularly where small business and consumers are involved.")

content to dig in their heels and resist any change of substance, especially if it improved the position of weaker buyers."[15]

This disproportionate influence by powerful special groups over the NCCUSL process does not result, the critics argue, simply from the usual influence well funded and well organized interest groups possess. They argue that the particular structure of the NCCUSL process magnifies the power of these groups and gives them more control of the process than they would normally wield. As the above statement from Speidel indicates, part of the reason why the strong sellers were successful in scuttling the revision was the absence of any strong voices in favor of the proposed revision. Speidel argues "there was never a group of sellers or buyers or consumers (or anyone) who strongly supported and pushed for the revision of Article 2."[16] This one-sided dialogue arises particularly with uniform laws dealing with commercial matters—the meat of the uniform law process—because, Kathleen Patchel argues, the process "at both its drafting and its enactment stage, exacerbates inherent organizational disadvantages under which consumer interests operate."[17] Put another way, if the critics are right, the NCCUSL process makes the disease most incident to popular government—the ability of well organized and self-interested groups to influence legislation in a way that benefits them at the expense of the public—worse. In the NCCUSL process, it appears, the rich get richer and the poor get less.

How does the structure of the process favor well-positioned groups? The first element of NCCUSL opponents' structural critique is what one of them calls "pay to play."[18] The "pay to play" problem arises because the NCCUSL drafting process relies on several drafting committee meetings (generally two to three a year), in addition to review by the entire NCCUSL membership at at least two annual meetings, all held at different locations around the country.[19] The committee meeting are rotated to different locations because the members of the committees are NCCUSL members from all over the country. (NCCUSL, one surmises,

---

15. *Id.*

16. *Id.* at 617.

17. Patchel, *supra* note 9, at 162.

18. Gail Hillebrand, *What's Wrong with the Uniform Law Process?*, 52 HASTINGS L.J. 631 (2001).

19. Miller, *supra* note 1, at 625. As Miller indicates, most acts are completed in two years, but, with regard to particularly important or complex acts, can take much longer. In the case of my project, for example, in the course of my two years as a reporter, I attended meetings in Wilmington, Del., Los Angeles, Denver, Dallas, Houston, and St. Augustine, Fla.

believes it would be inequitable for some conference members to always have to travel far for work on a particular committee while others would not.) The holding of frequent meetings at various locales, critics argue, is a prohibitive cost for many groups who wish to participate, and worse yet, allows only the wealthiest interest groups to send their representatives to meetings. Consumer or other non-profit groups, for example, cannot afford to participate fully in NCCUSL drafting sessions. The result of this structural defect is that there is an imbalance in whose views are represented before the drafting committees. NCCUSL prides itself, and indeed relies, on the open access to all groups to its drafting process,[20] but it is open, as Gail Hillebrand has colorfully put it, "in the same sense that the San Francisco single family housing market is open to all"—theoretically anyone can buy a house there, but only very few can afford it.[21] The result is that when the hard work of making policy choices and drafting language is done only one side is represented in the room—the interest groups with the resources to be there.[22] Because it is difficult to influence the outcome of any legislative process without forming the personal relationships and providing the direct input made possible only by personal contact with the actors in the process, groups that cannot take advantage of the access offered by NCCUSL too often lose out to those that do.[23]

Another structural problem raised by critics is that, while NCCUSL drafting committee meetings are generally open to any group that is interested in participating in the process, the meetings are not open to the public or the press.[24] NCCUSL, therefore, does in some sense do its

---

20. *See id.* at 627 ("Broad participation is a good thing. It makes the statute substantially better. It often also leads to a consensus, because the parties around the drafting table hear the concerns of others and become familiar with those concerns, and therefore are better able to reach a compromise.").

21. Hillebrand, *supra* note 18, at 638.

22. Hillebrand identifies a potential, related problem. The NCCUSL process relies on the production of large number of drafts. (Each meeting, for example, generally considers new drafts, and there are often drafts in between.) Keeping track of and reviewing these large number of drafts can consume a good deal of institutional and personal resources. *Id.* at 635. It stands to reason that the interest groups with greater resources will be more able to devote the necessary time and manpower to review and comment on the drafts, increasing their influence on the process. I know in my experience as a reporter that several groups that were unhappy with one aspect or another of our work expressed the opinion that earlier versions did not have the problems complained of, and they did not for some reason realize that changes had been made.

