Observations of an Observer

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I. THE ROLE OF OBSERVERS

This article reflects the perspective of an outsider who has observed the uniform law process and studied some of its finest products for over 30 years, but has never been a Commissioner of the National Conference of Commissioners on Uniform State Laws (NCCUSL) or (until May, 2002) a member of the American Law Institute (ALI) or any of their Drafting Committees. Thus, these comments are entirely personal and unofficial, unencumbered by either a shared agenda or any inside knowledge of the uniform law process. But they are the perspectives of an experienced observer, who has witnessed the workings of the uniform law process in a variety of contexts over a period spanning several decades.

In the pecking order of the uniform law process, the position of observer may be perceived as the lowest rung. It can be assumed by anyone, without qualification, who is interested enough to show up at a meeting and join the proceedings, but this understates the importance of

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1. At the 2002 Annual Meeting of ALI in May, 2002, after this article was written and presented as part of a symposium at Oklahoma City University School of Law on January 25, 2002, your author was elected a member of the ALI. At the 2002 Annual Meeting of NCCUSL on July 26-August 2, 2002, your author was appointed Reporter for a NCCUSL drafting committee charged with drafting a Certificate of Title Act (COTA).
such participation. For example, a number of high achievers within the NCCUSL process have started out just this way: by showing up and joining in. Extraordinary as it may seem, the uniform law drafting process is entirely open and, as noted below, the solicitude for the views of the most casual observer is quite remarkable. Thus, almost anyone can make a positive contribution. This is the essence of the participatory nature of the uniform law process, and something that distinguishes it from legislative and regulatory processes.

The uniform law process is sometimes derided for its "drafting by consensus" approach, but it is this approach, together with the participatory nature of the process, that helps distinguish uniform laws from other statutes and regulations. As a result of this approach, uniform laws tend to be descriptive of societal customs, mores, and expectations, rather than an exercise in social engineering. This reflects the common law model of society, in its most democratic form, as opposed to the polar alternative of an elite imposing its vision of the future on an unwilling public.

It may seem ironic that this most democratic of law-making processes is not based on the election of representatives, but upon reflection the reason is obvious: The only process more democratic than that of elected representatives is a process that allows the direct representation and participation of interested parties. That is what the uniform law process does, and a key to this participatory nature is the open-ended role of observers in a "drafting by consensus" process. In effect, this requires a reasonable consensus among all participants, including observers. The result is a uniquely democratic process.

Of course, being an observer is not the same as serving on the drafting committee, or even being a slightly more elevated "advisor" to the process (though in your author's experience the distinctions between advisors and observers tend to be largely formalities that fade in significance as the process unfolds). The single most important point to be made here is that the role of ordinary observers is strikingly important. This is a point that has continually surprised your author and other participants in various contexts over the past decade, and is a feature almost entirely alien to other political processes which typically, in contrast, are highly structured and wholly hierarchal. A primary purpose of the uniform law drafting process is to identify divergent views and, to the greatest extent possible, resolve them by consensus.

prior to enactment efforts. Divergent views are solicited, and seriously considered on their merits.

Thus, the uniform law process is something of a political phenomenon. In the uniform law process, consensus is essential and thus the most humble observer is important, can be heard, will be listened to and treated with respect, and can make a real contribution based on the merits of his or her position. This does not mean that every session is a love-fest, or that every observer will carry the day on every point, or that insulting comments by lawyers and academics will be in short supply.\(^3\) However, it is pretty clear that an ordinary observer without any political power-base will be accorded much greater deference in the uniform law process, based ultimately on the merits of his or her contribution, than if that same person showed up at any legislative or regulatory hearing in the land.

This is due partly to the make-up of NCCUSL drafting committees. These consist of NCCUSL Commissioners who may or may not be specialists in the area of law under consideration, but almost certainly cannot be specialists in every aspect of the issues being considered. Even a NCCUSL Reporter, who is almost certainly knowledgeable in that general area of law, cannot be an expert on every issue. Yet a major strength of the process, as compared to alternative legislative and regulatory processes, is the ability of the uniform law drafting process to account for the interrelation between different sources of law on specialized issues and to integrate the proposed uniform law into this overall legal environment. This is a hallmark of the uniform law process, an accomplishment that has been demonstrated consistently for over 100 years in the results of that process.

