

## Article

# Strengthening Federalism: The Uniform State Law Movement in the United States

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### INTRODUCTION

This Article addresses the importance of uniform state laws in maintaining and strengthening federalism in the United States.<sup>1</sup> The federal system of government established by the Constitution depends on an appropriate balance of federal and state law. Under the Tenth Amendment to the Constitution, powers not delegated to the federal government and not prohibited by the Constitution to the States are reserved to the States or to the people.<sup>2</sup> In order for state law to be a viable alternative to federal law on issues as to which uniformity is desirable, it is essential that state law be uniform from state to state.

The focus of this Article will be the critical role of the Uniform Law Commission (ULC) in establishing greater uniformity of state law. Part I will describe the formation of the ULC. Part II will discuss three broad subject areas in which the Commission has been particularly effective in promulgating uniform laws and maintaining the primacy of state law. Part III concludes by addressing the future challenges for the Commission in an increasingly globalized legal environment.

### I. THE ROAD TO THE UNIFORM LAW COMMISSION

Uniformity of state law was a challenge for the United States from its earliest days as a nation.<sup>3</sup> The thirteen individual colonies that came together to form the new nation follow-

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1. For more information on the subject, see ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION (2013).

2. U.S. CONST. amend. X.

3. STEIN, *supra* note 1, at 1.

ing our war of independence brought with them, and subsequently further enacted, separate and frequently inconsistent laws.<sup>4</sup> These diverse and inconsistent laws threatened the very existence of the new nation. In 1786, at the urging of James Madison, then in the Virginia House of Delegates, a conference of the states was held in Annapolis, Maryland, to consider a system of uniform commercial statutes.<sup>5</sup> At the conclusion of the Annapolis Convention, the assembled delegates—led by Alexander Hamilton of New York and James Madison of Virginia—adopted a resolution calling for another Convention to be held in Philadelphia in May of the following year, to consider the issues further.<sup>6</sup> The delegates at that subsequent Convention in 1787, of course, produced the Constitution of the United States “in order to form a more perfect union.”<sup>7</sup> So, the subject of uniformity of law among the states was a central issue to the very founding of our new nation.

The Constitution provided for uniform *federal* law throughout the nation, but the challenge of uniform *state* laws continued.<sup>8</sup> In the early years of the nineteenth century, the problem of inconsistent and varied state laws was partially eased by the fact that this was largely an age of common law, and all of the states had adopted substantially the same common law as it had developed in England.<sup>9</sup> Differences, however, soon began to emerge.

Confusion about differences in the common law between various states and uncertainty about the state of the common law in a given jurisdiction encouraged statutory codification of state laws in the first half of the nineteenth century.<sup>10</sup> A significant advocate of codification of law was United State Supreme Court Justice Joseph Story, who, while a member of the Court, authored a report that encouraged codification for the Commission to Codify the Common Law of Massachusetts.<sup>11</sup>

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4. *Id.* at 1–2.

5. WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 12 (1991).

6. See ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 106 (5th ed. 1976).

7. U.S. CONST. pmb.; see also STEIN, *supra* note 1, at 2.

8. See STEIN, *supra* note 1, at 2–3.

9. See *generally id.* at 1–18 (discussing the development of laws in the United States during the eighteenth and nineteenth centuries).

10. *Id.* at 3.

11. *Id.*

Another leading advocate for codification was New York lawyer, David Dudley Field, who believed that the law should be codified in statute rather than left to court interpretation. Field drafted a series of codes, including a civil code, a political code, a penal code, and a procedural code.<sup>12</sup> New York enacted the Civil Code, which was known as the “Field Code,” in the mid-1880s.<sup>13</sup> Other states enacted his codes as well, and soon thirty states had adopted amended versions of the New York Field Procedural Code of 1848.<sup>14</sup> This codification process marked the beginning of the movement toward uniform state laws.<sup>15</sup>

Soon lawyers in the various states took up the call for uniform state laws.<sup>16</sup> Indeed, one of the reasons advanced for creation of the American Bar Association (ABA) in 1878 was the need to promote greater uniformity of state law.<sup>17</sup> In 1881, the Alabama Bar Association created a committee “to make recommendations about uniformity of state laws and to bring the subject to the attention of bar associations of other states.”<sup>18</sup> Eight years later in 1889, the Tennessee Bar Association adopted a resolution calling for the ABA to create a committee of state representatives to form a system of uniform state laws.<sup>19</sup> The ABA did, in fact, appoint a committee on uniform state laws that year.

In 1890 the New York legislature went a step further and authorized the governor to appoint three commissioners to ex-

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12. *Id.*

13. See Andrew P. Morriss et al., *Debating the Field Civil Code 105 Years Late*, 61 MONT. L. REV. 371, 371 (2000) (describing the Field Civil Code as “a massive law originally drafted by New York lawyer David Dudley Field”).

14. See Thomas A. Shaw, Jr., *Procedural Reform and the Rule-Making Power in New York*, 24 FORDHAM L. REV. 338, 339 n.4 (1955) (observing that thirty states eventually adopted versions of Field’s Procedural Code).

15. STEIN, *supra* note 1, at 3.

16. See generally Simeon E. Baldwin, *The Founding of the American Bar Association*, 3 A.B.A. J. 658 (1917) (reprinting numerous personal letters detailing an informal meeting to be held in Saratoga, New York, for the purposes of discussing and establishing an American Bar Association).

17. *Id.* at 24. Another primary argument for a national bar association was to encourage the teaching of law in law schools, as opposed to the then prevailing practice of apprenticeship in a law office. It is not coincidental that two of the first committees established by the newly formed American Bar Association were a Committee on Uniformity of State Laws and a Committee on Legal Education.