23. *Id.* at 637.

24. Patchel, *supra* note 9, at 145-46.

work in secret. The relative lack of public accountability, one can argue, emboldens special interest groups who prefer to keep their motives and maneuvers hidden.[25] They can, in the secrecy of the committee meeting, press their case without any fear of their interests being exposed to the public. Once the legislation moves through the NCCUSL process and goes on to the state legislatures, their role is well hidden from the eventual political decisionmakers.

The bottom line of these criticisms is that the NCCUSL process makes it far too easy for interest groups representing the wealthy and powerful to obtain legislation they want or to block legislation they do not like. Because the powerful groups are often the only ones in the room with the drafting committee and they can press their claims—and threats—without public exposure of their tactics, both the members of the drafting committees and the NCCUSL leadership, who are, one must remember, concerned with, above all, the enactibility of the law, are likely to cave into the demands of the groups. As Speidel describes with regard to the Article 2 revision, while most independent observers agreed some revision was necessary, "[e]xcept for the Drafting Committee and the Reporters, no one devoted much effort to systematic advocacy for revision. This relative indifference made it easy for the strong sellers that opposed the revision to either block the project or recycle the revision until it died a natural death."[26]

Even in those situations where NCCUSL succeeds in encouraging full participation in the debate on particular legislation another serious problem may arise. Because, once again, NCCUSL must always be concerned with the enactibility of legislation, it cannot afford to ignore the views of any committed group that has the power to derail the legislation in a state or group of states. Given the economic and cultural differences between states, groups on different sides of a question can influence legislatures in different areas of the nation. Enactibility, therefore, can depend on satisfying antagonistic sides of the legislative debate. The easiest way to achieve compromise between opposing forces is to write general language that does not resolve the question either way, thus resulting in what Robert Scott calls "formal" (as opposed to substantive) uniformity.[27] Rather than providing a clear,

---

25. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 251-53. (1986).

26. Speidel, *supra* note 8, at 617.

27. Robert E. Scott, *Is Article 2 the Best We Can Do?*, 52 HASTINGS L.J. 677, 684

understandable rule for all to follow, NCCUSL product too often results in vague wording that is subject to differing judicial interpretation. Aside from defeating the goal of uniformity, this recourse to "lowest common denominator" legislation may result in less certain and effective rules than existed before enactment of the uniform law. As Robert Scott argues with regard to Article 2, "those uniformly adopted Code rules are so vague and so ill-defined that their primary effect is to delegate broad, perhaps unfettered discretion to courts."[28]

If one accepts, however, that powerful interest groups are capable of disproportionate influence over its work, the best alternative for NCCUSL, assuming that it wishes to promote legislation that advances the common good, may be to employ vague language in the hope that judges will later do the right thing and interpret in the law in a way favorable to the public. The choice presented in this scenario, however, is certainly an unpalatable one. As Scott puts it, the process either produces "mush, which gives you formal uniformity but no predictability, or you get what the dominant interest group wants, and you hope that they want the right thing."[29]

These arguments certainly paint a bleak picture, too bleak in my view. Before, however, I discuss why the NCCUSL process is, contrary to the critics, a sound one, I must concede that my experience as reporter did reveal that there is some truth, perhaps a good deal of it, to the arguments made by the critics. For example, it is true, in my view, that powerful interest groups do have a tremendous influence on the drafting committee both because of their very presence in the drafting sessions and because of their ability to fight enactment of law in the states. The best illustration I witnessed in my experience as the reporter for the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act (the Act)[30] of the power of special interest groups in the NCCUSL process came in our second drafting committee. Our first meeting, in September 1999, where I set out the issues facing the committee in drafting a statute providing for the interstate enforcement of protection orders, was attended by representatives by two interest groups. One

---

(2001). Scott contrasts formal uniformity, in which states just enact the same vague general standard, to uniform substantive rules that actually resolve legal questions.

28. *Id.*

29. *Id.* at 682.