One reason for this success is the participation of observers who are likely to be participating precisely because they are experts in the various areas of law being impacted by the proposed revisions. The ability to draw such specialists to an unremunerative and likely frustrating endeavor is another extraordinary hallmark of the uniform law process. Moreover, the narrow interests of individual observers are likely to be balanced by opposing interests of others in the same field, who are also able and willing to participate due to the open nature of the process. The typical result is a participatory, if sometimes acrimonious, debate between knowledgeable observers, none of whom has any direct political authority in the process, with the arbitrators of the result being members of a drafting committee with considerable general knowledge

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3. Some things will never change.
but little or no personal interest in the outcome outside the merits of the issue.

No side can win based on the tactics that are often decisive in legislative and regulatory battles, and the merits of the issue represent the primary basis for a compromise based on consensus. If, for any reason, the drafting committee should choose to ignore merit (or, in fact, even if it focuses entirely on merit), all realize that its decisions will be tested in the scholarly media by an outpouring of critical analysis and commentary, and later in the legislatures. Any deficiencies will be glaringly revealed, and the prospects for consensus, approval, and enactment significantly diminished. Thus, reporters and drafting committees have strong incentives to listen to all observers and to address their concerns on the basis of the widest possible consensus. This is not just a political theory; this is the way it works. The divergent views of observers interact with the desire of the drafting committee to achieve consensus in an open process; the role of each is essential to the other: Observers are important to the drafting committee's effort to achieve consensus, and the drafting process provides an important means for observers to participate in forging that consensus. The results can be extraordinary: uniform laws that are far superior to other legislative and regulatory products, in terms of draftsmanship, substance, consensus, and usefulness. After 100 years of such success, it is clearly no accident, and the role of observers is an important part of the explanation for this success.

Thus, while the observer is far from being King of the Hill, observers are accorded a surprising, and possibly unique, deference in the uniform law process. It is part of what makes this the most democratic and effective law-drafting process yet devised.  

II. A BACKWATER OF THE LAW?

It is an interesting historical phenomenon that important public policy innovations often do not come from the established intellectual and political centers created for that purpose. This is a phenomenon that

4. The cost of traveling to attend meetings has been cited as a barrier to such participation, but surely this is the least costly barrier to participation of any law-drafting process in the world. The movement of NCCUSL meetings around the country means that participation will be inexpensive and convenient to nearly everyone to some extent, and avoids the bias in favor of the Washington, D.C., area that is inherent in federal legislative and regulatory processes.
cuts across scientific, commercial, and political lines, and examples are legion. Many of the most important scientific discoveries and inventions have come from individual efforts at the fringe of major scientific institutions. The first successful, heavier-than-air, manned flight came from two bicycle mechanics rather than from the well-funded competing programs of several major institutions. Henry Ford and Walter Chrysler created the modern automobile industry by their individual efforts outside the automotive mainstream, and today the world’s most desirable automobiles come from enterprises that barely existed forty years ago. The leading producers of business calculators thirty years ago have now disappeared from the scene, replaced by higher-tech entrepreneurial start-ups that did not exist a generation ago.

And so it goes in the world of law and politics as well. When Lord Mansfield and his colleagues created the English Common Law over three hundred years ago, by extrapolating the criminal law to create the law of torts, and then extrapolating tort law and joining it with the Law Merchant to create the law of contracts, their King’s Bench was the poor cousin of the English court system. Both the Exchequer and the Chancellor in Equity had more secure and superior sources of funding, and far greater prestige. The King’s Bench was a relative backwater, starved for funding and relegated to undesirable cases involving punishment of bandits and highwaymen. Yet it became the source of one of the greatest intellectual and legal achievements of all time.

A short time later, the English world experienced another equivalent upheaval of revolutionary proportions and consequences, this time in the political realm. It came, not from the well-established political academies of England or continental Europe, but from a band of farmers and small-town lawyers in a true backwater of the British Empire. The recognized intellectuals of the day said it could not be done, but the American constitutional system set new standards for self-government that have stood the test of time and are yet to be surpassed.

Roughly one hundred years later, during the American Civil War, an attempt to raise federal revenues and simultaneously favor the development of federally-chartered banks, at the expense of a maverick system of largely unregulated frontier banks, led to the imposition of a

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7. *Id.*, at 175-205.
federal tax on state bank notes (then the primary currency in many areas). An apparent purpose was to put these state-chartered banks out of business, and extend federal control over the financial system into frontier areas. Frontier banks, operating in small towns under a system known as "free banking," in which a bank could be organized under state law much like a corporation can be organized today, were the financial backwater of their day, but were very important to their communities. When the federal tax made their bank notes uneconomical, these banks responded by offering their customers checking accounts instead (which were not taxed), ultimately creating today's bank collection system (and the bank collection code that became Uniform Commercial Code Article 4).

