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AS THE WORLD TURNS: REVISITING RUDOLF SCHLESINGER'S STUDY OF THE UNIFORM COMMERCIAL CODE "IN THE LIGHT OF COMPARATIVE LAW"

*Peter Winship**

*Problems of commercial law are apt to be similar or at least comparable in all commercial countries, so that in this field, perhaps more than in any other, foreign experience is likely to be instructive. As was said by a leading English scholar, "The value of comparative investigation of commercial law is so obvious as to make it unnecessary to labour the point."*¹

I. INTRODUCTION

Professor Rudolf Schlesinger's study of the Uniform Commercial Code (UCC) "in the light of comparative law" is an all-but-forgotten minor legal classic. Written as part of a report for the New York Law Revision Commission,² the study was printed as part of the 1955 Commission reports on the UCC³ and subsequently published in the inaugural issue of the *Inter-American Law Review*.⁴ The study itself does not examine each section of the proposed UCC: "[A]cting merely as a reviewing critic and striving to complete its report within

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1. Rudolf B. Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 INTER-AM. L. REV. 11, 27 (1959) (citing H. C. Gutteridge, *Comparative Law* 34 (2d ed. 1949)). Because readers are more likely to have access to this publication, page numbers cited in the text of this Essay are to it rather than to the official report cited *infra* note 2.

2. *Problems of Codification of Commercial Law*, N.Y. Legis. Doc. No. 65(A) (1955).

3. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1955: STUDY OF THE UNIFORM COMMERCIAL CODE 87-123 (1955) [hereinafter NYLRC]. Professor Schlesinger contributed Part III, *The Uniform Commercial Code in the Light of Comparative Law*, and collaborated in the introduction and conclusions of the report. *Id.* at 33. His co-consultant, Professor Edwin W. Patterson, wrote Part II, *The Codification of Commercial Law in the Light of Jurisprudence*. *Id.*

4. Schlesinger, *supra* note 1, at 17-56.

a relatively short period," the Commission limited itself to examining "only the method, overall coverage and organization of the Code."⁵ Consequently, Professor Schlesinger examines the arguments for and against codification, as well as the problem of separate codification of commercial law. His analysis demonstrates, in a very practical way, how a comparative perspective might be useful in the reform of domestic law. As such, the study is typical of the work of Professor Schlesinger, who was—and is—the dean of comparativists in the United States.⁶

Few comparative studies of the UCC have been published in the United States since the Schlesinger report.⁷ Foreign scholars—and German graduate students—rather than U.S. academics have been far more interested in making comparisons. In the heady days of the 1960s, after all U.S. jurisdictions except Louisiana had enacted the UCC, there was some talk of exporting all or part of the UCC. A 1968 Canadian conference asked, for example, whether Articles 2 and 9 were exportable.⁸ One of the participants at the conference noted:

Because General Schnader in his lifetime was not at all cordial to dismemberment for partial enactment, there was some initial reticence by the Americans in respect to the Ontario project [to draft a secured transactions law inspired

5. *Id.* at 17.

6. A recent issue of the *American Journal of Comparative Law*, in honor of Professor Schlesinger, attests to his standing among comparativists. *Rudolf B. Schlesinger—A Tribute*, 43 AM. J. COMP. L. 317-486 (1995). The issue includes a list of his publications. *Id.* at 483-86.

7. For a somewhat dated review of the literature, see Peter Winship, *Contemporary Commercial Law Literature in the United States*, 43 OHIO ST. L.J. 643, 669 n.155 (1982):

There have been very few comparative commercial law studies published in the United States since 1970. . . . There also have been several foreign law studies which make little or no attempt to compare the foreign system with the Uniform Commercial Code. . . . Important developments abroad have gone virtually unnoticed in American law journals. Even within English-speaking countries there have been remarkable developments, many of which show the influence of the Uniform Commercial Code. . . . There have, however, been some references to Canadian developments.

8. ASPECTS OF COMPARATIVE COMMERCIAL LAW: SALES, CONSUMER CREDIT, AND SECURED TRANSACTIONS 18-63, 291-395 (Jacob S. Ziegel & William F. Foster eds., 1969) (containing papers presented at a conference held at McGill University on September 3-5, 1968). Among the attendees from the United States were E. Allan Farnsworth, Grant Gilmore, John Honnold, Harry Sachse, and Byron Sher. *Id.* at vi-vii.

by UCC article 9] but at later stages they gave full and helpful assistance.⁹

By the 1970s, however, this enthusiasm had waned. When individual Canadian provinces adapted and even improved Article 9, U.S. practitioners and academics barely noticed.¹⁰

Recently U.S. practitioners and academics have shown a growing interest in foreign and international commercial law. The Permanent Editorial Board (PEB) for the UCC has invited foreign scholars to comment on the redrafting of Articles 2 and 9.¹¹ Renewed efforts are underway to "export" Article 9.¹² U.S. academics are once again attending Canadian conferences on whether Article 9 can, or should be, exported.¹³ The American Law Institute has dipped its toe into the study of foreign law by undertaking a study of insolvency laws in North American Free Trade Agreement (NAFTA) countries.¹⁴ U.S. law reviews have published several studies of how the drafting committees revising UCC articles might usefully adapt specific

9. Albert S. Abel, *Is Article 9 of the Uniform Commercial Code Exportable? The Ontario Experience*, in ASPECTS OF COMPARATIVE COMMERCIAL LAW: SALES, CONSUMER CREDIT, AND SECURED TRANSACTIONS, *supra* note 8, at 294.

