THE DORMANT COMMERCE CLAUSE DOCTRINE, *SWIFT V. TYSON*, UNIFORM STATE COMMERCIAL LAWS, AND FEDERAL COMMON LAW: SHIPS THAT PASSED IN THE NIGHT?

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In *Gibbons v. Ogden*, Chief Justice Marshall described the power of Congress to "regulate" commerce as "the power . . . to prescribe the rule by which commerce is to be governed."[1] At first blush, this definition seems to contemplate that the legal principles governing the conduct of interstate commerce—e.g., whether negotiations for the sale of goods to be shipped from one state to another have culminated in a binding agreement; what counts as a breach of such a contract; how a breach should be remedied; and the rights of third parties, like lenders, who participate in the transaction—are to be promulgated by Congress, not by the states. Federal sovereignty over the legal framework of interstate commerce seems not only to follow from Marshall's definitional remarks, but to be confirmed by an abundance of later judicial assertions: for example, that interstate commerce "comprehends all the component parts of commercial intercourse between different states," including "every negotiation, contract, trade and dealing between citizens of different states" as well as "the obligation to pay and the right to recover the amount due."[2]

With equal frequency, however, we are told that there is no "federal general common law,"[3] and every law student knows that

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1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

2. Furst v. Brewster, 282 U.S. 493, 497-98 (1931) (invalidating state law restricting right of foreign corporations to sue under contracts relating to interstate trade); *see also* United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895) ("[c]ontracts to buy, sell, or exchange goods to be transported among the several states . . . may be regulated [by Congress] because they form part of interstate trade or commerce"); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290-91 (1921) ("where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation"), and cases there cited.

3. E.g., Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), overruling Swift v. Tyson, 41

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the principal statutes governing commercial transactions—the Uniform Commercial Code and its predecessors, such as the Uniform Negotiable Instruments Law and the Sales Act—were enacted by the states, not by Congress.[4] If, however, we take account of the dormant Commerce Clause doctrine (hereafter the DCCD)—that the states cannot regulate interstate commerce, even when Congress has not acted, if the subject requires "one uniform system, or plan of regulation"[5]—the law of interstate commercial transactions would seem condemned to drift without compass or rudder between state legislatures that can't regulate and a Congress that hasn't.[6]

In fact, however, interstate business is not now, and has never been, required to navigate a trackless sea between Scylla and Charybdis. State statutes determine virtually all the legal rights and duties resulting from a commercial transaction,[7] a term described by the draftsmen of the Uniform Commercial Code as follows:

> A single transaction may very well involve a contract for sale, followed by a sale, the giving of a check or draft for a part of the purchase price, and the acceptance of some form of security for the balance.
>
> The check or draft may be negotiated and will ultimately pass through one or more banks for collection.
>
> If the goods are shipped or stored the subject matter of the sale may be covered by a bill of lading or warehouse receipt or both.
>
> Or it may be that the entire transaction was made pursuant to a letter of credit either domestic or foreign.
>
> Obviously, every phase of commerce involved is but a part of one transaction, namely, the sale of and payment for goods.[8]

Most of the documents mentioned in this inventory are so completely governed by state rules that a rigorous application of the DCCD to these rules would cause consternation if not panic in the commercial world.

The only major exception to this virtual state monopoly of the

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U.S. (16 Pet.) 1 (1842), and cases there cited. For a corrective to this overinclusive generalization, see Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986). For a classic analysis of Swift v. Tyson and of the *Erie* case, see Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

4. The District of Columbia, Puerto Rico, and other partially self-governing political entities have also enacted many uniform commercial laws, but their action is comparable to the enactment of these statutes by the states, not to action by Congress for the entire nation.

5. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); *see generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-4 (2nd ed. 1988).

6. The state-federal antithesis is, of course, adapted from Judge Friendly's article, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

7. State law is supplemented or superseded by the Federal Bills of Lading Act (*infra* note 9), the fraudulent conveyance provisions of the Bankruptcy Act, and a few more specialized federal laws and regulations, such as those governing bank collections.

8. 1 U.C.C. at XVI (General Comment) (1989).

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commercial law governing interstate as well as intrastate transactions is the Federal Bills of Lading Act of 1916.[9] Although trade between buyers and sellers separated by long distances is virtually unimaginable without the ubiquitous bill of lading—a document so vital that if negotiable it must be transferred to effect delivery, a tender of the goods themselves being ineffective for this purpose[10]—it was state law that gave bills of lading their force and effect before 1916. State law controlled even though the Supreme Court had observed as early as 1861, in *Almy v. California*, that "a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another . . . [and is] hardly less necessary to the existence of such commerce than casks to cover tobacco or bagging to cover cotton."[11] This statement presaged the

9. See Federal Bills of Lading Act of 1916 (the "Pomerene Act") 49 U.S.C.A. § 81-124 (West 1916); *see also* United States v. Ferger, 250 U.S. 199 (1919) (act upheld as applied to counterfeit bills of lading). Reflecting the then-current meaning of "interstate commerce," the Act covers bills of lading issued by common carriers for the transportation of goods "from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country." For discussion of the Pomerene Act's substantive rules, which apply to both foreign and interstate commerce, see G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 93 (2d ed. 1975). The 1916 legislation did not wholly preempt the field; see Browne v. Union Pacific R.R. Co., 267 U.S. 255 (1925) (state law governs existence of local custom regarding dates recited in bills of lading and scope of agent's authority to issue documents).

An earlier but less comprehensive federal law governing bills of lading was the so-called Carmack Amendment to the Interstate Commerce Act, 34 U.S.C. 595 (1906), which protected shippers by imposing on carriers issuing "through" bills of lading (i.e., covering shipment over a series of connecting lines) liability for damage to the goods regardless of where the loss occurred, subject to reimbursement if the issuer could show that a later carrier was negligent. See Adams Express Co. v. Croninger, 226 U.S. 491 (1913) (amendment adopted because state laws subjected railroads "to such a diversity of legislative and judicial holding[s] that it was practically impossible . . . to know . . . what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another").

10. G. GILMORE & C. BLACK, *supra* note 9, at 90 ("the goods are locked up in the bill"). This legal principle creates practical difficulties that discourage the use of negotiable bills of lading for surface shipments, as contrasted with shipments by sea, as noted by G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 1.4 (1965). See also Voghel v. N.Y., N.H., & H. R.R., 216 Mass. 165, 103 N.E. 286 (Mass. 1913) (consignee of shipment not entitled to delivery except on surrender of negotiable bill of lading).

