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# THE ROLES OF INDIVIDUALS IN UCC REFORM: IS THE UNIFORM LAW PROCESS A POTTED PLANT? THE CASE OF REVISED UCC ARTICLE 8

CHARLES W. MOONEY, JR.\*

*At the end of the day, based on observations drawn from the experience with the recent and ongoing revisions to update the Uniform Commercial Code, one can conclude that a reason why a number of things about uniform laws have had to be learned or relearned is that precedents were insufficient or insufficiently documented. But even if a more detailed or accurate history of this revision round for the Code is written, it can only serve to warn of problems encountered in the past and how they were addressed. That is no guarantee for the future since the context in which any future effort will take place inevitably will be different, and so will the people. Nonetheless, without an understanding of the history of the Code, we are bound to repeat it, both the successes, and the failures. So far, the process has benefitted from the published discussions of it, and hopefully such discussions will continue so as to leave even greater guidance for what is to come.<sup>1</sup>*

## I. INTRODUCTION

I was honored to be invited to speak at the recent symposium on the uniform law process at Oklahoma City University School of Law. The symposium provided a tribute to Professor Fred H. Miller as well as an outstanding academic conference.<sup>2</sup> It was an honor not only to appear with the distinguished assembled speakers, but also because it provided an opportunity to publicly express my admiration of Fred Miller and his life's professional work. I first encountered Fred Miller in 1972, as a

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1. Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 734 (1998) (footnotes omitted).

2. The Uniform Law Process: Lessons for a New Millennium, sponsored by the Oklahoma City University School of Law, January 25, 2002. Those invited to give remarks also were invited to write for this symposium issue of the Law Review.

young lawyer studying for the bar exam in Norman, Oklahoma. Over the past 25 years or so we have become good friends and shared many personal experiences and professional endeavors. During this time I have acquired enormous respect for Fred. He has distinguished himself as a lawyer, scholar, teacher, law reformer, friend, fierce defender of the organizations that he holds dear,<sup>3</sup> and especially as the loving husband of Marcia and father of Clay and Robert.

Another way to honor Fred (and the means that he will appreciate the most, no doubt) is to engage him (and others) in these pages on the uniform law process. In this brief essay I wish to build on the above-quoted passage written by Fred (with which I agree, wholeheartedly).<sup>4</sup> I shall rely largely on personal observations and experiences during the course of my involvement in that process over the past two decades, primarily as the process relates to the Uniform Commercial Code (UCC).<sup>5</sup>

## II. MEASURING SUCCESS IN THE UNIFORM LAW PROCESS

### A. Prologue

The process by which the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgates uniform laws and works to have them enacted is familiar and described well elsewhere, as is the NCCUSL-ALI working partnership for the UCC.<sup>6</sup> But how should one go about evaluating the success or failure of this process? As with all process, the end game is the results that it produces. Obviously, if the uniform law products that emerge are sound and well-received by the states, then it may follow that the process is sound as well. Conversely, if the products are poor and ignored by the states, then perhaps the process is seriously flawed. But here we must notice a problem or two

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3. I would include among these the National Conference of Commissioners on Uniform State Laws (NCCUSL), in which Fred has served as a Commissioner from Oklahoma and as Executive Director and for which he now chairs Executive Committee, the American Bar Association Section of Business Law (Business Law Section or Section), The American Law Institute (ALI), and the Permanent Editorial Board for the Uniform Commercial Code (PEB).

4. See *supra* text accompanying note 1.

5. AMER. LAW INST., NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 2002 OFFICIAL TEXT WITH COMMENTS.

6. See, e.g., Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861 (1995); Carlyle C. Ring, *The U.C.C. Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287 (1994).

with this line of examination. First, some uniform laws generally are thought to be outstanding and others, well, are not as acclaimed. Yet it appears to be the same *process* that produces varying qualities of products. Second, folks do not all agree on which products are superior and which are inferior. Happily, that keeps academics busy and interested but does not provide much insight into the process of producing uniform laws. Third, some products generally thought to be quite sound do not interest the states and are only sparsely enacted. Others about which strong negative concerns have been expressed are successful in the legislatures. The point is that what really counts is results. But disagreements about how to evaluate the results mean that a result-oriented measure of the process is bound to be inconclusive and subject to as much disagreement as are the results themselves. In short, so long as there remains disagreement on the substance of the statutory doctrine (however evaluated) that emerges, a result-oriented critique of the uniform law process necessarily will spawn disagreement as well.

But, so what? Legal academics and practitioners long ago gave up on law as a true “science.” We must accept the idea that our spirited discourse on law and policy is valuable in and of itself (because it creates knowledge). But the discourse also is valuable because it might result in a new, widely supported consensus. To date the linchpin of the uniform law process has been the idea that a group of knowledgeable, public-interest-minded lawyers, seeking input from all interests concerned with a matter, can codify an area of the law in a way that states will enact it in its uniform version.

Several academics have offered critiques of the uniform law process in recent years. While these critiques purport to focus on flaws in the process, the nub of the criticism appears to derive from perceived defects in the uniform laws that the process has produced—i.e., the doctrinal substance of promulgated uniform laws. And the nub of the nub is that powerful interest groups may have captured the process to the end that the substance of the product that emerges favors their interests. For example, that the substance of revisions of Articles 4 and 9 appears to favor banks and secured parties, at the expense of bank customers and consumer debtors, suggests that these favored interests somehow were able to capture and influence the relevant uniform law process.<sup>7</sup> In

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7. See, e.g., Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising U.C.C. Articles 3 and 4*, 28 LOY. L.A. L. REV. 743 (1993) [hereinafter, *Thinking Like a Lawyer*]; Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 638-41 (1995). I do

general the NCCUSL and ALI response has been to ensure that balanced input is obtained so that the drafting committee as well as the sponsoring organization (NCCUSL, or NCCUSL and the ALI for UCC projects) will be well informed. The aspiration of reaching a quality result with widespread support is to recreate the actual legislative process and, perhaps, even improve on it. During the wholesale UCC revision process of the 1980s and 1990s, the process has been increasingly successful in ensuring that all interests have been represented and considered at the drafting table.<sup>8</sup>

Criticism of both the substance and process for creating uniform laws is nothing new. During the period when the UCC initially was under construction, it did not lack for critics.<sup>9</sup> There also is nothing new about concern for the perceived excessive role and influence of what today are often pejoratively called "special interests." For example, during the review of the UCC by the New York Law Revision Commission, Grant Gilmore had this to say on March 22, 1954 at a public hearing:

The memoranda read this morning on behalf of the New York Clearing House . . . were so riddled with mistakes, inaccuracies, misreadings and misconstructions as to be largely untrustworthy and as to throw grave doubt on the professional competence in this field of those who prepared the memoranda. It cannot be overlooked that these memoranda were submitted to this Commission by representatives of some of the largest banks in New York City, advised presumably by competent counsel. These are harsh words, deliberately chose, which I shall be prepared to document before you gentlemen tomorrow.<sup>10</sup>

Critics of more recent revisions of the UCC, while clearly concerned with the substance that emerged or was emerging, have focused more

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not accept the premise of the argument with respect to Article 9, at least (i.e., that it unduly favors secured parties), but will accept it for the present discussion. For a brief discussion of a few of these critiques, see text accompanying notes 11-23, *infra*.

8. See Francis J. Facciolo, *Father Knows Best: Revised Article 8 and the Individual Investor*, 27 FLA. ST. U. L. REV. 615, 703 n.488 (2000) (discussing consumer interest input in revision projects for UCC Articles 2 and 9).

9. See, e.g., Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952).

10. 2 N.Y. L. Revision Comm'n, Hearings on the Uniform Commercial Code 1161 (1954). The New York Clearing House is a trade association of New York City banks.

closely on the process as well. For example, Professor Edward Rubin has offered trenchant criticism of both the substance of Article 4<sup>11</sup>—on which I agree to some extent<sup>12</sup>—as well as the process for revising Articles 3 and 4.<sup>13</sup> Rubin saw in the revision process an excessive influence of the banking industry and attorneys that represent its interests at the expense of consumers, and suggested that this industry had effectively captured the process.<sup>14</sup> Similarly, Professor Kathleen Patchell, in another thoughtful study, explained that the excessive power of the banking industry has resulted in a process that undervalues input from consumer interests.<sup>15</sup> Dean Robert Scott also has suggested the role of capture by secured creditors' interests in the process of revising Article 9.<sup>16</sup> Scott and Professor Alan Schwartz subsequently argued that information asymmetries allow law reform projects undertaken by NCCUSL and the ALI to be captured by private interests who control the drafting process, leading to detailed rules such as those found in UCC Article 9.<sup>17</sup> When capture is resisted, a more standard-based approach found in Article 2, they argue, emerges.<sup>18</sup>

In their interesting economic and empirical analysis, Professors Larry Ribstein and Bruce Kobayashi have criticized NCCUSL's reliance on ill-informed generalists and explored reasons why some uniform law projects are successful (defined in terms of widespread enactment) and some are not.<sup>19</sup> In another critique of the Article 9 revision process, Professor Edward Janger built on Scott and Schwartz (and others) in addressing the possible role of industry capture in the revision process.<sup>20</sup>

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11. Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 66 (1987).

12. See Charles W. Mooney, Jr., *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 CARDOZO L. REV. 305, 386-97 (1990).

13. Rubin, *Thinking Like a Lawyer*, *supra* note 7; Edward L. Rubin, *Efficiency, Equity and the Proposed Revisions of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991).