10. For contemporary references to the Canadian developments in U.S. law reviews, see Peter F. Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1052-53, 1054 n.156 (1978); Ray David Henson, Book Review, 12 OTTAWA L. REV. 514, 514 (1980). The waning interest among uniform law commissioners is documented in Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 U. PA. J. INT'L BUS. L. 227, 273-79 (1992).

11. Fred H. Miller, *Et Sic Ulterius II* (part 2), UCC BULL., Nov. 1994, at 3.

12. These efforts are directed at both international and national projects. A project within the International Institute for the Unification of Private Law (UNIDROIT) draws on Article 9 concepts for the proposed creation of an international security interest in mobile equipment. Thomas J. Whalen, *The Proposed Convention Governing the Recognition and Enforcement of Security Interests in Mobile Equipment*, 1995 COM. L. ANN. 539, 539-40. Reform efforts at the national level are spurred on by the World Bank and by agencies interested in developing the legal infrastructure in states with newly-emerging economies. For a thoughtful study, see Alejandro M. Garro, *Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform*, 9 HOUS. J. INT'L L. 157 (1987).

13. See the papers presented on "How Far Is Article 9 of the Uniform Commercial Code Exportable?" at the Twenty-Fifth Annual Workshop on Commercial and Consumer Law, October 20-21, 1995, in Toronto. Professor Charles W. Mooney, co-reporter on the revision of Article 9, was a panel member. These papers will be published in the *Canadian Business Law Journal*.

14. For a brief description of the project, see A.L.I., TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW 1-7 (Council Draft No. 1, Nov. 13, 1995).

international projects.¹⁵ And, last but not least, the *Loyola of Los Angeles Law Review* is publishing this valuable Symposium to provide an "outside" perspective.

Given the renewed interest in a comparative perspective, it is time, I think, to reread Professor Schlesinger's 1955 study. What questions does he ask? Are his answers still persuasive? Are the questions themselves still relevant? Does a comparative perspective still offer useful insights for U.S. scholars and practitioners? This Essay touches on these, and other questions, to illustrate the richness and continued relevance of the Schlesinger report.

II. REVISITING SCHLESINGER TO ADDRESS QUESTIONS OF CODIFICATION

A. *Should U.S. Commercial Law Be Codified?*

In 1955 this was a "fundamental" question before U.S. lawyers.¹⁶ It is not an issue of interest to contemporary civilians: For civil law systems the issue of whether or not to codify is a matter of historical interest only.¹⁷ The issue before civilians is how to revise and reorganize existing codes.¹⁸

Today the very question of whether U.S. commercial law should be codified has an anachronistic ring. Professor Schlesinger's question appears to have been answered with a resounding "Yes." In the decade following his 1955 report, virtually all U.S. jurisdictions enacted the UCC. During the last decade the UCC's sponsors have added Articles 2A and 4A to deal with personal property leases and wholesale wire transfers of funds,¹⁹ while a drafting committee is presently at work on a text governing licenses of intellectual property.²⁰ Debate about these new provisions has focused more on their content than on whether they should be included in an existing code. Proponents have found useful templates in the UCC, as is shown by

15. See, e.g., James E. Byrne, *Fundamental Issues in the Unification and Harmonization of Letter of Credit Law*, 37 *LOY. L. REV.* 1 (1991); Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 *LOY. L. REV.* 43 (1991).

16. Schlesinger, *supra* note 1, at 49.

17. *Id.* at 48-49.

18. *Id.* at 49.

19. See U.C.C. art. 2A (1990) (regulating personal property leases); U.C.C. art. 4A (1990) (regulating wholesale wire transfers of funds).

20. U.C.C. art. 2B (discussion draft Dec. 1, 1995).

the close resemblance between Article 2 on sales and Article 2A on leases. Opponents have objected to specific provisions, but few have questioned the desirability of clear, comprehensive, and systematic legislation.

There are limits. For a year before the summer of 1995, the drafting committee revising Article 2 contemplated a hub-and-spoke organization that would distinguish between general provisions for commercial contracts—the hub—and specific provisions for specific commercial contracts, such as sales and leases of personal property—the spokes.²¹ When this proposal was first presented at a meeting of the UCC committee of the American Bar Association's (ABA) Business Law Section, several comparativists at the meeting remarked on the "code-like" reasoning behind the proposal. When put to the Uniform Commissioners, however, the proposal apparently pushed the aesthetic value of a "rational" structure too far. Practical considerations, rather than issues of principle, underlay the objections. Why delay reform of sales law to tinker with a familiar structure? How do we explain the new complexity to our state legislators?

This recent debate raises the question of whether U.S. lawyers think "codification" when they support enactment of the UCC or its recent accretions. Is the UCC viewed as more than ten separate uniform law texts stapled together with a motley set of general principles and definitions in a rarely-consulted Article 1? In other words, is the UCC a "code"?

