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Ex Proprio Vigore

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INTRODUCTION

The National Conference of the Commissioners on Uniform State Laws (NCCUSL) is a legislature in every way but one. It drafts uniform acts, debates them, passes them, and promulgates them, but that passage and promulgation do not make these uniform acts law over any citizen of any state. These acts become the law of the various states only ex proprio vigore — only if their own vitality influences the legislators of the various states to pass them.1

An inescapable question for an elite legislature such as the Commissioners is how to get its laws enacted. How can it decide before the fact whether a particular law has the vitality to make it through the decisive state legislatures? By examining one of the early failures of the National Conference, I hope to show some of the sources of and the limits upon its power as an elite legislature.

The Conference, of course, is different from conventional legislatures in more than one way. Although the Commissioners are technically public officials, they are an elite group. Most of the Commissioners are prominent lawyers not chosen on the same basis used to choose a legislator, but chosen because they have a more intellectual interest in uniform law than would a typical legislator. They are elected not by a vote of the electorate but by the single vote of the governor. This mode of election doubtless removes the Commissioners farther from the people than the typical state legislator; it also produces a group that is much more sophisticated in the law and more interested in long-range questions than they would be if they had to stand for reelection every two or four years.

For the purpose of this article, I assume that the product of such an elite legislature is technically superior to the product of most state legislatures and at least the equivalent of what Congress itself could produce. Of course, technical competence is far down the list of things that commend particular legislation to state legislatures and even fur-

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1. Of course, in some circumstances the Commissioners may have success by adopting a law proposed by a group such as bankers, lawyers, business groups or others, who themselves have sufficient legislative influence to get the law passed.
ther down on the list of the public at large. Yet the principal argument that the Commissioners can make on behalf of a uniform law when it is considered by a state legislature is its technical and substantive superiority over a law born in the back room of a state legislature and sired by a lobbying organization.

This then is a fundamental problem of any elite legislature that lacks the power to cause its legislation to be adopted. What legislation is appropriate? What can be passed? What does the answer to those questions tell about the legislation that should be undertaken, the mode of drafting and adoption, and the acts that are necessary and appropriate to achieve adoption? If every uniform act proposed by the National Conference of Commissioners were adopted by most of the fifty state legislatures, the Conference would be a legislature in every sense. If, on the other hand, few such acts were ever adopted by more than a handful of legislatures, the Commissioners would be no more than a group of officious citizens.

**HISTORY OF THE CONFERENCE**

The exact origin of the NCCUSL is somewhat obscure, but it is clearly tied to the American Bar Association (ABA) and to its founding in 1878. One of the purposes of the ABA was to prompt "uniformity of legislation throughout the Union." Other bar associations took up the call for uniform legislation and doubtless had an impact on the formation of the NCCUSL. In 1888 a proposal was introduced in the legislature of New York to create "commissioners for the promotion of uniformity of legislation in the United States." Shortly thereafter the American Bar Association passed a resolution recommending that each state adopt an act similar to that proposed in New York. In 1890 the New York legislature approved the proposal, and in 1892 the NCCUSL's first meeting was held in Saratoga, New York.

Eventually all of the states, the District of Columbia, and Puerto Rico appointed Commissioners and have taken part in the acts of the National Conference. Even from the earliest time, however, people

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3. For example, in December 1881 the Alabama Bar Association created a committee to confer with members of other bar associations regarding the possibility of uniform state legislation on "questions of national importance." Young, *Uniform State Laws*, 8 A.B.A. J. 181, 182 (1922).
differed about the appropriate and feasible form of uniform legislation. The original New York law contemplated uniform laws on "marriage and divorce, insolvency and the form of notarial certificates." The American Bar Association resolution added laws dealing with descent, distribution of property, acknowledgment of deeds, execution and probate of wills. All of these topics were then thought to be uniquely state law questions, beyond the interest, ken, and even the constitutional reach of the Congress.

Originally the Commissioners held the naive assumption that the law could be "found" and stated. The original plan contemplated "put[ting] in statutory form . . . established principles to be found in a long line of cases" on "all subjects where uniformity is deemed desirable and practicable." Where authority differed, the NCCUSL was to follow the greatest authority. Repeatedly the Commissioners have drawn the distinction between law reform — a topic not within the authority of the NCCUSL — and codification of existing principles.

As any student of modern law knows, even the modest business of choosing between divergent authority is a reform and a change in the law at least in the state whose common law rule is rejected. But more fundamentally, any attempt to codify a body of common law necessarily presents the drafters irresistible opportunities to state rules that had been only vaguely articulated or deeply buried in the cases. In one sense, each of these statements of the law is more than a mere codification of existing principles. Notwithstanding that fact, now so obvious, the bar associations, either out of willful ignorance or because they had not thought about it, insisted on the more limited goal for the NCCUSL: "It is exclusively the province of this committee to make uniform, so far as it may, the existing laws of the various states on the subjects of interstate application. . . . [I]ts duty does not lie at all in the

7. Id.
8. Report, supra note 5, at 337.
9. The drafters of the Restatements proceeded on a similar assumption. See, e.g., Restatement of Contracts xi (1932) ("The function of the [American Law] Institute is to state clearly and precisely in the light of the decisions the principles and rules of the common law."). Perhaps their naiveté was less excusable than that of the Commissioners, since the Restatements were not designed to be enacted into law at all.
11. Young, supra note 3, at 182.
direction of promulgating new statutes.”

Although the NCCUSL occasionally made self-conscious decisions to “reform,” the admonitions against novelty have continued. For example, in 1929 the Committee on Scope and Program reiterated: “As a rule the Conference should avoid entirely novel subjects with regard to which neither legislative nor administrative experience is available.” The issue again arose in 1958 where the NCCUSL proposed new “model” acts. The Commissioners contemplated model acts as those where wide adoption would be impossible because of the local notions of the question addressed or for other reasons.

Even the most recent pronouncement of the Conference published in 1988 states that as a general rule the Conference should avoid acts on subjects that are “entirely novel and with regard to which neither legislative nor administrative experience is available.” While one no longer sees the assertion that the Conference should merely codify, novelty is still forbidden, at least in circumstances where there is no track record (and presumably where novelty cannot be hidden in the disguise of codification).

The expansion of the power of the federal government by Supreme Court decision commencing in 1942 with *Wickard v. Filburn* and the subsequent congressional exercise of that power in areas formerly

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15. THE UNIFORM WORKMEN'S COMPENSATION ACT, 9 U.L.A. 299 (1923), was surely one example. The Commissioners' adoption of such a law is described as follows: [While this [workmen's compensation law] was a new reform and hardly included in the original purpose of the Commissioners on Uniform State Laws, nevertheless the legislatures were demanding legislation of this character and . . . it would be better to offer them a perfect law at the beginning of the movement for this reform than to correct their mistakes later . . .]. Robbins, What the Commissioners on Uniform State Laws Are Doing for the People of the United States, 75 CENT. L.J. 1, 1-2 (1912).


18. Id.


20. 317 U.S. 111 (1942). *Wickard* upheld a penalty assessed under the Agricultural Adjustment Act of 1938 against a farmer, who exceeded his allotted quota of wheat, even though the excess wheat was grown solely for consumption on the farm. According to the Court, “[t]hat appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” 317 U.S. at 127-28. Thus, any
reserved by law or custom to the states has intensified the Commissioners' uncertainty and anxiety about their role. Obvious, but perhaps worth noting, is the fact that the Commissioners owe their existence to our federal constitutional system. Had the Constitution granted all legislative power to the federal Congress and none to the states, there never would have been a Conference of Commissioners on Uniform State Laws nor any need for one. Initially the need for the Conference arose because Congress was constitutionally foreclosed from enacting laws concerning a number of matters thought to influence only a state or citizens of a particular state. Any nineteenth-century lawyer would have said that such matters as private tort claims, private contract, rules on bills of exchange, security interests, insurance, and a host of other matters were beyond the power of Congress. If these matters were beyond the power of Congress, yet the states were to enact laws concerning them, there was obviously a place for a body to promote uniformity.

With cases like *Wickard, Perez v. United States*,²¹ and *Katzenbach v. McClung*,²² the constitutional barriers that had excluded the Congress from these areas were torn down. Today it is difficult to imagine an event so local or so remote from interstate commerce that the Congress could not enact a law concerning it. To the extent Congress chooses to exercise this new power, it will have extinguished the need for the NCCUSL.

Examples of congressional encroachment on what had been formerly regarded as the territory of the states abound. Of particular concern to the Commissioners must be cases such as the truth-in-lending law²³ where Congress snatched a few pages from the NCCUSL's own act, The Uniform Consumer Credit Code, and enacted them as federal law.²⁴ Other parts of the federal consumer credit legisla-

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²¹. 402 U.S. 146 (1971). *Perez* was a loan shark convicted under Title II of the federal Consumer Credit Protection Act. Although Perez was apparently a purely intrastate loan shark, the Court upheld his conviction on the grounds that he was "clearly a member of the class which engages in 'extortionate credit transactions' as defined by Congress," which class had been determined by Congress to "directly affect interstate and foreign commerce." 402 U.S. at 153, 147 n.1. Hence despite a total lack of evidence that Perez had any effect whatsoever on interstate commerce, his conviction was upheld since others belonging to his "class" did affect interstate commerce.

²². 379 U.S. 294 (1964). This case upheld the application, under the commerce clause, of the 1964 Civil Rights Act to a restaurant that refused to allow blacks to sit in its dining room, on the grounds that it had purchased food that at one time had moved in interstate commerce.


²⁴. During hearings on a precursor to the truth-in-lending law, Senator Proxmire stated that he was "sure that the committee, when it [marked] up the bill, [would] take into very careful consideration, and . . . adopt, a number of the suggestions" made by the NCCUSL's representa-
tion and the Federal Reserve's Regulation CC have gradually appropriated a significant portion of the rules on consumer credit and transfer of checks among banks to the federal government. Today few doubt the power of Congress to enact laws that would affect tort liability in all of the states, or laws concerning insurance, or laws concerning the licensing and operation of a variety of other businesses.

Does all of this mean that the Conference is merely a vestigial institution whose purpose has disappeared? I think not, but let me explain. The original constitutional division of legislative power between the states and the federal Congress arose to some extent out of fear of

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centralized government and of the power that such a government would wield. That idea was well expressed at the time of the drafting of the Constitution and was frequently on the lips of nineteenth-century politicians and statesmen. With the removal of the constitutional barriers against federal laws governing most elements of a private citizen's life, the same fear that caused the constitutional barriers in 1789 should again trouble the citizens, now exposed to federal power.