18. STEIN, *supra* note 1, at 4 (citing ARMSTRONG, *supra* note 5, at 16).

19. *Uniformity of Laws in the Several States*, 23 AM. L. REV. 819, 819–20 (1889) (reporting on the “eighth annual session of the Tennessee Bar Association”).

amine subjects appropriate for uniform state laws.<sup>20</sup> The ABA Committee urged other states to follow the example of New York, and, in 1892, the first meeting of the Conference of State Uniform Law Commissioners was held in Saratoga, New York.<sup>21</sup> Twelve delegates from seven states attended that first meeting—the seven states being Delaware, Georgia, Massachusetts, Michigan, New York, New Jersey, and Pennsylvania.<sup>22</sup>

The Conference of State Uniform Law Commissioners grew rapidly. When it met the next year in 1893, representatives from nineteen states attended;<sup>23</sup> by 1900, thirty-five states and territories that later became states were members.<sup>24</sup> Currently, fifty states, the District of Columbia, the commonwealth of Puerto Rico, and the United States Virgin Islands are members, for a total current membership of fifty-three jurisdictions.<sup>25</sup> Some states became members while still territories, before their admission to the Union as states.<sup>26</sup> In fact, one territory, the Philippine Islands, became a member of the Conference in 1909 and continued as a member for thirty-seven years until it became an independent nation in 1946.<sup>27</sup>

At its first meeting, the organization adopted as its official name the “Conference of Commissioners on Uniform State Laws.” It soon became known as the “National Conference of Commissioners on Uniform State Laws.”<sup>28</sup> More recently it has adopted a shortened informal name, more understandable to the public—the “Uniform Law Commission.”<sup>29</sup> Also, at that first

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20. See, e.g., Justice George Rossman, *Uniformity of Law: An Elusive Goal*, 36 A.B.A. J. 175, 177 (1950) (stating that “[i]n 1890 the [ABA] adopted a resolution which urged all states to take action similar to New York’s,” and that by August of 1892 “seven states had followed New York’s example”).

21. See REPORT OF PROCEEDINGS OF THE FIRST CONFERENCE OF THE STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LAW IN THE UNITED STATES 3 (1982).

22. ARMSTRONG, *supra* note 5, at 11.

23. See STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LEGISLATION IN THE UNITED STATES, THIRD CONFERENCE (1893).

24. See STEIN, *supra* note 1, at app. D.

25. *Id.*

26. See, e.g., STEIN, *supra* note 1, at 21 (noting that the Philippine Islands became a member as a territory).

27. *Id.*

28. See, e.g., PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL MEETING OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1915); see also STEIN, *supra* note 1, at 20.

29. See STEIN, *supra* note 1, at 20–21.

meeting in 1892, the delegates designated the meeting as a “Conference.”<sup>30</sup>

The original commissioners were very conscious of the significance of the new organization. Commissioner Frederic Stimson of Massachusetts, elected Secretary of the Conference, wrote proudly and immodestly in the report of that first meeting that “[i]t is probably not too much to say that this is the most important juristic work undertaken in the United States since the adoption of the Federal Constitution . . . .”<sup>31</sup>

## II. THE WORK OF THE UNIFORM LAW COMMISSION

The subjects of uniform laws discussed in the earliest years of the Conference were “Wills, Marriage and Divorce; Commercial Law; Descent and Distribution; Deeds and Other Conveyances; Certificates of Deposition and Forms of Notarial Certificates; Uniformity of State Action in Appointing Presidential Electors; and Weights and Measures.”<sup>32</sup> In its very first year of its existence, the ULC adopted, and recommended to the states for enactment, an Acknowledgements Act, an Act Validating Wills Lawfully Executed Without the State, and an Act Recognizing As Valid Wills Probated in Another State.<sup>33</sup> The Conference also recommended to the States statutory rules about the effect of bills and notes falling due on a Sunday or legal holiday, alternatives to a seal on a legal document, and the age of consent for marriage.<sup>34</sup> The Conference adopted a uniform table of weights and measures, and the minutes explained, “[i]t will probably be a surprise to most people to learn that the legal weights of a bushel, for instance, with the exception of wheat alone, vary in all the states, for all kinds of grain and the important commodities of trade.”<sup>35</sup>

The first commercial statute—the Uniform Negotiable Instruments Law—was adopted and promulgated in 1896, and it became the first ULC statute “to be adopted in every state and territory and the District of Columbia.”<sup>36</sup>

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30. *See id.* at 20. That abbreviated name has continued to be used, and from time to time this Article will refer to the Uniform Law Commission as the “Conference.”

31. REPORT OF PROCEEDINGS OF THE FIRST CONFERENCE, *supra* note 21, at 4.

32. STEIN, *supra* note 1, at 9.

33. ARMSTRONG, *supra* note 5, at 23.

34. *Id.*

35. *Uniformity of Statute Laws in the United States*, 16 N.J. L.J. 10, 16 (1893).

36. ARMSTRONG, *supra* note 5, at 26.

Several broad subject areas have tended to dominate the work of the ULC over its nearly 125 years of existence. This Article will discuss today three of those broad subject matter areas: Business Entity Law, Commercial Law, and Trusts and Estates Law. All three areas continue to be governed by state law, I would submit, in part because of the success of uniform state laws in those subject matter areas.