From the beginning there have been skeptics. Writing in 1962, Homer Kripke stated:

It is fair to say that the draftsmen of the Code had an anticodification or antistatute predilection. They did not want to codify the law, in the continental sense of codification. They wanted to correct some false starts, to point the law in the indicated directions, and to restore the law merchant as an institution for growth only lightly kept in bounds by statute. . . . [T]he express statutory injunctions to give effect to all of the nonstatutory influences for growth

21. Raymond T. Nimmer, *Intangible Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337, 1340 (1994); see also Raymond T. Nimmer, *Uniform Codification of Commercial Contract Law*, 18 RUTGERS COMPUTER & TECH. L.J. 465, 481-89 (1992) (applying the "hub and spokes" concept to computer software law).

are so strong that continental codification is a misleading analogy.²²

Recent loosely-coordinated revisions of individual UCC provisions reinforce this skepticism.

Scholars have been more agnostic. A recent "taxonomy" of codes reminds us that there are codes and codes—and that the UCC does not pretend to be a traditional European civil code.²³ From the text itself, however, one may tease code-like features. In a stimulating recent study, Professor Richard Buxbaum—not surprisingly, a student of Professor Schlesinger's—does just this and concludes that

the Sales and the Sales Financing articles . . . determine the UCC structure and thus its status as a code. It is the Swiss analogy at one end—the open-ended nature of the UCC towards general principles of contract law—and this recognition of sales finance as central to an American code at the other that set that structure.²⁴

The general principles set out in Article 1 also distinguish the UCC from other legislation. These principles are said to underlie all the commercial transactions covered by the UCC, but there are few such principles and what few there are have more or less relevance in the context of individual articles. Perhaps one test of whether the UCC is truly a code is whether its sponsors will review Article 1 seriously after the present round of revisions of individual articles.

A search for coherence in common functional and analytic traits is also going on today in at least some civilian jurisdictions. If the question of whether to codify was not relevant to civilians in 1955, the issue they did find relevant—how to revise and reorganize existing codes—is now relevant for both civilians and the sponsors of the UCC. Talk in France of "decodification" of commercial law should

22. Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 331.

23. Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1127-36.

24. Richard M. Buxbaum, *Is the Uniform Commercial Code a Code?*, in *RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE* 197, 219 (Ulrich Drobnig & Manfred Rehbinder eds., 1994); see also William D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231, 232-47 (1995); William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 293 (asserting that the UCC satisfies the fundamental characteristics of a code).

now resonate in the United States.²⁵ Perhaps an updated comparative study is needed.

B. Is Codification "Undemocratic"?

Professor Schlesinger takes seriously this surprising echo from the nineteenth century debate between James Coolidge Carter and David Dudley Field.²⁶ Responding to Field's proposal to codify the common law, Carter argued that codes are the products of arbitrary despots, while the common law represents the ever-changing customs of the people as expounded and administered by lawyers and judges.²⁷ Professor Schlesinger rebuts the argument in a few swift paragraphs. Carter's argument is not only historically inaccurate but his basic premise is more than questionable. Judge-made law does not always express the will of the people more aptly than codification. Napoleon's codes were popular in part because they curbed judicial discretion at a time when the memory of the abuses of eighteenth century judges was fresh.²⁸ That democratic ideals can be invoked both for and against codification demonstrates that references to democracy are "more emotional than rational."²⁹ "[C]odification is merely a *method*—a method which in itself is neither moral nor immoral, neither democratic nor tyrannical."³⁰

Professor Schlesinger is surely right on all counts. His rebuttal carried the day and the "Carter" arguments have disappeared from what is left of the debate about whether to codify U.S. commercial law.³¹ Law students are no longer exposed to Carter's concerns: The latest edition of a leading commercial law casebook that used to include a short excerpt from Carter's 1884 book now omits the

25. Bruno Oppetit, *L'expérience française de codification en matière commerciale*, 1990 RECUEIL DALLOZ SIREY, CHRONIQUE [D.S. CHRON.] 1 (Fr.).

26. Schlesinger, *supra* note 1, at 17-22.

27. *Id.* at 17-18.

28. *Id.* at 19.

29. *Id.* at 22.

30. *Id.* at 19.

31. Fortunately the debate has not disappeared from scholarly research. See, e.g., Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95 (1989) (discussing the effect of the Carter and Field debate on codification in the United States).

excerpt.³² Other course materials make no reference to the debate over codification.

For classroom purposes this neglect is unfortunate. Law students must struggle with what it means to codify law in order to recognize that Carter's argument is "more emotional than rational."³³ The debate also induces students to consider the appropriate roles of the legislature and judiciary. With a little historical perspective, students may consider the changing attitudes even within the United States. One possible scenario is that, whereas the drafters of the 1952 official text respected the judiciary and had a healthy skepticism about the "plain meaning" of rules, the drafters of revised Articles 2 and 4 look to detailed rules to "ensure" certainty and to limit the discretion of judges. A comparative perspective also illustrates shifting attitudes towards the judiciary. The common law does not enforce "penalty clauses"; traditional French civil law enforced all liquidated damage clauses without limit. Today, however, the committee revising UCC Article 2 limits the power of judges to strike down liquidated damage clauses in commercial contracts.³⁴ Distrust of the judiciary in an era of unbridled *laissez faire*, in other words, draws the borderline between legislative and judicial functions in the United States closer to the borderline found in nineteenth-century France. In the meantime, however, French attitudes have changed somewhat. In 1985 the French amended the *Code civil* to allow a judge to revise a clause when the liquidated sum is "manifestly excessive or pitiful."³⁵

32. Compare RICHARD E. SPEIDEL ET AL., *TEACHING MATERIALS ON COMMERCIAL LAW* 8 (3d ed. 1981) (discussing Carter's position) with RICHARD E. SPEIDEL ET AL., *COMMERCIAL LAW: TEACHING MATERIALS* 4-8 (4th ed. 1987) (omitting the discussion of Carter's position).