14. Rubin, *Thinking Like a Lawyer*, *supra* note 7, at 744-59.

15. Kathleen Patchell, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 103-105 (1993).

16. Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1822-47 (1994).

17. Schwartz & Scott, *supra* note 7, at 638-41.

18. *Id.* at 645-47.

19. Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996).

20. Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 617-25 (1998). Janger ultimately concluded that the Article 9 process had *not* been captured, however. *Id.* at

Janger also drew on Ribstein and Kobayashi in his explication of how the drafting process is influenced by factors such as threats of opposition in the legislatures, even in the absence of capture, and the resulting risk of nonuniformity.<sup>21</sup>

I will find it necessary to respond to some of these critiques, while adding my own, in written comments on a forthcoming article by Robert Scott.<sup>22</sup> His paper and others will be presented at an upcoming symposium on the unification of commercial law, sponsored by the Louisiana Law Review.<sup>23</sup> But this paper stakes out a different agenda.

I will focus on the roles of individuals, as opposed to institutions and institutional structures, in the uniform law process. To do so I shall provide a brief (largely autobiographical) sketch of the events—as I observed, participated, and influenced them—that led to the 1994 revision of Article 8 (and the substance of that revision) as well as the corresponding new regulations for federal book-entry Treasury securities.<sup>24</sup> In the epigraph quoted at the beginning of this paper, Miller explained that more detailed and accurate histories of revision projects would be “no guarantee for the future since the context in which any future effort will take place inevitably will be different, *and so will the people.*”<sup>25</sup> My first hypothesis is that roles played by individuals (each with an agenda of one sort or another, but an agenda nonetheless) in the uniform law process can provide a much more significant and outcome determinative influence than the “process.” And these roles are so varied and idiosyncratic that attempts to model the process in ways that would provide useful predictive value are largely futile, even if interesting. The uniform law “process” is not a potted plant.

I first offer my historical sketch. This project is risky; space in these pages does not permit a full-blown history of the revision of Article 8, which was completed in 1994. This is the start of that history, not the

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21. *See id.*, at 587-93.

22. Charles W. Mooney, Jr., *A Uniform Law Process of Which I Know Not: A Comment on Scott's Rise and Fall of Article 2*, 62 LA. L. REV. No. 4 (forthcoming 2002) (commenting on Robert E. Scott, *The Rise And Fall of Article 2*, 62 LA. L. REV. No. 4 (forthcoming 2002)).

23. Symposium, *Unifying Commercial Law in the Twentieth Century, Understanding the Impulse and Assessing the Effort*, Essays in Honor of Chancellor Emeritus William D. Hawkland, held March 7-8, 2002, at Baton Rouge. The symposium papers and comments will appear in 62 LA. L. REV., No. 4 (forthcoming 2002).

24. I caution that the tale I tell is one seen through my eyes. A more complete account would have to view the events through those of many participants.

25. Miller, *supra* note 6, at 734 (emphasis added).

completion. Following my sketch I examine briefly the most thorough analysis and critique of revised Article 8 that has been published since the revision was promulgated.<sup>26</sup> Professor Facciolo's detailed study not only explores the merits of revised Article 8's substantive provisions,<sup>27</sup> but also claims that the weakness that he perceives in protections for individual investors flow from flaws in the process.<sup>28</sup> My hope is that comparing his take with my guided motorcycle tour of the Article 8 revision process will illustrate that reliance only on publicly available, traditional resources may lead to serious misconceptions, and further, that "conventional wisdom" also may be misleading. This is not to fault Facciolo, who worked with what he had in hand. But it supports my second hypothesis, which echoes Miller's hope that "discussions will continue so as to leave even greater guidance for what is to come."<sup>29</sup> Any material improvement in our understanding the uniform law process will require more intensive, and personal, studies of specific projects. These studies will require archival material that will enable interested scholars to conduct them.

*B. A Personal Sketch of the Revisions of Article 8 and the Federal Book Entry Treasury Regulations: 1985-1996.*

I mark the beginning (or the beginning of the beginning) of the path leading to revised Article 8 with several failures of government securities dealers in the early 1980s, resulting in losses by investors including secured lenders and investors advancing funds in "repo" transactions.<sup>30</sup> The "fallout" from these failures included not only investor losses but several reported judicial decisions interpreting the law governing

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26. Facciolo, *supra* note 8.

27. I do not offer here a substantive rebuttal on the merits of Professor Facciolo's criticisms of revised Article 8. But I do in fact take exception with many of his arguments and analyses.

28. This is consistent with my earlier observation that perceived flaws in the process often are based on disagreements with the substantive results of the process—the uniform laws that are produced.

29. Miller, *supra* note 6, at 734.

30. See GENERAL ACCOUNTING OFFICE, U.S. TREASURY SECURITIES, THE MARKET'S STRUCTURE, RISKS, AND REGULATION 112-13, 141-51 (1986), App. VI, VIII.

In a repo, a seller of a security (a funds borrower) transfers the security to a buyer (a funds lender) under an arrangement whereby the securities seller agrees to repurchase the security on a specified date (often the next day) at a specified price, and the securities buyer agrees to resell the security back to the seller.

Mooney, *supra* note 12, at 324 n.51.



transfers of and security interests in book-entry Treasury securities.<sup>31</sup> My story begins in the spring of 1985 when I received a call from Donald N. Ringsmith, Associate General Counsel of the Federal Reserve Bank of New York (New York Fed), requesting my participation in a meeting on May 6, 1985, with a few other New York attorneys to discuss book-entry Treasury securities transactions.<sup>32</sup> Shortly thereafter I received a copy of a memorandum from Richard B. Smith, dated May 1, 1985, outlining possible approaches to revising Treasury's book-entry regulations.<sup>33</sup> Our informal small group met several times during the summer and fall of 1985.<sup>34</sup> The group provided no formal consensus advice, but as individuals we provided considerable input as to how the applicable regulations might be revised and clarified.

In March 1986 the Department of Treasury issued the first set of proposed "TRADES" regulations.<sup>35</sup> By then our informal New York City group had expanded somewhat and morphed into a task force of the Section's Ad Hoc Committee on Uncertificated Securities.<sup>36</sup> It was

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31. See, e.g., Gregory S. Crespi, *The Unsettled Status of Clearing Agent Liens Under Article 8*, 20 U.C.C. L.J. 159, 171-87 (1987). As the terminology suggests, "book-entry" Treasury securities are United States government securities that are not evidenced by certificates. At the time they were governed by two sets of regulations. 31 C.F.R. §§ 306.115-306.122, 350.2-350.6 (1995) (superseded).

32. The meeting was promoted by the U.S. Department of Treasury as well as the New York Fed. As it turns out, these sponsors had decided to explore preliminarily whether a revision of the regulations covering transfers of and security interests in book-entry Treasury securities was in order, prompted in no small part by frustration with some of the recent judicial decisions.

I was then a partner at Shearman & Sterling in New York City. Advice on transactions involving federal book-entry Treasury securities was one of my areas of responsibility. At the time I also served as chair of the Committee on Uniform Commercial Code of the Business Law Section and had been in an all-out "law reform" mode for several years. I welcomed the call.

33. Memorandum from Richard B. Smith (May 1, 1985). At the time Richard Smith was a partner at Davis, Polk & Wardwell in New York City and a former Commissioner of the Securities and Exchange Commission (SEC). The memorandum stated that "Don Ringsmith...would like to meet with a small group of local UCC experts to discuss the need for any revisions of the Treasury regulations."

34. Other participants in some or all of these early meetings included Donald N. Ringsmith and MarySue Sullivan (New York Fed), Margery Waxman, Walter T. Eccard, and Virginia Rutledge (Treasury); Stephen H. Case, Bradley Y. Smith and Richard B. Smith (Davis, Polk & Wardwell), Harold B. Novikoff (Wachtell, Lipton, Rosen, & Katz), and Thomas A. Williams (Milbank, Tweed, Hadley, & McCloy). Some meetings involved only New York City practitioners.

35. 51 Fed. Reg. 8846 (1986). "TRADES" is an acronym derived from "Treasury/Reserve Automated Debt Entry System." *Id.*

36. That ad hoc committee, Chaired by Stephen H. Case (Davis, Polk & Wardwell)

during this period, beginning in 1985 and continuing into the task force's discussions of the proposed TRADES regulations, that I came to the conclusion that resolving the problems and uncertainties in the government securities market (as well as under UCC Article 8) could not be achieved by means of a last-in-time "good faith purchase" rule. Instead, I argued for a rule that would insulate a transferee on the books of an intermediary on a "higher tier" from claims of customers claiming through a "lower tier" transferor. In essence, a customer could look only to its own intermediary for satisfaction of its claim to book-entry securities. Unfortunately, my view was in the distinct minority.<sup>37</sup>

On June 6, 1986, several members of the Section's task force submitted written comments to Treasury on the March proposed TRADES regulations.<sup>38</sup> Our comment letter addressed several issues, but focused in particular on the priority issue just mentioned. It proposed two alternatives, one, Alternative A, was "a modified version of the Uniform Commercial Code's 'last in time' bona fide purchaser rule."<sup>39</sup> Alternative B, the version that I supported, was based essentially on the principle that "the holder of an interest in book-entry Treasury securities could look only to the appropriate book-entry custodian [i.e., intermediary] maintaining such securities for such holder."<sup>40</sup> Treasury submitted another version of the TRADES regulations in November 1986.<sup>41</sup> A smaller number of our task force provided a comment letter to Treasury on January 30, 1987, but the disagreement over the appropriate priority rule was not resolved.<sup>42</sup>

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had been formed primarily to prepare a model form of indenture for the issuance by corporations of uncertificated debt securities. It provided a convenient "home" within the Section for those of us who wished to provide input on the anticipated new book-entry Treasury securities regulations.