11. Almy v. California, 65 U.S. (24 How.) 169, 174 (1860) (state tax on bills of lading covering shipment from San Francisco to New York held invalid under import-export clause of U.S. Constitution art. I, § 10, cl. 2). Eight years later, the Supreme Court held in Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868), that the import-export clause applied only to commerce with foreign countries; but instead of overruling Almy v. California, which involved interstate commerce, the Court stated that *Almy* was "well decided" because the tax there invalidated conflicted "with the authority of Congress to regulate commerce among the states." *Id.* at 138. Read with this gloss, *Almy* can be described as the first case to use the DCCD to invalidate a state law, although that priority is ordinarily awarded to Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872). This may reflect doubts about the retroactive rehabilitation of *Almy*; Cooley's treatise on taxation, which dominated this field for many years, states flatly that *Almy* "has been regarded as overruled" by Woodruff v. Parham,

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Court's rationale for summarily upholding the power of Congress to enact the Federal Bills of Lading Act of 1916, viz., that "as instrumentalities of interstate commerce, bills of lading are the efficient means of credit . . . on which the commercial intercourse of the country, both domestic and foreign, largely depends."[12]

Though scarcely less crucial to the conduct of interstate trade than the rules governing bills of lading, the law of sales, negotiable instruments, and secured transactions not only was dominated throughout the nineteenth century by state law, but continues even to this day to rest largely on state rather than federal authority. To be sure, during most of the nineteenth century, the state rules were largely judge-made, and hence were in theory amenable to a degree of federalization under *Swift v. Tyson*;[13] but this process was confined to cases satisfying the requirements for federal diversity jurisdiction, and it may not have applied to state commercial statutes, which were evidently more numerous than is ordinarily assumed.[14] An example of such a 19th century statute is the New York Factors' Act, regulating the power of agents to pledge property consigned to them by distant owners, which was enacted in 1830 in response to an appeal from "sundry merchants and others of New York City," who complained that the rules of the pre-existing common law imposed unfair burdens on them in dealing with "a vast amount of property [that] was shipped to New York, from sister States and from foreign countries, in the names of factors selected by the owners."[15]

Statutes like these, as well as state-to-state variations in the common law governing commercial transactions, led the American

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though he may have meant only that *Woodruff* rejected the import-export rationale for the decision. See T. COOLEY, A TREATISE ON THE LAW OF TAXATION 91 n.4, and 95-96 (2d ed. 1886).

For a case seemingly involving federal diversity jurisdiction that implicitly applies Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), in holding that a railroad bill of lading limiting the carrier's liability to an agreed amount did not violate public policy, see Hart v. Pennsylvania R. Co., 112 U.S. 331 (1884).

12. United States v. Ferger, 250 U.S. 199, 204 (1919). *See also* Atchison, Topeka, & S. Fe. Ry. Co. v. Harold, 241 U.S. 371 (1916) (Carmack Amendment, *supra* note 9, precluded application of state law treating bills of lading as negotiable instruments), hinting but not deciding that the state law might violate the DCCD even in the absence of federal legislation.

13. *Supra* note 3, see *infra* text at note 28.

14. For references to nineteenth century state commercial law statutes, see Beutel, *The Development of State Statutes on Negotiable Paper Prior to the NIL*, 40 U. COLUM. L. REV. 836 (1940); G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, *supra* note 10. For the application of Swift v. Tyson to state statutes "declaring" or "codifying" the preexisting common law, see *infra* text at notes 53-56.

15. 1830 N.Y. Laws, Ch. 179, 203. See F. BURDICK, THE LAWS OF SALES OF PERSONAL PROPERTY 276, 772 (2d ed. 1901) (tracing enactment and construction of this and similar statutes in other states).

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Bar Association's Committee on Commercial Law to conclude, in 1887, that "the present needs of the business community for uniformity of law relating to the enforcement of contracts and the collection of debts imperatively demand national legislation as the only adequate means by which the desired relief and protection can be attained."[16] The Committee therefore recommended enactment of a federal bankruptcy act, a federal statute providing for a vendor's lien on property sold on credit in interstate commerce, and a federal negotiable instruments law governing promissory notes, bills of exchange, bank checks and other instruments "purporting to have been made in one of the United States, or a Territory thereof, or the District of Columbia, and payable in any other State, Territory, or country," which were declared to constitute the "means and instruments of commerce among the several states."[17] The Committee predicted that if Congress took the lead by enacting the laws relating to bills of exchange and other commercial paper used in interstate commerce, the states "would enact the same provisions for the regulation of commerce among their own citizens, and there would thus be provided a uniform system of law relating to the essential features of commercial transactions throughout the whole country."[18]

As authority for federal action, the ABA's 1887 Report cited half a dozen contemporaneous decisions upholding federal regulations of interstate commerce,[19] and then asserted, in expansive terms suggesting that its members were premature New Dealers, that "it can scarcely be doubted [that] when merchants in one State buy goods from those in other States, thereby involving the transportation of the goods from the seller to the purchaser, . . . the power of Congress extends to the passage of such laws as may be necessary to regulate these transactions in all their details, by prescribing the rights and obligations of all parties concerned, and by

16. 10 REP. OF THE A.B.A. 332, 352 (1887). Nine years earlier, when the ABA came into being, a committee on commercial law was instructed to inquire into the diversity of state rules governing negotiable or commercial paper and to offer suggestions "as to the propriety and expediency of action on the part of the Association, looking toward greater uniformity in the law on that subject." 1 REP. OF THE A.B.A. 27 (1878).

17. 10 REP. OF THE A.B.A. at 354 (draft bankruptcy act), 359 (draft vendor's lien) and 362 (draft negotiable instruments law). The Committee's 1887 report was endorsed in principle by the A.B.A. itself in 1889; see 12 REP. OF THE A.B.A. 29, 35 and 343 (1889).

18. 10 REP. OF THE A.B.A. at 79. A similar distinction between federal and state jurisdiction was implicit in an 1878 A.B.A. resolution requesting its committee on commercial law to report on the possibility of achieving uniformity in the law governing endorsements in blank of commercial paper by the enactment of state and federal legislation covering respectively "domestic transactions" and "transactions between citizens of different states." 7 REP. OF THE A.B.A. at 74 (1884).

19. 10 REP. OF THE A.B.A. 336-43.

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prohibiting everything which in any way prevents or obstructs the essential features of all commercial transactions, the purchase or sale, delivery and payment."[20]

Nothing, however, came of this call for a uniformity crusade to be led by Congress; indeed, it seems to have been abandoned before even the most optimistic lobbyist could have expected Congress to act. In 1890, after hearing still another appeal for uniformity in commercial law,[21] the A.B.A. transferred the matter from its Committee on Commercial Law to a newly-created Committee on Uniform State Laws, which included A.B.A. members from every state in the union.[22] A year later, this committee reaffirmed the A.B.A.'s commitment to uniformity in commercial law—"the vast volume of interstate trade and commerce and business dealings of all kinds, growing in range and complexity to enormous proportions, is entitled to the protection and advantage of substantially uniform laws"—and reported that state commissions on uniform laws had been appointed by New York, Pennsylvania, Massachusetts, Michigan, New Jersey and Delaware and that other states were expected

20. *Id.* at 343. *See also* Tucker, *Congressional Power Over Inter-State Commerce*, 11 REP. OF THE A.B.A. 44, 247, 273 (1888) (commercial paper "between citizens of different states in payment of goods sold by one to the other" constitutes "interstate commercial intercourse."). A confusing later comment by an influential member of the A.B.A. seems at first blush to reject any federal authority over notes generated by intrastate transactions that were transferred to out-of-state holders as a result of unexpected and unrelated later events, which would not have been subject to federal regulation under the draft 1887 bill cited *supra* note 17. At any rate, in the end he argued for both federal and state legislation, the same position that was taken by the 1887 report itself. *See* 13 REP. OF THE A.B.A. 247, 262-63.