33. Schlesinger, *supra* note 1, at 22.

34. Compare U.C.C. § 2-718 (1990) ("[A] term fixing unreasonably large liquidated damages is void as a penalty.") with U.C.C. § 2-710 n.1 (discussion draft Oct. 1, 1995) ("A term fixing a reasonable liquidation at the time of contract is enforceable even though the amount fixed is unreasonable in light of the actual loss."). Without explanation, the January 4, 1996 draft restores the requirement that liquidated damages be reasonable in light of the actual losses. U.C.C. § 2-710(a) (discussion draft Jan. 4, 1996).

35. CODE CIVIL [C. CIV.] art. 1152 (Fr.). For analysis and comparison, see G. H. TREITEL, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT* 219-44 (1988).

C. *Can the Sponsors of the UCC Learn Anything from Civilians About How to Draft the UCC?*

After reviewing the civilian experience, Professor Schlesinger concludes:

Models, to some extent worthy of emulation or adaptation, may well be found in the civil law orbit with respect to the methods to be used (a) in the preparatory research (including comparative research) preceding the drafting of a code, (b) in the drafting itself, and (c) in the organized process of submitting successive tentative drafts to the public and to the legal profession for criticism and suggestions.³⁶

On each of these points, Professor Schlesinger criticizes the methods used by the sponsors of the UCC.

Not surprisingly, Professor Schlesinger returns several times to the value of comparative research as a means of identifying useful innovations and potential pitfalls. He argues against "a method of code-making which proceeds without any thought of international uniformity or harmonization, even within the common law world, and without the slightest attempt to inspire cooperation and parallel efforts in any other country."³⁷ "We can learn," he notes, "from the accomplishments and the mistakes of another country even though we realize that in some respects its legal system necessarily differs from our own."³⁸ Most civil law jurisdictions rely on the specialized staffs within a Ministry of Justice to draft codes, while the United States does not have a comparable institution. "The Uniform Commercial Code, of course, was not drafted by officials of a Ministry of Justice; but that is hardly a sufficient reason for losing the advantages of a method which permits us to learn from the accomplishments . . . of others."³⁹

Little has changed since Professor Schlesinger wrote. The UCC sponsors have not commissioned preparatory comparative research before beginning work on revision of specific articles. As noted earlier, the sponsors have now formally invited foreign scholars to comment on drafts, but these scholars are offered no compensation—a practice puzzling to scholars not familiar with the American

36. Schlesinger, *supra* note 1, at 56.

37. *Id.* at 26 (footnote omitted).

38. *Id.* at 26 n.35.

39. *Id.* at 27.

tradition of "voluntary" participation in law reform. Moreover, the drafts themselves present a moving target as draft after draft follow each other in rapid succession with basic policies left open. Unfortunately the UCC sponsors are unable to look to the independent research of U.S. comparativists to fill the gap: Few comparativists focus on commercial law subjects covered by the UCC.

If little has been done to improve preparatory research, Professor Schlesinger would be more pleased by methods adopted for revision of the UCC. Much greater publicity is given to preliminary studies and successive drafts of revised texts than was done when the UCC was initially drafted. Committee meetings are publicized and open. Drafting committees are much more conscious that certain interest groups may not be represented in the committees' deliberations. Efforts have been made, for example, to ensure consumer representation. Professor Schlesinger might question whether too many members of study committees continue on the drafting committees, but the very fact there are separate committees goes a long way toward satisfying his objections.

When setting out his objections, Professor Schlesinger relied almost exclusively on the methods adopted for the drafting of the German Civil Code. If one focuses not on the drafting of an original code but on revising that code, there may be useful lessons to be learned from more recent methods adopted by civilians to revise an existing code. The French, in particular, have struggled with this issue since World War II. Writing in 1955, Professor Schlesinger notes the initial work of committees charged with revising the French civil and commercial codes. What happened to the work of these committees and to subsequent projects might provide more pertinent suggestions on appropriate methodology.⁴⁰

D. Does the European Experience Provide Examples of the Disadvantages of Codification?

Professor Schlesinger suggests two examples of the disadvantages of codification: Codes may become obsolete and codification may encourage parochialism. In response to the danger of obsolescence,

40. See, e.g., Oppetit, *supra* note 25; François Terré & Anne Outin-Adam, *Codifier est un art difficile (à propos d'un . . . "code de commerce")*, 1994 D.S. CHRON. 99 (Fr.) (stating that in order to prevent codes from constant recodification and decodification, codes must be developed with objectivity and broadly applied, but must remain limited to contemporary standards of practical workability).

he recommends that the UCC sponsors consider how to institutionalize "constant recodification"—a recommendation, it is said, that subsequently led to the creation of the PEB for the UCC.⁴¹ His warning against parochialism has not had a similar impact.