37. My relatively clear recollection is that I was the only one participating in the task force who held this view, although I can find nothing tangible in my files to document this. It is fair to assume, as well, that while not advocating for this view some of the group held open minds on the question.

38. Letter from Stephen H. Case to Virginia Rutledge (June 6, 1986). The letter was signed by Stephen Case on behalf of several listed members of the task force (Martin J. Aronstein, Stephen H. Case, Sydney M. Cone, III, Linda Hayman, Robert Mendelson, Charles W. Mooney, Jr., Harold S. Novikoff, Richard B. Smith, and Thomas A. Williams).

39. *Id.* at 7.

40. *Id.* at 14.

41. 51 Fed. Reg. 43,027 (1986).

42. Letter from Stephen H. Case to Chief Counsel, Bureau of Public Debt (January 30, 1987). Once again, the letter was signed by Stephen Case on behalf of several listed members of the task force (Martin Aronstein, Stephen H. Case, Diane Greif, Robert

Before we submitted our initial comment letter, I had announced that I was resigning my partnership at Shearman & Sterling in order to accept a tenure-track position as Associate Professor of Law at the University of Pennsylvania Law School, as of July 1, 1986. During the task force discussions of the proposed TRADES regulations I was beginning to understand that taking on "conventional wisdom"—epitomized by Treasury's view of the world in this context—could provide an opportunity for professional gains in my academic career. For the better part of the next decade I relentlessly pushed my ideas in this area at every turn.

Following expiration of the comment period for the November version of the proposed TRADES regulations, the process for reforming the book-entry Treasury regulations languished. This was, largely, because of the enactment in October 1986 of the Government Securities Act of 1986, which became effective on July 25, 1987.<sup>43</sup> That act generally was perceived to have reduced considerably (but not eliminated) some of the risks that would have been addressed by clearer and more certain book-entry Treasury regulations. Moreover, many of the same staff and lawyers at Treasury who had been working on the TRADES regulations were required to devote themselves to proposing regulations under the Government Securities Act.<sup>44</sup>

The year 1988 witnessed some watershed events that ultimately would spark the wholesale revision of UCC Article 8 and would provide me with a golden opportunity to push my agenda of law reform for transfers of securities controlled by intermediaries (and my future article, then in progress).<sup>45</sup> These events were directly or indirectly influenced by the October 1987 "market break." In May 1988 the Working Group on Financial Markets issued its Interim Report.<sup>46</sup> That report included a recommendation that consideration be given to federal legislation to deal with the transfer and pledge of "options" and "certificated and uncertificated stock."<sup>47</sup> The following month the Chairman of the

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Mendelson, Charles Mooney, and Richard B. Smith).

43. Pub. L. No. 99-571, 100 Stat. 3208 (1986).

44. That Act required the Secretary of the Treasury to adopt rules for customer protection, "including but not limited to, capital adequacy standards" and "the acceptance of custody and use of customers' securities." 15 U.S.C. § 78d-5(b)(1)(a) (1987).

45. See Mooney, *supra* note 12.

46. Interim Report of The Working Group on Financial Markets, Submitted to The President of the United States (May 1988).

47. The report noted the nonuniformity that existed because the 1978 official text of Article 8 had not been adopted in a substantial number of the states. *Id.* at 15-16.

Securities and Exchange Commission (SEC), David S. Ruder, wrote to the President of the United States and to the leadership of Congress, enclosing a draft of proposed legislation.<sup>48</sup> Under the proposed legislation the SEC, upon making certain findings of necessity, could promulgate regulations governing “the transfer of certificated or uncertificated securities or limited interests (including security interests) therein” (but this power would not apply to government or agency securities such as Treasury securities covered by the book-entry Treasury regulations)<sup>49</sup> About two weeks later, Congressman Edward J. Markey introduced H.R. 4997, with the short title of the “Securities Market Reform Act of 1988” (the “Markey Bill”).<sup>50</sup> The Markey Bill would have given to the SEC the power to issue regulations dealing with the private law of transfer and pledge of securities along the lines proposed by the SEC. These proposals implicated federal regulations that could, in effect, provide a federal version of UCC Article 8 and relevant portions of Article 9. It seems that concerns about the operation of transfer and pledge rules, which originally had given rise to the efforts to reform the book-entry Treasury regulations, had become more generalized with respect the securities markets following the October 1987 “market break” and the many studies and reports that it generated.<sup>51</sup> I reacted to the Markey Bill with both fear and opportunism.

Why fear? I saw that passage of the Markey Bill could derail my efforts to influence the future shape of the law of securities transfers. I had ready access to academic experts in commercial law, the leadership of the ALI, NCCUSL, the Permanent Editorial Board for the UCC (PEB), and the ABA Section of Business Law (Section), Treasury officials and attorneys with the New York Fed who handled the hands-on work on the proposed TRADES regulations, and the small group of expert lawyers providing guidance to Treasury on the TRADES project.<sup>52</sup> But a regulatory process within the SEC bore the potential promise of a

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48. Letter from David S. Ruder to The Honorable George Bush (June 23, 1988).

49. *Id.* (proposing to add a new subsection (f) to § 17A of the Securities Exchange Act of 1934).

50. H.R. 4997, 100th Cong. (1998).

51. *See, e.g.*, Division of Market Regulation, U.S. Securities and Exchange Commission, *The October 1987 Market Break 10-57* (1988).

52. In 1987 I completed a four-plus-year term as chair of the ABA Business Law Section’s UCC Committee and I began four-year terms as a member of that Section’s Council and as the first ABA Liaison-Advisor to the PEB—a position that I had worked hard to have created in recognition of the increasingly significant role of the Section in proposing and influencing reform of the UCC.

new body of commercial law beyond my sphere. Why was I, an academic, concerned about "influence?" During the spring of 1988 I had begun research and writing on the subject of transfer and pledge of securities controlled by intermediaries. My goal was to produce a substantial article (it was to be a "tenure piece"<sup>53</sup>) proposing a new and controversial approach that would be both theoretical as well as influential on future efforts to reform this area of the law.<sup>54</sup> In addition, I was preparing to pursue my research and writing on this topic during the fall of 1988 in Tokyo, as a visiting scholar with the Bank of Japan. I did not relish the prospect of SEC regulations that could render my project obsolete or only of academic interest (if that) even before it has seen the full light of day.

The Markey Bill also provided an opportunity. If it could be revised so as to call for a federal advisory committee in advance of any SEC regulations, I might be well-positioned to find a seat at the table as a member of the committee or in another official capacity. That would have allowed me to advocate from within the process, not from the outside, for my views on the appropriate direction for law reform. Robert Mendelson, then chair of the UCC Committee's Subcommittee on Investment Securities, and I recruited Professor Egon Guttman and we began to make our plans over the summer of 1988.<sup>55</sup> We drafted and provided to the SEC a proposed revision of the Markey Bill that would create an advisory committee. After working the halls informally during the August 1988 ABA Annual Meeting in Toronto, we were confident that the advisory committee approach was feasible.<sup>56</sup>

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53. I was to be considered for tenure during the 1989-90 academic year.

54. The eventual result, of course, was *Beyond Negotiability*, *supra* note 12.

55. In addition to Mr. Mendelson, Professor Guttman, and myself, we received informal but wise counseling from Ernest T. Patrikis, then General Counsel of the New York Fed, and Peter R. Fisher, then an attorney with the New York Fed (and currently Under Secretary of Treasury for Domestic Finance).

56. Happily, David Ruder, then chair of the SEC, and Edward Fleischman, then a SEC Commissioner, were active members of the Section and appeared receptive to the advisory committee approach (or at least open minded). As I prepared to depart for Tokyo, leaving to Mr. Mendelson the first-chair advocacy for the advisory committee approach, I provided him with detailed comments on possible revisions concerning the membership of a committee. Most were intended to make it likely that the two of us would be involved. Indeed, in my final missive to Mr. Mendelson before my departure I stated: "I am turning over the 'Career Enhancement' aspect of this project to your exclusive hands and judgment." Letter from Charles W. Mooney, Jr. to Robert C. Mendelson (August 18, 1988).

Next came a turn of events that from my perspective was even *better* than a federal advisory committee. In October 1988 SEC Chairman Ruder wrote to David E. Nelson, then chair of the Section.<sup>57</sup> Chairman Ruder explained that the SEC staff had been working with the Subcommittee on Investment Securities (which Mr. Mendelson chaired) on the possibility of establishing an SEC advisory committee, but that the staff had “concluded that the rigidities inherent in federal advisory committees would not be conducive to creative study of this critical area.”<sup>58</sup> Chairman Ruder then invited the Section to “consider sponsoring an expert ad hoc committee that can study the issues and develop intelligent and workable solutions.”<sup>59</sup> Having been made aware that Mr. Nelson had been attempting to contact me to discuss this project, on November 14, 1988, I faxed a letter to him setting forth my ideas about staffing, structure, and goals of the proposed study.<sup>60</sup> Shortly thereafter, Mr. Nelson called me (in Tokyo) to discuss membership, structure, and goals of the new committee.<sup>61</sup> At his request, that same day I faxed another letter to him with additional detailed suggestions. On December 16, 1988, Mr. Nelson wrote to me inviting me to become a member of the newly created ABA Advisory Committee.<sup>62</sup> The ABA Advisory Committee was to be chaired by Robert Haydock, Jr., of Boston.<sup>63</sup> It held its first meeting in Philadelphia on January 21, 1989.