30. An annotated version of the Act, as approved by NCCUSL at its 2000 annual meeting, appears in *Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act (with Prefatory Note and Comments by Andrew C. Spiropoulos)*, 35 FAM. L.Q. 205 (2001) [hereinafter *Domestic-Violence Protection Orders Act*].

person represented one of the leading organizations pressing for the strongest possible laws against domestic violence. The other person represented the interests of men's rights in the legal system. As one might surmise, the discussions over how to proceed with the Act were at times quite heated. I also believed, however, between the two sides, that the committee received a balanced analysis of the difficult questions concerning the Act. The decisions reached at the first meeting, and thus the first draft that resulted from it, were marked by a good faith attempt to carefully weigh the need for effective protection for victims of abuse, the duty to protect the rights of those accused of abuse, and the need for a coherent system of keeping track of these orders.[31]

The anti-domestic violence interest groups, however, were not the least bit pleased with the first draft of the Act, and they organized to let the drafting committee know just how displeased they were. When the second drafting committee meeting convened to discuss the first draft, instead of one person from one interest group, on my count, they faced at least five people from four separate interested parties, including an important official from the United States Department of Justice (DOJ). No one from the other side showed up.[32] The resulting meeting and next draft went as the critics of the process would expect; the drafting committee altered the Act in precisely the manner the interest groups demanded.[33]

From this account, it may seem obvious that the drafting committee just listened to the loudest voices. As someone who, first, without a position on many of these questions, but was acting as the reporter for the committee, and, second, was in the room, I can say that my impression was that on many issues the committee was genuinely persuaded, not intimidated, by the advocates. They are, after all, the experts in the field, and we were not. But I would give the critics of the NCCUSL process their due. I do think that the debate might have turned out differently if other groups who opposed the advocates' position were

---

31. The draft, for example, allowed victims to immediately enforce protection orders upon arrival in a state, but, after thirty days had passed, were required to register the order with the local authorities. *See* UNIF. INTERSTATE ENFORCEMENT OF DOMESTIC-VIOLENCE PROTECTION ORDERS ACT § 2(b) (Draft February 1999) (on file with author).

32. In fact, they never showed up again. In my opinion, one of the reasons for this absence, and one that buttresses the case for the critics of the NCCUSL process, is that the men's rights representative was working pro bono for the group, while, of course, the advocates for the other side were paid, full-time employees for their organizations.

33. *See* UNIF. INTERSTATE ENFORCEMENT OF DOMESTIC-VIOLENCE PROTECTION ORDERS ACT § 2(b) (Draft April 1999) (on file with author).

in the room. More importantly, it did appear to me that one of the most important reasons for the committee's decisions did not involve the merits of the arguments; they accepted the advocates' demands because they believed that the Act could not be enacted if the anti-domestic violence interest groups opposed it.[34]

In sum, then, the NCCUSL critics have a point; drafting committees, in making their decisions, do, independent of what is the right answer, take into account the ability of interest groups to prevent enactment of the statute when making policy decisions. But it is also fair to ask what legislator does not take into account the political viability of a statute when making their decisions? After all cannot one argue that in democracy, if a statute cannot be enacted, it is a fairly good indication that it is not sound legislation?[35] Notwithstanding this point, however, one must concede that enactibility does lead to the possibility that interest groups can exercise, at the very least, a veto against good legislation.

I must also concede the truth of another element of the critics' case. When faced with controversial issues, the committee I served did resolve several knotty debates by using general language that will have to be interpreted by future courts. One example will suffice. When determining which kinds of protection orders should be enforced under the Act, the drafting committee decided that only domestic-violence orders, as opposed to protection orders issued in other contexts, should be enforced under the Act. But how should a domestic-violence order be defined? Does it include roommates? Is an order issued by a criminal court protecting a spouse a "domestic-violence" order or a criminal order? How about single-sex relationships? Rather than make these difficult decisions, the committee instead decided that the Act would simply state that enforceable protection orders are orders "issued by a tribunal under the domestic-violence or family-violence laws of the issuing State," thus leaving to the courts to determine whether the order in question qualifies under this general standard.[36] Thus, the committee

---

34. Surprising as it might seem, some anti-domestic violence groups have voiced opposition the Act even after, in my view, winning almost of what they wanted from the committee. Proposed amendments of the Act, undertaken after consultation with DOJ, may serve to alleviate the final concerns of the groups. *See* Proposed 2002 Amendments to Act, *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm [hereinafter Proposed 2002 Amendments].