Professor Schlesinger chooses the failure of civil law jurisdictions to provide for recodification as one of two warning examples of what the sponsors of the UCC should avoid.⁴² The danger can be met only by "constant recodification"—an expression, he notes, credited to Edward Livingston.⁴³ This recodification requires permanent machinery

(a) constantly to be on the alert for court decisions and business practices which may make it appear desirable to revise certain Code provisions, or to add new articles or sections to the Code; (b) to study the problems so uncovered; (c) to prepare the necessary revisions; and (d) to secure the uniform adoption of such revisions.⁴⁴

He states that a staff of specialists and a liaison with legislators are indispensable, and he speculates that an interstate compact may be necessary.⁴⁵

The PEB has taken on most of the tasks of Professor Schlesinger's permanent machinery. It has done so with innovative techniques he does not suggest. It has intervened as *amicus curiae* in important appellate cases and, more recently, it has issued PEB Commentary on the UCC⁴⁶ to analyze difficult questions of interpretation. The PEB does not have, however, the "indispensable" permanent staff of specialists and it leaves the liaison with state legislators to the National Conference of Commissioners on Uniform State Laws (NCCUSL). As for interstate compacts, the UCC sponsors have not resorted to compacts to establish the PEB or to maintain uniformity when adopting revised texts.

It might be timely to reconsider Professor Schlesinger's proposed permanent staff. A permanent staff of specialists may be desirable, if not indispensable. Such a staff could provide the background

41. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 5 (3d ed. 1988).

42. Schlesinger, *supra* note 1, at 57.

43. *Id.* at 35 & n.61.

44. *Id.* at 35.

45. *Id.*

46. See U.C.C. app. V (1990).

studies necessary for drafting committees. At the very least staff studies would provide a consistent approach. A staff might also enrich the process by systematic studies of business practice and by comparative studies. Not surprisingly, spelling out the advantages of a permanent staff suggests the example of the New York Law Revision Commission for which Professor Schlesinger worked.⁴⁷ The once-proud Commission, however, is a shadow of its former self and similar commissions in California and Louisiana have also fallen on hard times. These commissions, in any event, have always been exceptional. Despite occasional calls for a "Ministry of Justice" model of lawmaking,⁴⁸ the United States has always preferred lawmaking on the cheap. Certainly the UCC sponsors have traditionally relied, in effect, on volunteer labor. Whether or not the work of these volunteers is suspect,⁴⁹ one can anticipate some resistance to professionalizing the work of the PEB. Cost, of course, is a factor and it may be that when these costs are weighed against the benefits—many of which are intangible—of a permanent staff that the proposal should be rejected. All that is suggested here is that the issue be considered. When doing so, of course, it might be useful to take a look at foreign law-making models, especially at the recent experience with law reform commissions in the major common law countries such as England.⁵⁰

The value of reexamining the use of interstate compacts is more speculative. At the time Professor Schlesinger wrote, Professor Paul Freund reported to the New York Commission on the possible uses of compacts in relation to the UCC.⁵¹ The UCC sponsors took no action and there has been virtually no reference to the device in subsequent debates about revision and uniformity. It may, however, be worth looking once again at interstate compacts. Approval of more and more revised code articles may lead to a quiltwork of

47. For a review of the work of the New York Commission at the height of its influence, see John W. MacDonald, *Legal Research Translated into Legislative Action—The New York Law Revision Commission 1934-1963*, 48 CORNELL L.Q. 401 (1963).

48. See Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114-15 (1921).

49. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 604 (1995).

50. For recent assessments, see Stephen Cretney, *The Politics of Law Reform—A View from the Inside*, 48 MOD. L. REV. 493, 507-08 (1985); P. M. North, *Law Reform: Processes and Problems*, 101 LAW Q. REV. 338, 338-46 (1985); Anthony Ogus, *Economics and Law Reform: Thirty Years of Law Commission Endeavour*, 111 LAW Q. REV. 407, 407 (1995). Experience in Australia and Canada should not be ignored.

51. See 3 NYLRC, *supra* note 3, at 2177.

adoptions that will lead to such great nonuniformity that novel techniques may be necessary. New legislative techniques may also be necessary to integrate the growing number of international commercial law texts into a federal system in which private law has traditionally been the province of the states. Use of interstate compacts in this context was proposed as long ago as 1921 when Dean John Henry Wigmore made the proposal in a detailed report to the NCCUSL.⁵² It may not be, in other words, merely an academic exercise to reread the Freund and Wigmore reports or to examine how states have used interstate compacts since 1960.