Ironically, the NCCUSL may find this new-found fear of federal power to be a reason for their organization. Conceivably the Commissioners can be a rallying point for the states against federal encroachment. In 1910, long before Wickard v. Filburn, a news account noted that President Taft had suggested as much:

The cry against overcentralization of the government would be hushed if the states worked in harmony with each other in their law making; otherwise, as Senator Root predicted two years ago, Congress will be urged to effect for the whole country the laws which conditions demand and the state statutes fail to supply.

That the Commissioners' role might be to fill the void that would otherwise be filled by federal law has not gone unnoticed by the Commissioners themselves. Commissioner Allison Dunham made the point twenty-five years ago: "From the very beginning, including the early reports of the American Bar Association, it has been a theme that uniformity of law by voluntary state action was a means of removing any excuse for the federal government to absorb powers thought to belong rightfully to the states."

29. It is beyond a doubt that the new federal constitution, if adopted, will in a great measure destroy, if it do not totally annihilate, the separate governments of the several states. We shall, in effect, become one great Republic. — Every measure of any importance, will be Continental. . . . From the moment we become one great Republic, either in form or substance, the period is very shortly removed, when we shall sink first into monarchy, and then into despotism.

An Old Whig IV, in Federalists and Anti-Federalists: The Debate Over the Ratification of the Constitution 18 (J. Kaminski & R. Leffler eds. 1989) (anonymous essay published in the Philadelphia Independent Gazetteer, Oct. 27, 1787). For numerous other examples of commentary from the time of the Constitutional convention questioning the excessive power of the federal government, see id. passim.

30. Two examples: In 1812, Cyrus King of Massachusetts, opposing a federal draft of state militia, said that "[s]uch arbitrary plans can only be calculated to destroy the Militia System, and, of course, the sovereignty of the States." S. EDMUNDS, THE FEDERAL OCTOPUS IN 1933, at 7 (3d ed. 1933). In 1833, President Jackson vetoed a proposal to grant public land to various states, on the grounds that "a more direct road to consolidation cannot be devised. Money is power, and in that government which pays all the public officers of the States will all political power be substantially concentrated." Id. at 83.


Moreover, this fear of federal power may be enhanced because the power is exercised not by a ponderous, deliberative body such as the Congress, but by agencies of the federal government such as the Federal Reserve Board, the Federal Communications Commission or the Federal Trade Commission. For example, bankers seeking a particular set of rules to determine the banks' liability to customers might have more confidence in the stability of those rules if they were stated in a uniform state law that could be changed only by the acts of state legislatures than if the rules were found in regulations authorized by Congress, but promulgated by the Federal Reserve Board. Under federal agencies, such regulations can be changed on short notice and with modest debate.

The tearing down of the constitutional barriers should give the National Conference legitimate anxiety about their place in the new and less federalist society. Yet that same expansion of federal power may ultimately strengthen their position if they can fill the void before the Congress and the federal agencies do so.

**HISTORY OF UNIFORM LEGISLATION BY THE NCCUSL**

Since 1892 NCCUSL has promulgated over 200 uniform acts. Because amendments to existing acts are often described as new acts — for instance, the article 2A proposed in 1987 — the true number of acts is subject to debate. But however one counts, it is clear that much of the Commissioners' seed has fallen on barren ground. Of the more than 200 uniform acts, 107 have been adopted by fewer than ten states; seventy-seven of these have not made the grade in even five states, and a number of the uniform acts have earned zero adoptions. Many of the unsuccessful acts have been withdrawn or superseded by other acts; these are no longer included in the listing of uniform laws.

The Commissioners have had great successes as well. Twenty-two acts have been adopted by more than forty states. Because the Uni-
form Commercial Code superseded three of these previously successful acts and is itself counted as at least three acts (the original Code, the 1972 amendments to article 9, and 1977 amendments to article 8), the number twenty-two slightly exaggerates the number of successes.

Before we turn to the unsuccessful divorce acts discussed in detail below, consider the successful acts, those passed by more than forty states. Successful acts can be classified in many ways; for this article, I choose classes that tend to identify characteristics that make an act successful: commercial acts, lawyer and court acts, and descent and estate acts. The first category includes nine acts. It contains the queen of all uniform acts, the Uniform Commercial Code. Also included are such important acts as the Uniform Partnership Act, the Uniform Limited Partnership Act, and the Uniform Arbitration Act.

Under the rubric “lawyer and court acts” we list things such as the Uniform Criminal Extradition Act, the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Uniform Durable Power of Attorney Act, and the Uniform Reciprocal Enforcement of Support Act. These categories are not perfect; for example, one might include the Uniform Arbitration Act in the list of lawyer matters and exclude it from the commercial law list. Finally are acts having to do with distribution of decedents’ estates; the Uniform Anatomical Gift Act and the Uniform Simultaneous Death Act fit here. The NCCUSL has itself organized the acts under four cate-
gories based on technical aspects, but these are less informative as to the factors of success.

The story of the success or failure of these acts is the story of the limits on the power of an elite legislature. Presumably the Commissioners who voted for and promulgated the 200 uniform acts would have favored their adoption in every state. That more than half of these acts have achieved no significant adoption is a statement about the limited power of this legislature, and if one can learn from the successes and failures of the Conference — about which acts are hopeless and which are likely to find widespread adoption — the lesson would be useful for the Commissioners. To the extent these lessons also show the kind of laws that our legislatures will pass and the persons to whom they listen, these successes and failures merit study by a larger audience than just the Commissioners. Quite likely there are some lessons buried here about the power of the states versus the power of the Congress. There may be a message for citizen groups and for quasi-official groups such as law revision commissions. There may even be some clues about the American public’s need for and attachment to the idea of uniform laws. Finally, one might also learn here about the limited importance of law as a control on human behavior.

Answers to these questions must wait for another day. I propose to study them here by examining the public debate, the circumstances of adoption, and the legislative fate of four early uniform acts on divorce. The following description of the unsuccessful efforts to modify the divorce law provides a basis for debating the proper role of uniform state laws and the attendant power, and limits on the power, of the Commissioners.

40. The four categories are:

(1) Acts to facilitate the flow of commercial transactions across state lines

(2) Acts to avoid conflict of laws when the laws of more than one state may apply to a transaction or series of transactions

(3) Acts to provide reciprocity as to rights and remedies between states and residents of different states

(4) Acts without substantial interstate implications but conceived and drafted to fill emergent needs, to modernize antiquated concepts, or to codify the common law

REFERENCE BOOK, supra note 19, at 106.

Of the 22 successful acts, six (NEGOTIABLE INSTRUMENTS LAW, supra note 36, STOCK TRANSFER ACT, supra note 36, WAREHOUSE RECEIPTS ACT, supra note 36, UNIF. COMMERCIAL CODE, supra note 36, U.C.C. Article 8, supra note 36, and U.C.C. Article 9, supra note 34) fit into category 1; none fits in category 2; five (REVISED CRIMINAL EXTRADITION ACT, supra note 36, UNIF. ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS, CHILD CUSTODY JURISDICTION ACT, supra note 36, ENFORCEMENT OF FOREIGN JUDGMENTS ACT, supra note 36, and RECIPROCAL ENFORCEMENT OF SUPPORT ACT, supra note 36) fit in category 3; and the rest get stuck in the “catch-all” category 4.
UNIFORM DIVORCE LEGISLATION

In 1906 the National "Congress" on divorce legislation issued the following proclamation:

The great and constantly increasing number of divorces in the United States has aroused a general public interest which has resulted in a widespread movement for their restriction. As one result of the discussion of this subject, there is a well founded belief that a part of this increase in divorces, attended with special evils and scandals, is due to the lack of a divorce law uniform throughout the nation.

The power to establish such uniform law has not been committed to the Federal Government by the Constitution, except for the District of Columbia and the territories, and the movement for restriction has therefore been in the direction of securing action of the several states in the passage of such law. In the message of President Roosevelt to the Congress of the United States, on January 30, 1905 (sent at the instance of the Interchurch Conference and requesting the continuance of the collection of Divorce Statistics under Federal authority), he suggested such co-operation of the states, in this language:

"The institution of marriage is of course at the very foundation of our social organization, and all influences that affect that institution are of vital concern to the people of the whole country. There is a widespread conviction that the divorce laws are dangerously lax and indifferentely administered in some of the states, resulting in a diminishing regard for the sanctity of the marriage relation. The hope is entertained that co-operation amongst the several states can be secured to the end that there may be enacted upon the subject of marriage and divorce uniform laws, containing all possible safeguards for the security of the family." 41

So read the first three paragraphs of the address by the Committee on Resolutions of the 1906 National Congress on Uniform Divorce Laws. The report was addressed to the President and Congress of the United States and to the governors and legislatures of the states and territories. By their reference to the data on divorce, to the "general public interest," to the limits on the power of the federal government, to the action of the interchurch conference in calling for the National Congress and to the general statement of the President concluding that "divorce laws are dangerously lax," these paragraphs identify many of the actors in the attempt to change the divorce laws. They capture the general motivation of the proponents of change and public expression of concern for and disapproval of the existing divorce law.

This general upheaval in favor of restrictions on divorce law and the actions that followed produced four uniform laws, one passed in 1900, superseded by two others in 1901, and those in turn superseded by the fourth, promulgated in 1907 by the NCCUSL. The fourth act had been adopted by the National Congress of 1906; the three paragraphs quoted above refer to it.

Despite the interest of the churches, the apparent general public interest, and President Roosevelt’s view about the need for change in the law, these proposals were a dismal failure. No state adopted the 1900 Act. The uniform laws promulgated in 1901 were together adopted in only two states, and only Delaware, New Jersey, and Wisconsin adopted the law of 1907.

I first recite some of the events that preceded and attended the attempt to modify the divorce laws of the states. By examining the apparent motives of the proponents and opponents, I will try to explain why the uniform divorce laws were unsuccessful and to extrapolate from this experience to other cases where the uniform laws have been or might be proposed.

To set the stage for the debate, I first review the law and the practice as it existed at the turn of the century. At that time, South Carolina did not permit divorce at all, and the most important player in the state legislative game, New York, permitted divorce only on the ground of adultery. An early twentieth-century commentator described the grounds for divorce in the various states as follows:

First, let us take that section comprised of Virginia, North Carolina, Kentucky and Tennessee. An examination of the laws of these states will disclose the fact that there are twenty-two grounds of absolute divorce recognized by one or the other of the four.

Of the twenty-two grounds, but two are common among the four states, namely: (a) Adultery and (b) Pregnancy of wife at time of marriage unknown to husband. Of the remaining twenty grounds, but two are common to three states (Virginia, Kentucky, and Tennessee), (a) Abandonment, etc. (b) Conviction of felony, etc. Two others are com-

42. STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LEGISLATION IN THE UNITED STATES, REPORT OF ELEVENTH NATIONAL CONFERENCE HELD AT DENVER, COLORADO, AUG. 19 AND 20, 1901, at 8 (1901) (Report of Amasa Eaton and S.A. Williams) [hereinafter 1901 REPORT].