Some one hundred years later the legal and commercial systems spawned by these innovations (the Common Law, the American constitutional system and its doctrine of federalism, and a commercial banking system based on the law of negotiable instruments and the bank collection code) were again being questioned. During the 1930s centralized economic authority was in vogue world-wide, and in the United States various areas of state law (such as securities law) were being significantly federalized, not always with resulting improvements in clarity and simplicity. The responses included yet another revolutionary development in American law, the Uniform Commercial Code (UCC), this time the product of a relatively obscure drafting system known as the uniform law process.

Today, the uniform law process still can be regarded as a political backwater, at least in comparison to the far more powerful and better-funded institutions of state and federal government that are the primary alternative sources of laws and regulations. The uniform law process has no significant budget, no legislative or regulatory authority, no significant media support or recognition, and the lowest possible public profile. It is a relative political backwater; but in this respect, it joins a short list of others that includes Lord Mansfield's court, the leaders of the American colonies, frontier bankers, and the creators of the UCC, as a source for the best laws ever created.

10. See Norton & Whitley, supra note 8, at 2-9; Myers, supra note 9, at 162-66.
III. Why Is It So?

By now the reader may have concluded that your author is an unabashed apologist for the uniform law process, and that may be so. But if so, it is partly a product of thirty years of frustrating experience with the uniform law process, and even more frustrating experiences with the alternatives. Thus, it is not a matter of whether the uniform law process is perfect—clearly it is not. At various times in uniform law processes your author has witnessed a large number of participants who have been severely frustrated and even bitter, and if forced to choose, probably would have bet against success of the project at hand. And sometimes they would be right. Like any law-making process, this one is better not observed if you have a weak stomach or demand perfection or absolute truth.

But, as with any democracy, the point is not whether the process is perfect, but whether it is better than the alternatives. And so, with regard to the uniform law process, this question can only be answered by looking at the other options. While this is not the time or place for a full dissertation on the merits and weaknesses of state and federal legislative and regulatory processes, a few basic observations are in order as a means to note the relative benefits of the uniform law process.

A simple comparison of almost any uniform law with almost any other comparable statute generally will reveal that the uniform law is better drafted, is more of a consensus product, relates better to other laws, and is more user-friendly, as compared to the typical legislative or regulatory product. There is a surprising amount of agreement on this point, even among those not enamored of the uniform law process. Why this is so is clearly an issue worthy of consideration. Set against this are other reasons said to include, in favor of federal law and/or regulation: more rapid action (the uniform law process is relatively slow); greater uniformity (the uniform law process is subject to state nonuniform amendments); and that regulatory implementation of federal statutes allows needed exceptions to be frequently granted (in contrast to uniform laws which apply equally to everyone). It is also sometimes argued that legislative processes better reflect the will of the people (while the uniform law process is said to be the work of unelected narrow specialists).

To the extent all of this is true (and there can be legitimate doubts with regard to all of these observations), perhaps inadvertently these criticisms of the uniform law process highlight its strengths, and contribute to an understanding of why uniform laws are so qualitatively
superior. For example, it is the length of the uniform law drafting process (i.e., the slowness of the process) that helps avoid the knee-jerk reactions and short-term expediency that characterize so many legislative and regulatory efforts. Legislatures (and even regulators) must react to popular manias and political fashions. As a result, their products and regulating tend to reflect short-term thinking, imposed in helter-skelter fashion on top of a myriad of other such laws. Sometimes, as in consumer law, this creates a maze of contradictory and incomprehensible rules that few can understand. Unprompted by a general public that cannot understand or count the costs of such a legal environment, the legislature perceives no crisis and stubbornly resists reform.