As for Professor Schlesinger's warning that codification may encourage parochialism, there is little doubt that much of the energy of U.S. commercial law scholars has been directed at the UCC and they have shown little interest in foreign commercial law. The reasons for this parochialism, however, are complex and multiple. Moreover, scholars and graduate law students from other parts of the world have not been as parochial. Many of them have attended graduate school in the United States or have been visiting professors in U.S. law schools. For those who have not been to the United States, the UCC provides easier access to U.S. commercial law. These scholars and students come from all parts of a world in which English has become the *lingua franca*. In this respect Professor Schlesinger's emphasis on the danger of isolation within the English-speaking world because "[t]he common legal heritage of the English-speaking world is one of the constructive forces in the world today"⁵³ comes from a different generation.

*E. Do Civilians Offer Any Guidance on How to Deal with
Standard Form Contracts?*

Faced with an economy characterized by mass production, mass distribution, and mass credit, U.S. legislation and court decisions "traditionally deal in a casuistic manner with specific types of clauses, and do not treat the problem as a general one which permeates the

52. NCCUSL, *Report of the Committee on Inter-State Compacts* 297, in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE (1921); see also Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules on Private Law*, 102 U. PA. L. REV. 323, 339 (1954) (discussing Wigmore's proposal).

53. Schlesinger, *supra* note 1, at 26.

whole law of contracts.”⁵⁴ The civilians have faced the same issue and resolved it with a variety of devices: “general clauses,” stringent form requirements, prohibition of specific terms, statutory standard terms, and regulation of trade associations and their standard forms.⁵⁵ Various articles of the UCC address the need for standardized business deals—Professor Schlesinger cites Articles 4, 8, and 9—but the UCC refrains from laying down general rules for standard contract terms.⁵⁶ Professor Schlesinger does not conclude that “sweeping general rules applicable to all standardized contracts are necessarily superior to the casuistic approach [of U.S. law],”⁵⁷ but he does urge serious study of the advantages and disadvantages of the various approaches.⁵⁸ He also recommends that the UCC drafters should consider whether Article 1 should provide some guidance, either by setting out general rules on standard contract terms or by cross-referencing specific rules in the various articles.⁵⁹ Clear and conscious resolution of these issues is necessary, he implies, if the UCC is to live up to its sponsors’ billing as an adjustment of U.S. commercial law to “the facts of 20th century business life.”⁶⁰

Notwithstanding Professor Schlesinger’s recommendation, the UCC sponsors did not carry out a study of the various approaches to standard form contracts. Karl Llewellyn, who had recognized the problem much earlier⁶¹ and who in 1941 had drafted a section to deal expressly with form sales contracts,⁶² did not have an opportuni-

54. *Id.* at 32.

55. *Id.*

56. *Id.* at 31-32. In the original report Professor Schlesinger states that “[i]t is not clear whether a coherent policy underlies the various provisions.” 1 NYLRC, *supra* note 3, at 101. He omits this sentence without explanation in his 1959 law review article. Schlesinger, *supra* note 1, at 32.

57. Schlesinger, *supra* note 1, at 32.

58. *Id.* at 32-33.

59. *Id.* at 33.

60. *Id.* at 31.

61. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362-71 (1960); Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 701-03 (1939).

62. The section was promptly withdrawn because the section’s essential objectives are believed to be solid and to call for attention. They are:

(a) to further the use, in construction of particular contracts, of written agreed rules of trade practice; and

(b) to distinguish, in transactions concluded on printed forms prepared by one party, between the terms really dickered and bargained about, and the unread block of print.

But the machinery for administration thus far developed is inadequate, and is too unreckonable to be in keeping with the lines of the Draft.

ty to deal with the issue at greater length before his death in 1962. Individual scholars such as Professors David Slawson,⁶³ Todd Rakoff,⁶⁴ and Eric Holmes⁶⁵ have studied standard contracts, but as yet there is no scholarly consensus on the appropriate legal response. Nor have judges done better. The Restatement of Contracts includes a single, tentative provision on standardized contracts.⁶⁶ Section 2-207 of the UCC addresses the "battle of forms" but few commentaries on this notorious section recognize that it only deals with a particular instance of the use of standardized forms. The approach of U.S. law remains casuistic and unsystematic.

There is nothing to suggest that business use of standard form contracts will decrease in the twenty-first century. Indeed, new issues will emerge with the growth of electronic commerce. How will standard terms be translated to a world where parties conclude contracts by the exchange of electronic messages? It is therefore heartening to note that the drafting committee revising Article 2 proposes to introduce a section on "assent to standard form records."⁶⁷ Comments to this section state that it is inspired in part by the *Principles of International Commercial Contracts* prepared by UNIDROIT.⁶⁸ This UNIDROIT text, in turn, can be traced to civilian concepts and special laws.⁶⁹

Whether or not this proposal for Article 2 is ultimately accepted, it is at best only a partial response to Professor Schlesinger's call for a more systematic study of the alternatives. Professor Schlesinger

1 UNIFORM COMMERCIAL CODE: *DRAFTS* 332 (Elizabeth Slusser Kelly ed., 1984). These two lines of policy were approved as desirable but "conditioned on adequate [implementation] machinery being discovered." *Id.* at 331. This recommendation ultimately led to the "unconscionability" provision of the final text. U.C.C. § 2-302 (1990).