43. Acts Drafted by Other Organizations and Approved by the National Conference, in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTIETH ANNUAL CONFERENCE 448, 449 (1940).

44. Id. The 1907 Act was withdrawn by the Conference in 1928. Id.

45. Article 17, § 3 of the 1895 Constitution of South Carolina reads: “Divorce from the bonds of matrimony shall not be allowed in this State.” S.C. CONST. art. XVII, § 3 (1895).

46. N.Y. CODE OF CIV. PROC. § 1756 (1902).
mon to Kentucky and Tennessee — (a) Cruelty, etc. (b) Habitual drunkenness, etc., while seven of the remaining sixteen grounds are recognized only in Tennessee, six only in Kentucky, two only in Virginia, and one only in North Carolina.47

The same author found that adultery was the only ground common to all seven of the states in New England, that abandonment and cruelty were common to six, and that there were other miscellaneous grounds, such as habitual drunkenness, conviction of a felony, impotency, and several others that were recognized only by a few of the seven states.48

Some Western states had divorce laws considerably more lenient than their Eastern counterparts. South Dakota, for example, allowed divorce on six grounds: adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, and conviction for felony.49 It also adopted broad definitions of some of the grounds, including "infliction of . . . grievous mental suffering" within the definition of cruelty,50 and refusal to have intercourse and selecting an unreasonable mode of living within desertion.51 There is no mention of any waiting period for effectiveness of the court's decree, although a six-month residence in the state was required.52 Grounds for divorce in Montana were identical to those in South Dakota, with some minor variation in the definitions.53 Colorado listed ten grounds for divorce, but the only major addition to the list was impotence.54 Neither of the latter two states imposed any waiting period after the decree before it became final. The residence provisions differed somewhat: Montana required the plaintiff to have been a resident for one year,55 while Colorado had no specific requirement other than that the plaintiff actually be a resident if the offense complained of happened within the state.56 In some of the western states the formal residence requirements appear to have been winked at.57

48. Id. at 310-11. The seven states are Massachusetts, New York, Connecticut, Rhode Island, New Hampshire, Vermont, and Maine.
49. 2 S.D. STAT. ANN. § 3470 (1901).
50. 2 S.D. STAT. ANN. § 3472 (1901).
51. 2 S.D. STAT. ANN. § 3473(1), (9) (1901).
52. 2 S.D. STAT. ANN. § 3489 (1901).
53. See MONT. CIV. CODE §§ 130-145 (1895).
54. See COLO. STAT. ANN. § 1562 (1891).
55. MONT. CIV. CODE § 176 (1895).
56. COLO. STAT. ANN. § 1564 (1891).
57. The New York Times reported a case of a New York woman who took advantage of the western laws to get a divorce she otherwise could not get: She told her friends that she was going West to get a divorce. She notified the telephone
Even in circumstances in which a party was a proper resident of the state where he or she sought divorce, there was the question of appropriate service on or notice to a nonresident defendant. All seemed to concede it was appropriate to grant divorces against absent defendants, but the questions how to give notice to that defendant and how to assure the satisfaction of due process for that person were troublesome.\textsuperscript{58}

One looking at these divorce laws and examining the popular claims about divorce practice might have identified some combination of three issues as “the problem.” First were those who simply thought divorce too freely granted; they would have favored general restrictions on the availability of divorce. Doubtless many of the churchmen held this view; it was probably the view of those who supported New York’s single cause divorce law. Alternatively, one might conclude that the evil was not that too many divorces were granted, but that one state might grant a divorce to a resident of another state. This was the problem of so-called “migratory” divorces, and it was thought particularly acute for states like New York with restrictive laws. Finally there was the problem of the due process rights of the absent spouse. Even advocates of more generous divorce laws could have joined proponents of divorce restriction out of concern over the third question.

It was divergent grounds for divorce — in law and in application — that produced all of the problems under the second heading and most of those under the third. If the substantive law and the application of that law in New York, New Jersey, and South Dakota had been the same, there would have been no need for New Yorkers to pretend to be residents of New Jersey or South Dakota, and to procure divorces there on the basis of inadequate notice to their spouses in New York and in violation of the laws of New York.

As early as the 1880s one sees discussion of the inadequacy of the divorce law and consideration of the problem of migratory divorce. In 1883, a reader of the \textit{New York Times}, who describes himself as having “‘passed through the mill,’” wrote to criticize the inconsistency of the divorce law.\textsuperscript{59} He complained that a woman not only could continue company in New York to take her name out of the telephone book, but took great care to warn her friends that she was at home and could be communicated with by telephone. She went out to the Western States and engaged rooms, returned to New York, and in due course of time, after a sufficient number of days of residence required by the statute had expired, she again went from New York to the State and came back with a divorce decree in her hand.

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N.Y. Times, July 5, 1908, at 8, col. 4 (quoting Barratt, \textit{Migratory American Divorces — Their International Status — Is a Central Registry Practicable?}, 17 \textit{Yale L.J.} 589, 592 (1908)).
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\textsuperscript{59} \textit{An Anomaly in Divorce Law}, N.Y. Times, Jan. 8, 1883, at 3, col. 5.
to use her husband's name, but that after a divorce she could go to another state and get married and return to New York even though the law of New York would keep her from remarrying were she the defendant in the original divorce action.

**VOICE OF THE CLERGY**

In 1890 the *New York Times* reported the tenth annual meeting of a Boston group called the National Divorce Reform League. The Reverend Dr. Samuel W. Dike, the corresponding secretary of that group, reportedly stated: "[t]he spirit of reform has apparently completely checked the increase of loose legislation, and has resulted in few better laws in some States, but the great work is as yet almost untouched." This seems the first recognition of the need for uniform laws.

During this time various church officials and organizations were active in proposing changes in the law. In 1883 and 1898 organs of the Episcopal Church proposed changes in the laws of some of the states and at least considered proposals concerning a uniform law on divorce. In 1899 the Right Reverend William Crosswell Doane, the Episcopalian bishop of the diocese of Albany, published a long essay in the *New York Times* on the "Question of Divorce and Remarriage." In that essay he specifically discussed a proposal of the National Commissioners on Uniform Laws (apparently the proposal that became the 1900 uniform act). Although Reverend Doane endorsed the uniform

60. Id. Complaints about divorce were often associated with complaints about the ease of marriage. On October 27, 1883, the *New York Times* in an editorial bemoaned sham marriages done "in fun" as part of a "'game.'" It admonished those who make fun of divorce by sham marriages as follows:

> We pride ourselves in this country on the complete freedom which is given to our girls, but when young people use that freedom in burlesquing marriage it is time to ask whether the nursery is not the proper place for them, until they can learn how to conduct themselves decently if not sensibly.

*Married in Fun*, N.Y. Times, Oct. 27, 1883, at 4, col. 5. In 1892 the Homeopathic Medical Society proposed the prohibition of marriages "among those tainted by heredity with crime, insanity or disease . . . ." It proposed the "enactment of suitable scientific laws restricting such marriages." *Would Restrict Marriages — The Homeopaths Vote to Appeal to the Legislature*, N.Y. Times, Oct. 6, 1892, at 4, col. 7.


62. Id.

63. *See Calling for New Divorce Laws*, N.Y. Times, May 13, 1883, at 1, col. 6. At an 1898 meeting in Washington, D.C. the Episcopal bishops declined to pass a resolution endorsing the uniform law and considered the question whether to change the rule prohibiting remarriage of divorced persons, but decided to leave the rule as it stood. *The Episcopal Council — Bishops Decide to Take No Action on Question of Remarriage of Divorced Persons*, N.Y. Times, Oct. 18, 1898, at 12, col. 4.

law to the extent it restricted the opportunities for divorce and prompt remarriage after divorce, he had some doubts about the proposal then under consideration:

[W]hile I dread the attempt to provide one marriage law for all the states, lest in the effort to lift the lowest we lower the highest standards of the civil law; I am very thankful for the recommendation of the National Commissioners on uniform laws in certain of their details; requiring a residence in good faith for a year; allowing no divorce for any cause previous to residence unless it be a cause in the State whence the petitioner comes; nor for cause arising in the State without two years delay; divorce to be granted only on trial in open session, and the decree to be inoperative for six months if the defendant fail to appear.\(^6\)

From the letters to the *Times* one can tell the clergy were not bashful in speaking from the pulpit on the evils of divorce and, presumably, in favor of laws restricting divorce.\(^6\)

**THE "EVILS" OF EARLY DIVORCE LAW**

The newspapers also contain anecdotal descriptions of the evil consequences in particular cases of conflicting laws and of the failure of various states to give full faith and credit to the judgments of other states. The point is made as follows in a commentary in the *New York Times* in 1876.

It is true that the Federal Constitution provides that full faith and credit shall be given in each State to "the public acts, records, and judicial proceedings" of every other State. This might be interpreted to mean that a divorce obtained in Indiana must necessarily be recognized as lawful by the courts of this State. In actual practice, however, such recognition is by no means universally given. If the divorce has been obtained by fraud, it is, of course, held by our courts to be inoperative. There are, however, many cases in which it is uncertain whether a foreign divorce obtained in a perfectly regular way, is not worthless outside of the State in which it was obtained. For example, a wife residing in this State may leave her husband and go to Indiana, and after residing there as long as the Indiana statute requires, procure a divorce for some cause not permitted by the New-York statute. Whether this divorce

\(^6\) Id.

\(^6\) In a sermon, the Reverend Mr. Hamilton denounced "home wreckers" and asked for the social ostracism of divorced people in general. Layman, "Regarding Divorced Persons," *N.Y. Times*, June 29, 1899, at 6, col. 7 (letter to the editor) (quoting Rev. Hamilton). His statement from the pulpit brought a letter from one reader of the *Times* who was critical of his strong stand, *id.*, and from another critical because the Reverend did not go far enough. The latter writer condemned the Reverend because he was "lacking in the courage of his opinions when he mildly suggested that society should frown upon divorces 'as a favor to the Church,'" adding that if they would 'do such kindness to the Church,' God would reward them." The writer commented, "[h]as the worship so influenced teachers of the Gospel that they must timidly beg as a favor what it is their duty to demand as a prerogative?" D.R., "Home Wreckers in Society," *N.Y. Times*, June 29, 1899, at 6, col. 7 (letter to the editor).
would be held good by our courts is a question that is by no means settled. The fact that the wife left the State expressly to accomplish what she could not accomplish under the New-York State laws would cause the courts to look with suspicion upon her conduct. The legal theory that a wife's residence is the same as that of her husband might be construed to mean that she could not, by leaving him and going to Indiana, obtain a legal residence there which would be sufficient to give the Indiana courts jurisdiction over her. There would be, also, a question whether the service of process upon the husband by publication in an Indiana newspaper would be sufficient to give the Indiana court jurisdiction over him. Thus, in spite of the Federal Constitution, the perfect good faith of the wife, and the regularity of the proceedings in the Indiana court, it would be uncertain whether she would be a wife or a divorced woman in this State.  