Eventually the ABA Advisory Committee created an informal task force, or drafting group, to take the lead in preparing a report containing recommendations accompanied by substantive discussion.<sup>64</sup> The ABA Advisory Committee and its drafting group met numerous times during

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57. Letter from David S. Ruder to David E. Nelson (October 25, 1988).

58. *Id.*

59. *Id.*

60. Letter from Charles W. Mooney, Jr. to David E. Nelson (November 14, 1988).

61. Telephone conference between Charles W. Mooney, Jr. and David E. Nelson (November 16, 1988).

62. Letter from David E. Nelson to Charles W. Mooney, Jr. (December 16, 1988). At that point the committee was referred to as the “Advisory Committee on the Business Law Section Project on Financing Securities Transactions.” It soon adopted the designation of “Advisory Committee on Settlement of Market Transactions.”

63. The ABA Advisory Committee also became known informally as the “Haydock Committee.”

64. This informal group, sometimes supplemented by other interested members of the ABA Advisory Committee or observers, consisted of myself and Professor Emeritus Martin Aronstein; Professor Egon Guttman; Jonathan Kallman, (SEC); Robert C. Mendelson, Ernest Patrikis (New York Fed); and Richard B. Smith. The group had no chair, but most of the drafting was done by Kallman, Mendelson, and myself.

1989 and 1990. This also was the period during which I was writing and putting the finishing touches on *Beyond Negotiability*.<sup>65</sup> I distributed drafts for comment during the summer of 1989 and continued to work on the piece into 1990, when it was published.<sup>66</sup> Drafts of the ABA Advisory Committee report summarized the paper's "upper tier priority" thesis, and drafts of the paper were cited.<sup>67</sup> In February 1991 the ABA Advisory Committee issued its Interim Report (as it turned out, that was the only formal report ever issued by the committee).<sup>68</sup> The report was widely distributed. Among other proposals, the report stated:

A majority of the committee believes that the better view, as a matter of policy, should be to give priority . . . to upper-tier claimants in circumstances where a shortfall in the fungible bulk exists and two similarly situated, different-tier claimants assert an interest in the same fungible bulk. A minority of the Committee believes that the better view in these circumstances, as a matter of policy, should be to give priority to lower-tier claimants.<sup>69</sup>

The Report cited and discussed *Beyond Negotiability* in support of the majority view.<sup>70</sup>

As the ABA Advisory Committee was moving toward completion of its work on a report, Congress enacted the Market Reform Act of 1990.<sup>71</sup> That act added Section 17A(f) to the Exchange Act, a direct descendant of similar provisions proposed by the SEC and in the Markey Bill in

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65. See Mooney, *supra* note 12.

66. *Id.* *Beyond Negotiability* was the lead article in a symposium issue of the *Cardozo Law Review*. Other symposium articles were Martin J. Aronstein, *The New/Old Law of Securities Transfer: Calling a "Spade" a "Heart, Diamond, Club or the Like,"* 12 *CARDOZO L. REV.* 429 (1990); Egon Guttman, *Transfer of Securities: State and Federal Interaction*, 12 *CARDOZO L. REV.* 437 (1990); James Steven Rogers, *Negotiability, Property, and Identity*, 12 *CARDOZO L. REV.* 471 (1990); Michael E. Don & Josephine Wang, *Stockbroker Liquidations Under the Securities Investor Protection Act and Their Impact on Securities Transfers*, 12 *CARDOZO L. REV.* 509 (1990); Jeanne L. Schroeder & David Gray Carlson, *Security Interests Under Article 8 of the Uniform Commercial Code*, 12 *CARDOZO L. REV.* 557 (1990).

67. See, e.g., Investment Securities under UCC Article 8: Selected Issues Concerning Scope, Transfer, Security Interests and Priorities (Draft, November 26, 1990).

68. American Bar Association, Section of Business Law, Interim Report of the Advisory Committee on Settlement of Market Transactions (Exposure Draft, Feb. 15, 1991) [hereinafter Interim Report].

69. *Id.* at 36.

70. *Id.* at 37-40.

71. Pub. L. No. 101-432, 104 Stat. 963 (1990).

1988.<sup>72</sup> Subsection (f) once again authorized the SEC, upon its making specified findings of necessity, to adopt rules covering transfers of interests in securities, including limited interests such as security interests, and dealing with the rights of parties to transactions and third parties.<sup>73</sup> Subsection (f) also required the SEC to establish, within ninety days after enactment of the Market Reform Act, an advisory committee under the Federal Advisory Committee Act.<sup>74</sup> While this development might have disrupted the work of the ABA Advisory Committee, which generally was committed to a state law (i.e., Article 8) solution, in fact it did not. In establishing and appointing the fifteen members of the Market Transaction Advisory Committee (MTAC), the SEC, the Board of Governors of the Federal Reserve System (Fed), and the Department of Treasury (Treasury) sensibly ensured cooperation and coordination by appointing to MTAC several active participants in the ABA Advisory Committee.<sup>75</sup> Indeed, by the time that MTAC held its first formal meeting on October 29, 1991, the ABA Advisory Committee had completed its work and yet another related major project was well underway.

That major project was the revision of UCC Article 8 by a drafting committee appointed by NCCUSL and the ALI. But moving from the ABA Advisory Committee's recommendations to the Article 8 drafting committee involved a few interesting twists. Shortly after the ABA Advisory Committee finished its work, Robert Haydock proposed to the President of NCCUSL (then Lawrence J. Bugge), that it form a drafting committee for the revision of Article 8.<sup>76</sup> According to Haydock, Mr. Bugge declined and requested Mr. Haydock "to follow the procedures used in the preparation of the 1977 Amendments to Article 8."<sup>77</sup>

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72. 15 U.S.C. § 78q-1(f) (2000).

73. 15 U.S.C. § 78q-1(f)(1) (2000).

74. 15 U.S.C. § 78q-1(f)(4) (2000).

75. Under subsection (f)(4)(B), the SEC was to appoint 11 members, the Fed 2 members, and Treasury 2 members. MTAC members active in the ABA Advisory Committee included myself, Robert Mendelson (MTAC Chair), Martin J. Aronstein, Richard B. Nesson, Sandra M. Rocks, and Robert J. Woldow. In addition, one member was past president of NCCUSL, Carlyle C. Ring, Jr., who generally favored the uniform state law approach over a federal commercial law approach.

76. Memorandum from Robert Haydock to Members of the [ABA] Advisory Committee (July 12, 1991).

77. *Id.* What became the 1977 Amendments to Article 8, i.e., the 1978 Official Text, initially was drafted by the Section's Committee on Stock Certificates. Committee on Stock Certificates, Section of Corporation, Banking, and Business Law, Report of the Committee on Stock Certificates B-1 to B-39 (1975).



Haydock himself then appointed a drafting committee from among the most active participants in the preparation of the Committee's report.<sup>78</sup> But before long Bugge and the NCCUSL Executive Committee reversed this decision and decided to appoint a normal NCCUSL drafting committee, with the ALI invited to appoint representatives to the drafting committee as well. During the course of the spring of 1991 the Article 8 drafting committee was assembled, with Professor Curtis Reitz as its chair and Professor James Rogers as the reporter.<sup>79</sup> The drafting committee held its first (largely organizational) meeting during the NCCUSL Annual Meeting in August 1991<sup>80</sup> and its first three-day substantive meeting on October 25-27, 1991.

For present purposes, as they say "the rest is history." In 1994 revised Article 8 was approved by the ALI and NCCUSL and now has been enacted in every state.<sup>81</sup> Although it did not embrace my "upper tier priority" proposal as a drafting convention, it reached the same

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78. Members included, in addition to myself, Jonathan Kallman (ABA Advisory Committee Secretary), Martin Aronstein, Egon Guttman, Robert C. Mendelson, Ernest T. Patrikis, and Richard B. Smith. Memorandum from Robert Haydock to Members of the [ABA] Advisory Committee (July 12, 1991); Interim Report, *supra* note 68, unnumbered final page.

79. During the period during which revised Article 8 was prepared (1991-1994) I maintained my interest and commitment to the project, as well as my personal goal of seeing that the principles for which I had advocated in *Beyond Negotiability* and elsewhere would receive a fair airing. When approached, I declined to be considered for the position of reporter because I was in the midst of serving as a co-reporter for the PEB Study Group for UCC Article 9 and expected to be considered eventually for the position of co-reporter for a drafting committee to revise Article 9. But I did propose to Professor Fred H. Miller, an active Uniform Law Commissioner from Oklahoma and soon-to-be Executive Director of NCCUSL, that Professor Reitz would make an outstanding chair. Professor Reitz, my Penn colleague whose office is across the hall from mine, had read and commented on drafts of *Beyond Negotiability* and had been a Uniform Law Commissioner for many years. I also suggested Professor Rogers as a candidate for reporter and made the initial call to him to inquire about his willingness. Professor Rogers also had commented on a draft of *Beyond Negotiability*, was an expert on commercial law, and had written on negotiability. I was appointed by the Section as its Advisor to the Drafting Committee and Richard B. Smith was appointed as the ABA Advisor. Memorandum from Edith O. Davies, Executive Secretary, NCCUSL to Curtis Reitz and Charles Mooney, Jr. (October 4, 1991) (enclosing list of all Article 8 drafting committee advisors and observers).