Another discordant note on the subject of federal authority can be found in an 1891 report of the A.B.A.'s Committee on Uniform State Laws, which addresses the contention that uniformity "can be better and more permanently secured . . . by Congressional action, and, if necessary, by constitutional amendment . . . than by separate state action." In response, the report accepts as "conclusive" the counter-argument that Congress could not enact a uniform law of marriage and divorce "without absorbing eventually all the powers incidental to the subject, including family relations, property relations of husband and wife, guardianship of minors, custody and maintenance of children, legitimacy" and the rest of the law of domestic relations. "This [the Report asserts], it is evident the states will not permit. And the same difficulty lies in the path of national action *in the other matters in question*, except by constitutional amendments simply prohibitory in their nature" (emphasis added). See 14 REP. OF THE A.B.A. (1891), 365, 370, 373-74. The intended referent of the term "the other matters in question" is unclear, but if this report was intended to express qualms about the power of Congress to promulgate rules of commercial law for *interstate* transactions, it is hard to envision the source of the Committee's doubts or to understand why it would choose such a curiously vague way of repudiating the unqualified assertion of broad federal authority in 10 REP. OF THE A.B.A., *see* text at note 20.

21. 13 REP. OF THE A.B.A. 247-63 (1890); *see also id.* at 11. With extraordinary prescience, the speaker suggested that before the states could be persuaded to adopt uniform legislation, the utopia predicted by *Bellamy's Looking Backward* might eliminate the need for uniformity since "bills of exchange and promissory notes would be superseded by credit cards." *Id.* at 263.

22. The original mission of this committee was to seek uniformity in state laws governing wills, divorce, and acknowledgements. See 12 REP. OF THE A.B.A. at 96, 385 (1889).

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to follow suit.[23] It also exhibited a residue of hope for federal participation by recommending the appointment of commissioners not only by the rest of the states, but also by Congress "for the territories and the District of Columbia."[24]

The result of these organizational activities was a meeting in 1892 of delegates named by the state commissioners to a self-styled "Conference of the State Boards of Commissioners for Promoting Uniformity of Law in the United States," now known as the National Conference of Commissioners on State Laws ("NCC").[25] Although independent of the American Bar Association, its "generous godfather," the NCC met in its early years just before and in the same location as the A.B.A.'s annual meeting, thus becoming a training ground for aspiring A.B.A. leaders.[26]

With pardonable grandiloquence, one of the NCC's early prime movers likened it to a forerunner to the Philadelphia Constitutional Convention of 1787, the Annapolis Convention of 1786 because of the latter's mandate "to consider how far a uniform system in . . . commercial intercourse [among the states] . . . might be necessary to their common interest and permanent harmony," while another, with equal plausibility, analogized the NCC to the Philadelphia Convention of 1787.[27] The NCC might have claimed, more modestly but more persuasively, that it was heir to the nationalizing mission of *Swift v. Tyson*, in which Justice Story committed the Supreme Court to the principle that in diversity cases, "the true

23. 14 REP. OF THE A.B.A. 365 (1891), *reprinted in* 9 National Conference of Commissioners on Uniform State Laws (hereafter "NCC") 1899 HANDBOOK, Appendix, at 20 (1899); *see also* 13 REP. OF THE A.B.A. 336 (1890) (text of New York law creating commission on legislative uniformity and inviting other states to send representatives to a convention to draft uniform laws for submission to other states).

24. *Id.* at 375. The NCC has included commissioners from the District of Columbia and other partially self-governing political entities (e.g., pre-statehood Hawaii and Alaska, the Philippine Islands, the Virgin Islands, and Puerto Rico) and their legislative bodies have enacted some uniform state laws. For an abortive later attempt to persuade Congress to create a *national* board of commissioners to promote unity "upon subjects wherein diversity is a hindrance to interstate commerce and an impediment to the prosperity of the country," including the preparation of codes of commercial and mercantile law for submission to Congress or the states, see 4 NCC HANDBOOK 9-10 (1895).

25. *See* 4 NCC HANDBOOK at 21.

26. *See* 8 NCC HANDBOOK 13 (1899). ("generous godfather"); Toll, *Uniform State Laws*, 26 ROCKY MTN. L. REV. 450 (1954) ("[C]onversations which the [NCC] commissioners had been carrying on among themselves during the preceding week had a great deal to do with the selection of the slate [of ABA officers and executive committee members] that was to be elected."); J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 290 (1950).

27. 12 NCC HANDBOOK 5-7 (1902); Stimson, UNIFORM STATE LEGISLATION, 9 NCC HANDBOOK 27, 36 (1899) ("first time that representatives of the States of the Union have been brought into common debate on questions of fundamental law since the meeting of the Constitutional convention itself").

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interpretation and effect [of contracts and other instruments of a commercial nature] are to be sought, not in the decisions of [state] tribunals, but in the general principles and doctrines of commercial jurisprudence."[28] To be sure, in this "great leap forward toward the goal of a nationally uniform law,"[29] Justice Story's unifying instrument was the federal judiciary, while the NCC looked to the legislatures of the several states, a strategy that perhaps entitled the NCC to call itself Task Force E Pluribus Unum. As I read the record, however, the early exponents of uniform commercial laws did not draw any sustenance from *Swift v. Tyson*; indeed, rather than praising its vision of a national system of commercial law, they blamed the case for sowing confusion because the parties to a business transaction could not foresee whether a future dispute would be decided by the state's decisional law or by the "general principles and doctrines of commercial jurisprudence" as construed in diversity cases by the federal courts.[30]

In its first two decades of life, the NCC drafted and endorsed a

28. 41 U.S. 1. For more on the relationship between this case and the uniform law movement, see *infra* text at notes 47-49. For an earlier precursor of the unified law movement, see the remarks of James Sullivan, resuscitated from obscurity and summarized by 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 36-37 (1953).

29. G. GILMORE, THE AGES OF AMERICAN LAW 33 (1977).

30. *See, e.g.*, 13 REP. OF THE A.B.A. 247, 255-60 (1890). *See also* 304 U.S. 64 at 75 ("[I]n attempting to promote uniformity of law throughout the United States, the doctrine [of Swift v. Tyson] had prevented uniformity in the administration of the law of the state."). This complaint assumes that an otherwise dispositive decision by the state's highest court was frequently rejected by the federal judiciary, and that the state court subsequently adhered to its original decision; but my perusal of nineteenth century commercial law cases suggests that few of Swift v. Tyson's progeny fitted that classic pattern. More typical, at least in my review, were cases in which the federal court described the state decision (if indeed any was cited) as ambiguous, distinguishable, or qualified by later decisions of the same state court, announced that it was in any event not bound by the state's decisions, and then turned for enlightenment to the "general principles and doctrines of commercial jurisprudence." (Since this is how many state courts would themselves fill in gaps in their decisional law, it might be said that the federal court, by looking to general commercial law, behaved as though it were "in effect, only another court of the State"—its proper role in diversity cases, according to Justice Frankfurter's influential opinion in Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).) If in such cases the federal court's reading of the state decisions was valid, then its decision did not by itself create a federal-state conflict, though a conflict would of course arise if the federal decision was later rejected by the state courts. If, on the other hand, the federal court was disingenuous in describing the state decisions, there may have been a present conflict, though an unacknowledged one. Unless disingenuousness was endemic among nineteenth century federal judges handling commercial litigation, however, clearcut but unacknowledged conflicts were not common. It is worth noting that Grant Gilmore persuasively accuses Justice Story of disingenuously elevating a few New York dicta to the status of an authoritative decision in Swift v. Tyson in order to assert that it conflicted with the "general principles of commercial jurisprudence," when in fact New York law, properly construed, already "coincided with that of the rest of the civilized world." G. GILMORE, *supra* note 29, at 32-33. *See also* Stalker v. M'Donald, 6 Hill 93 (NY 1843), disputing the validity of Justice Story's statement of New York law in Swift v. Tyson.

