

Third-Party Laws



By Paul Engel

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- According to our state constitutions, our state legislatures make state law.
- What about the Uniform Commercial Code?
- Did you realize that a privately funded third party is drafting legislation for your state?

Most of us believe that our state legislatures are making our state laws. But what if that is only partially true? What if a third-party was making the laws for your state? Would you be OK with that? Would you be concerned to find out that two private entities are making the laws your state uses regarding commerce?

Background

We were all taught in school that governments in the United States have three branches: Legislative, executive, and judicial. While Congress had given up much of its legislative power to executive agencies when it comes to commerce, the states have given up their power as well. Not to executive agencies in the government, but to two third-party actors that make up laws that the states merely adopt. These “laws” are called the Uniform Commercial Code.

The Uniform Law Commission was formed in 1892 in part to create uniform commercial laws. The Uniform Negotiable Instruments Law was approved in 1896, and soon enacted in every state. More commercial laws soon followed: the Uniform

Sales Act and Uniform Warehouse Receipts Act in 1906; the Uniform Bills of Lading Act and Uniform Stock Transfer Act in 1909; and the Uniform Conditional Sales Act in 1918.

[Uniform Commercial Code](#)

In the late 19th century, the United States was in the middle of the industrial revolution. With the migration west of so many people, now connected by railroads, the differences in commerce laws between the different states was becoming a hinderance. In 1892, a group was formed called the Uniform Law Commission to help create laws that multiple states could agree to, allowing better interstate commerce. There's just one problem here: The Constitution.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[U.S. Constitution, Article I, Section 8](#), Clause 3

Not just the fact that Congress has the power to regulate interstate commerce, this code defines commerce within the states. Furthermore, states are forbidden from entering interstate compacts without Congress' permission.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State,

[U.S. Constitution, Article I, Section 10](#), Clause 3

However, this isn't an interstate compact since the states don't agree to adopt the parts of the UCC, but to consider the proposed legislation. So we have a loophole to implement common laws used for both intrastate and interstate commerce, which is nothing new, though I'm getting ahead of myself.

The ULC officially took on the task of drafting a comprehensive code to provide guidelines for all commercial transactions in 1940.

Uniform Commercial Code

Let me be perfectly clear: I do not have a problem with individuals, or even groups, suggesting legislation. I have drafted, and continue to draft, suggested legislation for my state and county representatives for consideration. As we'll see, it's not the suggestions that are the problem.

In 1942, the ULC and the American Law Institute joined in a partnership that put all the component commercial laws together in a comprehensive Uniform Commercial Code that was offered to the states for their consideration in 1951.

Uniform Commercial Code

I can only assume that the American Law Institute is full of lawyers. I don't know what the law schools taught back in 1942, but today my polling has shown they do not teach the supreme law of the land: The United States Constitution.

Again, the idea of making the commerce laws between the states more uniform has some logic to it, but I don't think what was started back in the 1940s is what were seeing today.

Pennsylvania became the first state to adopt the UCC in 1953, and every other state followed suit over the next twenty years.

Uniform Commercial Code

In 1953, all 48 states adopted the UCC, created by two third-parties, as law. Alaska and Hawaii adopted the UCC after they joined the union in 1959.

Third-Party Law Making

Why did these two entities join in this project? As you can imagine, creating a set of laws that meets the needs of an entire continent is no small underrating.

The UCC is a joint project of the Uniform Law Commission and the American Law Institute. Recognizing that drafting a combined commercial code was a massive undertaking, the ULC invited ALI to participate in the codification project, and the ALI board accepted the invitation in 1942.

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It appears that the Uniform Law Commission bit off more than they could chew, so they reached out to the American Law Institute for help. This started a decade-long attempt to draft the UCC. Has anyone wondered where they got the money for this endeavor?

Over the next ten years the two organizations collaborated at drafting meetings funded in large part by a generous grant from the Maurice and Laura Falk Foundation, with additional funding contributed from law firms, banks, and businesses that recognized the need for uniform commercial laws.

[Uniform Commercial Code](#)

I had not heard of the Maurice and Laura Falk Foundation. A little research taught me:

The Maurice and Laura Falk Foundation is a racial and social justice organization founded in 1929. The Foundation funded research in economics, healthcare, political science, and racial discrimination issues.

[Maurice And Laura Falk Foundation \(1929–1965\)](#)

So the Falk Foundation funded projects in several different disciplines, but with a racial and “social justice” point of view. That will become important later.

The UCC is maintained under the guidance of the [Permanent Editorial Board for the Uniform Commercial Code \(PEB\)](#), is comprised of members appointed by the ULC and the ALI. The PEB, established in 1961, monitors developments in commercial

law, recommends UCC amendments and revisions when necessary, and publishes official commentary to help courts interpret specific UCC provisions. An endowment established with the original Falk Foundation grant funding and replenished with UCC publishing royalties is available to fund UCC drafting projects.

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So if you thought two third-parties wasn't enough bureaucracy, they formed the Permanent Editorial Board for the Uniform Commercial Code. This is the body that makes recommendations for amendments and revisions to the code. Not only are they founded from the Falk Foundation grant, but apparently the UCC also charges entities for their publications, which helps fund the board.

The Uniform Commercial Code

Now that we've talked about the UCC, let's take a look at what the code actually does.

Article 1 of the Uniform Commercial Code (UCC) provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the UCC.

[Uniform Commercial Code](#)

Article 1 includes definitions that will be commonly used within the UCC. This can be handy, since it would make life difficult if terms for commercial transactions changed when you crossed state lines. As with any man-made document, things need to be fixed from time to time.

In addition, over the years it has been in place, certain provisions of Article 1 have been identified as confusing or imprecise. Several changes reflect an effort to add greater

clarity in light of this experience. Finally, developments in the law have led to the conclusion that certain changes of a substantive nature needed to be made.

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In addition to the smaller changes made over the years, it appears that a fairly substantial set of changes was made for the 2001 revision.

The 2001 Revision of Uniform Commercial Code Article 1 rounds out a complete refurbishment of the Uniform Commercial Code that began in 1985. New articles have been added. All the major articles have been either revised or amended. Article 6 on Bulk Transfers may be repealed, by recommendation, shortening the UCC by one article. The Article 1 Revision merely responds to all of the work and effort on the UCC since 1985.

[Uniform Commercial Code](#)

While I do not have access to the actual code, I think we can come to some reasonable conclusions from what I've found so far.

Conclusion

The logic of a uniform commercial code makes sense. How difficult would it be to do business across state lines if the rules for letters of credit or mortgages were different? Is the UCC the best, or even the legal way, to accomplish this end? Congress, not the Permanent Editorial Board of the UCC, has the legal authority to regulate interstate commerce. While the different acts of the UCC are not exactly interstate compacts, they come awfully close.

The UCC is composed of several acts. Not every state has adopted all of the acts. For example my adopted home state of Tennessee has only adopted Article 3: Negotiable instruments

and Article 4: Bank Deposits and Collections, but I am concerned that politicians, in their drive to “do something,” may see the UCC as an easy short-cut and not fully consider the impact this third-party would have on their citizens. After all, the entire process is primarily funded by what appears to be a left-leaning foundation more interested in political causes than economic ones.

[US Legal includes a list of which states have adopted the various articles of the UCC.](#) I suggest you ask yourself two questions. First, are you comfortable that your representatives in your state legislature have properly considered the proposed legislation? Second, would you be more comfortable if your elected members of Congress were making those decisions?

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E-Mail Paul Engel: paul@constitutionstudy.com