80. This was one of two meetings of the Article 8 Drafting Committee that I missed entirely. I was hospitalized with meningitis. A conflict also prevented me from attending a final "clean-up" meeting held February 11-13, 1994.

81. The recent revisions of Article 9 also involved revision and relocation of various provisions on revised Article 8 and its accompanying revisions of Article 9. But the recent revisions made no material substantive changes.

results in substance. In particular, it adopted the conceptualization of a "securities account" in the indirect holding system, which I had long advocated.<sup>82</sup> But it took the precise shape that it did through long and arduous discussions, a great deal of learning by the drafting committee, hard work and insight of many advisors and observers, and, of course, the exceptional talents of Professors Reitz and Rogers.

As Article 8 was making progress on drafting, structure, and substance, yet another federal hiccup threatened to interrupt the process. A meeting of the drafting committee was scheduled for February 21-23, 1992, to review Professor Rogers' first draft of the revised article. The plan was to have the "first reading" of revised Article 8 at the August 1992 NCCUSL Annual Meeting in San Francisco. Substantial consensus was emerging on many of the priority contests that had troubled Treasury (including those at which my "upper tier priority" proposal was directed). Then, out of the blue, on February 9, 1992, Richard L. Gregg, Commissioner of the Bureau of the Public Debt, wrote to Professor Reitz to inform him that Treasury intended to propose new TRADES regulations in the near future. In April 1992 Treasury published the new proposed regulations, with comments due by September 8, 1992.<sup>83</sup> Recall also that this development arose as MTAC was preparing to begin its work.<sup>84</sup>

The Section responded again, by appointing a Task Force on Proposed Trades Regulations, chaired by Sandra Rocks.<sup>85</sup> Although a

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82. See, e.g., Mooney, *supra* note 12, at 310:

[T]he central thesis of this article [is] . . . that a property law construct for resolving priorities among claimants to fungible bulks of securities is a fundamentally flawed approach. . . . The interest of an ownership claimant through an intermediary is best characterized as a bundle of rights against the intermediary. The "property" involved is the claimant's interest in its account with its intermediary, not the fungible bulk of securities that may or may not underlie that account.

Under revised Article 8, a customer of a "securities intermediary" is an "entitlement holder" who has a "security entitlement" with respect to "financial assets" credited to the entitlement holder's "securities account." UCC §§ 8-102(a)(7) (defining "entitlement holder"), (14) (defining "securities entitlement"), (17) (defining "security entitlement"); 8-501(a) (defining "securities account").

83. Prop. Treas. Reg. §§ 357.0-.45, 57 Fed. Reg. 12,244 (1992) (amended by 57 Fed. Reg. 20572 (1992)) [hereinafter 1992 proposed TRADES regulations].

84. See *supra* text accompanying notes 73-74.

85. By this date, the Ad Hoc Committee on Uncertificated Debt Securities, which

conflict prevented my attendance at the first meeting of the ABA Task Force, held on May 15, 1992, as the Section's Advisor to the Article 8 drafting committee I agreed to participate. I also had some pre-meeting advice for Ms. Rocks, which indicated my displeasure with Treasury's move and my desire to submit my own comments as well.<sup>86</sup> In July 1992

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facilitated comments on the 1986 versions of TRADES had completed its work on a Sample Uncertificated Debt Indenture. See Report of the Ad-Hoc Committee on Uncertificated Debt Securities, 46 BUS. LAW. 911 (1991); Memorandum from Stephen H. Case to Former Ad Hoc Committee on Uncertificated Securities (April 15, 1992).

86.

I am willing to be involved in the comment process, although I cannot say that I am happy about it. A draft of a revised Article 8 is being sent out from NCCUSL in Chicago at this very moment. I believe it will reflect a relatively strong consensus on most important issues. By and large, these are the same issues addressed by the Proposed TRADES Regulations. I think it unconscionable, irresponsible, and (even) outrageous that Treasury would (i) interrupt the process of consensus building that is going on in the Article 8 process, (ii) dilute the precious time that the group of (essentially) volunteers has to devote to it, and (iii) ignore, by and large, the substance of the consensus that has been built so far—especially on priority issues.

I am particularly annoyed because three representatives of Treasury have sat through virtually every minute of the Article 8 deliberations since last summer. They rarely have put in their two cents worth but, in my presence, they *never* have expressed any disagreement with the major points on which the group has reached agreement. Dittò for a couple of years of work in the Haydock Committee.

It follows, for me, that the principal work of the ABA group should be to point out differences between the Proposed TRADES Regulations and the Article 8 project, support the growing consensus in the Article 8 project, attack the unprincipled approach reflected by the Proposed TRADES Regulations, and implore Treasury to hold off on any final regulations until next spring, when we should have a very clear picture of the new Article 8. . . .

Finally, I intend to submit my own comments on the Proposed TRADES Regulations. Compared to what I suspect the ABA group will produce, I expect that my comments will be somewhat more . . . "direct." There are more than enough folks involved in this project whose charm and conciliatory skills will, no doubt, keep things cool. What may be missing is a dose of political hardball from someone who is more interested in sound public policy and responsible government than what the regulators think. I'm ready to go public with my "they're out to lunch" theme.

Letter from Charles W. Mooney, Jr. to Sandra M. Rocks (May 8, 1992). Although I was never presumptuous enough to ask, I suspect that the Treasury representatives who actually participated in deliberations of the ABA Advisory Committee and the Article 8 drafting committee, Calvin Ninomiya (Chief Counsel, Bureau of the Public Debt), Cynthia Reese (Deputy Chief Counsel, Bureau of the Public Debt), and Virginia Rutledge

I joined with other ABA Task Force members in a letter to Treasury requesting a six-month extension of the comment period in order to take account of the progress of the Article 8 revision project.<sup>87</sup> Treasury acceded to the request.<sup>88</sup> Although I never followed through with formal comments to Treasury on the 1992 proposed TRADES regulations, I did publish them.<sup>89</sup> Treasury extended the comment period one more time,<sup>90</sup> and, finally, in November 1993 it wisely withdrew the 1992 proposed TRADES regulations.<sup>91</sup>

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(Attorney, Treasury), did not support publication of the 1992 proposed TRADES regulations. I suspect that it was Commissioner Gregg or other high ranking officials within Treasury who insisted on the proposal. I have no basis to criticize the individual positions of Mr. Ninomiya, Ms. Reese, or Ms. Rutledge.

87. Letter from Sandra M. Rocks et al. to Cynthia Reese, Deputy Chief Counsel, Bureau of the Public Debt (July 2, 1992).

88. 57 Fed. Reg. 33,470 (1992) (extending comment period until March 8, 1993). The circular noted that:

The Department has received a request from twenty-three members of the Book-Entry Treasury Regulations Task Force of the Investment Securities Subcommittee of the UCC Committee of the Business Law Section of the American Bar Association, to extend the period for submission of comments on the proposed regulations for six months. The extension has been requested in view of the current progress being made to revise Article 8 of the Uniform Commercial Code.

*Id.*

89. See Charles W. Mooney, Jr., *Good Faith Transferees of U.S. Treasury Securities and Other Weird Ideas: Making Federal Commercial Law*, 26 LOY. L.A. L. REV. 715 (1993). While most of that article addressed the substance of Treasury's proposed "good faith transferee" rule, it also assailed the process:

These [previously explained] results make one wonder why the Treasury Department chose to cling to the good faith transferee priority rule. It is unfortunate that busy professionals must take valuable time, which might be applied usefully on the Article 8 revision project, to review and comment upon the 1992 Proposed Regulations. Fortunately, no one seriously can believe that anything resembling the 1992 Proposed Regulations will become final.

*Id.* at 723.

90. 58 Fed. Reg. 9134 (1993) (extending comment period until November 30, 1993).

91. 58 Fed. Reg. 59,972 (1993). Treasury noted in its circular:

While the effort to revise UCC Article 8 has not yet reached finality, at this time it appears likely that when completed, the revision will represent a fundamental change from the existing Article 8 rules. Since the proposed TRADES regulations are based to a great extent on the principles of the existing Article 8 rules, it does not appear beneficial to request comments on the TRADES regulations currently proposed for comment. Rather, it would be more productive for interested parties, and of greater benefit to Treasury, for

In the meantime MTAC went about its business of carefully reviewing various market practices and issues from the standpoint of the SEC's regulatory authority. MTAC was continually briefed on the ongoing Article 8 revision and often discussed substantive issues considered by the Article 8 drafting committee. As the Article 8 project neared its completion, Robert Mendelson, MTAC's chair, wrote to then-SEC Chairman Arthur Levitt with a status report.<sup>92</sup> Mr. Mendelson noted that MTAC had reviewed the current Article 8 draft and that based on this review MTAC "believes that if it is enacted on a uniform basis in a sufficient number of important commercial jurisdictions, it will, on balance, add certainty and predictability to the current law regarding investment securities."<sup>93</sup> Mr. Mendelson also recommended that MTAC and the SEC monitor the consideration of revised Article 8 by NCCUSL and the ALI and "reexamine the version finally adopted."<sup>94</sup> Levitt answered on June 22, expressing pleasure that the ALI approved the final draft of revised Article 8 on May 19, 1994, and essentially noting agreement with Mr. Mendelson's suggestions.<sup>95</sup> In its 1996 final report, MTAC concluded that "[i]n light of revised Article 8, the Advisory Committee believes that virtually all of the areas it examined are addressed by revised Article 8 and therefore does not believe that Commission rulemaking is necessary at this time."<sup>96</sup>

At long last, 1996 also saw the saga of the thrice-proposed TRADES regulations coast to a happy ending. By 1995 Treasury's Bureau of Public Debt had a new Chief Counsel, Walter T. Eccard.<sup>97</sup> Following completion of revised Article 8, the ABA Task Force<sup>98</sup> once again focused on the TRADES regulations. In June 1995 the ABA Task force

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potential commenters to concentrate on completing an acceptable Article 8 revision.