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series of uniform commercial laws, encompassing negotiable instruments (1896), sales (1906), warehouse receipts (1906), bills of lading (1909), and stock transfers (1898 and 1909), some of which were widely enacted.[31] None of these state statutes, however, distinguished between intrastate and interstate commerce. Indeed, confining their coverage to intrastate transactions would have trivialized the uniform commercial laws movement, as described in 1911 by the NCC's president:

> [By the time] this Conference came into being, and quite irrespective of the merits or demerits of the proposed codification of the body of the law, public sentiment had gradually become aroused, to some extent at least, to an appreciation of the danger, uncertainty and gross injustice resulting from the different inferences drawn by the courts of the various states, from the precedents that were claimed to establish the law upon matters affecting the rights and duties of citizens whose business was carried on beyond the borders of their own states. The close inter-communication brought about by the modern uses of steam and electricity have caused a revolution in mercantile business which has not yet reached its fullest development. Instead of going to the local shopkeeper for merchandise necessary for use in daily life, the distributing centers, even in obscure agricultural communities, have been transferred to great cities. The boundaries of the states have become, from the point of view of the business man, merely geographical expressions.[32]

It was these "geographical expressions," however, that gave the members of the NCC their mandate, which, according to the NCC itself, was "to examine [various subjects] upon which uniformity of legislation in the various states and territories of the union is desirable, *but which are outside the jurisdiction of the Congress of the United States*" (emphasis added), with a view to drafting uniform laws to be submitted to the several states for approval and adoption.[33] The commissioners must have been sorely tried by this restrictive enabling act; taken at face value, it unaccountably placed off limits any area that Congress had the constitutional power to

31. For a summary of the NCC's early work on commercial law, see 18 NCC HANDBOOK at 101. The Federal Bills of Lading Act, *supra* note 9, was modelled on the NCC's Uniform Bills of Lading Act of 1909, modified to cover only interstate transactions. See 16 NCC HANDBOOK 29 (1906) ("[W]e prepared an act to provide a negotiable bill of lading covering interstate shipments . . . and that act was introduced in Congress.").

32. Smith, *President's Address*, 21 NCC HANDBOOK, 95, 121 (1911) (quoting from an address of Frank Bergen, a fellow commissioner). The centrality of interstate transactions to the NCC's early activities is memorialized in a recent NCC LEAFLET titled A TRADITION OF EXCELLENCE as follows: "During their second decade, Uniform Law Commissioners (ULC) concentrated on legislation that made interstate commerce easier." NCC LEAFLET, A TRADITION OF EXCELLENCE 2 (1985).

33. See the model act for the appointment of state commissioners, 11 NCC HANDBOOK 6 (1901); the italicized restriction was omitted from the NCC's 1941 Model Act to Provide for the Appointment of Commissioners—9 U.L.A. 34 (1951)—but has not been wholly extirpated; see, e.g., MASS. GEN. LAWS ANN. Ch. 6, § 27 (West 1985); Michigan, MICH. COMPILED LAWS Ch. 8 (79-83) (West 1915). On the other hand, some states did not include the restriction even at the NCC's inception. *See, e.g.*, N.Y. LAW Ch. 205 (1890).

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regulate, even if the states had concurrent authority to act in the absence of federal preemption. In any event, the commissioners pursued their broad objective despite their narrow credentials; if challenged, perhaps they would have pled confession and avoidance and invoked the example of the delegates to the Constitutional Convention of 1787, who were sent to Philadelphia "for the sole and express purpose of revising the Articles of Confederation" but who, refusing to be shackled by their commissions, produced a new constitution.[34]

Whether the NCC's drafts, by covering interstate commercial transactions, were inconsistent with the authority vested in the commissioners by the states is now at most a footnote to history; whether the states, by enacting the model laws, asserted jurisdiction denied to them by the DCCD, is a more weighty issue, to which I now turn.

Rooted in *Cooley v. Board of Wardens*, the DCCD taught that the states could not regulate "subjects [that] are in their nature national, or admit only of one uniform system or plan of regulation," even if Congress had not preempted the field.[35] Committed as it was to the elimination of diversity, the NCC could hardly deny that commercial law was a "national" subject without concomitantly repudiating its own raison d'etre; the accuracy of this label was further confirmed by the virtually universal enactment of the Uniform Negotiable Instruments Law. The states thereby implicitly acknowledged, in a paradox unique in the history of the DCCD, that the subject they were regulating was reserved by *Cooley v. Board of Wardens* for Congress because it required national uniformity, rather than the exercise of state-by-state "legislative discretion" to meet "local necessities."[36] The NCC's call for uniformity stemmed

34. For the resolution of Congress calling the convention ("for the sole and express purpose" etc.) and the credentials of delegates, see III M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 13, 559-86 (1986).

35. See Cooley v. Board of Wardens, *supra* note 5. For a recent endorsement of *Cooley's* "uniform national rule" formula, see Ray v. Atlantic Richfield Co., 435 U.S. 151, 179 (1978); see also Nat'l Agric. Chemicals Ass'n v. Rominger, 500 F. Supp. 465, 470 (E.D. Cal. 1980); see generally Tribe, *supra* note 5.

36. See Cooley, *supra* note 5, at 319 The states are, of course, not the arbiters of whether a uniform national rule is required; that role is vested in the federal judiciary, as noted in Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). My point is that widespread enactment of the uniform laws constituted an admission against interest, so to speak, that could have been taken into account by the federal courts in deciding whether uniformity in the treatment of interstate commercial transactions was necessary.

A related paradox is that the NCC has had only minimal success in unifying the law in areas that create no DCCD obstacle to state action, such as marriage and probate procedure, perhaps because the hallmark of the state's constitutional freedom to act in these areas—the perceived virtue of taking account of local customs, preferences, and circumstances—leads state legislatures to view the NCC's unifying mission as quixotic or even counter-productive.