35. Henry Gabriel, *The Revision of the Uniform Commercial Code—How Successful Has it Been?*, 52 HASTINGS L.J. 653, 664 (2001).

36. *Domestic-Violence Protection Orders Act*, *supra* note 30, at 212 (Section 2(5)).

did do what the critics accuse; they avoided the hard interpretive questions, and attempted to put off more interest group squabbling, in the hope of crafting a statute that would be enacted.

III. RESPONSE: WHY THE NCCUSL PROCESS WORKS

It may appear that I have conceded so much of the critics' case that the independent observer would have to conclude that the NCCUSL process is indeed fatally flawed. This conclusion would be reasonable if one were comparing this process to an ideally designed one. Compared, however, to the existing alternatives, the legislative process developed by NCCUSL is a sound one that, when working as it should and in the areas in which it is designed to operate, is more likely to result in sound law than a pure state legislative process or even the federal legislative process. My argument will divide into two parts: first, I will directly respond to the public choice critique of the NCCUSL process, demonstrating that the critics' case is overdrawn; and second, I will make the positive case for why the special nature of the NCCUSL process results in superior lawmaking.

A. The Weaknesses of the NCCUSL Process are Exaggerated

My first response to the critics is to point out that the public choice critique of NCCUSL is just as applicable to any democratic legislative process. The success of well-organized, relatively wealthy interest groups against those who stand for the concerns of less organized, but more representative, interests is a standard axiom of the political science and legislation literature.[37] While some of the critics concede that the state legislative process suffers from the problem of interest group influence, they argue that the Congress is less susceptible to interest group pressure, particularly from business interests.[38] The political

---

The DOJ, it should be noted, has objected to the vagueness of the provision, and has asked that this section be amended to specifically reference anti-stalking law. *See* Proposed 2002 Amendments, *supra* note 34.

37. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 85-88 (2000).

38. Patchel, *supra* note 9, at 148-49 ("State legislatures tend to be more susceptible to special interest groups representing business interests. This phenomenon is reflected in the substance of state legislation, which tends to favor these interests over those of consumers. On the other hand, since the founding of the nation, federal legislation has been suggested as the cure for undue influence by factions, as the greater number of interests represented in the national legislature tends to operate to dilute the power of

science literature, however, demonstrates that business groups also wield disproportionate influence in the federal legislative process.[39]

Indeed, one would expect nothing less, for it can be argued that the Constitution was designed precisely to allow powerful interest groups, including—if not especially—those representing business interests, to block legislation that affected their rights. It is part of the genius of the Madisonian system of complex checks and balances that throws up multiple barriers, (e.g. bicameralism, the committee system, the filibuster, the executive veto) to the passing of laws, or what many scholars call "vetogates,"[40] that these mechanisms allow interest groups to often defeat legislation. Failure to pass legislation that may advance the common good is the price Americans are willing to pay to prevent the passage of laws that deprive minorities of rights.[41] There is good evidence to believe that Madison, for one, expected—and, in deed, welcomed—that business interests would often prevail in the legislative process.[42] Federal legislators, therefore, must be just as sensitive to the concerns of large interest groups as a NCCUSL drafting committee if only because the opposition of a single major group, using the vetogates, can sink a piece of legislation. If Article 2 were federal legislation, does anyone doubt that Congress would have been sensitive to the objections of the strong sellers?

The second criticism of the NCCUSL process that is exaggerated is the problem of the use of general terms. While it is true that the use of general language, or standards over specific rules, does lead to ambiguity that must be resolved by judges, the advantages of drafting in this manner are often taken for granted. The obvious ones, particularly for NCCUSL, are, first, that a general provision allows all groups to support the proposal and, second, that these provisions, even if they are subject to differing interpretations, have a "longer shelf life," thus facilitating

---

special interest groups.").

39. One study, for example, found that the Washington, D.C. interest group community is heavily oriented toward business interests; seventy percent of all organizations having a presence in the city and fifty-two percent having an office there represented business interests. ESKRIDGE, FRICKEY & GARRETT, *supra* note 37, at 85.

40. *Id.* at 68.

41. *Id.* at 83-84.