#### A. BUSINESS ENTITY LAW

Business entity law was an early focus of the Conference when it undertook to draft a Uniform Partnership Act in 1902.<sup>37</sup> Partnership was a well-recognized business entity form even before the ULC was formed.<sup>38</sup> Justice Story, in 1841, had devoted one of his series of Commentaries to the “Law of Partnership.”<sup>39</sup> England codified its partnership laws in 1890, and so it was a natural subject for the newly formed Conference to take up.<sup>40</sup>

James Barr Ames, the then long-time Dean of Harvard Law School and an early Commissioner, offered to draft a Uniform Partnership Act.<sup>41</sup> The project soon became very controversial as two competing theories of partnership law emerged.<sup>42</sup> The Conference had to decide whether to adopt the “aggregate” or “legal” theory of partnerships, on the one hand, or the “mercantile” or “entity” theory of partnerships on the other hand.<sup>43</sup> The “mercantile” or “entity” theory views partnerships as entities distinct from their partner members,<sup>44</sup> whereas the aggregate or legal theory considered partnerships as “collections of persons jointly and severally liable for all debts and obligations of the partnership.”<sup>45</sup> When the ULC was created, the common law in England and America incorporated the aggregate or legal theory.

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37. STEIN, *supra* note 1, at 22.

38. See SCOTT ROWLEY, *THE MODERN LAW OF PARTNERSHIP* 11 (1916); Larry E. Ribstein, *A Critique of the Uniform Limited Liability Company Act*, 25 STETSON L. REV. 311, 328 (1995).

39. STEIN, *supra* note 1, at 37.

40. See *id.*

41. PROCEEDINGS OF THE EIGHTEENTH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 102 (1908).

42. STEIN, *supra* note 1, at 37.

43. *Id.*

44. John Morey Maurice, *A New Personal Limited Liability Shield for General Partners: But Not All Partners Are Treated the Same*, 43 GONZ. L. REV. 369, 372 (2007).

45. STEIN, *supra* note 1, at 38; see also Maurice, *supra* note 44, at 375–77.

Sir Frederick Pollock, the English jurist and scholar who wrote the Partnership Act that was enacted by parliament in England, urged that the United States follow England's lead and statutorily incorporate the "aggregate" theory.<sup>46</sup> Dean Ames strongly disagreed.<sup>47</sup> He told the Conference, "I feel so strongly that, if the Conference thinks my plan undesirable, I should much prefer to have some one else draw the act; I should have no heart in drawing an act on any other theory . . . ."<sup>48</sup> He submitted two drafts of a Partnership Act that were based on the entity theory.<sup>49</sup> His drafts were not adopted, and in both 1907 and 1908 Dean Ames urged that consideration of the Act be postponed.<sup>50</sup> Unfortunately, Dean Ames died in January of 1910 before the Partnership Act could be completed.<sup>51</sup> Later that same year the Conference adopted a resolution to the effect that any previously approved resolutions limiting the partnership law project to the entity theory be rescinded and that the Conference should consider the subject of partnership anew as though no prior position had been adopted.<sup>52</sup>

From that time forward, the draft moved away from the entity theory and toward the aggregate theory, in which individual partners retained joint and several liability for the debts and obligations of the partnership.<sup>53</sup> William Draper Lewis, then Dean of the University of Pennsylvania Law School and later a Commissioner on Uniform Laws and Founding Director of the American Law Institute (ALI), replaced Ames as the Reporter for the Partnership project.<sup>54</sup> He submitted two drafts—one embodying Dean Ames entity approach and the other based on the aggregate theory.<sup>55</sup> The Conference scheduled a two-day

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46. Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 U. PA. J. INT'L. BUS. L. 227, 234 (1992).

47. PROCEEDINGS OF THE FIFTEENTH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 29 (1905).

48. *Id.*

49. William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 620 (1915).

50. PROCEEDINGS OF THE SEVENTEENTH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 26 (1907).

51. PROCEEDINGS OF THE TWENTIETH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 72–73 (1910).

52. *See id.* at 52; *see also* STEIN, *supra* note 1, at 39.

53. STEIN, *supra* note 1, at 39.

54. *Id.* at app. G.

55. PROCEEDINGS OF THE TWENTIETH ANNUAL CONFERENCE, *supra* note 51, at 142.

meeting of the leading academics and lawyers in the area of business law, following which they recommended the Act be based on the “aggregate” or common law theory.<sup>56</sup> Dean Lewis completed the Act based on that approach, and it was adopted by the Conference.<sup>57</sup> The Uniform Partnership Act adopted in 1914 treated partnerships the same as their members.<sup>58</sup>

The Partnership Act was revised in 1997 with the adoption of the Revised Uniform Partnership Act.<sup>59</sup> Significantly, and perhaps ironically, the 1997 Act reversed course from the original Act and embodies the “entity” theory of partnerships, which “provides continuity for the partnership in the event that, say, a partner dies or leaves the firm.”<sup>60</sup> So, the partnership law has returned to the view with which Dean Ames began his work more than 100 years ago.<sup>61</sup> The 1997 Revised Uniform Partnership Act has been widely adopted—around forty jurisdictions have adopted the Act.<sup>62</sup>

Other business entity forms have also become the subject of uniform statutes.<sup>63</sup> Limited partnerships, which were used in the early twentieth century to avoid personal liability of the partners, became the subject of the Uniform Limited Partnership Act in 1916.<sup>64</sup> That law has been revised several times, resulting in a Revised Uniform Limited Partnership Act (RULPA) in 1976 and 1985,<sup>65</sup> and most recently the 2001 modification known as Re-RULPA.<sup>66</sup> The 2001 Re-RULPA eliminated restrictions on the ability of a limited partner to participate in management of the business “without forfeiting his protection from personal liability.”<sup>67</sup>

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56. Lewis, *supra* note 49, at 640.

57. STEIN, *supra* note 1, at app. F.

58. *Id.* at 40.

59. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, UNIFORM LIMITED PARTNERSHIP ACT (1997), available at [http://www.uniformlaws.org/shared/docs/partnership/upa\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf).