In 1896 the New York Times quoted a New York judge's complaint about the need of a special officer to look into the events of default cases. Presumably the judge was really complaining not about "default," but about collusive divorces in which the parties allege adultery even though none has occurred in order to achieve a divorce contrary to the laws of New York. Another judge reported that he performed the repugnant task of finding a New Yorker who had procured an invalid Connecticut judgment to be a bigamist.

The case was that of a husband suing for absolute divorce from a wife who had obtained a divorce from him in Connecticut, according to the laws of that State, the husband not having been personally served, and had married again in Connecticut. The husband's application was granted, the court holding that, as to him, the Connecticut divorce and marriage are void. On this state of things the comment of Judge MAT-TICE was: "The Constitution of the United States requires that 'full faith and credit shall be given in each State to the judicial proceedings of every other State,' and, it is said, public policy requires one jurisdiction to observe as valid a marriage legally contracted in another jurisdiction. Seemingly we do neither."  

The New York Times also reported the case of a woman who, claiming to have moved to another state where she was to get a divorce, in fact remained in New York telling only her friends how to contact her and avoiding all appearance of continued residence in New York. In another case, the Times reported, an influential citizen suc-

69. *Uniform Divorce Laws*, N.Y. Times, Mar. 12, 1899, at 18, col. 2. For other examples of legal commentary critical of the current system and advocating the need for reform, see *Not Bigamy if You Wed Outside State*, N.Y. Times, Jan. 25, 1914, at 13, col. 3 (comments of ex-Judge Dittmanoefer concerning men known to him with "undivorced wives"); Spurr, *Uniform Divorce Legislation, 17 CASE & COM. 17* (1911); Wise, supra note 47; *Uniform Divorce Laws, 17 VA. L. REG. 480* (1911).
70. See N.Y. Times, supra note 57.
ceeded in changing the law in a minor way to enable him to remarry after his divorce:

Nobody disputes the gravity of the evils entailed by varying divorce laws, nor the openings for fraud which the variation makes.

... There has been, doubtless, much hasty and unconsidered State legislation upon divorce. It has been known that a man of wealth and influence has induced the Legislature of a State to pass a divorce law, general in its terms, but in fact for the sole purpose of meeting his particular case.\(^\text{71}\)

These commentaries and anecdotes are all critical of the existing divorce law and, for the most part, of divorce itself. An extensive divorce study done by Col. Carroll D. Wright, Commissioner of the National Bureau of Labor Statistics, fueled this fire.\(^\text{72}\) Submitted to Congress in 1889, the report studied divorces in the United States from 1867 through 1886. Although careful study of the report showed certain alleged evils, such as migratory divorce, to be exaggerated,\(^\text{73}\) the study did show a rapid rise in the number of divorces. Moreover, it stated that the percentage of American marriages that ended in divorce was substantially higher than similar percentages in European countries.\(^\text{74}\) The study also showed that the percentage of divorces per 10,000 married persons had risen in every year, and that the total number of divorces had increased by 157% at a time when the population had increased by only 60%.\(^\text{75}\) As a result of the study, Colonel Wright was invited to speak to church groups\(^\text{76}\) and probably to other organizations interested in the divorce question. His findings became

\(^{71}\) For a Uniform Divorce Law, N.Y. Times, Oct. 25, 1906, at 8, col. 2. The story about the man in question, a Mr. Catlin, is reported in Romance of Divorce Law, N.Y. Times, Apr. 20, 1879, at 12, col. 1. One might call this the Henry VIII approach to reforming divorce laws.

\(^{72}\) C. Wright, A Report on Marriage and Divorce in the United States, 1867 to 1886 (1889).

\(^{73}\) The Reverend Samuel Dike, a major proponent of uniform divorce laws, conceded based on the study that 80% of divorces occurred within the state where the marriage took place, "thus dispelling a prevalent idea that a uniform national divorce law would remedy the evil." Divorce Reform League, supra note 61.

\(^{74}\) The ratio of marriages to divorces in the United States between 1867 and 1886 ranged from a low of 9.74 to 1 in New Hampshire to a high of 61.94 to 1 in Maryland. C. Wright, supra note 72, at 138-39. In contrast, Austria averaged around 240 to 1, England averaged 718 to 1, and Ireland averaged several thousand to 1. Id. at 986, 1017, 1018. One commentator noted that "[t]he less number of divorces in European countries is due principally to the fact that in a large number of them the church, as well as the law, forbids divorce." Krauskopf, The Marring of the Marriage Bond, 14 Am. J. Soc. 780, 781 (1909).

\(^{75}\) C. Wright, supra note 72, at 140.

\(^{76}\) See, e.g., Marriage and Divorce — An Interesting Paper Read before the Unitarian Conference, N.Y. Times, Sept. 24, 1891, at 3, col. 2 (Colonel Wright delivered a paper before the Unitarian Conference).
the basis for debate about the need for reform.77

THE UNIFORM LAWS OF 1900 AND 1901

This public debate of the late nineteenth century had its first concrete impact on the Uniform Commissioners in 1899. In its August 1899 meeting, held in conjunction with the American Bar Association meeting, at Buffalo, the Commissioners considered a proposed uniform law on divorce.78 Part of that draft became the 1900 act, “An Act To Establish a Law Uniform with Regard to the Law of Other States Relative To Divorce Procedure and Divorce from the Bonds of Marriage.” This first uniform law on divorce contained eight sections and was promulgated in 1900.79

77. See Montgomery, For Uniform Divorce Laws, N.Y. Times, Apr. 1, 1904, at 6, col. 4 (citing Wright's statistics).

A second study published by the census bureau in 1909, see The Story of Divorce Court Records Tell, N.Y. Times, Oct. 17, 1909, § 5 (Magazine), at 4, col. 1, seems to have had little impact on the debate. It compared the divorce rates among the various states and confirmed what had been claimed all along, namely, certain of the western states, particularly Colorado, Montana, and Washington, had quite high divorce rates, whereas certain eastern states, notably South Carolina, New York, and Pennsylvania, had quite low rates. It showed that the total number of divorces had risen from under approximately 20,000 in 1880 to approximately 72,000 in 1906. It also noted that the divorce rate per 100,000 in the population in the United States exceeded the nearest country by a factor of more than two. Our nearest competitors were Switzerland and then France, Denmark, and Germany. Although advocates of the uniform legislation could have used the data in the 1909 report, it appears that they had run out of steam by that time, having tried without success for several years to get the 1907 legislation adopted.

78. AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES RELATIVE TO DIVORCE AND DIVORCE PROCEDURE.

Section 1. Divorce from the bond of marriage shall not be granted for other causes than the following: Adultery, bestiality, sodomy, impotency, extreme cruelty, habitual drunkenness or intoxication, whether from the use of alcoholic drinks or of drugs, conviction of felony with sentence of imprisonment for — years or more, and continuous desertion for at least — years.

Section 2. No divorce shall be granted for any cause arising prior to domicile of the petitioner in this state that was not a ground for divorce in the State where the cause arose.

Section 3. No person shall be entitled to a divorce who has not had an actual bona-fide residence in this State two years next before bringing petition or suit for a divorce, with the actual intention of making this State his or her permanent home.

Section 4. No person shall be entitled to a divorce unless the defendant shall have been personally served with process, or shall have entered an appearance in the case, or it shall have been made to appear by the petitioner to the satisfaction of the court that the petitioner does not know the address nor the residence of the defendant, and has not been able to ascertain either, after reasonable and due inquiry and search continued for one year; in which case, the court may authorize notice to be given of the pendency of the petition for divorce, by publication, in such manner as may be provided by law or by rule or special order of the court.

Section 5. No divorce shall be granted upon default nor admissions by the pleadings nor upon the uncorroborated testimony of either of the parties.

Section 6. After absolute divorce, either party may marry again; but no decree for absolute divorce shall be finally entered or become operative, until three months after hearing and decision upon the petition.

STATE BOARD OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LEGISLATION IN THE UNITED STATES, REPORT OF NINTH NATIONAL CONFERENCE, HELD AT BUFFALO, N.Y., AUGUST 25, 26 AND 28 1899, at 5-6 (1899) [hereinafter 1899 REPORT].

79. AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER
In 1901, the 1900 law was superseded by two acts: "An Act To Establish a Law Uniform With the Laws of Other States Relative to Migratory Divorce" and "An Act To Establish a Law Uniform With the Laws of Other States Relative to Divorce Procedure and Divorce from the Bonds of Marriage."

STATES RELATIVE TO DIVORCE PROCEDURE AND DIVORCE FROM THE BONDS OF MARRIAGE.

Section 1. No divorce shall be granted for any cause arising prior to the residence of the complainant or defendant in this State, which was not a ground for divorce in the State where the cause arose.

Sec. 2. No person shall be entitled to a divorce for any cause arising in this State, who has not had actual residence in this State for at least one year next before bringing suit for divorce, with a bona fide intention of making this State his or her permanent home.

Sec. 3. No person shall be entitled to a divorce for any cause arising out of this State unless the complainant or defendant shall have resided within this State for at least two years next before bringing suit for divorce, with a bona fide intention of making this State his or her permanent home.

Sec. 4. No person shall be entitled to a divorce unless the defendant shall have been personally served with process, if within this State, or if without this State, shall have had personal notice duly proved and appearing of record, or shall have entered an appearance in the case; but if it shall appear to the satisfaction of the Court that the complainant does not know the address nor the residence of the defendant and has not been able to ascertain either, after reasonable and due inquiry and search, continued for six months after suit brought, the court or judge in vacation may authorize notice by publication of the pendency of the suit for divorce, to be given in manner provided by law.

Sec. 5. No divorce shall be granted solely upon default nor solely upon admissions by the pleadings, nor except upon hearing before the Court in open session.

Sec. 6. After divorce either party may marry again, but in cases where notice has been given by publication only, and the defendant has not appeared, no decree or judgment for divorce shall become final or operative until six months after hearing and decision.

Sec. 7. Wherever the word "divorce" occurs in this act, it shall be deemed to mean divorce from the bonds of marriage.

Sec. 8. All acts and parts of acts inconsistent herewith are hereby repealed.

STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LEGISLATION IN THE UNITED STATES, REPORT OF THE TENTH NATIONAL CONFERENCE HELD AT SARATOGA SPRINGS, N.Y., AUG. 25, 27, 28, 29, 1900, at 44-45 (1900).

80. AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAW OF OTHER STATES RELATIVE TO MIGRATORY DIVORCE.

Section 1. No divorce shall be granted for any cause arising prior to the residence of the complainant or defendant in this state, which was not ground for divorce in the state where the cause arose.