42. THE FEDERALIST NO. 10, *supra* note 6, at 47 ("A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.").

longer term uniformity of the law.[43] But there is another advantage of general provisions that the critics sometimes forget. When dealing with difficult questions of law, often what makes them difficult is that under one particular set of facts, one wants one result and in another the opposite. The failure to agree on a specific rule in such a situation, thus, does not result from interest group stalemate; it comes from the real difficulty of the problem. In the example I gave earlier from the Act, for instance, the truth is that it is extremely difficult to define exactly which kinds of state laws are domestic-violence or family-violence laws. Some states may have easily identifiable laws against domestic violence, but others may rely on more general laws to do the same task. Rather than promulgate a complex definition that may not fit the facts of the cases as the drafting committee intended, it was best to state the principle in general terms and allow judges to implement it as the cases arise.

My final defense of the NCCUSL process against its critics is to remind them that, unlike in the federal legislative process, the NCCUSL process possesses a "safety valve" against special interest group capture in the enactment process in each state. While, of course NCCUSL does not encourage, and, in fact, argues against any deviation from the uniform act approved by the NCCUSL,[44] the fact remains that groups who believe that they were mistreated by in the NCCUSL process, unlike in the winner take all federal system, may take up their argument in the individual state legislatures. With regard to the Act, for example, when the anti-domestic violence organizations were unhappy with the way the Act treated the enforcement of orders issued by criminal courts, they, as the bill has been considered by state legislatures, have, with some success, lobbied the states for more aggressive enforcement of these orders than that afforded by the Act.[45] Thus, any interest group that lost when a uniform act was drafted can try to persuade legislators in a state where the opposing interest groups are not as strong to pass a different version of the statute, providing a check on those groups' power.

---

43. Miller, *supra* note 1, at 628.

44. *See* Marianne B. Culhane, *The UCC Revision Process: Legislation You Should See in the Making*, 26 CREIGHTON L. REV. 29, 57 (1992). What NCCUSL prefers, if there is sufficient resistance to a provision in a uniform act as it winds its way through the enactment process, is that the question of amendment be referred to its "standby" committee on the act in question. *Id.*

45. *See Domestic-Violence Protection Orders Act*, *supra* note 30, at 217 n.18.

B. The NCCUSL Process Has Important Strengths

The most persuasive case for the soundness of the NCCUSL process is founded upon the special features of the process that positively increase the likelihood that it will result in good law. Most importantly, the process is designed so that the drafters (including the reporters) represent a balanced perspective, with an orientation toward the common good, not the serving of particular interests. Drafting committees are composed of people with different legal perspectives, typically law professors, practicing attorneys, and judges.[46] The reporter (and chief drafter) is most often an academic whose role is not to advance any particular agenda but is instead to organize and present a fair account, through thorough research and analysis, of the important legal and policy questions facing the committee, ensure that the committee addresses each of the important questions, and then fairly translate the policy decisions of the committee into coherent and accurate statutory language.[47] In carrying out their task, reporters heavily rely on scholarly advice from other academics, including those on the committee, those who hold NCCUSL leadership positions, or those who are interested observers.[48]

In addition to the relative neutrality of its participants, the process is an exceptionally open and deliberative one whose primary (although not only) goal is to reach the right answer to legal and policy questions. My experience is that, while you may have to "pay to play,"[49] the access you receive—the bang for the buck, if you will—is extraordinary. Unlike in the federal legislative process, where you have to beg a legislator or staffer to see you, or if you do participate in a hearing, it is just to testify at a "show" proceeding while the real work is done behind closed doors or at a "markup" session in which you cannot participate, observers routinely directly participate in the drafting process. Fred Miller quotes an observer who has put it well: "I would rather be a participant than an applicant."[50] NCCUSL will send drafts and meeting notices to anyone

---

46. *See* Carlyle C. Ring, Jr., *The UCC Process–Consensus and Balance*, 28 LOY. L.A. L. REV. 287, 294 (1994).

47. *See id.* at 295.

48. *See id.*

49. Contrary to the critics, however, I would say that the costs of attending a NCCUSL meeting are reasonably low. The meetings are generally held in a medium range hotel that has offered a generous discount to the group. *See* Miller, *supra* note 1, at 625.

50. Fred H. Miller, *The Significance of the Uniform Laws Process and Why Both Politics and Uniform Laws Should be Local: Perspectives of a Former Executive*

who requests inclusion on the mailing list. Anyone who attends a drafting committee meeting is encouraged to directly participate; observers frequently suggest language and critique the suggestions of others on the spot.[51] The debate is open and meaningful. Observers, in effect, are treated as legislators.