60. STEIN, *supra* note 1, at 41.

61. *Id.*

62. *Partnership Act (1997) (Last Amended 2013)*, UNIF. L. COMM’N, [http://www.uniformlaws.org/Act.aspx?title=Partnership%20Act%20\(1997\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=Partnership%20Act%20(1997)%20(Last%20Amended%202013)) (last visited Apr.19, 2015).

63. See, e.g., STEIN, *supra* note 1, at 41.

64. *Id.*

65. *Id.* at app. F.

66. Elizabeth S. Miller & Thomas Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343, 361 (2005).

67. STEIN, *supra* note 1, at 43.



The ULC also promulgated a Uniform Business Corporation Act in 1928, which was adopted by three states and partially by a fourth state.<sup>68</sup> Fifteen years later the Act was renamed the Model Business Corporation Act.<sup>69</sup> In 1950, the ABA Business Law Section published a Model Business Corporation Act.<sup>70</sup> The ABA Act was well done and was enacted in several states.<sup>71</sup> Recognizing the success the ABA had with its act, the Conference in 1958 withdrew its own Model Business Corporation Act.<sup>72</sup>

Since that time the Conference and the ABA have had an informal understanding to divide responsibility for business entity acts.<sup>73</sup> The ABA Business Law Section has continued to update its Model Business Corporation Act, and later in 1964 promulgated a Model Nonprofit Corporation Act.<sup>74</sup> The ULC has continued to draft and update non-corporate business entity statutes.<sup>75</sup> In addition to the Revised Uniform Partnership Act and the Revised Uniform Limited Partnership Act, the Conference has adopted and promulgated a Uniform Limited Liability Company Act,<sup>76</sup> a Uniform Unincorporated Nonprofit Association Act,<sup>77</sup> a Uniform Statutory Trust Entity Act,<sup>78</sup> and a Uniform Limited Cooperative Association Act.<sup>79</sup> In 2011, all of these Acts were collected into the Conference's Harmonized Business Organizations Code.<sup>80</sup> Uniform business entity acts have been, and continue to be, a principal subject matter focus of the Conference.<sup>81</sup>

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68. Richard A. Booth, *A Chronology of the Evolution of the MBCA*, 56 BUS. LAW. 63, 63 (2000).

69. *Id.*

70. *Id.*

71. STEIN, *supra* note 1, at 44.

72. Booth, *supra* note 68, at 64.

73. STEIN, *supra* note 1, at 44–45.

74. *Id.* at 45. The Model Nonprofit Corporation Act was subsequently updated in 1987 and 2008. *Id.*

75. *See generally id.* (discussing limited liability companies).

76. UNIF. L. COMM'N, UNIFORM LIMITED LIABILITY COMPANY ACT (ULLCA) (2006) (LAST AMENDED 2013): SUMMARY, *available at* [http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca%20last%20amended%202013%20summary\\_Jan%202015\\_GH%20edits.pdf](http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca%20last%20amended%202013%20summary_Jan%202015_GH%20edits.pdf).

77. STEIN, *supra* note 1, at 46.

78. UNIF. L. COMM'N, UNIFORM STATUTORY TRUST ENTITY ACT (2010), *available at* [http://www.uniformlaws.org/shared/docs/statutory%20trust%20entity/ustea\\_final\\_09.pdf](http://www.uniformlaws.org/shared/docs/statutory%20trust%20entity/ustea_final_09.pdf).

79. *Id.*

80. *Id.*

81. *See generally* STEIN, *supra* note 1, at 37–56 (describing the importance and origin of uniform business entity acts).

I noted that Harvard Law School Dean James Barr Ames and University of Pennsylvania Law School Dean William Draper Lewis were reporters for the original Uniform Partnership Act in the early part of the last century.<sup>82</sup> They were only two of several major law reformers of the early twentieth century who were Uniform Law Commissioners. Others included Dean Roscoe Pound of the Harvard Law School and the University of Nebraska Law School, and Professor Samuel Williston of Harvard Law School.<sup>83</sup> They, and many other legendary scholars, became active as Commissioners and Reporters because the ULC was *the* organization where major substantive law reform was occurring as state law was being codified and made uniform.<sup>84</sup>

#### B. COMMERCIAL LAW

A second major subject matter focus of the Conference is the area of commercial law. The highlight of these acts is, of course, the adoption of the Uniform Commercial Code (UCC) in 1951.<sup>85</sup> The UCC is often described as the “crown jewel” of the work of the ULC.<sup>86</sup>

I have already noted the approval and successful promulgation of the Uniform Negotiable Instruments Law by the Conference in 1896.<sup>87</sup> It was the first uniform law statute to be adopted in every jurisdiction that was then a member of the Conference.<sup>88</sup> Another very important commercial act of the Conference in the early twentieth century was the Uniform Sales Act, authored by Harvard Law Professor and Massachusetts Commissioner Samuel Williston, and approved in 1906.<sup>89</sup> Other uniform commercial law statutes followed—the Uniform Warehouse Receipts Act in 1906, the Uniform Bills of Lading Act and the Uniform Stock Transfer Act in 1909, the Uniform Conditional Sales Act in 1918, and the Uniform Trust Receipts Act in 1933.<sup>90</sup>

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82. *Id.* at 37–41.

83. *Id.* at 227.

84. *See generally id.* at app. G (listing former and current commissioners).

85. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTIETH YEAR 164 (1951).

86. STEIN, *supra* note 1, at 71.

87. *See supra* note 36 and accompanying text.

88. ARMSTRONG, *supra* note 5, at 26.

89. *Id.* at 32, 165.

90. *Id.* at 165–68.