Section 2. The word "divorce" in this act shall be deemed to mean divorce from the bond of marriage.

Section 3. All acts and parts of acts inconsistent herewith are hereby repealed.

1901 REPORT, supra note 42, at 27.

81. AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES RELATIVE TO DIVORCE PROCEDURE AND DIVORCE FROM THE BONDS OF MARRIAGE.

Section 1. No person shall be entitled to a divorce for any cause arising in this State, who has not had actual residence in this State for at least one year next before bringing suit for divorce, with a bona fide intention of making this State his or her permanent home.

Section 2. No person shall be entitled to a divorce for any cause arising out of this State unless the complainant or defendant shall have resided within this State for at least two years next before bringing suit for divorce, with a bona fide intention of making this State his or her permanent home.

Section 3. No person shall be entitled to a divorce unless the defendant shall have been personally served with process, if within the State, or if without the State, shall have had personal notice, duly proved and appearing of record, or shall have entered an appearance in the case; but if it shall appear to the satisfaction of the Court that the complainant does not know the address nor the residence of the defendant and has not been able to ascertain
The two acts of 1901 were merely the Act of 1900 divided in two with a few added provisions. Although the 1899 draft contained a provision on the grounds for divorce, these substantive provisions on cause did not survive. Both the 1900 Act and the 1901 Acts are merely procedural and jurisdictional; none of the three acts purports to deal with the grounds for divorce. One can only guess why the grounds that were included in the 1899 considerations were dropped in 1900 and 1901. Perhaps this was the work of the New Yorkers, who opposed any expansion beyond adultery as a basis for divorce.

As I have indicated above, the act of 1900 was enacted nowhere and the two acts of 1901 achieved a cumulative adoption by two states. What part these acts played in the later deliberations in the congress of 1906 or in debates that preceded it is unclear. Yet most of the provisions of the 1900 and 1901 acts appear in the 1907 uniform act. There was little mention in the debates either of those laws or of the Commissioners. Indeed, as late as 1911, President Taft seems to have been ignorant of the uniform laws and of the NCCUSL, despite the fact that he was a lawyer and a judge.

During the first decade of the twentieth century the tide in favor of restriction on divorce rose rapidly. In 1902 New York enacted a law to require a three-month waiting period after the decree before a divorce would become effective. In 1905 Governor Pennypacker of

either, after reasonable and due inquiry and search, continued for six months after suit brought, the Court or Judge in vacation may authorize notice by publication of the pendency of the suit for divorce, to be given in manner provided by law.

Sec. 4. No divorce shall be granted solely upon default nor solely upon admissions by the pleadings, nor except upon hearing before the Court in open session.

Sec. 5. After divorce either party may marry again, but in cases where notice has been given by publication only, and the defendant has not appeared, no decree or judgment for divorce shall become final or operative until six months after hearing and decision.

Sec. 6. Wherever the word "divorce" occurs in this act, it shall be deemed to mean divorce from the bond of marriage.

Sec. 7. All acts and parts of acts inconsistent herewith are hereby repealed.

Id.

82. See 1899 REPORT, supra note 78, at 5-6.

83. At the 1899 Convention, the original proposal was split into two acts: a "Bill Relating to Causes" (§ 1 of the original proposal), and a "Bill Relating to Procedure" (§§ 2-6 of the original proposal). 1899 REPORT, supra note 78, at 6-7. The bill relating to causes was never reconsidered by the Commissioners. The bill relating to procedure was substantially adopted as the 1900 Act.

84. A letter from representatives of the Denver clergy to the Commissioners stated: "we pray you that... when the law as to 'causes for divorce' will be further considered that you will use your influence to secure the recognition only of such grounds for divorce as are in accordance with the law of Christ." 1901 REPORT, supra note 42, at 10. The letter does not indicate which causes accord with the law of Christ and which do not.

85. See supra text accompanying notes 42-44.

86. Corrects Taft on Divorce - Says Uniform Laws on Causes Exist in 90 Per Cent. of States, N.Y. Times, Sept. 11, 1911, at 3, col. 2 [hereinafter Corrects Taft on Divorce].

87. 1902 N.Y. Laws Chap. 951, which reads in pertinent part: "No final judgment annulling
Pennsylvania, together with others, proposed a national congress on the uniform divorce laws.\textsuperscript{88}

**THE WOMEN’S MOVEMENT**

The interests of women were, of course, intimately involved in the divorce laws and their interests were not necessarily the same as those of men. Because there were few women in the legislatures, writing for the national publications, or in the bar, little was reported on any peculiarly female view of divorce law. The only voice identified as speaking for women as a group at this time was the National Council of Women. In 1895 this group discussed the prospect of the national divorce law at its meeting in Washington, D.C.\textsuperscript{89} Clearly, many at the 1895 meeting raised their voices in criticism of the existing divorce law, but the nature of their criticisms is not clear. One representative complained “‘[t]hat the laws men have made without conferring with women have been unequal and most cruel to women.’”\textsuperscript{90} The report of this meeting does not explain whether the critic was advocating more generous divorce law or perhaps the converse — greater restrictions on migratory divorces by men.\textsuperscript{91}

Some at the 1895 meeting proposed that marriage should be harder to obtain and should be attended with some “education” as a solution to failed marriages. Others explicitly objected to restrictions on remarriage: “[H]ave you given the churches the right to say that because a woman has once sought happiness and failed, she shall not attempt to get it again?”\textsuperscript{92} The speaker then claimed that a man could be remarried, but a woman could not. It is unclear to which state law she was referring.

In their 1905 meeting, the Council apparently was aware of the proposal for a national congress on uniform divorce law. It adopted a resolution “to co-operate with the Church and State to ascertain what are the chief causes which induce or lead up to divorce.”\textsuperscript{93} The resolu-

\textsuperscript{88}. \emph{Address of the Committee on Resolutions, Appointed by the Divorce Congress, at Washington, D.C., February 19-22, 1905}, in \emph{Address & Resolutions}, supra note 41, at 2.

\textsuperscript{89}. \emph{Women Discuss Divorce — Ways for Reform Suggested at the National Council}, N.Y. Times, Mar. 1, 1895, at 14, col. 1.

\textsuperscript{90}. \emph{Id.} (quoting Mrs. Dietrick).

\textsuperscript{91}. In the headline, the \emph{Times} points out that “Many of the Speakers [are] Unmarried.” \emph{Id.}

\textsuperscript{92}. \emph{Id.} (quoting Mrs. Harriet A. Shinm).

\textsuperscript{93}. \emph{Miss Anthony for Divorce — Objects to National Women’s Council Resolution Against It}, N.Y. Times, Apr. 15, 1905, at 1, col. 5.
tion went on to condemn divorce as “known to cause most disastrous results in the family and State.”

The most interesting aspect of the 1905 meeting is the reported dissent of the noted feminist, Susan B. Anthony. The New York Times reported that Ms. Anthony “was on her feet before the reading of the resolution [described above] had been concluded.” She commented:

I do not consider divorce an evil by any means. . . . It is just as much a refuge for women married to brutal men as Canada was once a refuge from brutal masters. I will never vote for a resolution that will cut women off from refuge from designing and brutal men.

Her statement is the only explicit endorsement of divorce and recognition of the possibility that divorce could be a virtue that I have found in any of the public discussion, commentary, or in the debate of the Congress of 1906. It did not carry the day even with her female colleagues, who instead adopted the resolution that condemned divorce as “disastrous.”

THE “CONGRESS” OF 1906

The Pennsylvania legislature, acting at the behest of President Roosevelt, authorized Governor Pennypacker to request the cooperation of other states in drafting a uniform divorce law. Forty states, along with the District of Columbia and the territory of New Mexico, responded, sending delegates to Washington, D.C., in February 1906. Concluding that “the matter falls properly within the jurisdiction of the Commissioners,” Governor Higgins of New York forwarded Governor Pennypacker’s proposal to the senior New York representative of the NCCUSL. Some of the delegates to this Congress were Commissioners on Uniform State Laws.

The first session of the Congress was held in Washington the week of February 19, 1906; an adjourned session was held November 13-14,
1906 in Philadelphia. In February of 1906 the New York Times applauded the Congress as follows:

It is of course a National scandal that couples should be living in any State one or both of whom would be in contempt of the courts of that State for the Constitutional provision that credit shall attach in the courts of any State to the judicial proceedings of any other State. The case is worse than that. Contempt of court is often a technical offense and sometimes it attests manhood and good citizenship. But contempt of law is one of the most serious conditions that can happen under a government of law. And contempt of law is what the existing welter of legislation on the question of divorce inevitably induces.\(^{101}\)

The work of the National Congress consisted of seventeen resolutions adopted in the February sessions in Washington and a proposed uniform act debated and adopted in the November meetings in Philadelphia.

The uniform law carried forward and strengthened some of the provisions in the 1901 Commissioners’ uniform acts designed to restrict migratory divorce and to assure that absent defendants received notice. Unlike the 1901 acts, this act specified six bases for divorce.\(^{102}\) It also recognized absolute divorce as different from separation (\textit{a mensa et thoro}).\(^{103}\)

A New Yorker favoring more liberal divorce laws might conclude that the act contained good news and bad news. It liberalized divorce by adding five grounds in addition to adultery, but restricted the opportunities to divorce by limiting migratory decrees and by including a one-year waiting period after the decree before finality. To the extent

\(^{101}\) \textit{For Uniform Divorce Laws}, N.Y. Times, Feb. 21, 1906, at 8, col. 2 (editorial). Removed 80 years from that language it is hard to tell exactly what the Times is condemning. Perhaps its reference to “contempt of law” refers to collusive allegations necessary to achieve divorce in jurisdictions where the causes for divorce are quite limited.

\(^{102}\) Section 3.

The causes for divorce from the bonds of matrimony shall be:

a. Adultery.

b. Bigamy, at the suit of the innocent and injured party to the first marriage.

c. Conviction and sentence for crime by a competent court having jurisdiction, followed by a continuous imprisonment for at least two years, or in the case of indeterminate sentence, for at least one year: \textit{Provided}, That such conviction has been the result of trial in some one of the states of the United States, or in a Federal Court, or in some one of the territories, possessions or courts subject to the jurisdiction of the United States, or in some foreign country granting a trial by jury, followed by an equally long term of imprisonment.

d. Extreme cruelty, on the part of either husband or wife, such as to endanger the life or health of the other party and render cohabitation unsafe.

e. Wilful desertion for two years.

f. Habitual drunkenness for two years.

\textit{An Act Regulating Annulment of Marriage and Divorce}, in Address & Resolutions, \textit{supra} note 41, at 22-23.

