The Still Questionable Role of Private Legislatures

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In 1995, Robert Scott and I published the first formally analyzed private law making bodies such as the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") function.[1] Adapting models drawn from the modern positive political theory literature, we predicted that a private legislature (a "PL") would: (a) have a status quo bias, rejecting serious reforms; (b) adopt rules (as opposed to standards) when lobbied by a single interest group;[2] and (c) adopt standards, or succumb to paralysis, when lobbied by competing groups. The impressionistic evidence and a content analysis of the U.C.C. and the ALI Corporate Governance rules were consistent with the models' results. Because we focused on private legislatures, we did not make a serious comparison between the competencies of these legislatures and ordinary legislative bodies. Nevertheless, we speculated that an ordinary legislature would perform well relative to a PL because it would have better mechanisms for resolving the claims of competing interest groups, and would be better able to find facts relevant to proposed laws. We did not recommend that the ALI and NCCUSL be abolished. Rather, we argued that these bodies should return to their original mission—to treat only subjects where society had reached a consensus on the relevant values, if that consensus could be translated into law with the use of traditional legal expertise alone.

Our article attracted a fair amount of criticism which focused primarily on the accuracy of certain assumptions of the assumptions models. No critic has shown, however, that the models were solved

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1. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995) [hereinafter "Schwartz & Scott"]. Our article cited a number of prior papers that contained thick descriptions of the ALI and NCCUSL's role in creating particular laws. Kathleen Patchel had previously written an informal interest group analysis of the U.C.C., which argued that the drafting process slighted consumer interests. *See* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 Minn. L. Rev. 83 (1993). Almost contemporaneously with our work, Larry Ribstein and Bruce Kobayashi published an interesting empirical analysis of the adoption process for uniform state laws. *See* Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. Legal Stud. 131 (1996).

2. The law giver specifies the content of a rule in advance (driving more than sixty miles an hour is unlawful); and specifies the content of a standard ex post (driving "unreasonably" is unlawful).

incorrectly, nor has any critic provided a competing theory that accurately predicts, as our theoretical results did, that an Article 2 revision, if it passed, would contain mainly standards; that the revised Article 9 would contain mainly rules; and that the Products Liability Restatement would choose standards so vacuous as to retain the status quo. Our conclusions were tentatively stated, however, because our formal work was preliminary and our data was impressionistically assembled. Thus, we concluded by remarking the need for "more theory and more evidence relating to how private law-making groups function" before a conclusive judgment could be drawn regarding just when, if ever, a PL would function well.[3] Robert Rasmussen's paper for this Symposium[4] contains numerous interesting insights, but it does not respond to this need.

This partly is because Rasmussen does not focus on private legislatures as such; instead, he argues that the "case against" the most successful PL legislative product, the U.C.C., is"uneasy." This claim does not respond directly to the Schwartz and Scott paper where we attempted to show that the mixture of rules and standards in the U.C.C. was more the product of structural features that characterize the ALI and NCCUSL than the result of policy choices regarding the appropriate level of abstraction on which to write statutes. Our analysis thus is consistent with the view that the U.C.C. contains some valuable sections. Unsurprisingly, then, Rasmussen is tougher on the Code than we were. He makes trenchant comments about the statute's unprincipledly limited scope; concedes that much of Articles 3 and 4 are unnecessary; recognizes that consumer interests were slighted in the original Code and in revisions; notes that Article 6 is withering away; criticizes the Article 9 revisions for not considering the interests of tort claimants; notes that the Code's coverage is being reduced by justifiable Federal interventions; and does not attempt to exhibit the relative superiority of Code solutions to important commercial problems.