In between meetings, NCCUSL goes to great lengths to make sure everyone has an opportunity to review and comment upon proposed legislation. Drafts are immediately available on the Internet, and reporters encourage comments and suggestions.[52] Because the primary drafters are academics, not politicians, they are far more likely to consider and incorporate suggestions. They do not check to see if you have donated any money to a campaign before allowing you access; they give it for free and welcome your help. Thus, even if one is not able to attend drafting committee meetings, NCCUSL facilitates, and, again, actively welcomes, full participation in the drafting process.

Even the critics of the process agree that, by and large, the NCCUSL drafting committees and reporters are balanced and are not predisposed to favoring particular interest groups.[53] While each member of a drafting committee and the reporter certainly have their own political preferences, the committee's preferences, in my experience, generally balance each other, and, in any event, none of the committee members are there to serve a particular interest. In sum, the NCCUSL process begins with a considerable advantage over typical legislative processes; the decisionmakers really aspire to do the right thing and are willing to listen to anyone who will help them do that.

The second advantage of the NCCUSL process is the one that most surprised me: the real and special expertise of NCCUSL members. The membership of NCCUSL consists, mainly, of four groups: private practitioners (who make up about 60% of the membership), state and local government lawyers (14%), judges (9%), and academics (16%).[54] Their background and expertise is in the day to day functioning of the courts and practice of law in the states. Unlike the congressional solons in Washington who know little and care less about how law works and is practiced outside the heady world of large law firms and the federal

---

Director, 27 OKLA. CITY U. L. REV. 507, 510 (2002).

51. *See* Ring, *supra* note 46, at 296.

52. Miller, *supra* note 1, at 626.

53. Gabriel, *supra* note 35, at 663.

54. Miller, *supra* note 1, at 622. About ten percent of these members are also state legislators. *Id.*

bureaucracy, the members of NCCUSL know and care about local legal procedures, technical (but important) legal requirements, and how law is actually enforced.

In addition to their special expertise, members possess a cast of mind that is conducive to fair resolution of hard questions. Unlike the highly political and ideological federal legislators and staffers, because of the habits developed in the ordinary practice of law, NCCUSL members tend to be moderate in their approach to difficult questions; they are problem solvers, not ideologues. Consequently, they may have to be educated on policy matters, but they can save you from many elementary errors in the implementation of policy into law. Their knowledge of the existing legal system is indispensable in understanding what the practical effects of a new law will be and how the new law can be integrated in the existing system. In the words of Fred Miller, "the uniform laws process is well suited to smoothly fit the new legal tile representing the uniform law, which derives from the diversity of thought in the states, into the overall existing legal mosaic or structure that is state contract, property, or other fundamental law."[55]

Let me illustrate this point with two examples from my own experience. The first illustration concerns a seemingly minor point. In considering the problem of when law enforcement officers, faced in the field with a request to enforce a protection order from another state, discover that the order has never been served upon the individual subject to the order, the drafting committee decided that the law enforcement officer should serve the order.[56] Several NCCUSL members, in the course of debate on the Act, pointed out that in some states law enforcement officers are not authorized to effect service of process; the committee thus carefully drafted the provision to provide only that the officer must make "a reasonable effort" to effect service.[57]

A second, more central, example concerned the interstate enforcement of criminal orders. The congressional act that inspired the promulgation of the Act appears to require states to afford unlimited enforcement of these orders, and the DOJ took the position that this enforcement is indeed required.[58] The drafting committee, however, from the very first, understood, that the interstate enforcement of

55. Miller, *supra* note 50 at 511-12.

56. *See Domestic-Violence Protection Orders Act*, *supra* note 30, at 221 (Section 4(c)).

57. *See id.* at 224 n.30.