*Id.*

92. Letter from Robert C. Mendelson to Arthur Levitt (May 18, 1984).

93. *Id.*

94. *Id.*

95. Letter from Arthur Levitt to Robert C. Mendelson (June 22, 1994).

96. Market Transactions Advisory Committee, Report to the U.S. Securities and Exchange Commission Pursuant to Section 17A(f)(4) of the Securities Exchange Act of 1934, at 5-6 (December, 1996).

97. Eccard had been with Treasury during the period when the 1986 versions of the TRADES regulations had been proposed but thereafter left for private practice. Interestingly, he was one of the signatories of the ABA Task Force letter to Treasury requesting an extension of the comment period for the 1992 proposed TRADES regulations. See *supra* note 87.

98. See *supra* note 85.

wrote to Commissioner Gregg proposing two alternative approaches.<sup>99</sup> In March 1996 Treasury published its fourth set of proposed TRADES regulations, with comments due by May 3, 1996.<sup>100</sup> The March 1996 proposed TRADES regulations involved a quite limited federal preemption.<sup>101</sup> Subject to that preemption, it essentially adopted the revised Article 8 choice of law rules with respect to both participants in the federal book-entry system and the interests of third parties.<sup>102</sup> However, if application of those rules would result in application of a pre-1994 version of Article 8, then *revised Article 8* would apply.<sup>103</sup> There are some interesting nuances of this structure, but in essence the March 1996 proposed TRADES regulations represented a complete victory for the Article 8 revision process. In August 1996 Treasury issued its final TRADES regulations, which made only a few minor changes to the March 1996 proposed TRADES regulations.<sup>104</sup> Although there were more than a few bumps in the road along the way, the TRADES regulations together with the conclusions reached by MTAC<sup>105</sup> were exemplars of cooperation between federal regulators and participants in the uniform state law process.<sup>106</sup>

From the time I became involved and interested in reform of the book-entry Treasury regulations in 1985 until the final 1996 TRADES regulations adopted the revised Article 8 paradigm, I sought to advance and bring to reality my vision of the appropriate substantive regimes for those regulations and revised Article 8. I would characterize my efforts

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99. Letter from Sandra M. Rocks (on behalf of the ABA Task Force) to Commissioner Richard Gregg (June 27, 1995) (outlining a proposal for federal regulation at the "top tier" where securities are held on the books of the Fed and an alternative proposal for entirely state-law regulation).

100. Prop. Treas. Reg. §§ 357.0-.44, 61 Fed. Reg. 8420 (1996) [hereinafter March 1996 proposed TRADES regulations]. In supplementary information dealing with "Legal Development," the March 1996 proposed TRADES regulations cited *Beyond Negotiability*, supra note 12, as well as the Prefatory Note to, and a memorandum accompanying, revised Article 8 prepared by the reporter, James Rogers.

101. See March 1996 proposed TRADES regulations, § 357.10 (law governing rights and obligations of United States and Federal Reserve Banks; rights of any Person against the United States and Federal Reserve Banks).

102. *Id.* § 357.11

103. *Id.* § 357.11(d).

104. Treas. Reg. §§ 357.0-.44, 61 Fed. Reg. 43,626 (1996).

105. See *supra* text accompanying note 95.

106. Perhaps a reminder is in order that this is in no small part due to the fact that individual participants in each process included many individuals who also were participating in the others.

honestly as both relentless and open.<sup>107</sup> No one involved in the process possibly could have doubted the nature or fervor of my agenda. Why did I take up this demanding, time-consuming, and potentially (professionally) risky cause?<sup>108</sup> I did so for reasons substantially similar to those that I believe motivate many others to devote themselves to *pro bono* projects, but these are reasons that the individuals involved normally are loathe to describe candidly. Ambitious professionals, including (perhaps *especially* including) legal academics, enjoy receiving attention, professional acclaim, recognition as “experts,” and respect as a serious players in their fields. I was (and am) no exception. I sought and achieved credit as the intellectual inspiration for a major rethinking and recodification of an important area of the law.<sup>109</sup> I hoped to demonstrate that serious theoretical scholarship also could have a practical impact on improving the legal regime for securities controlled by intermediaries. And I sought to do so not through political channels but instead through the power of reason, education, and persuasion on the merits.<sup>110</sup>

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107. The *pro bono* projects mentioned thus far were not the only securities-market-related activities that occupied my time me during this period. For example, from 1989 until 1994 I participated in numerous meetings as a member of the Legal and Regulatory Subgroup of the Group of Thirty U.S. Working Group. The Working Group and Subgroup (as well as other subgroups) grew out of a 1989 report made by the Group of Thirty (an international private sector group concerned with financial markets). See GROUP OF THIRTY, REPORT, CLEARANCE AND SETTLEMENT SYSTEMS IN THE WORLD'S SECURITIES MARKETS i (1989) (making nine recommendations for improving worldwide systems for clearance and settlement). Deficiencies in national private-law systems, such as Article 8 and the book-entry Treasury regulations, contributed to the prevailing problems. See *id.*, at 9-11. In addition, as mentioned above, *supra* note 79, from 1990 until 1992 I served as co-reporter for the PEB UCC Article 9 Study Group, which produced a lengthy report in December 1992. From 1993 until 1999 I served as co-reporter for the Article 9 Drafting Committee.

108. The risk, in my view, was that the policies that I advanced ultimately would be rejected with a corresponding implicit rebuff of my scholarship.

109. See, e.g., Facciolo, *supra* note 8, at 635 (“Professor Charles W. Mooney, Jr., the legal academic whose ideas form the intellectual underpinnings of Revised Article 8”); 664 (“Professor Mooney proposed the model of ‘upper-tier priority,’ which became the intellectual foundation of Revised Article 8”); 669 (“Professor Mooney, the intellectual progenitor Revised Article 8’s general approach”); 699, n.473 (“Professor Mooney’s influential article advocating a complete revision of 1977 Article 8”); (“Professor Mooney brought his own well thought out approach to the process of revising 1977 Article 8, one congruent enough to that of the federal regulators to be included in the Bankers Trust Company report”) (footnotes omitted). As discussed below, in his article Professor Facciolo takes exception with my insights and the corresponding aspects of revised Article 8. See *infra* text accompanying notes 115-22.

110. See *infra* text accompanying notes 131-35.

No one plausibly could deny that these types of self-interest play an important motivational role in all aspects of professional activities. But this point raises additional questions about the uniform law process in particular. First, were my motivations and goals inconsistent with the tradition of “leaving one’s briefcase and clients at the door”? I believe not. During most of this period I was an academic and had no prevailing “client” interests.<sup>111</sup> Moreover, it was not until well into the work of the Article 8 drafting committee that the kernels of the approach I had advocated were fully developed in the statutory text. Indeed, my views were distinctly in the minority among participants in the various projects during most of this period. Far from a “lackey” for financial institutions, I was working to bring “industry” representatives toward my point of view. Second, in order to leave one’s client interests behind while participating in a law reform process, must one leave behind his or her brain, conceptual framework, or views about public policy? Again, I believe not. Advocacy for one’s “world view” in a fair, open, nonmanipulative manner should be welcome in the process.<sup>112</sup> Third, was my approach consistent with my responsibilities as the Section’s Advisor to the Article 8 drafting Committee? I believe that it was. My efforts for the Section involved full disclosure of my views and activities during ABA meetings twice each year and at meetings of the Section’s leadership each year, as well as written reports. Moreover many active Section members participated in the ABA Advisory Committee, the Article 8 drafting committee, and the various ABA task forces that commented on proposed TRADES regulations.<sup>113</sup> Finally, would I have pursued my agenda had I believed that it represented poor, questionable, or unduly risky policies? Of course not. Having made a huge

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111. Although I have been a consultant to Morgan, Lewis & Bockius LLP since 1994, that relationship temporally occupies only a tiny portion of my professional work and that firm represents clients on all sides of the issues addressed in the relevant projects (including individual investors). See also letter from Charles W. Mooney, Jr. to David Nelson (October 14, 1988) (addressing organization and structure of ABA Advisory Committee; “[P]articipants would be expected to ‘leave their briefcases at the door’ and assume a duty to the group and the project not unlike that of an independent member of a corporate board.”).

112. Of course, intense criticism has its place in the process as well. See, e.g., *supra* note 89.

113. See *supra* text accompanying notes 30-106. For example, four past or present chairs of the Investment Securities Subcommittee of the Section’s Committee on Uniform Commercial Code participated in the work of the Article 8 drafting committee—Professor Egon Guttman (member), Robert Mendelson (observer), Sandra Rocks (observer), and Robert Wittie (observer).



investment in research and study, I believed in my approach and was (and remain) convinced that it is good public policy. Yet I was eager to have the rationale and durability of my ideas tested in the market for law reform.