The UCC is the product of collaboration between the Conference and the ALI. The ALI was created in 1923, primarily to promulgate restatements<sup>91</sup> of the law—the common law as well as statutory law.<sup>92</sup> Several Uniform Law Commissioners were among the Founders of the ALI, and William Draper Lewis, Dean of the Pennsylvania Law School and Uniform Law Commissioner from Pennsylvania, was the first Executive Director of the ALI.<sup>93</sup>

In the 1930s the Conference and the ALI entered into an agreement to cooperate in the drafting of certain state statutes, and the two organizations immediately began to cooperate in drafting uniform acts, such as the Uniform Property Act and the Uniform Contribution among Joint Tortfeasors Act.<sup>94</sup> Those joint drafting projects were only a prelude to the groundbreaking work that was to come.

The major project between the ULC and the ALI is the Uniform Commercial Code. In 1841, Justice Joseph Story, a leading advocate of codification of the common law, wrote for the majority of the Court in *Swift v. Tyson* that “in federal diversity cases judges had to follow state statutes, but not the state’s judicial interpretations of its own statutes.”<sup>95</sup> In essence, federal judges could express their own views of the common law.<sup>96</sup> The *Swift* decision encouraged development of a federal commercial common law.<sup>97</sup> That was the law for the next century, until the landmark decision of the Supreme Court in *Erie Railroad Co. v. Tompkins* in 1938.<sup>98</sup> In a majority opinion written by Justice Louis D. Brandeis, a former Commissioner on Uniform State Laws from Massachusetts, the Supreme Court declared:

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.

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91. Restatements are treatises published by the ALI, describing the law in a given area and guiding its development moving forward. Uniform laws, however, are proposed legislation that states are able to “adopt exactly as written” for the purpose of improving the law and promoting greater consistency among the states. BLACK’S LAW DICTIONARY 1763 (10th ed. 2014).

92. HEIN ONLINE, AMERICAN LAW INSTITUTE (2014), available at <http://heinonline.org/HeinDocs/ali2.pdf>.

93. STEIN, *supra* note 1, at 55.

94. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS FORTY-FIFTH YEAR 32 (1935).

95. STEIN, *supra* note 1, at 79 (citing *Swift v. Tyson*, 41 U.S. 1 (1842)).

96. See generally *Swift*, 41 U.S. at 18–20.

97. STEIN, *supra* note 1, at 79.

98. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.<sup>99</sup>

The abolition of the unifying factor of federal common law to govern commercial transactions created an immediate need for a nation-wide statutory commercial law.<sup>100</sup> Many scholars advocated a federal sales law to supersede the State Uniform Sales Act.<sup>101</sup> That call was joined by the Merchants' Association of New York City, a very influential organization because of New York City's position as a major commercial center.<sup>102</sup> Professor Karl Llewellyn, a distinguished commercial law professor at Columbia University Law School and a Commissioner on Uniform Laws from New York, also shared that view.<sup>103</sup>

The President of the ULC at that time was Commissioner William Schnader of Pennsylvania, who was often referred to as General Schnader because he had been Attorney General of Pennsylvania.<sup>104</sup> Schnader, one of the most influential commissioners in Conference history, persuaded the Conference to reject Llewellyn's proposal for a federal statute, and so Llewellyn began to revise the existing state Uniform Sales Act.<sup>105</sup> He was later joined by a talented New York commercial law attorney, Soia Mentschikoff, who became Associate Chief Reporter of the project.<sup>106</sup> Llewellyn, the Chief Reporter, and Mentschikoff, Associate Chief Reporter, subsequently married and moved together to the faculty of the University of Chicago Law School, and both became Commissioners on Uniform Laws from Illinois.<sup>107</sup> Schnader, Llewellyn, and Mentschikoff are often described as the parents of the UCC.<sup>108</sup>

Professor Mentschikoff has related a story of how the project, which began as a revision of the Uniform Sales Act, grew into the UCC.<sup>109</sup> According to Professor Mentschikoff:

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99. *Id.* at 78.

100. STEIN, *supra* note 1, at 80.

101. *Id.*

102. Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 95 (1993).

103. *Id.*

104. *Id.* at 97; *see also* Homer Kripke, *Reflections of a Drafter: Homer Kripke*, 43 OHIO ST. L.J. 577, 580 n.14 (1982).

105. Patchel, *supra* note 102, at 97.

106. STEIN, *supra* note 1, at 84.

107. *Id.* at 95.

108. *See generally id.* at 95–96 (describing the influence of Schnader, Llewellyn, and Mentschikoff on the development of the UCC).

109. *Id.* at 81.

Schnader [asked Llewellyn,] “Would it be possible, instead of asking for piecemeal amendment or piecemeal enactment of amended statutes, to put them all together into something that would be coherent and that could be known as the Uniform Commercial Code so that we could make all of the changes with one act of the legislature?” . . . [And Llewellyn readily replied,] “No problem at all. I’ll draw you up a little outline of what it would look like.”<sup>110</sup>

And so the UCC was born.

The ALI was invited to be a partner in the project which was finally approved by the Conference and the ALI in 1951.<sup>111</sup> With Schnader’s considerable influence in his home state, Pennsylvania promptly enacted the UCC in 1953. After that early success, however, enactments stalled as many states waited to see how the Code would fare in the leading commercial state of New York.<sup>112</sup> After an intensive study by the New York Law Revision Commission over the next several years, which produced a multivolume analysis and some recommended revisions, the New York legislature enacted the UCC into law in 1962.<sup>113</sup> Other states soon enacted the Code, and by 1968 it was the law in forty-nine states, the District of Columbia, and the United States Virgin Islands.<sup>114</sup> The lone state holdout, Louisiana, saw inconsistencies between the UCC and its Civil Code, but it too enacted several articles of the UCC with amendments in 1974.<sup>115</sup> This uniform state law, adopted in largely the same form throughout the United States, is now the law that governs a major share of the commercial transactions in all jurisdictions in the country. It is impossible to overstate the importance of the UCC.