\(^{103}\) \textit{Id.} at 22 (distinguishing “divorce from the bonds of matrimony, or divorce \textit{a vinculo matrimonii},” from “[d]ivorce from bed and board, or divorce \textit{a mensa et thoro}.”).
that he saw good news, the reader from New York would be wrong. The national congress did not intend to liberalize divorce or to expand the opportunity for it in any respect. In one of the earliest concessions to a powerful and unbending state — an act now painfully familiar to the Commissioners\(^{104}\) — the national congress apparently bowed to the wishes of states such as New York and South Carolina, for resolution 6 reads as follows:

While the following causes for . . . divorce from the bonds of matrimony . . . seem to be in accordance with the legislation of a large number of American states, this Congress, desiring to see the number of causes reduced rather than increased, recommends that no additional causes should be recognized in any state; and in those states where causes are restricted, no change is called for . . . .\(^{105}\)

Thus the New Yorker would receive the bitter medicine of the antimigratory, antiremarriage rules without the sugar of the additional five grounds for divorce. Notwithstanding the resolution stating the intention of the Congress, the proposed act lists six causes for divorce and may have been interpreted by the readers who did not know of the resolution to be an exhortation for the expansion of the causes for divorce in states like New York.

There appear to have been no members of the Congress who believed that divorce laws should be liberalized. In its deliberations the only voice in favor of expansion of certain of the rights of divorce on behalf of women in even a limited way is that of the Reverend Crane, a female representative from the State of Michigan.\(^{106}\)

THE 1907 ACT

To understand the ways in which the proposed act (adopted by the Commissioners as their uniform act in 1907)\(^{107}\) would have restricted

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104. Recently, for example, the NCCUSL decided to incorporate the changes made by California to article 2A of the UCC into the uniform version. The NCCUSL reasoned that "uniformity was more important than the relatively minor policy and language differences" reflected in the California amendments, and if a powerful state such as California enacted a version different from the rest of the country, true uniformity would not exist. Miller, \textit{UCC Article 2A and its Uniform Amendments}, UCC BULL. Apr. 1991, at 1, 2 (1991).

105. \textit{Resolutions Adopted by the National Congress on Uniform Divorce Laws}, in Address & Resolutions, \textit{supra} note 41, at 17.

106. Reverend Crane was concerned that because a woman was required to go wherever her husband chose, she might end up in a state that permitted divorce only under very restricted circumstances, or perhaps not at all. She proposed an amendment to § 8(b) of the Act, which disallowed divorce in any state on a ground not recognized in the state where the cause of action arose, \textit{see id.} at 24-25, as follows: "an injured wife, having returned to her ante-nuptial domicile, and having there resided continuously for two years, may be granted relief according to the laws of such domicile." Adjourned Meeting, \textit{supra} note 100, at 95. The amendment was rejected, primarily because of "the possibility of its opening the door to other larger abuses." \textit{Id.} at 113 (comments of Amasa Eaton).

107. \textit{National Conference of Commissioners on Uniform State Laws, Proceed-
divorce, consider several of its sections. First, the articulation of the grounds for divorce might have restricted the bases for divorce even in jurisdictions that had recognized most of those listed. As an example, section 3 granted divorce apart from desertion, drunkenness, conviction, bigamy, and adultery, only for "[e]xtreme cruelty on the part of either . . . such as to endanger the life or health of the other party or to render cohabitation unsafe." This is not necessarily the cruelty that had been recognized on the frontier prior to 1906; certainly it is not the tepid "mental cruelty" that became a widespread basis for divorce later in the century.

Second, section 8 generally required one to have been a bona fide resident of a state for two years prior to the commencement of an action there. Third, this same section required that the plaintiff's cause be recognized as a basis for divorce in the jurisdiction where that party resided at the time the cause of action arose for it to be the basis for a divorce in the forum state.

Fourth, section 12 required a public hearing before a court. Presumably the antidivorce advocates hoped that the fear of such publicity and embarrassment would inhibit the inclination to divorce.

Fifth, section 13 permitted the court to appoint a "disinterested attorney" to defend uncontested cases. Is this intended as an antidote to collusion? Probably. Section 14 further attacks collusion by requiring "affirmative proof" in addition to the admissions of the defendant, and section 15 requires that "no record or evidence in any case shall be impounded." Salacious journalists would have the right to expose the plaintiff and the defendant!

108. See An Act Regarding Annulment of Marriage and Divorce, in Address & Resolutions, supra note 41, at 21-29 (text of the Act).

109. Id. at 22-23.

110. For example, South Dakota included infliction of "grievous mental suffering" as a ground for divorce. 2 S.D. STAT. ANN. § 3472 (1901); see also supra notes 49-57 and accompanying text.


112. An Act Regarding Annulment of Marriage and Divorce, in Address & Resolutions, supra note 41, at 24-25.

113. Id.

114. Id. at 26.

115. Id.

116. Id. at 27.

117. Id.
Finally, section 17 provided a one-year waiting period after the entry of the decree before it became final.\textsuperscript{118} This rule would prevent remarriage for one year after the decree.

If one accepts the Congress' Resolution 6 that the portions of the law on causes of divorce should not be enacted in any state where they would add to the causes, nothing in the uniform law expands the right to divorce and much restricts it. On the other hand, the presence of the six grounds for divorce in the uniform law and their recognition as common to most of the states may have given the law a threatening quality to conservatives in states like New York.\textsuperscript{119} The Right Reverend Doane had foreseen this problem as early as 1899: "[t]he defect, which is exactly the danger of any uniform law, is the suggestion to allow remarriage to either party, and the addition to the one cause, possibly permissible, of four other causes."\textsuperscript{120}

Initially, at least, the uniform law appears to have been warmly received by politicians. Early in 1907 a committee from the national congress presented the act to President Theodore Roosevelt. The \textit{New York Times} reported that "[t]he President, who is in friendly accord with all efforts to lessen the divorce evil and to limit the causes of divorce, had a long talk with the committee."\textsuperscript{121}

In some circles that warm endorsement for uniform divorce law and for the reform of the existing law seems to have existed even beyond 1910. In 1911 President Taft announced a 10,000 mile tour to urge the necessity of a uniform law on divorce.\textsuperscript{122} As late as 1913 the \textit{New York Times} reported on a conference presided over by an Episcopal bishop and attended by "prominent church and social workers of various faiths and denominations."\textsuperscript{123} Among those present was

\textsuperscript{118} Id.

\textsuperscript{119} All the same, the question before the convention is one of great difficulty. The problem of the convention is to propound some project of divorce which, "ex proprio vigore," on account of its intrinsic reasonableness and equity, shall commend itself to the sense of equity and to the sense of reasonableness of all the representatives of all the States in this Union. But the existing difference in the statutes of the different States shows that they have taken widely different views upon this question. It indicates that there is no common denominator. If the convention shall succeed in arriving at a common denominator, without doubt it will have deserved very well of the whole country. At present a man, or a woman, may be a malefactor, or malefactress, in one state and a blameless citizen in another. But the effort to find a common standard which shall "impose itself" is at all events laudable.

\textit{For Uniform Divorce Laws, supra} note 101.

\textsuperscript{120} Doane, \textit{supra} note 64.

\textsuperscript{121} \textit{President Talks Divorce — Committee Presents to Him the Plan of the Recent Conference}, \textit{N.Y. Times}, Jan. 13, 1907, at 4, col. 2.

\textsuperscript{122} \textit{See Corrects Taft on Divorce, supra} note 86. It appears from the report that President Taft may have been ignorant of the uniform law drafted by the National Congress and adopted by the Commissioners in 1907.

\textsuperscript{123} \textit{Evils of Divorce Shown in Figures}, \textit{N.Y. Times}, Jan. 15, 1913, at 9, col. 2.
Reverend Francis M. Moody "who has been leading the agitation for uniform divorce laws in the West."\textsuperscript{124} In what must have been one of the earliest eastern condemnations of the general moral deprivation of Californians, Reverend Moody condemned "the Pacific Coast" as "the greatest divorce centre not only of this country, but of the entire world."\textsuperscript{125} He also criticized the Midwest.

The Commissioners adopted the 1906 act of the National Congress as a Uniform Act in 1907.\textsuperscript{126} In 1907 it was adopted in Delaware and New Jersey, and in 1909 in Wisconsin.\textsuperscript{127} In the state legislatures it appears that the tide for divorce restriction apparently had never risen, or, if it had, was rapidly falling by 1907. Although Bishop Doane and other prominent persons specifically endorsed the Uniform Act and encouraged the New York legislature to pass it, the bill was reported to be "smothered in committee" in New York.\textsuperscript{128}

By 1909 scholars were publicly challenging the premise of the entire divorce restriction effort. In that year Professor George Elliott Howard of the University of Nebraska published an article in the *American Journal of Sociology* entitled "Is the Freer Granting of Divorce an Evil?"\textsuperscript{129} This public consideration of the possible virtues of divorce shows that the moralistic grip of the churchmen and others who advocated restriction on divorce was weakening. Commenting upon a 1908 divorce study by the Census Bureau and upon a colleague's commentary, Professor Howard noted:

> We need not beg our premise. Divorce is about three times as frequent as it used to be. This is the salient fact. In Europe, too, while the number of divorces is relatively small, generally the rate is rising. Clearly we are face to face with a phenomenon, huge, portentous. What is its meaning, how should it be interpreted?\textsuperscript{130}

Using the data collected in the 1908 Census report and other data, Professor Howard argued that "imperfect legislation and faulty judicial procedure are not a principal cause of the divorce movement."\textsuperscript{131}

\textsuperscript{124} Id.

\textsuperscript{125} Id.

\textsuperscript{126} 1907 PROCEEDINGS, supra note 107, at 29; Report of the Committee on Marriage and Divorce, in id. at 120-30.

\textsuperscript{127} NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING 316 (1928).

\textsuperscript{128} Decency, Uniform Laws, N.Y. Times, Mar. 29, 1910, at 10, col. 1 (letter to the editor).

\textsuperscript{129} Howard, *Is the Freer Granting of Divorce an Evil?*, 14 AM. J. SOC. 766 (1909).

\textsuperscript{130} Id. at 766 (emphasis omitted). Invoking Luther, Milton, and others, Professor Howard argued that far from being an evil, "divorce is prescribed as a remedy for a social malady." Id. at 767.