To be clear, I shall close this section by emphasizing my view that, on balance, the role of self-interested professional motivation is a decidedly *beneficial* influence on the uniform law process. Unlike motivations grounded on clients' or participants' economic and business interests, the market for professional recognition in an environment of candid deliberations provides a healthy foundation for improvement in a legal regime.<sup>114</sup>

*C. Informing a Process-Oriented Critique of Revised Article 8 Through an Historical Sketch.*

In his thorough analysis of Revised Article 8 Professor Facciolo offers a critique of its substance as well as what he claims were flaws in the process leading to its promulgation.<sup>115</sup> As with many nominally process-based critiques,<sup>116</sup> Facciolo finds the substantive results found in revised Article 8 not to his taste and reasons from that to conclude the "process" undesirably excluded interests that he believes share his viewpoint (or would, if those interests were informed). Specifically, Facciolo claims that certain aspects of the substance of revised Article 8 favor institutional market participants to the detriment of the interests of consumers (to whom he refers in this context as "individual investors").<sup>117</sup> Noting that representatives of individual investors did not participate in the Article 8 revision process, he blames their absence in the process, at least in part, for the substantive results that he dislikes.<sup>118</sup>

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114. I cannot deny, however, that not infrequently the law reform process motivates individuals (usually legal academics, but perhaps they are the only ones that I notice) to advocate positions (usually "half-baked") that all concerned know have virtually no chance of carrying the day. These various unserious proposals may be grounded in rhetoric covering a spectrum from populism to social Darwinism. My impression and speculation is that the common denominator is the motive of drawing attention to the proponent(s) (and to the proponent(s) advocacy of the particular cause or ideology) and little else.

115. See Facciolo, *supra* note 8, 697-71.

116. See *supra* text accompanying notes 7-8.

117. See Facciolo, *supra* note 8, at 618.

118. Facciolo, *supra* note 8, at 697-702. I qualify my observation with "in part" because Facciolo also argues that inclusion of representatives of individual investors, even in the manner he advocates, "may not be sufficient to protect consumers." *Id.* at

The nub of Facciolo's substantive complaint are the new standards on recovery by an entitlement holder from a direct or indirect transferee from that entitlement holder's securities intermediary, under revised sections 8-502, 8-503, and 8-510. By imposing the burden of proof on the entitlement holder,<sup>119</sup> substituting the "collusion" standard for the "notice of adverse claim" standard, and awarding priority over entitlement holders to a "control" secured lender to a securities intermediary,<sup>120</sup> Facciolo argues that the revision materially disadvantages entitlement holders (including individual investors in the indirect system).<sup>121</sup> But Facciolo's dilution-of-rights argument assumes that the investor's pre-dilution rights under the pre-1994 Article 8 had meaningful value. They did not.<sup>122</sup> He also claims that the revision process overvalued the protective qualities of SEC investor protection regulation and Securities Investor Protection Act (SIPA).<sup>123</sup> Facciolo's *substantive* critique fails largely because he cannot substantiate his central thesis that revised Article 8 disadvantages individual investors. But my focus here is on his assessment of the revision *process*.

Facciolo describes the core of his procedural indictment as follows:

[S]ignificant resources should have been devoted to hiring representation for individual investors. At a minimum, a group should have been formed consisting of an experienced practicing lawyer, a legal academic and an economist. The two lawyers

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703. According to Facciolo: "Financial institutions and other major businesses not only dominate the national uniform laws revisions process but also the process by which the revisions are adopted at the state level." *Id.* at 703. Because Facciolo fails to reconcile these opposing strands of criticism, his argument for mandatory inclusion of consumer representation seems incoherent. (Perhaps he advocates *both* inclusion of consumer interests as well as a rescue of the process from business interests.) Nonetheless, I shall overlook this and continue to focus on his consumer-inclusion thesis.

119. *Id.* at 654.

120. *Id.* at 640-42, 654-72.

121. *Id.* at 696-714.

122. Dilution of these pre-1994 rights is not Facciolo's only criticism, but it is the centerpiece of his critique. Under the 1978 official text of Article 8 a customer of a "lower-tier" intermediary could have recovered from a transferee on the books of an "upper-tier" intermediary only if (i) the customer could trace its interest in a fungible bulk (that was wrongfully transferred by its intermediary) to the upstream transferee, (ii) the upstream transfer occurred after the customer received its interest on the books of the lower-tier intermediary, and (iii) the upper-tier transferee did not become a bona fide purchaser under 1978 § 8-302. See Mooney, *supra* note 12, at 382-83.

123. See Facciolo, *supra* note 8, at 675-97. The Securities Investor Protection Act is codified at 15 U.S.C. §§ 78aaa-lll (2000).

should have had, or been willing to develop, an expertise in commercial law, particularly issues of negotiability and security interests; and the economist should have had, or been willing to develop, an expertise in systemic risk in the financial markets. All three should have had practical or theoretical experience with the clearance and settlement of securities. In addition, there was a need for expertise in evaluating the federal regulatory regimes and SIPA, which might have required additional members for the individual investor group. Although the amount of work would have ebbed and flowed over a period of years, each member of such a group would have had to invest a significant portion of his or her working time on such a project. No reputational gain would have necessarily accrued to any member of the group representing individual investors. Only monetary compensation would have secured the necessary level of expertise and involvement.<sup>124</sup>

Given the gravity of the potential harm to which the revision process exposed individual investors, according to Facciolo's account, the ALI and NCCUSL should have secured funding (in the hundreds of thousands or even millions) in order to retain and pay representatives of the (apparently) Platonic and homogeneous aggregation of individual investors. However, Facciolo fails to take seriously that lobbyists and interest groups represented by competent counsel chose not to devote their resources to the Article 8 revision project.<sup>125</sup> The priority issues and

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124. Facciolo, *supra* note 8, at 702-03.

125. Facciolo chides Professor Rogers for writing that "presumably . . . consumer law advocates naturally devote their limited resources to matters that genuinely concern the groups or interests they represent." Facciolo, *supra* note 8, at 701 (quoting James S. Rogers, *Policy Perspectives on Revised UCC Article 8*, 43 UCLA L. REV. 1431, 1545 n.166). Facciolo notes that because Rogers did not identify any consumer groups that "it is impossible to evaluate their orientation and why they may not have responded to" the invitation to participate issued by the chair of the drafting committee, Professor Reitz. I am quite sure that one of these groups was the National Association of Investors Corporation. See Memorandum from Chuck Mooney to Curtis Reitz and Jim Rogers (October 24, 1991):

After looking at the most recent list (October 4, 1991) that I have received . . . , it seems to me that the following groups may need representation or additional representation at the drafting committee meetings:

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the stakes for individual investors in the indirect holding system were well known in the industry by the time that the Article 8 revision process began. For example, these issues and the investor "risk" that Facciolo perceives were identified conspicuously in both the ABA Advisory Committee Report<sup>126</sup> and in the narrative accompanying the 1986 proposed TRADES regulations.<sup>127</sup> The inference is clear that investor group representatives believed and continue to believe that the framework of SEC regulation and SIPA protection, not "property" rules under Article 8, are the appropriate areas of concern for investors. Now, perhaps a law professor can divine the concerns that are sufficiently grave to warrant large expenditures for representation at the drafting committee table, even when paid lobbyists and counsel for individual investor constituencies cannot. But I doubt it.<sup>128</sup>

Consider next Facciolo's claims from the perspective of my historical narrative. The antecedents of the collusion standard and the control priority rule were not industry proposals but my conceptualizations of how to devise a better and more efficient mousetrap—one in which absent serious misbehavior a customer of an intermediary could look only to the intermediary for satisfaction.<sup>129</sup> Moreover, Facciolo's consumer-underrepresentation critique misses an overarching dynamic of the Article 8 drafting committee process. In this respect the Article 8 project was exceptional. I share the view that in some contexts drafting committee members, advisors, and observers are imperfect proxies for "consumer" interests.<sup>130</sup> But individual investors in

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3 Retail investors. (Probably the National Association of Investors [Corporation] would cover this base (that and the individuals sitting in the room!).)

126. See Interim Report, *supra* note 68, at 25-40.

127. 51 Fed. Reg. at 8848-53 (1986).

128. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) ("I will argue . . . that 'brilliance' should count heavily against an economic or legal theory. The same traits of novelty, surprise, and unconventionality that are considered marks of distinction in other fields should be considered suspect in economics and law, in which thoughtfulness may be a more important virtue.") (footnote omitted). I must concede that my own arguments in *Beyond Negotiability* might be similarly criticized. Cf. Schroeder & Carlson, *supra* note 66, at 563 ("These [fungible bulk] provisions are heavily emphasized in Professor Charles Mooney's brilliant study of modern securities transfers."). The difference, perhaps, is that my ideas have been subjected over several years to tests in both the financial markets as well as the marketplace of ideas.

129. See *supra* text accompanying note 37.

130. See, e.g., Facciolo, *supra* note 8, at 620-22. For example, few at the Article 9 drafting committee table had experienced personally the ordeal of having an automobile

the context of the indirect holding system are not your run-of-the-mill "consumers." Indeed, the individual members of the drafting committee epitomized the middle- to upper-income individuals who maintain a substantial portion of their wealth in securities accounts.