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from its recognition of the confusion resulting from conflicting state rules governing such matters as the holder-in-due-course status of transferees of negotiable instruments, the requisites of an effective transfer of merchandise in transit, and the validity of offbeat endorsements of bank checks and bills of exchange—all threats to interstate commerce of the type that the DCCD presumably prevented by outlawing state regulations even when Congress was silent. In the NCC's early years, the DCCD had already been used by the Supreme Court to invalidate a state's rules because another state might impose contradictory regulations on the same interstate transaction or event, thus making it impossible for the regulated enterprise to comply with the law of both states.[37] Even resolving a contradiction by reference to conflict of laws principles only partly alleviates the potential burden on interstate commerce, since the parties to the transaction may be unable to predict with reasonable assurance the forum whose laws will ultimately be designated as controlling if a dispute actually arises.

Thus the NCC labored in the penumbra, if not in the deep shade, cast by the DCCD, but if the Commissioners were worried about its emanations, their doubts left no mark on their uniform commercial laws, which were all equally applicable to interstate and intrastate transactions.[38] Yet they could not have been unaware of the impact of the DCCD, which was "brought to fruition"[39] during Justice Waite's tenure as Chief Justice (1874–1888). Indeed, of the Supreme Court decisions cited in the influential 1887 report of the A.B.A.'s Committee on Commercial Law, which helped to pave the way for the uniform laws movement, the five most recent cases as of the date of the report not only described the power of Congress as "exclusive," but also nullified state statutes infringing on this federal power even though Congress had not undertaken to employ it.[40]

To be sure, the DCCD did not automatically condemn all state action merely because Congress could pre-empt the field; by the end

37. See Hall v. De Cuir, 95 U.S. 485 (1878).

38. Although the Uniform Bills of Lading Act as proposed in 1909 did not exempt interstate transactions, a limitation necessarily resulted from the later enactment of the Federal Bills of Lading act of 1916 (*supra* note 9), and was explicitly recognized by some states adopting the uniform act after 1916; *see* 4 U.L.A. § 1 (1985) (Statutory Notes).

39. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 74-75 (1937); see also D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, 31 (1990) (after the Civil War, the Commerce Clause "was wielded with increasing frequency to protect commerce against state interference").

40. 10 REP. OF THE A.B.A., *supra* note 16. See Walling v. Michigan, 116 U.S. 446 (1886); Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887); Philadelphia & S. Mail A. S. Co. v. Pennsylvania, 122 U.S. 326 (1887); W. U. Telegraph Co. v. Pendelton, 122 U.S. 347 (1887).

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of the nineteenth century, the Supreme Court's criteria for applying the doctrine were so unclear, diverse, and inconsistent that "there were precedents to justify almost anything the Court might choose to decide."[41] In this lamentable state of the law, did the commissioners wonder whether they were eliminating uncertainty in the law at the state legislative level, only to create uncertainty at the federal constitutional level? My perusal of the NCC annual handbooks during its formative years failed to uncover any worries about the impact of the DCCD on the model commercial laws, and there is no mention of this subject in a forthcoming history of the NCC.[42]

As events fell out, however, any misgivings that the commissioners might have entertained proved to be groundless: the NCC's uniform laws were enacted as proposed, with no exemptions for interstate transactions, and the federal courts not only interposed no constitutional objections, but were evidently never even called upon to examine the issue.[43] Why not? Because no one complained, at

41. Currie, *supra* note 39, at 31. For application of the DCCD when a transaction is subject to a state law that conflicts, or has the potential of conflicting, with the laws of another state, see *supra* text at note 37.

42. My search included all entries for "federal" and "commercial" in the 1945 consolidated index to the NCC HANDBOOKS, as well as an examination of stenographic transcripts of the NCC's earliest proceedings and W. ARMSTRONG, A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE ON UNIFORM STATE LAWS, scheduled for publication in 1991, which its author graciously made available to me in manuscript form. Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 237 (1965), asserts that the NCC manifested concern about the DCCD, citing a 1911 speech by its president as acknowledging that congressional action was required to obtain uniformity in some aspects of the law governing incorporation, pure food and drugs, and warehouse receipts. 1911 NCC HANDBOOK 95. As I read the speech, however, it makes no mention of either incorporation or the DCCD, expresses concern about state food and drug laws because Congress had *already* acted in that area, not because the states would be inhibited in the absence of federal action, and discusses the Uniform Warehouse Receipts Act, which followed the usual NCC practice of treating interstate and intrastate transactions alike, only in summarizing a decision involving a point of Pennsylvania law.

43. In asserting this negative, I am conscious of trembling on the edge of an abyss, especially because I rejected the safety net proffered by Lexis and Westlaw and did my research in the old fashioned way: by looking in books. For a pertinent decision by the New York Appellate Division, see Gubelman v. Panama Ry. Co., 192 A.D. 165, 182 N.Y.S. 430 (1920) (Uniform Bills of Lading Act applies to interstate shipment from New York to Panama Canal Zone); for two inconclusive Massachusetts decisions, see Roland M. Baker Co. v. Brown, 214 Mass. 196, 100 N.E. 1025 (1913), involving a dispute between two residents of Massachusetts over ownership of goods purchased in Russia and shipped to Boston, which rejected a claim that the Uniform Bills of Lading Act was an unconstitutional regulation of foreign commerce, since "[e]verything done by either party has been done [in Massachusetts], and it is only their rights against each other by reason of what has been done here that are now in question"; to the same effect, see Voghel v. N.Y., N.H. & H. R.R., *supra* note 10 ("although this bill of lading was issued in a foreign country, [the Uniform Bills of Lading Act] is applicable to these parties as between themselves"). For cases upholding state laws governing the liability of interstate railroads to shippers in the absence of federal preemption, see Adams Express Co. v. Croninger, *supra* note 9.

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least not with enough vigor and persistence to elicit a reported opinion. Why not? I cannot offer a definitive answer, but here are some raw materials.

First, when reading the Commerce Clause, nineteenth century lawyers probably associated the term "regulations" with legislative action, either by Congress or its counterparts in the several states. The common law, I suggest, would have been envisioned as the legal foundation for the conduct of commerce, rather than as a system by which the government "regulated" the market by dictating or changing the terms of private bargains.[44] To be sure, political scientists might regard this dichotomy as a distinction without a difference, and one can conjure up classroom examples that it might not survive even in the minds of lawyers. Assume, for example, that an agrarian state elected a populist judge—call him Cardozo of the Prairies—on a pledge to modernize the common law by cramming its interstices full of long-overdue social reforms, and that his first decision required all railroad trains to make unscheduled stops to pick up would-be passengers whenever hailed by a flag or lantern, because in serving the public from whom they derive their privileges, they must always be animated by "the punctilio of an honor the most sensitive."[45] Even an intellectually phlegmatic nineteenth century lawyer might well have concluded that this provocative version of the common law was as much a "regulation" of interstate commerce as a state statute of similar import;[46] but this hypothesis, based on an extreme case, does not undermine my more general supposition that conventional judge-made law was probably viewed as immune to the DCCD's constitutional standards.