Nevertheless, Rasmussen believes that there is something to be said for a process that could produce a statute such as the U.C.C.. In particular, he claims that: (a) "the U.C.C. drafting and revision process . . . will produce a more technically competent set of laws than would a public legislature;"[5]; (b) "[t]he uniform law process has

3. Schwartz & Scott, *supra* note 1, at 651.

4. Robert Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 La. L. Rev. 1097 (2002) [hereinafter "Rasmussen"].

5. Prior scholars claimed that PL products are technically superior to typical state legislative products. Rasmussen's claim seems novel in that it extends the claim of superiority to Federal legislative products as well and makes clear that PL technical competence extends not only to the drafting of individual sections, but to the ability to create entire coherent statutes.

the potential to reduce the payments made by the various interest groups;" (c) all affected parties participated in the drafting of some U.C.C. Articles and their revisions; the Articles thus internalize the costs and gains the statute creates and so likely are efficient; and (d) the U.C.C. may be "more complete" than an ordinary statute. Regarding the need for uniformity in legal regulation,[6] Rasmussen argues that the ability of parties to write choice of law clauses in contracts does not obviate the need for a nationally uniform law of sales. This part of his article is very well done, and rewards careful reading.[7] But the last of his four claims is not seriously argued, and the initial three are not sustained.

Rasmussen appears to attribute multiple meanings to the word "technical" when he argues that PL products are technically superior to those of an ordinary legislature, but none of these meanings can sustain the claim. Initially, he may mean that the U.C.C. is better drafted than a typical statute. Rasmussen's article, however, does not provide criteria whereby one could assess whether one legislature's drafting choices better implement the policy at issue than another legislature's choices do or could. The absence of such criteria would make it difficult to evaluate the evidence for a claim of better PL drafting, but Rasmussen offers no evidence either. For example, Rasmussen does not exhibit a set of U.C.C. sections dealing with a subject and compare them to a similar set of sections in a typical statute. He does note that Congress corrects mistakes in its statutes, but this cannot prove his case since some mistakes will always be made. Indeed, the Code's Permanent Editorial Board corrects mistakes.

Rasmussen's claim may be that the U.C.C. is more coherently drafted than other statutes, but he does not sustain this position. A claim that statute A is more coherent than statute B is vague. The claim could mean that A has fewer linguistically inconsistent sections

6. Private legislatures such as the ALI and NCCUSL cannot be justified only on the ground that they produce needed uniform laws because, obviously, uniformity also could be achieved by Federal statutes or regulations.

7. A definition of uniformity should include at least two concepts: that the law "on the books" is uniform across jurisdictions; and that the law is uniformly applied through time in a single jurisdiction, in the sense that similar contracts are interpreted similarly through time. Rasmussen's argument runs only to uniformity in the former sense, and argues that it is better achieved by statute than by contract. Thus, his article does not address Scott's claim that the Code does badly, relative to the common law, in achieving uniformity in the latter sense, and perhaps not so well, relative to the common law, in achieving uniformity in the former sense. *See* Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies, in* The Jurisprudential Foundations of Corporate and Commercial Law 149 (Jody S. Kraus & Steven D. Walt, eds. 2000).

than B has. Or it could mean that B attempts to realize policies that actually are inconsistent while A does not. Or it could mean that if A uses a policy to resolve a problem, it will use that policy rather than another to resolve similar problems. Rasmussen's claim that the U.C.C. is more coherent than ordinary statutes dealing with the same problems therefore suffers from two defects: he does not say what he means by coherence in a statute, and he does not offer evidence that the U.C.C. is more coherent on the meaning chosen than other statutes.

Rasmussen's claim for the technical superiority of private legislatures may refer instead to the idea that these legislatures deal with "technical" subjects that are beyond the competence of ordinary legislatures to resolve. Thus, he claims that "Article 9 is a very complex statute that took a good deal of expertise to put together. . . . [I]t is fair to say that revised Article 9 is a better-drafted statute than one that would have been produced at the Federal level."[8] This is false. Congress produces tax, environmental, and regulatory statutes that deal with issues far more complex than questions such as how best to give notice of liens or how to set default priorities among secured claimants. Indeed, the tax laws appear to deal well with the latter questions.[9] Therefore, to make persuasive the claim that Congress could not write an effective personal property security statute needs more argument than Rasmussen's article supplies.