### C. TRUSTS AND ESTATES LAW

A third broad subject matter area that has been a focus of the ULC is the area of Trusts and Estates Law.<sup>116</sup> Two of the first uniform acts approved by the Conference were the “Uniform Act Relating to Execution of Wills” and “Uniform Act Relative to the Probate in this State of Foreign Wills,” both approved in 1895.<sup>117</sup> Through the first half of the twentieth

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110. Soia Mentschikoff, *Reflections of a Drafter: Soia Mentschikoff*, 43 OHIO ST. L.J. 537, 537 (1982).

111. ARMSTRONG, *supra* note 5, at 75.

112. Henry Gabriel, *The Revision of the Uniform Commercial Code—How Successful Has It Been?*, 52 HASTINGS L.J. 653, 659 (2001).

113. Patchel, *supra* note 102, at 62.

114. ARMSTRONG, *supra* note 5, at 77.

115. *Id.*

116. STEIN, *supra* note 1, at 119.

117. *Id.* at app. E.

century, the Conference adopted over ten other uniform acts in the trusts and estates area.<sup>118</sup>

Following the enormous effort that had gone into the development of the UCC between 1940 and the wave of enactments that began with New York's enactment in 1962, the Conference debated whether it should undertake another broad subject-matter code.<sup>119</sup> An obvious candidate for such a code was the probate area, which was seriously out of date by the 1960s.<sup>120</sup> Many in the public believed that the probate law was an inefficient and overly costly area of law.<sup>121</sup>

Efforts had been underway in the ABA since the 1940s to reform probate law.<sup>122</sup> The ABA Section of Real Property, Probate and Trust Law approved a Model Probate Code in 1946, which had modest success.<sup>123</sup> It was a collection of statutes that states could adopt in whole or in part.<sup>124</sup> In 1962, two leaders of the ABA Section approached the Conference and proposed the drafting of an updated Model Probate Code.<sup>125</sup> The Conference, pleased with the success of the UCC, agreed to undertake a project to reform the probate law, but decided on a uniform statute, rather than an updated model code.<sup>126</sup>

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118. *Id.* (indicating the passage of the Uniform Principal and Income Act in 1931, the Uniform Trustees' Accounting Act in 1936, the Uniform Trusts Act in 1937, the Uniform Estates Act and Uniform Common Trust Fund Act in 1938, the Uniform Simultaneous Death Act in 1940, the Uniform Interstate Arbitration of Death Taxes Act and the Uniform Compromise of Death Taxes Act in 1943, the Uniform Gifts to Minors Act in 1956, the Uniform Estate Tax Apportionment Act in 1958, and the Uniform Trustees' Powers Act in 1964); see also ARMSTRONG, *supra* note 5, at 171.

119. STEIN, *supra* note 1, at 63–72 (describing the activities of the Conference following the development of the UCC).

120. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 894–96 (1992); see also Julius A. Leetham, *Probate Concepts and Their Origins*, 9 WHITTIER L. REV. 763 (1988) (describing the history of probate law).

121. STEIN, *supra* note 1, at 120. Norman F. Dacey's book, *How To Avoid Probate!*, "was the best-selling book of 1965 and was on the best-seller list for 47 weeks." *Id.* at 121.

122. STEIN, *supra* note 1, at 121.

123. Thomas L. Jones, *Richard Vance Wellman*, 40 GA. L. REV. 1087, 1087 (2006).

124. *Id.*

125. STEIN, *supra* note 1, at 121.

126. *Id.* Unlike uniform statutes, model codes are not drafted to be enacted in their entirety. Model codes are used when there is not the same need for uniformity state-to-state. See BLACK'S LAW DICTIONARY 1003 (6th ed. 1990) (defining "model act").

The project began immediately in 1962.<sup>127</sup> Initially, Professor William Fratcher of the University of Missouri School of Law was the Chief Reporter, but soon after the project began he was succeeded by Professor Richard Wellman of the University of Michigan Law School.<sup>128</sup> Professor Wellman is often considered the father of the Uniform Probate Code (UPC).<sup>129</sup> The work proceeded rapidly, and, after seven years of intensive research and drafting, the UPC was approved in 1969.<sup>130</sup>

The UPC had several sections, some addressing the substantive law of intestate succession, wills, and trusts.<sup>131</sup> The most controversial section was a procedural section dealing with estate administration.<sup>132</sup> It introduced new concepts, such as “informal probate of a will” and “unsupervised administration.”<sup>133</sup> The underlying policy was that if there was no controversy in an estate, simplified, streamlined, and less costly procedures ought to be available.<sup>134</sup> On the other hand, if the estate was complex or contested, procedures would be made available to resolve the issues.<sup>135</sup>

The UPC was not quickly embraced by the bar associations in many states.<sup>136</sup> Proponents of the UPC’s probate reforms highlighted the large fees, long delays, and corrupt patronage practices of the traditional probate administration.<sup>137</sup> Opponents of the simplified and shortcut procedures of the UPC stressed that the traditional process was necessary to protect the survivors of the decedent, including widows and orphans.<sup>138</sup>

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127. Jones, *supra* note 123, at 1087.

128. LAWRENCE H. AVERILL, JR., *UNIFORM PROBATE CODE: IN A NUTSHELL* 5 (3rd ed. 1991).

129. Kristin Kissiah, *A Tribute to Richard V. Wellman*, UNIV. GA. L. SCH., <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1036&context=advocate> (last visited Apr. 19, 2015).