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44. For an opinion that flirts with this idea, see Western Union Tel. Co. v. Call Publ. Co., 181 U.S. 92 (1901), rejecting plaintiff's claim that the state common law requiring common carriers to justify rate discrimination among customers was an unconstitutional regulation of interstate commerce; blurring the issue, the Court found that the "general common law existing throughout the United States" forbade rate discrimination by common carriers. *See also* Pennsylvania R.R. Co. v. Hughes, 191 U.S. 477 (1903), in which state common law, invalidating contracts by common carriers to limit their liability to shippers, was attacked (though unsuccessfully) as improperly interfering with interstate commerce; Atchison, Topeka & Santa Fe Ry. Co. v. Harold, 241 U.S. 371 (1916), treating as an open question, not needing to be decided, the claim that the rule governing the rights of a holder in due course of a bill of lading concerning an interstate shipment, as determined by the common law of Kansas, "constituted a direct burden on interstate commerce, and was therefore void"; Chicago, Milwaukee & St. Paul Ry. Co. v. Solan, 169 U.S. 133 (1898) (state statute forbidding common carriers to reduce by contract their common law liability to passengers upheld as applied to interstate trip).

45. The standard owed by common carriers to the public was, of course, derived by our imaginary populist judge from Meinhard v. Salmon, 249 NY 458, 464, 164 N.E. 545 (1928) (Cardozo, J.).

46. See Cleveland Ry. Co. v. Ill., 177 U.S. 514 (1900) (state law requiring all trains to stop at all county seats held invalid; no evidence that suitable alternative accommodations were not available).

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A belief that the DCCD was not applicable to a state's commercial common law—assuming that the issue rose to the level of conscious attention—could also have been fostered or buttressed by the sub silentio acceptance in *Swift v. Tyson* of the assumption that, were it not for the accident of diversity jurisdiction, the legal status of a bill of exchange executed in Maine and accepted by the defendant in New York would be determined by New York law despite the instrument's interstate attributes.[47] To be sure, the DCCD was only an embryo when *Swift v. Tyson* was decided (1842),[48] but its later growth as a threat to state *legislative action* could well have left unimpaired the impression, suggested by *Swift v. Tyson*, that the *common law* was immune to attack on DCCD grounds. Moreover, when state courts refused to bring their decisions into line with the "general commercial law" as expounded by *Swift v. Tyson* and its progeny, businessmen and their lawyers complained that the federal/state divergence was an inconvenience or nuisance, but not that the state rule was an unconstitutional "regulation" of interstate commerce by the state courts.[49]

Second, assuming that I am right in postulating that the common law was implicitly immunized against the DCCD, I suggest that turn-of-the-century lawyers may have assumed, again implicitly rather than overtly, that the same shield protected the NCC's early uniform state laws, like the Uniform Negotiable Instruments Law and the Uniform Sales Act, when applied to interstate transactions. Commenting on the reception of these uniform state commercial laws, Grant Gilmore observed

> [T]hey were hardly treated as statutes. The general understanding of the profession seems to have been that the new statutes were designed merely to restate the common law. The lawyers and judges, who were entirely familiar with the common law, went on thinking, talking, arguing and deciding cases, as if the statutes had never been passed. In time, the common law background faded from consciousness and the statutes had to be seriously examined—but that took a generation or more.[50]

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47. 41 U.S. 1. The bill of exchange in Swift v. Tyson was drawn by a resident of Maine in favor of one Norton, evidently also a resident of Maine, and was accepted by the defendant, a resident of New York, in part payment for lands located in Maine, which he had contracted to purchase from Norton and a person associated with him. The residence of Swift, to whom Norton negotiated the bill, is not stated in the opinion, but he took the bill in connection with a transaction with a Maine bank.

48. Cooley v. Board of Wardens 53 U.S. 299, is usually cited as the first explicit recognition of the DCCD, but it did not spring full-blown from the pen of Justice Curtis, who wrote for the majority in that case; for precursors, see Justice Johnson's concurring opinion in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), and Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829), where Chief Justice Marshall referred to "the power [of Congress] to regulate commerce in its dormant state."

49. *See*, 13 Rep. of the A.B.A. *supra* note 30.

50. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1044 (1961); see

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Thus, until the profession began to distinguish clearly between the commercial common law and the NCC's uniform state statutes, one might well expect that lawyers would attribute to the latter, by unarticulated assumption if not explicitly, the same constitutional status they accorded to the former.

Third, even an imaginative lawyer, unhampered by the blinders of custom, would hesitate to invoke the DCCD to attack a troublesome provision of a uniform commercial statute unless the alternative common rule that would be substituted for the statutory provision would be more attractive. Only an incorrigible optimist, however, could be confident of this result. Whether the statutory provision was replaced by the state's pre-existing decisional law (or by a hypothesized decision if the issue had not been previously decided by the state courts), as one might infer from *Swift v. Tyson*,[51] or by "the general common law existing throughout the United States," as might be inferred from a later Supreme Court decision,[52] the substitute was likely in the overwhelming bulk of cases to be the same as the statutory provision that the litigant was hoping to escape. After all, the uniform law movement sought to tidy up the nation's commercial law—to "declare" or "codify" rather than to reform or revolutionize it—and the objectionable divergences that were eliminated to achieve uniformity were mostly warts on an otherwise acceptable portrait.

This melancholy thought—that a lawyer's trailblazing use of the DCCD to attack a troublesome provision of a state's uniform commercial law might merely give his client an expensive 360 degree trip through a revolving door—suggests an equally melancholy conjecture: that the NCC's much vaunted uniform commercial laws made so few substantive changes in the preexisting common law that litigants were not motivated to question their constitutional validity as applied to interstate commercial transactions because a successful attack would ordinarily merely substitute Tweedledee for Tweedledum.

Fourth, for lawyers seeking to avoid a menacing statutory provision, there was sometimes an alternative to the untested DCCD route if the client could satisfy the requirements of federal diversity

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also Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 396 (1908), decrying judicial hostility to "statutory intruders" into areas traditionally covered by the common law.

51. *Supra* note 3. The suggestion in the text assumes that the venue for the hypothetical litigation was a state court. Diversity cases in the federal courts would probably have been governed either by the state's common law or by the "general" common law, depending on the impact of Swift v. Tyson on declaratory state statutes; for this issue, see *infra* text at notes 53-56.

52. 181 U.S. 92.

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jurisdiction: *Swift v. Tyson*.[53] Distinguishing in that case between a state's common law and its "positive statutes . . . and the construction thereof adopted by the local tribunals," the Supreme Court held that the federal courts, when exercising their diversity jurisdiction, were not bound by the former, and this principle led some ingenious lawyers to argue that statutes "declaring" or "codifying" the common law should be given the same treatment as common law rules rather than accorded the status of "positive statutes." This claim was accepted by some lower federal courts and was not rejected by the Supreme Court until 1934,[54] only four years before it overruled *Swift v. Tyson* itself.[55] From 1897, when Connecticut became the first state to enact the Uniform Negotiable Instruments Law, to 1934, a few assiduous litigants appealed successfully from various provisions of state commercial statutes to the "general commercial law" as expounded and applied by the federal courts in diversity cases under *Swift v. Tyson*.[56] This pre-1934 alternative to the DCCD, however, was not available to litigants in those federal courts that, anticipating the Supreme Court's 1934 decision, refused to assimilate declaratory statutes to the common law, nor could it be invoked by litigants who did not qualify for federal diversity jurisdiction.