63. W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1985); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

64. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

65. Eric Mills Holmes & Dagmar Thurmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT'L & COMP. L. 323 (1987).

66. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

67. U.C.C. § 2-206 (discussion draft Oct. 1, 1995).

68. UNIDROIT, *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* arts. 2.19-22 (1994).

69. MICHAEL JOACHIM BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW* 91-95 (1995) (citing the German Law on Standard Contracts [*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen-AGBG*]; the Italian, Dutch, Quebec, and Louisiana civil codes; and EEC Directive 93/13).

notes some of the civilian responses to the phenomenon of standard contracts. A systematic study today should take into account civilian developments since 1955, with special attention to the German Law on Standard Contracts.⁷⁰ The study would also ask whether Article 1 should provide some guidance. Professor Schlesinger's call for such a study should, in other words, be renewed today.

F. Are the "Commercial Law" Concerns of Contemporary Civilians of Any Relevance to the Drafters of the UCC?

At the time Professor Schlesinger wrote his report, civilians were engaged in debate about the unity of private law versus the autonomy of commercial law—an issue the common law resolved several centuries ago when it absorbed the law merchant.⁷¹ This civilian debate is therefore, he concludes, of little interest to U.S. lawyers wrestling with the question of whether to codify commercial law.

In 1955 the trend was clearly in favor of those who argued for the unity of private law. This trend has continued during the forty intervening years so that today we could report, as Professor Boris Kozolchyk has, on the *The Commercialization of Civil Law and the Civilization of Commercial Law*.⁷² There are traces of the debate in the legal literature but the heat has dissipated.

Ironically, during this same period the consumer movement has appeared to challenge the unity of private law. Civilians have not drafted "consumer codes" on the model of the older commercial codes but legislation provides special protection for consumer transactions otherwise subject to the civil code. In recent years supranational directives issued by the European Community have further complicated the picture. For civilians today the challenge is to explain how these regulatory rules fit into the world of civil codes.

The consumer movement has, of course, also had an impact on U.S. law. Much of this impact has come through federal and state legislation enacted during the late 1960s and 1970s. Except for environmental legislation, there have been few consumer initiatives since 1980 and the present political climate does not bode well for further federal legislation. In these developments the uniform law

70. For a summary of the 1976 German law, see Otto Sandrock, *The Standard Terms Act 1976 of West Germany*, 26 AM. J. COMP. L. 551 (1978).

71. Schlesinger, *supra* note 1, at 49-50.

72. Boris Kozolchyk, *The Commercialization of Civil Law and the Civilization of Commercial Law*, 40 LA. L. REV. 3 (1979).

commissioners have had relatively little influence. The original UCC had few provisions specifically addressing consumer transactions. Even after a 1974 revision of the 1968 Uniform Consumer Credit Code,⁷³ few states have enacted this uniform consumer legislation.

Revision of Articles 2 and 9 of the UCC gives the uniform law commissioners another opportunity to examine how consumer protections might be incorporated into the UCC. The drafting committees for both projects have established consumer task forces. Financial support for consumer representatives on these task forces has been solicited through the efforts of Professor Amy Boss and Ed Smith, former and present chairs of the UCC Committee of the ABA. Business Law Section. Is it too much to hope that these task forces might look to recent civilian experience? Writing before the consumer movement picked up pace, Professor Schlesinger has little to say in his 1955 report about protection for consumers in civil law jurisdictions. But surely he would be among the first to urge such a study today.⁷⁴

G. Does the Civilian Experience Offer Any Guidance on How to Promote Uniformity?

Comparing the situation in the United States with that of Germany after the enactment of the 1861 Commercial Code and before the enactment of the Civil Code at the end of the century,⁷⁵ Professor Schlesinger notes the absence in the United States of a

73. UNIF. CONSUMER CRED. CODE (1974).

74. There is some hope that such a study will be carried out at least unofficially. In a recent e-mail message to me, Professor Kathleen Patchel wrote:

[Professor Amy Boss] and I are going to write an article discussing the current debate over whether to draft separate consumer codes or continue U.C.C. coverage of consumer transactions and I thought it would be useful to contrast the inclusion of consumer transactions in the U.C.C. with the civil law tradition

.....

Electronic message from Kathleen Patchel to Peter Winship (Oct. 24, 1995) (on file with author).

75. Before enactment of the German Civil Code, the uniform rules of the commercial code in Germany had to be integrated with the nonuniform general law of the local states making up what became the German empire. Schlesinger, *supra* note 1, at 24. The Supreme Commercial Court in Leipzig not only interpreted the German Commercial Code but also, by deciding pendent issues of local law, determined conflicts between the code and local substantive or procedural law. *Id.* at 51-54. When he writes of maintaining uniformity, therefore, Professor Schlesinger is concerned not only with interpretation of the UCC text but also with the possibility that general state law might be read to limit the UCC provisions.

single court of last resort to hear commercial disputes.⁷⁶ The UCC drafters must therefore use other techniques to maintain uniformity. Professor Schlesinger proposes several techniques—limit coverage of the UCC to areas with well-established rules, look to legal scholarship, and institutionalize “constant recodification”—without suggesting that these techniques are borrowed from the civilian experience.⁷⁷ This experience does, however, suggest some benefits from creating and maintaining uniformity. Following enactment of a uniform code, both academics and local practitioners will be interested in a common “national” commercial law and this “will help to narrow the gap between practical law and academic law—to the benefit of both.”⁷⁸ Similarly, a uniform code will allow foreign academics and practitioners easier access to U.S. commercial law and may facilitate future international efforts to harmonize commercial law around the world.⁷⁹