I do not claim that the demographics of these drafting committee members proves the soundness of the statute that emerged from the process from the standpoint of individual investors.<sup>131</sup> Instead, I rely on the nature and substance of the dialogue within the drafting committee meetings. While a few members could be characterized as experts in the field,<sup>132</sup> most functioned as a cross between a jury hearing arguments of the advisor and observer experts and investigating judges. From the first meeting that addressed substance in October 1991 and throughout the process they had to be convinced. At the core of their skepticism were questions such as, "Why should an intermediary's customers suffer a shortfall in available customer securities while the interest of a secured lender or other purchaser from the intermediary is protected?" I include the reporter, Professor Rogers, as one of the skeptics as well.<sup>133</sup> Over time good answers to their questions emerged as revised Article 8 took its final form. But the debate was long, difficult, and sharp. Far from a process dominated by industry professionals, most drafting committee members were instinctively wary of industry positions, and sometimes even antagonistic. In particular many saw my conceptual approach as counterintuitive. This wariness continued well into the drafting process and accounts, I believe, for how late into the process the rules of which Facciolo complains emerged in their final form.<sup>134</sup> It is remarkable that notwithstanding this skepticism the statute produced by the drafting committee ultimately enjoyed the complete support of its members. But only the process of investigation, reason, argument, and evidence put the

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repossessed following a default on loan payments.

131. That claim would represent the flip side of Facciolo's flawed indictment of the drafting committee's product.

132. Richard Smith, though not a UCC expert, and Egon Guttman, are examples. Facciolo appears to be unaware of my role in the Drafting Committee as the Section's Advisor.

133. In his initial comments on a draft of *Beyond Negotiability*, Professor Rogers found my "upper-tier priority" proposal to be counterintuitive. He reasoned that securities controlled by intermediaries were analogous to inventory and the intermediary's customers analogous to buyers in ordinary course of business, who properly should cut off the interests of the intermediary's secured creditors. See UCC §§ 9-320(a) buyer in ordinary course of business takes free of security interest created by buyer's seller); 1-201(9) (defining "buyer in ordinary course of business").

134. See Facciolo, *supra* note 8, at 709-10.

committee in a position ultimately to win the support of the NCCUSL, the ALI, the state legislatures, and the Treasury. It is unimaginable that an extended debate on such a high level could have been sustained in a state legislative body. Moreover, there is nothing that I know of in the written records that could provide even a glimpse of the intense nature of the debates that took place during the Article 8 drafting committee meetings. One simply "had to be there."<sup>135</sup>

Facciolo also undervalues the attitudes of the regulators and self regulatory organizations toward investor protection.<sup>136</sup> While he correctly notes that these participants had in mind interests of sophisticated market participants and market efficiency as well as intermediary customer interests,<sup>137</sup> they nonetheless were preoccupied throughout the process with the concern that the resulting statute could be criticized as unfair to individual investors. Moreover, Facciolo apparently believes that his prototypical investor-protection dream team would have *only* the investors' interests in mind.<sup>138</sup> But with a moment's reflection one realizes that it is in the investors' interest to have a well functioning financial market in which credit can be extended with certainty and safety. Facciolo apparently thinks that during the drafting

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135. It is worth noting that in one singular case the drafting committee repeatedly rejected an argument that I advanced. I argued that under the 1978 official text of Article 8 a secured creditor of an intermediary who perfected its security interest by means of the intermediary's book entries on the intermediary's own books (so-called "agreement to pledge" or "AP" lenders) would achieve priority over the intermediary's customers in a bankruptcy or SIPA insolvency proceeding. See Mooney, *supra* note 12, at 361-63. I urged the drafting committee to preserve that result, but the drafting committee decided that priority would be appropriate only for secured creditors that achieve control. UCC § 8-511(b). See Memorandum from Charles W. Mooney, Jr. to Curtis R. Reitz (February 10, 1994):

I still think it is wrong to take AP lenders from a probably senior position under current law and subordinate them to customers. I haven't heard the case made for that in a coherent fashion. Why force additional "control" expenses if the customers are not going to get the benefits anyway?

Memorandum from Jim Rogers to Chuck Mooney (March 3, 1994):

We took yet another vote on the issue [of AP lender priority] at the Feb 94 NYC meeting, with the usual result. . . . It's time to stop fussing over the Art 8 priority rule on AP lender vs customer and get on with a more productive discussion about what sort of financing arrangements might be implemented under the new Art 8/9 rules.

136. See Facciolo, *supra* note 8, at 680-81.

137. *Id.*

138. *Id.* at 702-04.

process his proposed individual investor dream team would have convinced all of the regulators of financial markets that their concerns were overblown as to systemic risk being exacerbated by uncertainty as to the private law relating to securities transfer and pledge and that the SEC and SIPA frameworks were likewise inadequate to protect individuals.<sup>139</sup> Astonishingly, Facciolo believes that the Article 8 drafting committee should have conducted empirical analyses of these issues along the way.<sup>140</sup> The truth is, of course, that whether or not federal regulation could be improved to the better of individual investors, the scope of Article 8 could never be adjusted in a way that provides comprehensive and meaningful investor protection. The chief reason that investors keep their wealth in securities accounts is to allow their intermediaries to transfer interests in securities to outsiders. It was formulating a solution to the uncertainties faced by these outsiders to which the Article 8 drafting committee directed its attention.<sup>141</sup>

In addition to skeptical drafting committee members and an initially skeptical reporter, I also found counsel for sophisticated market participants, as well as regulators and self-regulatory organizations, quite resistant to arguments that the proper conceptualization of the "property" in play was an investor's "account" and its bundle of rights against its intermediary. They too were steeped in the conceptualization of an investor's interest in the underlying securities or other assets "in" the account.

The Article 8 drafting committee exercise was a four-year engagement of many minds in a genuine intellectual, conceptual, and practical discussion. Unlike some other drafting processes, perhaps,<sup>142</sup> concessions to industry views by committee members otherwise opposed on the merits out of concern for ultimate legislative enactment never became an issue. By the end of the process the committee was united based on a good understanding of the issues and the basic resolutions. Having witnessed, indeed lived, the process, I do not believe that Facciolo's individual investor dream team would have had any impact on the substance of revised Article 8. I cannot imagine an argument that

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139. *See id.* at 675-97.

140. *See, e.g., id.* at 696.

141. Facciolo's misunderstanding of this point is evident in his suggestion that section 511(b) be deleted. *Id.* at 712-13. That would mean that everyone who engages in repo or secured lending transactions with a securities intermediary would be required to assume subordination of its property interest to the intermediary's customers in case of an intermediary failure.

142. Schwartz & Scott, *supra* note 7, at 638-41.

they would have made that was not made, and repeated, during the process. But I do not ground my assessment on the “industry dominance” hypothesis that he advances. Instead, there is every reason to believe that Facciolo’s dream team, like the rest of the participants in the project, ultimately would have shared in the consensus.

As mentioned above,<sup>143</sup> there are other reasons unrelated to the uniform law process why Facciolo’s account is suspect. Significantly, the revised Article 8 regime does not impose any material disadvantages on individual investors.<sup>144</sup> Moreover, if at the margin there is some additional risk placed on individual investors, those risks must be weighed against the social benefits of avoiding unnecessary costs and increased certainty in the financial markets. But these arguments go to the merits of Facciolo’s substantive critique, to which I plan to return in another effort. Whether the substantive rules found in revised Article 8 are flawed is a question worthy of debate. But Facciolo has not begun to make the causal connection between the provisions of which he complains and his assertion of inadequate investor representation in the process.

### III. CONCLUSION

Informed by one person’s brief factual review of the process from which revised Article 8 emerged, Facciolo’s theses that the absence of individual investor representatives or the industry capture of the process, or both, resulted in the substantive rules found in revised Article 8 is at best incomplete and, more likely, without merit. Interestingly, however, Facciolo apparently agrees with a central thesis in this paper. Only with more detailed and rich inquiries into the history of a project can one obtain a sufficiently deep understanding to test available theories or models.<sup>145</sup> As Facciolo candidly notes, because he “did not participate in

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143. See *supra* text accompanying notes 125-29.

144. See *supra* text accompanying note 122.

145. See Facciolo, *supra* note 8, at 705 n.501. I have briefly recounted here only one person’s story about the revision of Article 8. Obviously there are many more stories of participants in the revision process which could add important perspective on the process. See also Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1647 (2000) (criticizing attempts “to graft the complex and highly individualized process by which values and preferences are created and modified onto a formal analytical framework”).

A more profitable approach, I have suggested, is to deploy rational choice analysis on its own terms, but retain (as part of the analyst’s frame of judgment) the situational sense of context-specific knowledge as an antidote to inapposite analogies and



the drafting process, he cannot provide a full explanation" for the resulting statutory structure.<sup>146</sup> I also join in his exhortation for additional donations to the ALI and NCCUSL archives maintained by the University of Pennsylvania Law School's Biddle Law Library.<sup>147</sup> These archival materials will empower future researchers to reach deeper and wider into both substance and process. My hope is that the brief historical narrative that I have provided offers at least a glimpse and a taste for the idiosyncratic aspects so characteristic of a uniform law project.

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generalizations. As legal scholars, we are in the uncomfortable middle ground between the general and the particular.

*Id.*

146. Facciolo, *supra* note 8, at 705.

147. The University of Pennsylvania Law School is the depository of the archival material of the ALI under an agreement effective as of May 1, 1994, and that of NCCUSL under an agreement effective as of August 15, 1994.