At least this kind of legislative gridlock may lead to a relative degree of stability in which the courts ultimately can make some record based on rational interpretations of the law, in the tradition of the Common Law. The same cannot be said for regulatory processes, in which agency discretion frequently creates a series of ad hoc qualifications, opinions, and exceptions, often based on the political expediency of the moment and perhaps understood only by a favored few, that results in a legal environment with so many analytic holes that it resembles a lunar landscape. In such an environment, anything like uniformity or consistency is a myth. Moreover, it is like a landscape that suffers constant earthquakes. Create a bureaucracy with a roving mandate to devise new regulations or interpretations whenever a need arises, and the result will be a constant outpouring of new and revised regulations, shifting the legal landscape first one way and then another. Compliance becomes a nightmare and largely impossible for small businesses (which tend to disappear as federal regulation increases). If you do not believe it, ask any knowledgeable banking lawyer.¹¹ The result is something quite different from “law” as commonly understood: The law will be whatever the agency wants it to be in a given case at a given time; uniformity and consistency, and legal rights in the traditional sense, will be in short supply, and only a favored few will be qualified to reliably make decisions based on the state of that “law.”

Legislatures may indeed reflect the will of the people and are an important bulwark against despotism and other abuses. They may be well-equipped to deal with high-profile issues such as war and peace, or at the state level, more mundane issues such as gun control and cigarette

¹¹. You will need to ask off the record, and while the lawyer is in a relaxed and convivial state, because the factors described in this article mean that no prudent banking lawyer will want to be quoted as criticizing federal bank regulation.
taxes; but most legislators are not legal specialists. They are no more
qualified to determine the details of solutions to narrow issues than are
the members of the general public they represent. Within the bounds of
broad parameters, legislatures need the help of specialists in dealing with
such issues. There can be little disagreement on this point; the only
question is whether these specialists will be a select group of legislative
staffers, or paid lobbyists who contribute their expertise behind closed
doors, or regulators with unilateral authority to rewrite the law via
implementing regulations, or participants in an open uniform law process
devoted to drafting-by-consensus and subject to subsequent legislative
scrutiny.

The alternatives to the uniform law process invite the abuses that so
often characterize modern law-making. Lobbyists are invited to score
points for special interests at the expense of the general public,
lawmakers who must conduct expensive election campaigns are forced to
confront the realities of campaign contributions, agencies with
essentially unilateral authority and little effective oversight cannot resist
solutions that primarily enhance their own authority and jurisdiction, and
processes based on political considerations emphasize divisions rather
than creating consensus.

The traditional answer is that legislation enacted by elected
representatives (and, perhaps, implemented by administrative agencies
which draft the details of the law) may be messy, but is superior to the
alternatives. But this is not necessarily true if the alternative is a
carefully crafted uniform law, produced by knowledgeable parties in a
truly open and participatory process, reflecting a consensus among
competing viewpoints, which is then subjected to legislative scrutiny and
enactment.

If power corrupts (and surely there can be little doubt of that), then
perhaps it is the relative lack of power of the participants in the uniform
law process that enhances its success. The reporters, drafting
committees, advisors, and certainly the observers, have no direct
legislative or regulatory authority. They rely solely on the quality of
their work and the persuasiveness of their arguments for any impact they
may hope to have. Yet by shifting the details of law-drafting to this
uniform law process, recognizing that each new effort must
independently pass muster in the legislatures, academia, and the forum of
public opinion, the workings of the law and our democratic institutions
can be dramatically improved in the twenty-first century.
IV. WHAT SHOULD BE NEXT?

Obviously, it is not up to your author to decide what projects NCCUSL undertakes next, but it seems clear that many areas of law are in need of rationalization and would benefit from the attention of the uniform law process. A compelling example is consumer law, where the failure of the states to widely enact the Uniform Consumer Credit Code, and their divergent approaches to “predatory lending” issues, has left state law in disarray and invites continual erosion of that law by means of federal preemption. The result is an incomprehensible matrix of conflicting state and federal laws that should be an embarrassment to any advanced society. The recent proliferation of unrealistic (and in some cases poorly drafted) laws governing “predatory lending” threatens to create a legal crisis that will drive up the costs and reduce the availability of credit for marginal borrowers in some states. The expansion of contradictory federal and state privacy laws is likewise imposing unnecessary legal costs on society.12

All of these areas, and many others, are obvious candidates for a more rational system of law based on a consensus-oriented drafting process. Today, only the uniform law process offers this opportunity. Some areas of U.S. law appear close to failure in terms of providing a clear, simple, and effective system of rules to govern applicable transactions. If this kind of legal anarchy (or “casino society,” as some have called it) is to be avoided, the uniform law process will need to be utilized more widely to reconstitute a workable system of laws for the twenty-first century.

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