\textsuperscript{131} Id. (different typeface in original).
He noted that over the previous two decades
more stringent provisions for notice to the defendant have been made, 
longer terms of previous residence for the plaintiff are required, more 
satisfactory [i.e., more stringent] conditions of remarriage after the de-
cree are prescribed, while some of the worst "omnibus" clauses in the list 
of statutory causes have been repealed.\footnote{Id. at 768.}

"Nevertheless," he stated, "the divorce rate has gained a threefold ve-
locity."\footnote{Id. at 769.} Continuing this heretical analysis, he noted that only about 
fifteen percent of divorces between 1887 and 1906 were contested.\footnote{Id. at 770.}
He concluded with the grossest heresy that the figures disclosed a 
"tendency toward dissolution of wedlock by mutual consent or even at 
the demand of either spouse."\footnote{Id. at 776.}

Professor Howard also noted that the most recent statistics con-
firmed what Colonel Wright found in 1889 — that migratory divorces 
comprised only a small percentage of all the cases. In an earlier day 
eighty percent of divorces occurred in the same state where the parties 
had married.\footnote{Id. at 789.} Of the twenty percent who married in one state and 
were divorced in another, the greater share must have moved for rea-
sons other than to achieve a divorce.\footnote{Id.}

Professor Howard argued that the rise in divorce was caused by 
underlying social conditions, by changes in the relations between men 
and women, and was not related to the law. He agreed with those who 
claimed that easy and thoughtless marriage is one of the causes of di-
vorce, but he concluded that divorce "is merely a healing medicine for 
marital ills."\footnote{Id. at 776.}

Professor Howard's discussion was not merely a dry discourse in 
an academic journal, for other prominent participants in the divorce 
debate published commentaries in the same journal. Among them 
were the Reverend Dr. Samuel Dike,\footnote{Id.} Rabbi Krauskopf,\footnote{Krauskopf, supra note 74.} and Wal-
ter George Smith.\footnote{Id. at 789. Mr. Smith was president of the NCCUSL from 1909-1912, and a delegate 
from Pennsylvania to the National Congress on Divorce in 1906, as well as ex-president of the 
Federation of Catholic Societies of Pennsylvania.} Clearly the article had got the attention of some

\footnote{132. \textit{Id.} at 768.}
\footnote{133. \textit{Id.}}
\footnote{134. \textit{Id.} at 769.}
\footnote{135. \textit{Id.}}
\footnote{136. \textit{Id.} at 770.}
\footnote{137. \textit{Id.}}
\footnote{138. \textit{Id.} at 776.}
\footnote{139. \textit{Id.} Reverend Dr. Dike was a major proponent of uniform divorce laws, and Corre-
sponding Secretary of the National Divorce Reform League. See supra text accompanying notes 61 and 62.}
\footnote{140. Krauskopf, supra note 74.}
\footnote{141. \textit{Id.} at 789. Mr. Smith was president of the NCCUSL from 1909-1912, and a delegate 
from Pennsylvania to the National Congress on Divorce in 1906, as well as ex-president of the 
Federation of Catholic Societies of Pennsylvania.}
of the major players in the debate. With the exception of Mr. Smith, the commentators conceded the power of Professor Howard's arguments.142

How directly and to what extent this article and others like it influenced the fate of the uniform law in the state legislatures is unclear. Its report in the New York Times143 shows that it did not suffer the dismal fate of most academic writing. Surely it would have been a powerful tool in the hands of one who was opposed to additional legal restrictions on divorce. Perhaps it was used by such persons in the debates in the various legislatures; I cannot tell.

By the end of the first decade of the twentieth century, the reform movement was running out of steam. After 1909 no state enacted the 1907 uniform law. Imperceptibly the piecemeal restrictions on divorce that had been enacted in New York and elsewhere reversed themselves. Ultimately the divorce laws were greatly liberalized in almost every state, in part as a result of the next grand divorce law effort by the NCCUSL in its uniform act published in 1973.144

What can one learn from this story? That a law passed by a “National Congress,” indorsed by two presidents, warmly advocated by various church groups, and by a prominent national women's organization, could achieve only three state adoptions should concern the National Conference of Commissioners. Let us examine the facts I have recited and speculate about the lessons for other laws in the failure of the divorce reform legislation.

THE MUTE OPPOSITION

The uniform divorce laws may have failed to achieve substantial passage in the states because they were never favored by a majority of the citizens nor by most of the legislators. But how could that be? The history shows vocal and extensive support for more restrictive divorce laws by churchmen, church organizations, a national women's organization, two presidents of the United States, and a host of distinguished lawyers and judges. The expressed opposition, on the other hand, is faint and barely noted.145

142. See supra notes 139-41.


144. UNIFORM MARRIAGE AND DIVORCE ACT, 9 U.L.A. 156 (1973). Section 302 of the Act provides that if the court finds that the marriage is “irretrievably broken,” a divorce decree may be entered. That is the only provision regarding grounds for divorce in the Act. Section 303(e) abolishes defenses to divorce such as collusion. See generally O'Connell, Marriage, Divorce, and the Uniform Marriage and Divorce Act, 17 N.Y. L.F. 983 (1972).

145. Ms. Anthony and Professor Howard are rare examples.
Is it plausible that the absence of articulate opposition meant only that such expression was suppressed? The tone of the criticism of divorce by almost all of the advocates of the new legislation is captured in the following statement:

[I]f this Church can by any language or by any enactment of canon or rubric rid herself of all responsibility for remarriage after divorce, she will have set up a barrier against the foul tide of the desecration of marriage, of the degradation of the family, of the deterioration of the home, which must turn the current aside until it finds its way where it belongs into the sewage, and not into the sources of supply. 146

The President himself found the lax administration of the divorce laws resulted in a “diminishing regard for the sanctity of the marriage relation.” 147

Listen to the advocates decry the “foul tide” and “sewage”; hear them invoke the “sanctity of marriage!” This righteous and moralistic tone that characterized the discourse of most of the advocates of the legislation may have silenced the opposition. Its tone left little room for reasonable differing views. Only a moral cretin could argue against the “sanctity of marriage” and for the “evil” of divorce. Similar claims are made today concerning the debate on college campuses where some maintain that certain arguments are “politically correct” and therefore readily advanced, while others, not “politically correct,” are stifled. 148

One can identify at least two groups who would have favored more generous divorce laws and who presumably would have opposed the uniform law of 1907 because of the restrictions it placed upon the availability of divorce. First were women in states such as New York where the only ground for divorce was adultery. In the words of one commentator, these women were “yoked” irretrievably to their husbands. 149 As long as the husband did not commit provable adultery, wives were made to tolerate a husband’s drunkenness, cruelty, and even desertion.

In the entire debate on the divorce law one sees the woman’s posi-

146. Doane, supra note 64. Another example of the moralistic quality of criticism of divorce is this letter to the editor of the New York Times, commenting on the increase in divorce from 1867 to 1886 as reported by Colonel Wright’s study: “If any contagious disease should show a like increase the country would be panic-stricken. Yet the great majority of people are absolutely indifferent to a disease infinitely more deadly, for it threatens the morality and intellect of the race, if not its existence.” Montgomery, supra note 77.

147. Address, in Address and Resolutions, supra note 41, at 2 (quoting President Roosevelt).

148. “There is no escape from complex politics on campus, the forum for the debate over ‘political correctness’ and whether it stifles free speech.” DePalma, Higher Education Feels the Heat, N.Y. Times, June 2, 1991, § 4, at 1, col. 1.

149. Krauskopf, supra note 74, at 781.
tion expressed in only two circumstances. First was Susan B. Anthony's opposition to the resolution at the National Council of Women. The second expression on behalf of women came in the deliberations of the National Congress on Uniform Divorce Laws in Philadelphia.

To a woman who was experienced only as a homemaker, committed to her children and who would have had a difficult time earning a living outside the home, the inability to get a divorce was more serious than it would have been for a similarly abused husband. Presumably the husband who suffered similar abuse at the hands of his wife could simply desert her, find employment elsewhere, and move on to a new existence. While that might not be a satisfactory solution to the problem even for the husband, it was much more likely to be available to him than to the wife.

It is likely that there was a second large number of people in sullen and silent opposition to the laws restricting divorce. These were not the women yoked to the men or the men willing to desert wives they could not divorce, but men who wished divorce and were unwilling to desert their wives and families. They also include divorced men and women in states with generous laws. Then, as now, the population in restrictive states must have had ample representation of those who wished divorce but could not get it. In states with more lax divorce laws there must have been many who had received divorces and were happy for it. None of these people appears to have spoken out and no one spoke for them, but surely they were everywhere — among the judiciary, the bar, and in the legislature. Even if the moralistic tone of the debate silenced these people, it is unlikely to have changed their views about the virtues of divorce.

One who is going to get his laws passed *ex proprio vigore* must know the nature and the strength of the opposition to any such laws. Almost by hypothesis any strong opposition to a uniform law means that it will fail. The divorce laws tell us that when the public debate about a law has a moralistic and righteous tone, one must be careful about drawing inferences. The Uniform Divorce Law went nowhere; quite plausibly it went nowhere because the women's objections were never expressed and because the opposition of a larger number of men and women was also never expressed, all due to the moralistic tone of the advocates that shamed the opponents into silence.

One can imagine a number of laws that might stimulate a similar

150. *See supra* notes 95-96 and accompanying text.
151. *See supra* note 106.
debate in today's society, a debate in which the advocates might claim moral righteousness and successfully shame their opponents. Debates about affirmative action, gender discrimination, and discrimination on the basis of sexual preference might have this quality. Similar dangers could arise in the debate concerning discrimination on the basis of age, about laws having to do with those carrying the AIDS virus, and conceivably even with respect to laws such as that now under consideration by the Conference concerning employment at will.\textsuperscript{152}

Presumably most of the laws that will be proposed by the Commissioners will not cause such debate. Yet when the laws do tread on such ground, it is important for the Commissioners to examine not merely the public debate, but also the private one, and to use care that the advocates of a particular position do not shame the opponents into silence. That this was the fate of the divorce law in New York is intimated by the report in the \textit{New York Times} that the uniform law was "smothered in committee."\textsuperscript{153} By a man "yoked" to a shrew? By a migrating divorcee?

\textbf{SHIFTING DATA AND SHIFTING PERCEPTIONS}

It is self-evident that any uniform law having a chance for adoption depends on a perception that such a law is needed. Throughout the debate on divorce from 1890 until 1909 almost all of the proponents of the law agreed that divorce was too frequently granted, too frequently collusive, and that there were too many migratory divorces. Moreover, almost all of the proponents seemed to have agreed that more stringent laws would cure those problems.

Yet from 1889, when Colonel Wright's study of divorce was published, that foundation was already being undermined.\textsuperscript{154} Even Reverend Dike, one of the strong advocates of uniform divorce laws, conceded that the 1889 study showed that migratory divorces were not a major problem. Yet the law of 1900 and the laws of 1901 were aimed almost entirely at migratory divorces. Apparently the message did not reach the ears of the Commissioners.

More troublesome for the enactment of the 1907 law was Professor Howard's analysis in 1909.\textsuperscript{155} He pointed out that divorce had been increasing rapidly and at an unchecked rate during the same time when the states were adding barriers to divorce laws to make divorce


\textsuperscript{153} Decency, supra note 128.

\textsuperscript{154} See Howard, supra note 129, at 770; Divorce Reform League, supra note 61.