Finally, Rasmussen sometimes seems to rest his claim of technical superiority on the ability of a private legislature to draw on the services of law professors. These professors do participate extensively in the creation of laws such as the U.C.C. Rasmussen thus may argue that law professors provide expertise to private legislatures that is not available to Congress, but this claim would be incorrect. The evaluation of a proposed statute may require legal, scientific, economic or similar expertise. Law professors have legal expertise. As Scott and I have observed, a private legislature does not hold hearings, cannot require parties to testify or supply statements and, as a matter of practice, does not pay for services. As a consequence, private legislatures rely on the unpaid labor of legal academics. In contrast, Congress and administrative agencies have available to them the expertise of legal academics, scientists, economists and others. Put simply, no PL could draw on as much expertise as could the national legislature, federal administrative agencies, or the legislatures of important commercial states when passing a law.

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8. Rasmussen, *supra* note 4, at 1144.
9. *See* The Federal Tax Lien Act, 26 U.S.C.§ 6321, et seq. (1990).

The claim that the U.C.C. and other PL products exhibit high technical competence relative to typical legislation is often made by PL participants and is repeated by law professors. Those who make the claim, however, do not specify what technical competence is in the legislative context, provide evidence that private legislatures have a lot of it, or refute the view that these legislatures can bring fewer needed resources to bear on the solution of policy problems than public legislatures can. Rasmussen's analysis of the U.C.C. regrettably follows standard practice.

Rasmussen's claim that the U.C.C. process may reduce interest group expenses is difficult to evaluate. Many observers want to minimize spending by private groups used to influence legislation because this spending is thought to distort the lawmaking process. If this view is right, then that policy outcomes may be purchased more cheaply from private legislatures than from the Congress would appear to be a drawback of the PL process, not a strength. Perhaps Rasmussen means only that the *same* law would require fewer social resources to produce in a PL than in the Congress. This claim is not obviously correct, but a serious argument for it is lacking.

Finally, Rasmussen's claim that some Articles (3, 4 and 9 apparently) were drafted by everyone whom the laws could affect, and thus were likely to be efficient, is interesting but preliminary. It is similar to the claim by Karl Llewellyn that trade association rules are presumptively efficient when all affected parties participate in creating the rules. Llewellyn, however, believed that when trade associations deal with the unorganized public, they engage in exploitation. As a result, trade association rules no longer deserve the presumption of desirability.[10] As Rasmussen carefully observes, the banks and finance companies whom the Code regulates do deal with consumers whose interests were not seriously considered in the drafting process. Thus, his efficiency claim for these articles is only partial. The claim also raises a question. Banks and finance companies have trade associations. Why did they need a uniform law to get effective self regulation? Two answers seem possible. Holdouts could defeat private bargaining over rules, so that the coercion of a statute is needed for efficiency. Or, the force of law makes it easier for private groups to extract rents from unorganized outsiders. Rasmussen's article does not choose between these possibilities, yet this choice seems essential to the making out of his claim that at times the U.C.C. process is at least as efficient as the usual legislative process would be.

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10. *See* Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory, in* The Jurisprudential Foundations of Corporate and Commercial Law 12, 16-17 (Jody S. Kraus & Steven D. Walt, eds. 2000).

There are a number of interesting things in Rasmussen's paper. As said, the discussion on the difficulty of achieving national uniformity by contract is original and seems right. There also are a number of thoughtful remarks about particular U.C.C. Articles, and some casual but useful history. Rasmussen's article, however, does not add new theory or new facts to the debate over the efficacy of private legislatures. If this is not yet clear, then see that his article begins with this question: "Given that there are a number of [legislative] institutions from which to pick, which institution would we think does, on average, a better job?"[11] The article ends with a discussion of Article 9 that asks the same question: "If Congress were to have initial responsibility for some subset of secured transactions and the states have responsibility for others, we would need to articulate the basis on which one decided that a transaction is governed by state law or federal law. This may not be an easy matter."[12] Rasmussen asks the right question, but makes too little progress in answering it.

11. Rasmussen, *supra* note 4, at 1110.
12. *Id.* at 1145.