130. Eugene F. Scoles, *Care and Maintenance of Our Legal System: Richard V. Wellman—Academic Lawyer*, 40 GA. L. REV. 1097, 1101 (2006).

131. See generally STEIN, *supra* note 1, at 122–23.

132. Robert A. Stein, *Joseph Trachtman Lecture, Probate Reformation: The Impact of the Uniform Laws*, 23 PROB. LAW. 10 (1997).

133. *Id.*

134. STEIN, *supra* note 1, at 122 (“The Code was based upon a simplified process for informally transferring property at death, but offering more formal processes if necessary to address issues in the estate.”).

135. *Id.*

136. Stein, *supra* note 132, at 10.

137. *Id.* at 10–11.

138. *Id.*

Bonding companies, newspaper publishers, and others who had a stake in the existing system joined the opponents.<sup>139</sup>

Even with the opposition, the UPC slowly gained enactments. The adoptions grew over time, as a generation of new lawyers began practice having been educated about the UPC in law school. Today, at least eighteen states and other jurisdictions in the ULC have adopted all or part of the UPC to govern estate administration; many more states have adopted specific provisions from the UPC.<sup>140</sup> Even in states that have not yet enacted the UPC, it has influenced many probate reforms.<sup>141</sup>

The long effort to secure enactments of the UPC had a related benefit. To assist the enactment process, a Joint Editorial Board (JEB) for the UPC (subsequently renamed the Joint Editorial Board for Uniform Trusts and Estates Acts) was established.<sup>142</sup> The JEB-UTEA, as it is known, consisted of representatives from the Conference, the ABA Section of Real Property, Probate and Trust Law, and the American College of Probate Counsel (later renamed the American College of Trust and Estate Counsel).<sup>143</sup> The three primary bar organizations in the trusts and estates area not only worked together to achieve enactments but also began to propose and develop reforms in other parts of trusts and estates law.<sup>144</sup> Professor Wellman, who moved to the University of Georgia Law School, was the initial Director of the JEB for Uniform Trusts and Estates Acts, and was later succeeded by Professor Lawrence Waggoner of the University of Michigan Law School.<sup>145</sup> Professor Thomas Gallanis of the University of Iowa Law School currently provides the leadership for the JEB as Executive Director.<sup>146</sup>

Largely as a result of the efforts of the JEB for Trusts and Estates Acts, numerous areas of trusts and estates law have been updated and reformed in the past thirty years. These trusts and estates reforms include a Uniform Trust Code, a Uniform Statutory Rule Against Perpetuities, a Uniform Prudent Investor Act, and a revised Uniform Principal and Income

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139. Averill, *supra* note 120, at 897.

140. Stein, *supra* note 132, at 14.

141. STEIN, *supra* note 1, at 128.

142. Jones, *supra* note 123, at 1088.

143. *Id.*

144. *See generally* STEIN, *supra* note 1, at 123.

145. Jones, *supra* note 123, at 1088–89; *see also* STEIN, *supra* note 1, at 136.

146. Thomas P. Gallanis, UNIV. IOWA C. L., <http://law.uiowa.edu/thomas-p-gallanis> (last visited Apr. 19, 2015).



Act.<sup>147</sup> In addition, the UPC itself has been revised and updated on several occasions since its original adoption in 1969.<sup>148</sup> Currently, several additional uniform trusts and estates statutes are under development, including a Uniform Trust Decanting Act,<sup>149</sup> a Fiduciary Access to Digital Assets Act,<sup>150</sup> and an Interjurisdictional Recognition of Substitute Decision-Making Documents Act.<sup>151</sup>

The probate law in the country underwent little change in the first half of the twentieth century.<sup>152</sup> By contrast, the area has been totally reformed over the past thirty years.<sup>153</sup> I have elsewhere described this enormous change in the law governing trusts and estate administration “as a ‘uniform laws revolution’ in probate and trust law, producing a modern, up-to-date system of transferring wealth from one generation to the next.”<sup>154</sup>

By almost any measure, the ULC has been a great success. In addition to the three subject matter areas I have discussed, uniform state laws are controlling in numerous other areas of law. Over its 120 years of existence, the ULC has promulgated more than 300 uniform laws, resulting in thousands of enactments in the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands.<sup>155</sup> In my opinion, the fact that many areas of substantive law remain state law, rather than federal law, is attributable to the development of uniform state laws.

In the 1971 Supreme Court case of *Younger v. Harris*, Justice Hugo Black described federalism in these words:

The concept [of federalism] does not mean blind deference to “States’ Rights” any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent

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147. STEIN, *supra* note 1, at 128–33.

148. *Id.* at 127.

149. *Committees: Trust Decanting*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Committee.aspx?title=Trust%20Decanting> (last visited Apr. 19, 2015).

150. *Committees: Fiduciary Access to Digital Assets*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Committee.aspx?title=Fiduciary+Access+to+Digital+Assets> (last visited Apr. 19, 2015).

151. *Committees: Recognition of Substitute Decision-Making Documents*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Committee.aspx?title=Recognition%20of%20Substitute%20Decision-Making%20Documents> (last visited Apr. 19, 2015).

152. STEIN, *supra* note 1, at 118–33.

153. *Id.*

154. *Id.* at 133.

155. *Id.* at app. D.

is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.<sup>156</sup>

The position of the ULC and of this Article is not that state law should control on every important issue. It is, rather, that on those issues as to which uniformity is desirable and practicable, state law should be uniform in order to be a viable alternative to federal law on the subject. In that sense, the ULC has performed and continues to perform a vital role in maintaining and strengthening federalism in our increasingly complex and interconnected legal world.