Finally, in trying to account for the charmed life enjoyed by the uniform state laws, we must remember that not every intriguing legal issue is litigated, a fact of life that would be deplorable save for its admirable redeeming social consequence, viz., enabling law professors to flog the same horse in the classroom year after year.

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53. 41 U.S. 1.

54. Burns Mortgage Co. v. Fried, 292 U.S. 487 (1934) (under § 34 of Judiciary Act of 1789, applicable state statute furnishes rules of decision for federal courts; interpretation by highest state court is as conclusive as though "literally incorporated" into the statute), reversing Burns Mortgage Co. v. Fried, 67 F.2d 352 (3d Cir. 1933) (federal courts not bound by state court interpretation of "state statute such as the [Uniform] Negotiable Instruments Law which attempts to codify the rules that govern a branch of general commercial law"). For earlier decisions applying Swift v. Tyson to state decisions interpreting "declaratory" statutes, see Capital City State Bank v. Swift, 290 F. Supp. 508 (E.D. Okla. 1923) ("when the statute of a state is merely declaratory of the general principles of the common law, a federal court sitting in that state is not bound by the construction of such statute where a question of general commercial law is involved"; principle applied to Uniform Negotiable Instruments Law); see also the more tentative comments by Judge Learned Hand on this issue in American Mfg. Co. v. United States Shipping Board, 7 F.2d 565, 566 (1925) ("the rule of compulsory conformity [under § 34 of the Judiciary Act of 1789] perhaps does not apply to a statute codifying a part of the commercial law, as to which we in general follow our own notions"); Babbitt v. Read, 236 F. 42, 49 (2d Cir. 1916) (doctrine of independence "not so well settled"); for other cases, both pro and con, see Burns Mortgage Co. v. Fried, 67 F.2d at 495; *see also* Beutel, *Common Law Judicial Techniques and the Law of Negotiable Instruments—Two Unfortunate Decisions*, 9 TUL. L. REV. 64, 67 (1934).

55. 304 U.S. 64.

56. For these courts, see Burns Mortgage Co. v. Fried, 67 F.2d at 495, n.12.

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For a lawsuit, one ordinarily needs "an adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer, and the perceptive court."[57] I say "ordinarily," because quite a lot of law is made by unpersuasive lawyers grasping at straws; they also serve who only leap and lose. But even if all lawyers—good, bad, and indifferent—were brigaded together, they would still not be able to litigate *everything*.

On analysis, therefore, the paucity of DCCD attacks on the uniform state commercial laws is not as astonishing as it originally seemed; but even if it is not as baffling as a riddle wrapped in a mystery inside an enigma, it remains, I fear, a conundrum.

* * * *

In 1937—half a century after the American Bar Association's Committee on Commercial Law proposed enactment of a federal negotiable instruments law and other legislation governing interstate commercial transactions[58]—a successor A.B.A. committee recommended enactment of a federal sales act.[59] The 1937 proposal, like its 1887 precursor, died aborning, but the fact that it was conceived testifies to the obstacles blocking the achievement of a nationalized commercial law via the uniform state laws movement: the time, cost, and energy required to campaign for each model act in every state; the pressure to sacrifice uniformity by accepting local amendments in order to win enactment;[60] the danger that post-adoption amendments, however desirable, will not be universally accepted, shattering whatever uniformity had been attained;[61] the painful fact that every state's courts have the last word in construing every provision, no matter how it is interpreted in other states

57. Friendly, *supra* note 6, at 791.

58. *Supra* note 17.

59. 62 REP. OF THE A.B.A. 610 (1937); *see generally, A Symposium: The Proposed Federal Sales Act*, 26 VA. L. REV. 537 (1940); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 276 (1973). There were two 1937 bills (H.R. 1619 and H.R. 7824, 75th Cong., 1st sess.); both died in committee, as did a 1940 successor, H.R. 8176, 76th Cong., 3d sess. The coverage of these proposals was limited to transactions in interstate commerce; see Note, *Federal Sales Act: Constitutional Comment*, 26 VA. L. REV. 688 (1940); W. Crosskey, *supra* note 28, at 38. The NCC's Revised Uniform Sales Act was the residuary legatee of the unsuccessful federal sales act project; see W. TWINING, *supra* at 278-80.

60. *See generally*, Schnader, *Why the Commercial Code Should Be "Uniform"*, 20 WASH. & LEE L. REV. 237 (1963).

61. For early recognition that the Negotiable Instruments Law, though "the most consummate piece of codification in the legal literature of our language . . . cannot be implicitly relied on as a uniform law, even [where] it has been enacted" because it had already been subjected to piecemeal amendments by some states, see 21 NCC HANDBOOK (1911), 121. Two years earlier, the president of the National Conference had suggested that the interstate compact provision of the Constitution (art. I, § 10) might be employed to ensure that no state, after adopting a uniform law, could amend it without the approval of the Conference[!] and then only if all other states adopted the same amendment. Eaton, *Attitude of the Bench and Bar Towards the Negotiable Instruments Law*, 19 NCC HANDBOOK, 55, 60.

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and despite the admonition, included in some acts, that the law is to be construed and applied to promote uniformity across state lines;[62] and the risk in each state that subsequent legislation will effect destabilizing repeals or amendments by implication.[63]

Within weeks after losing this battle for a federal sales act, the partisans of uniformity started to plan what became "one of the most ambitious legislative ventures of modern times,"[64] the Uniform Commercial Code, a joint project of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Like its superseded predecessors, such as the Uniform Negotiable Instruments Law and the Uniform Sales Act, the UCC applies without distinction to interstate and intrastate transactions; and also like them, its widespread adoption by the states mutely cries out that commercial law is a "national subject" that, in the words of *Cooley v. Board of Wardens*, requires "one uniform system or plan of regulation."[65]

Indeed, if this truism requires explicit support, it can be found in the UCC's almost forgotten Proposed Final Draft, issued in 1950, which consisted of a "State Version" to be enacted by the states, and a "Federal Version" to be enacted by Congress, the latter encompassing any contract that "is in or affects interstate commerce."[66] The justification for the Federal Version was explained as follows:

> Hitherto the field of law covered by this statute has been almost entirely state law.
>
> Today the number of commercial transactions which pass between the states or

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62. *See, e.g.*, Uniform Sales Act, § 74. *See generally* Hintze, *Disparate Judicial Construction of the Uniform Commercial Code— The Need for Federal Legislation*, 1969 UTAH L. REV. 722. The U.C.C. now has the benefit of a permanent editorial board, empowered to file amicus briefs on U.C.C. issues on request by state courts. See Dezendorf, *How the Codes Permanent Editorial Board Is Functioning*, 22 BUS. LAW. 227 (1966); 1 U.L.A. xxix-xl (1989).

63. For an effort to protect against implied repeals, see U.C.C. § 1-104 (1989) (no implied repeal by later legislation "if such construction can reasonably be avoided").