58. *Id.* at 217 n.18.

criminal orders that provide for the revocation of bail, probation, or parole on motion by the state would present severe practical difficulties. How does one state revoke bail or probation in another state? Congress never identified or understood the problem; the committee, because of the background and expertise of its members, realized the problem and made a good faith effort to solve it.[59]

Finally, another strength of the NCCUSL process is the careful attention to drafting its process allows. While critics complain of the length of time (at least two years) and the large number of drafts involved in the process, the fact remains that this intense attention to detail, and review by many eyes, allows for more frequent identification and correction of the errors and failure to anticipate problems that plague any legislative process. Even after the NCCUSL's involvement ostensibly ends, when states take up the acts, the legislation can still be corrected. In the Act, for example, even after two years and multiple drafts, there was a simple error concerning the enforcement of ex parte protection orders that none of us involved in the process picked up. It was, however, identified in one of the local enactment efforts and I am confident that the problem will be corrected.[60] One can only hope that some day Congress and the state legislatures will be as dedicated, and as efficient, in correcting their errors.

IV. CONCLUSION

The NCCUSL process is not broken; it is an invaluable tool for the drafting and passage of sound law. This does not mean that there are no disadvantages to the process or that those who run it do not need to think hard and act well in order to maximize its advantages and minimize its pitfalls. In conclusion, I will discuss three important considerations that, if attended to, will make the NCCUSL process work at its best.

First, it is imperative that those who supervise the drafting process, particularly the chair of the drafting committee and the reporter, act as honest brokers, not partisans. The process works best when the chair and the reporter, rather than act on a personal agenda, instead provide open access to all who are interested in the statute and seek to make decisions by consensus, rather than bare knuckles politics. As Fred Miller, who

---

59. The committee's solution was to allow the enforcement of only those orders that recognize the standing of a protected individual to seek enforcement of the order. *Id.* at 214 (Section 3(b)). For a full explanation of the committee's thinking, see *id.* at 216-18.

60. *See* Proposed 2002 Amendments, *supra* note 34.

understands this process better than anyone, has stated: "[m]uch depends on the Chair of the Drafting Committee establishing the groundwork for consensus and making sure decisions are made openly; on the Reporter being viewed as trustworthy and objective; [and] on the drafting committee members becoming experts and working for compromise among the views they represent."[61] The key to producing statutes that both serve the common good and will be enacted by the states is that they must arise out of a true consensus among the interested parties; only a consensus oriented process will result in a product that fairly balances the concerns of all.[62]

Second, to achieve that necessary consensus, NCCUSL must actively solicit the views and participation of all interested parties in the particular legislative process. While NCCUSL, as discussed above, does an excellent job of welcoming input and facilitating participation of those who seek to be involved, NCCUSL must do better at actively soliciting, rather than just permitting, the participation of observers. The more involvement by more people sooner in the process, the more likely it is that the needed consensus will be reached.[63] As others have noted, it is particularly important that lawyers working with state and local bar groups, who will be influential in state enactment and eventual implementation of the law, become involved in the process and serve as a bridge between NCCUSL and the practicing bar.[64] The fundamental strength of the NCCUSL process is its inclusiveness; NCCUSL should seek to maximize that advantage.

Finally, I think that it is important that NCCUSL recognize that its process, sound as it is, does not work in every area of the law. NCCUSL should take on projects in areas of law, such as technical commercial law and full faith and credit questions (e.g., enforcement of judgments or out of state orders) that are core functions of the day to day workings of the legal system and, thus, where the expertise of its members is most useful. NCCUSL should stay away from policy oriented, ideology laden areas of law, such as the regulation of intellectual property (particularly, for example, as it relates to cyberspace.) In those areas, where technical legal expertise is not as central to the resolution of the issues and the

---

61. Miller, *supra* note 1, at 629-30.

62. *See* Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1715 (1999).

63. *See* Culhane, *supra* note 44, at 54-55.

64. *See* Fred H. Miller, *Realism not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 724 (1998).

participants are less likely to reach a consensus, the advantages of the NCCUSL process are greatly reduced.[65] Members of the drafting committees, even if they seek balance, have difficulty, in areas where they do not possess equal expertise, responding to the attacks of self-interested observers. Thus, it is more likely that the committee will just go along with the group that makes the most trouble or, when the antagonists are evenly matched, no consensus will be reached and, thus, the process will break down.

In sum, the critics of the NCCUSL process are not entirely but are mostly wrong; the process, when operating properly and used in the areas for which it was designed, is an invaluable tool for the drafting and enactment of good law.

65. Scott, *supra* note 27, at 683 ("[W]e need to remember that . . . the uniform laws process would work well when it focused on projects that required technical expertise but did not involve fundamental value choices.").