\textsuperscript{155} See supra note 129.
more difficult to achieve. He thus challenged the very basis of the proponents' claim that stronger law would diminish divorce.

Such criticism should make all legislators humble. Exactly how a law will affect the behavior of citizens to be governed by that law is almost always a complex question to which the answer is difficult to foretell. One sees exactly this debate concerning intended versus actual effects with respect to the firearms legislation,\textsuperscript{156} with respect to the Uniform Consumer Credit Code\textsuperscript{157} and with respect to hundreds of other laws, large and small.

Data about the need for and probable impact of a particular law can be a strength or a weakness for an elite legislature. Persuasive data showing a need for a law and giving a reasonable basis for conclusion about its effect can be a powerful tool. But the revelation of potential and unintended consequences of such a law can easily undermine it.

That professionals such as Professor Howard attacked the foundations of the divorce legislation and were successful in persuading some of the advocates of that legislation\textsuperscript{158} may have hastened the death of the Uniform Divorce Law. Surely Professor Howard was an unusual academic, for he was able not only to get several of the major participants in the national debate to write commentaries to be published with his article in the \textit{Journal of American Sociology}, but he also attracted the attention of the \textit{New York Times}. His analysis and the concessions some of the proponents of the uniform legislation made to his analysis would have made powerful arguments against the adoption of the uniform legislation — at least in states where more liberal laws prevailed at the time.

\begin{footnotesize}
156. Advocates of gun control legislation maintain that such legislation will reduce the number of handgun deaths in this country. The National Rifle Association, on the other hand, insists that "[i]f guns are outlawed, only outlaws will have guns." \textit{See}, \textit{e.g.}, Sullum, \textit{Gun Bans Won't Stop the Gunman}, L.A. Times, July 2, 1990, at B7, col. 5. The NCCUSL faced a similar problem in 1940 with its Uniform Pistol Act. Because of objections to the Act from all sides of the issue, only two states adopted it. Report of Section of Uniform Torts and Criminal Law Acts in \textit{National Conference of Commissioners on Uniform State Laws, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference} 154 (1948).

157. The UCCC set interest rate ceilings well above those of most states, assuming that increased competition between lenders would keep rates below the maximum levels. To appreciate the diversity of reaction to this proposal, compare Moo, \textit{Consumerism and the UCCC}, 25 \textit{Bus. Law.} 957, 961 (1970) ("The available evidence in the only area of consumer credit in which the law today permits at least limited competition, that is, the financing of automobile loans, tends to prove the validity of the Code approach.") with Dennon, \textit{The Uniform Consumer Credit Code Bombshell}, 22 \textit{Pers. Fin. L.Q. Rep.} 125, 128 (1968) ("Once a ceiling is fixed, the greedy will rush in to take every advantage of increased yields as soon as there is a statutory foundation.").

158. \textit{See}, \textit{e.g.}, Howard, \textit{supra} note 129, at 776 (comments of Rev. Dike).
\end{footnotesize}
Ultimately the divorce law blanket may have been too small to cover all of the people who sought to sleep under it. How wide should a law be? When has the blanket been pulled so far in one direction that those who originally were covered on the other side are now uncovered?

When the uniform divorce legislation was proposed in 1900, 1901, and 1907, New York was the most populous and powerful state. Its law permitted divorce only on the ground of adultery. Clergymen and others from New York were among the strongest proponents of restrictions on migratory divorce and of the addition of other restrictions, such as a one-year waiting period after the decree before finality. Yet the law that was proposed by the National Congress in 1906 and adopted as the uniform law in 1907 contained five additional grounds for divorce. Although the National Congress had stated in a resolution that it did not propose the expansion of the causes for divorce in any jurisdiction, the uniform law included the six causes without any restrictions. A law that would add five new grounds would have been unacceptable to its most zealous advocates in states like New York. In a 1907 report on the uniform law, the New York Times raised this possibility:

Upon the whole, the moderation of the report, which will be objected to by many of the most zealous advocates of restriction of divorce, is that attribute of it which makes it likeliest of general adoption, and therefore gives most promise of its usefulness. It is a report against which it is very hard to make tenable objections.159

To draft a statute that will be broad enough to accomplish most of its original supporters' goals and yet to include the largest possible number of additional supporters is the height of legislative art.160 This

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159. For a Uniform Divorce Law, supra note 71. This problem had earlier been recognized in the 1899 article by The Right Reverend William Croswell Doane. There the Right Reverend Doane complained that "the defect which is exactly the danger of any uniform law is the suggestion to allow marriage to either party and the addition to the one cause possibly permissible of four other causes." Doane, supra note 64.

160. A similar problem afflicted the Commissioners in their attempts to satisfy both the debtor and the creditor interests in the Uniform Consumer Credit Code. Certain consumer creditors had financed the original study for the UCCC and had been supporters of it. Among other things, they wished to have uniform laws so they could use the same forms throughout the states. They particularly wanted to have uniform usury laws and to have laws that would have permitted entry into various local markets by national creditors who were closed out of those markets by restrictive state licensing laws. Representatives of consumer debtors, on the other hand, saw this legislation as a possibility to enlarge consumers' rights. See Dix, President's Committee on Consumer Interests States Position on the UCCC, 23 Pers. Fin. L.Q. Rep. 13 (1968) (endorsing the Code as beneficial to consumers).

The Commissioners attempted to draft a law broad enough to cover all the concerns. One way to explain the failure of the UCCC is to conclude that the debtors pulled the blanket over
art is practiced every day in the Congress and in the state legislatures where the blanket is pulled back and forth by successive draft and redraft in response to particular statements and complaints of various interest groups.

For the Commissioners successfully to practice that art requires more talent than is required either in the Congress or in the state legislatures. That is because the Commissioners must draft a law without explicit current input from interested constituents, and, in some cases, without even a clear understanding of the identity of all the interested parties. To the extent that the Commissioners’ drafting process is open and to the extent that semiformal “advisors” are invited from every potential interest group, the problem can be minimized. But it remains a serious problem.

I suspect that many uniform acts, including the Uniform Consumer Credit Code and the Uniform Firearms Act, were doomed to failure for this reason. It is my guess that there was no conceivable set of rules that could have been supported by the most zealous of the consumer advocates and also by the most zealous of the creditor advocates. Even the widest possible blanket could not have covered their bed.

Although it is less obvious, that may also have been one of the primary reasons for the failure of the Uniform Divorce Law. If the strongest advocates of the law in places like New York and South Carolina — where divorce was already greatly restricted — feared that the law’s enactment would add not only restrictions on divorce, but also new grounds for divorce, their support for it may have waned and even disappeared.

Professional Criticism and Professional Qualities of Uniform Legislation

The debates over the Uniform Divorce Law included many statements by lawyers and judges about the technical inadequacies of the existing laws and about the inappropriate consequence of the lack of uniformity. Judges and lawyers complained of the treatment of those who had received invalid divorces and had become unknowing bigamists. They bemoaned the failure to grant full faith and credit to out-of-state decrees. They expressed concern about the collusive

themselves and off the backs of the consumer creditors, the act’s original advocates who then abandoned it.


162. Uniform Divorce Laws, supra note 69 (remarks of Judge Mattice).
nature of divorces.\textsuperscript{163} They made a variety of other technical objections to the existing divorce laws that might have been regarded as meritorious, not only by advocates of more restrictive divorce laws but also by proponents of more generous divorce laws.

What part did this professional opinion play in the debate on the Uniform Divorce Law? It is not clear. Surely the most powerful and zealous advocates (President Roosevelt and members of church groups) wished for a divorce law that was more restrictive, not necessarily more just. Yet these zealous advocates would have seized on the technical arguments to use them as weapons against the proponents of more generous divorce laws.

Whether these technical issues really played a role on their own is impossible to know. Ultimately, of course, they were not enough — even when combined with all the other arguments — to carry the day on behalf of the uniform divorce legislation.

The experience of sundry other proposals by the uniform commissioners shows that purely professional interests can be sufficient in certain circumstances.\textsuperscript{164} My reading of the divorce debate and of the debate concerning the Uniform Consumer Credit Code is that technical competence arguments are relatively weak. The pull to make the law technically better is an engine of modest horsepower. Going up even the smallest incline against debtor advocates or those who favor more generous divorce laws, it is soon unable to move forward. When there is only a modest incline and no opposition, as in the case of laws concerning procedural issues in the courts,\textsuperscript{165} this engine can carry its load to the destination, but only in such circumstances. That the Commissioners are likely to draft laws that are clearer, better understood, and with more insight, should be regarded as an incidental virtue, not as a force that will carry a uniform law to its destination.

\textbf{CONCLUSION}

A comparison of the 107 uniform acts that have been adopted in no more than ten states with the twenty-two that have been adopted in more than forty states leaves one with many questions and few answers about the power of the Commissioners. A close look at the hist-
tory of the Uniform Divorce Law gives only a few answers — and those possibly unique to the times and mores of the turn of the century. The growing power of the federal government both threatens the Commissioners and gives them a new argument for their existence. Yet, the most interesting lesson from the divorce acts is in the power of an unspoken, ill-represented, and sullen opposition. The Commissioners should never underestimate opposition, no matter how brutish and inarticulate.

A second lesson lies in the writing of Professor Howard in 1909. His assertion that a law will not do what its proponents expect, but may do quite different things, is now a commonplace. Yet it is a commonplace often forgotten.166

At this writing the future of the Commissioners as an influential elite legislature is in doubt. Conceivably the fear of a more powerful centralized government will enhance their power. It is just as likely that Congress and the federal agencies will snatch more and more power from the Commissioners and from the states by enacting statutes and adopting regulations. We may see the day when the federal government will rule not only traditional state areas of worker’s compensation, torts, and insurance, but even the treasured commercial law. I share the view of banks and others concerning the growing power of the organs of the federal government.167 I am hopeful that others will see the National Conference of Commissioners on Uniform State Law as a wise and conservative alternative to federal regulation and federal legislation.

166. One motivation for passing the Unif. Fraudulent Transfer Act, 7A U.L.A. 639 (1984), particularly § 3(b) of that Act, was to reject the rule laid down in Durrett v. Washington Natl. Ins. Co., 621 F.2d 201 (5th Cir. 1980). U.F.T.A. § 3 Com.(5). Durrett held that a nonjudicial foreclosure sale of an insolvent mortgagor’s property for 57.7% of its fair market value could be rescinded as fraudulent, despite the absence of any evidence of collusion or other improper behavior. Section 3(b) of the U.F.T.A. merely requires a “regularly conducted, non-collusive foreclosure sale” to establish a lack of fraud. However, since federal bankruptcy law almost always governs situations such as the one arising in Durrett, U.F.T.A.’s “reform,” limited to state law, will probably not achieve its goal. See 11 U.S.C. § 548 (1988).

167. Everyone knows that one of the three most common lies is: “I am from the federal government and I am here to help you.”