In 1995 the likelihood that the UCC will be enacted as federal law is as remote as it was in 1955. Issues of Code interpretation therefore come before the United States Supreme Court only incidentally. Nonuniformity is not, however, a major threat today. Techniques proposed by Professor Schlesinger have played an important role. The willingness of the PEB to revise the UCC periodically has been particularly important, but published textbooks and commentaries have also discouraged nonuniform interpretations. There have been other influences not mentioned by Professor Schlesinger but with analogs abroad: legal education using national casebooks to train students who increasingly search for jobs outside the locale of their law schools, and easier access to non-local court decisions through specialized reporting services or through electronic databases.

As for the gap between practitioners and academics, Professor Schlesinger’s prediction that both groups would benefit from a uniform national text has been borne out. Commercial law professors are among the least likely academics to be the object of criticism by those who fear that law schools are drifting away from the real problems facing practicing lawyers. Many of these professors

76. Schlesinger, *supra* note 1, at 51-53.

77. *Id.* at 54.

78. *Id.* at 55.

79. *Id.*

participate actively in the work of the UCC's sponsors, as well as in the commercial law sections of the ABA. and local bar associations.

More intriguing is Professor Schlesinger's suggestion that national adoption of the UCC may facilitate international harmonization of commercial law. To the extent commercial law rules are *ius dispositivum*, private rule-making bodies, such as the International Chamber of Commerce, cannot provide the rules. Harmonization therefore depends upon cooperation between nations. Adoption of the UCC as a uniform national law is a preparatory step toward "the ultimate goal of international harmonization of conflicting laws."⁸⁰ This analysis suggests three queries. Is uniform adoption of the UCC truly a "preparatory step" for international harmonization? What institutional arrangement will be necessary to take additional steps? Is international harmonization of conflicting laws the ultimate goal for the UCC sponsors?

National unification of U.S. commercial law by uniform adoption of the UCC may actually inhibit international harmonization. Attempts earlier this century to draft uniform negotiable instruments legislation provides a cautionary example. Diplomatic conferences adopted uniform texts in the Geneva conventions of 1930 and 1931, but only civil-law countries became parties to the conventions. A common explanation is that common-law countries had effectively unified their legislation earlier in the century by enacting legislation based on the U.K. Bills of Exchange Act,⁸¹ and these countries were unwilling to give up this earlier partial uniformity in favor of a strange and untried "uniform" text.⁸² Similarly, U.S. states that have enacted the UCC may be reluctant to modify the UCC to harmonize it with "foreign" concepts and rules. It is not self-evident, in other words, that adoption of the UCC is necessarily a "preparatory step" for international harmonization.

Even if adoption of the UCC is a preparatory step, further progress towards international harmonization requires intervention of the federal government. At the time Professor Schlesinger wrote, it was generally assumed that approaches to foreign governments and

80. *Id.*

81. BILLS OF EXCHANGE ACT OF 1882, c. 61 (U.K.), reprinted in A. G. GUEST, CHALMERS AND GUEST ON BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES 1 (14th ed. 1991).

82. See Hessel E. Yntema, *Unification of the Laws Respecting Negotiable Instruments*, 4 INT'L L.Q. 178, 187 (1951).

representation at international diplomatic conferences must be made through the federal government.⁸³ Yet, as noted earlier, he criticizes the UCC sponsors for ignoring international harmonization or attempting to cooperate with other countries. He does not indicate, however, what steps the UCC sponsors should take "to inspire cooperation and parallel efforts in any other country."⁸⁴ Subsequent history suggests that there can be coordination between the sponsors and the U.S. Department of State but that it takes effort.⁸⁵ Whether this effort has been effective deserves a study in itself. One can only regret that Professor Schlesinger did not focus on the problem.

That he did not focus on it is all the more regrettable given his surprising reference to "the ultimate goal of international harmonization of conflicting laws"⁸⁶—a goal which he earlier recognizes "may be a Utopian goal at this time."⁸⁷ This is surprising because it is highly unlikely that the UCC sponsors would have supported—or would support—a goal that smacks of "internationalism" and "World Government." It is additionally surprising because this normative theme has died out among younger comparativists raised on relativism and "objective" social science. Professor Schlesinger does not elaborate or defend the goal, but his reference to the goal is just as relevant today as it was in 1955.

III. CONCLUSION

Professor Schlesinger's 1955 report to the New York Law Revision Commission is just as relevant and stimulating today as it was when written. The questions he asks are timeless and, for the most part, his answers are still persuasive. As an example of how comparative research may offer useful insights for U.S. scholars and practitioners, the report remains a model. Read—or reread—it.

83. See Nadelmann, *supra* note 52, at 362.

84. Schlesinger, *supra* note 1, at 26.

85. For a general review of the U.S. practice, see Peter H. Pfund, *Overview of the Codification Process*, 15 *BROOK. J. INT'L L.* 7 (1989).

86. Schlesinger, *supra* note 1, at 55.

87. *Id.* at 26 n.35.