### III. THE UNIFORM LAW COMMISSION MOVING FORWARD

Looking ahead, the newest challenge for the ULC is to address international issues in uniform state legislation. In our increasingly global practice of law, state law—in order to be most effective—must connect across international borders as well as across state borders. For example, the 2006 Uniform Child Abduction Prevention Act provides that “every abduction case may be a potential international abduction case.”<sup>157</sup> The 2008 amendments to the Uniform Interstate Family Support Act were adopted to satisfy American obligations under the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.<sup>158</sup>

The ULC has long had a close working relationship with the Uniform Law Conference of Canada.<sup>159</sup> That relationship has become even closer in recent years, and the organizations have on occasion undertaken joint drafting projects.<sup>160</sup> The Mexican Center for Uniform Laws has also participated in some of the joint drafting projects.<sup>161</sup> The three organizations jointly de-

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156. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

157. STEIN, *supra* note 1, at 186.

158. *Id.* at 187.

159. *See, e.g.*, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS FIFTY-NINTH YEAR 43–44 (1950).

160. *See, e.g.*, Michael I. Jeffrey, *Transboundary Pollution and Cross-Border Remedies*, 18 CAN.-U.S. L.J. 173, 177 (1992) (discussing the Uniform Transboundary Pollution Reciprocal Access Act drafted by the joint committee).

161. *See* UNIF. L. COMM’N, UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (2008) (LAST AMENDED 2011), *available at* <http://www.uniformlaws.org/shared/docs/unincorporated%20nonprofit%20association/>

veloped a Uniform Unincorporated Nonprofit Association Act, approved in 2008.<sup>162</sup> Currently, the Conference and the Uniform Law Conference of Canada are jointly drafting a Uniform Act on Interjurisdictional Recognition of Substitute Decision-making Documents.<sup>163</sup> Recently, the Conference also reached out to neighboring nations in the Caribbean to undertake joint projects in such areas as enforcement of child support orders and enforcement of judgments.<sup>164</sup>

Another international issue that has recently arisen for the Conference is the implementation by state law of private international law treaties signed by the United States.<sup>165</sup> At the request of the Office of the Assistant Legal Advisor to the State Department for Private International Law, the Conference has begun to address this issue, particularly for conventions that are related to areas of Conference uniform acts such as the Uniform Commercial Code and the Uniform Interstate Family Support Act.<sup>166</sup> Over the past few years, a concept of “cooperative federalism” has been developed:

[Cooperative federalism] facilitate[s] the implementation of treaties, when appropriate, through enactment of state law. Under this concept, a nearly identical federal statute and a uniform state law are drafted to implement a private international law treaty. The federal statute would implement the treaty except in those states in which the implementing uniform state law has been enacted.<sup>167</sup>

State law governing the subject would be retained in those states enacting the uniform state law implementing the convention. This might be viewed as a kind of “reverse preemption.”

The United States has entered into several private international law treaties in recent years.<sup>168</sup> The Conference has worked closely with the State Department to identify the best

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Revised%20UUNAA%20Summary\_Jan%202015\_GH%20edits.pdf.

162. *Id.*

163. UNIF. LAW COMM'N, UNIFORM RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT (2014), *available at* [http://www.uniformlaws.org/shared/docs/Interjurisdictional%20Recognition%20of%20Advance%20Planning%20Documents/2014\\_URSDDA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Interjurisdictional%20Recognition%20of%20Advance%20Planning%20Documents/2014_URSDDA_Final.pdf).

164. *See, e.g.*, UNIF. LAW COMM'N, CURRENT ULC PROJECTS RELATED TO INTERNATIONAL AND TRANSNATIONAL LAW, *available at* <http://www.uniformlaws.org/shared/docs/jeb%20international%20law/ulc%20international%20and%20transnational%20projects.pdf>.

165. STEIN, *supra* note 1, at 188.

166. *Id.*

167. *Id.*

168. *See, e.g.*, UNIF. LAW COMM'N, *supra* note 164.

method of implementing each of these conventions.<sup>169</sup> The implementation method varies depending on the specific convention.<sup>170</sup> Some treaties, such as the United Nations Convention on the Use of Electronic Communications in International Contracts (the E Commerce Convention), are planned to be adopted by a federal statute only.<sup>171</sup> The Conference concluded no amendment was necessary in the Uniform Electronic Transactions Act (UETA), which governs the vast majority of electronic executions in the United States.<sup>172</sup> Other treaties, such as the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, are planned to be implemented by cooperative federalism.<sup>173</sup>

Thus, the mission of the ULC continues to develop, from uniformity of state law to include, now, harmonization of state law with the law of other nations as well as the implementation by state law of private international law treaties. The work of the ULC over its more than 120 years has enabled state law to be a viable alternative to federal law in many areas in which uniformity of law is desirable. More and more, the ULC will work with the federal government to harmonize American law with the laws of other countries.

In the words of U.S. Supreme Court Justice Sandra Day O'Connor,

The Uniform Law Commission plays an integral role in both *preserving* our federal system of government and keeping it *vital* . . . . The mission of the Uniform Law Commission remains the same today more than 120 years after its founding in 1892: to promote uniformity of law among the states, and to support and protect the federal system of government by seeking an appropriate balance between federal and state law. The Commission has served our nation well.<sup>174</sup>

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169. *See id.*

170. *See id.*

171. INT'L ISSUES WORKING GRP., UNIF. LAW COMM'N, REPORT ON IMPLEMENTING THE UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS 5-6 (2010).

172. *See id.*

173. *See* UNIF. LAW COMM'N, *supra* note 164.

174. Justice Sandra Day O'Connor, *Foreword* to ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION, at ix-xi (2013).