64. Twining, *supra* note 59, at 270.

65. Cooley, *supra* note 5.

66. ALI and NCC, Uniform Commercial Code: Proposed Final Draft (Spring 1950), § 1-105. The Federal Version also reached contracts involving any "federal territory," defined to mean the District of Columbia and any United States territory or possession without its own legislative body.

In a discussion of the Federal Version, Professor Braucher asserted:

> The constitutional power of Congress to act on commercial law in interstate transactions is clear; it deserves no further discussion. (Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100, 102 (1951).)

Those who are not satisfied with this assurance can consult other sources, e.g., Hintze, *Disparate Judicial Construction of the Uniform Commercial Code—The Need for Federal Legislation*, 1969 UTAH L. REV. 722; Johnson, *Constitutional Law—A Federal Commercial Code—Some Possibilities Under the Constitution*, 45 MICH. L. REV. 1021 (1947).

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> which directly or indirectly affect interstate commerce has become so great as to warrant the Congress of the United States in entering the field by enacting this Code to apply wherever the contract or transaction falls within the permissible jurisdiction of Congress under the commerce clause as that jurisdiction has been defined in the recent decisions of the Supreme Court of the United States construing the words "affects interstate commerce."[67]

As routinely applied when the UCC was being drafted, the term "affects interstate commerce" was so expansive[68] that the Federal Version would have left nothing but a few crumbs to the State Version—an outcome that, one would have supposed, would have been welcomed by the unifiers because in one fell swoop it would have nationalized commercial law for the overwhelming bulk of business transactions.

In the principal scholarly commentary on the Federal Version, a leading proponent of the UCC's reforms warned that "[i]f the Code is to become law anywhere without causing more trouble than it cures, the Federal Version must be enacted before or soon after the first state acts."[69] He explained his caveat as follows:

> The proposed Code is no mere list of specific amendments to cure ambiguities and conflicts of authority; it is a sweeping revision and reform in the light of fifty years of experience under the uniform laws. It seems likely that state legislatures will be no less hesitant to pass it than they were to pass comparatively minor amendments. In the absence of Congressional action, then, one could anticipate a fifty-year interval during which various common-law rules would prevail in some states, several versions of some or all of the uniform acts would prevail in others, and the Code, with or without amendments, would be in force in still others. The principal benefit would be the creation of a vast experimental laboratory for the conflict of laws.[70]

Enactment by Congress of the Federal Version would also, he noted, immunize the law governing interstate transactions—the principal object of the UCC's solicitude—against the virus of nonuniform amendments and conflicting state interpretations. As for

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67. U.C.C. Proposed Final Draft at 14 (May 1949).

68. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942).

69. Braucher, *supra* note 66, at 104. Braucher proposed to reduce the Federal Version's jurisdictional reach by relegating to the states any contract whose "points of contact [i.e., offer, acceptance, performance, etc.] are limited to a single state or Territory." *Id.* at 107. He objected to broader federal authority for prudential reasons, primarily fear that state legislatures would resent it and that Congress might refuse to enact it. For Judge Friendly's bolder vision of federal action, see *infra* note 75.

In later pedagogical works, Braucher did not mention his 1951 warning against state enactment of the UCC without a federal counterpart, though it would surely have been good for a few minutes of classroom debate. *See* R. BRAUCHER, COMMERCIAL TRANSACTIONS; TEXT, CASES, AND PROBLEMS (2d ed. 1958); R. BRAUCHER & R. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS (1977). Braucher's *Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958), also omits any mention of the Federal Version in discussing the U.C.C.'s preenactment history.

70. Braucher, *supra* note 66, at 104.

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the uniformity that would be achieved for intrastate transactions by concurrent state enactment of the State Version, he regarded that as merely a useful by-product, since "our nationwide corporate enterprises . . . have learned to operate without [this type of uniformity]."[71]

Despite this focus on the needs of interstate merchants and their lawyers, partisans of the Federal Version evidently did not play the DCCD card by arguing that a commercial code deriving its authority solely from the states could not constitutionally regulate interstate transactions. In any event, before Professor Braucher's ardent espousal of the Federal Version reached its audience, the dual-version strategy had already been abandoned by the UCC's Editorial Board. Its Proposed Final Draft No. 2, issued in the spring of 1951, carried forward only the State Version, under which the UCC applies to any contract with any of a number of specified relationships to the enacting state (e.g., offer, acceptance, performance, delivery of goods, issue or receipt of a bill of lading or other document of title, application for or extension of credit, etc.).[72] This abandonment of the Federal Version was not only complete but also ignominious: it was not labelled "AAA-Major change of substance," nor even "AA-Minor change of substance," but only "A-change of form only." An additional ignominy was added by a contemporaneous account of changes in the UCC drafts, which does not even mention the demise of the Federal Version.[73]

Thereafter, a survivor from the first two decades of the NCC would have had a sense of déja vu: like the Uniform Negotiable Instruments Law, the first success of the uniform laws movement, the UCC was enacted by every state without any exemptions for interstate transactions, while the DCCD slept on, totally ignored by the UCC's draftsmen, by practitioners and academicians commenting on the UCC before and after its enactment, by lawyers representing clients with UCC disputes, and by judges interpreting the UCC. If awakened, however, the DCCD has a last clear chance to

71. Braucher, *supra* note 66, at 104.

72. U.C.C. Proposed Final Draft No. 2, § 1-105(2) (Spring 1951). No distinction is made between interstate and intrastate transactions, but if the contract bears "a reasonable relationship" to two or more states—as is ordinarily if not invariably true of interstate transactions—the parties may agree on which jurisdiction's law shall apply. *Id.*, Section 1-105(6). See generally, Gruson, *Governing Law Clauses in Commercial Agreements—New York's Approach*, 18 COLUM. J. TRANSNAT'L L. 323 (1979), and articles cited there at n.3.

73. See Malcolm, *The Proposed Commercial Code, A Report on Developments from May 1950 through February 1951*, 6 BUS. LAW. 113 (1951). For a threat to revive the Federal Version, issued when some states, all of which eventually fell into line, were being recalcitrant, see Schnader, *The Uniform Commercial Code—Today and Tomorrow*, 22 BUS. LAW. 229, 232 (1966).

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collide with the UCC; and if it were held that the UCC is an unconstitutional regulation of interstate commerce, Congress might be impelled, a century after the exponents of uniformity first looked to Washington for salvation, to enact a federal code of commercial law,[74] possibly even one applicable to intrastate as well as interstate transactions.[75] For this author, a harmless drudge poking through the dustbin of history, that would be pay dirt indeed.

74. Federal enactment of the U.C.C. would produce a corpus of what Judge Friendly called "specialized federal common law," i.e., "a federal decisional law . . . that is truly uniform because, under the supremacy clause, it is binding in every forum," unlike the "spurious uniformity" achieved by Swift v. Tyson, which prevailed only in diversity cases. Friendly, *supra* note 3, at 405.

75. See Friendly, *supra* note 3, at 419, "[S]hould Congress take the still bolder step of declaring that, in order to make [federal enactment of the Uniform Commercial Code] truly workable in these large areas of its enumerated powers [i.e., interstate transactions, bankruptcy, admiralty, etc.], the small remaining enclaves [i.e., intrastate commerce] must also be occupied?"

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