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Uniform Law and Its Impact on National Laws Limits and Possibilities

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AND ITS IMPACT ON NATIONAL LAWS
LIMITS AND POSSIBILITIES

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I.

Overview

Uniformity of law figures prominently in the first century of American federalism. Just thirteen years after the Declaration of Independence of 1776, the United States of America abandoned its first constitution and adopted a new one that provided for more uniform law. The Constitution of 1789, however, recognized and perpetuated, a non-uniform law of slavery. To abolish that non-uniform law of slavery the country fought the bloody Civil War (1861-1865). With abolition of slavery, the United States rejected the idea that component states might have fundamentally different social, economic, or political systems.

Until 1865 division over slavery obscured a general need for uniform law that was growing parallel to the development of modern means of transportation and communication. In 1776 travel was rare; commerce among component states was

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of minor importance. Within a century, all that had changed. Merchants carried on trade in every state; citizens of all states established relations with each other. The founding in 1878 of the American Bar Association well marks the national need: the first article of the Association's constitution made a first purpose of the association "uniformity of legislation throughout the Union."

Before the Civil War representatives acting for component states negotiated political solutions to this one great national issue of disharmonious legislation. They left largely unattended other issues of uniform law. The principal role of the national United States Supreme Court was to preserve against particularistic state intrusion areas for federal legislation. Political realities ruled out political solutions to national needs for uniform law.

Prior to the Civil War Supreme Court Justice Joseph Story despaired that the nation was "perpetually receding farther and farther from the common standard."[1] The divisive issue of slavery in effect required seeking uniform law through means that were less-overtly political. Story himself used a variety of ways to promote uniform law. He authored important court decisions that gave uniform federal law preëminence. He wrote commentaries that formed the basis of harmonized state law.[2] He chaired one of the first major reports on codification. He taught at the first truly national law school.

After the Civil War, with the issue of slavery resolved, the nation could give attention to the importance of uniform law for the rapidly growing commerce among the states. No longer, however, did representatives acting for component

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[1] Joseph Story, *Progress of Jurisprudence, An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, at Boston (Sept. 4, 1821), in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 213, 224 (William W. Story ed., 1852).

[2] And this American legal writers did from the earliest of publications. *See*, *e.g.*, AMERICAN PRECEDENTS OF DECLARATIONS iii-iv (1802) ("the work, though more immediately applicable to the practice of New-England, may be considered as adapted by form, and qualified by authority, to invite the attention and meet the necessities of every State in the Union.").

states negotiate political solutions to these needs. Instead, shifting coalitions of interested parties persuaded the central government or the individual component states to adopt uniform or harmonized legal rules. No longer was the principal role of the national United States Supreme Court in legal unification to determine what states could do without infringing federal prerogatives; it became to decide what the central government might do without violating states' rights.

Two post-Civil War developments mightily furthered this more expansive federal role. The post-Civil War amendments to the Constitution, especially the fourteenth amendment of 1868 assuring rights of citizenship and due process throughout the Union, resulted in new, expansive powers for the federal government. Meanwhile, the ever growing commerce among the component states led the central government to seek to satisfy those needs with greater federal involvement. At first slowly, and then decisively with the development of the administrative state in the "New Deal" of the 1930s, the Supreme Court acquiesced in an expanded role of the central government.

Today, the picture of federalism remains much the same as that which developed in the the century following the Civil War: consensus based approaches that do not involve governments negotiating with each another. These are principally three:

(1) The central government, relying on pre-existing federal powers, adopts laws that apply nationwide. These federal laws usually do not displace state law completely. The component states, to the extent necessary, adjust their laws to coordinate with national laws.

(2) The component states, either in imitation of the law of one leading state or of the federal government or following uniform and model laws proposed principally by the National Conference of Commissioners of Uniform State Law (founded

by the states in 1892) or the American Law Institute (founded by academic and practicing lawyers in 1923), adopt substantially similar laws.

(3) Both the central government and the component states in the interest of national harmony rely on third party harmonization through "restatements" of law and other academic and non-binding interpretations of laws as well as on decisions of private, national-standards setting bodies (*e.g.*, trade associations).

In all of this the national Supreme Court plays what sometimes seems a capricious role: generally it accepts those consensus decisions, but from time-to-time, at the request usually of private parties and rarely of component state representatives, it determines that the nationally-agreed upon federal rule impermissibly infringes on state authority.

II.

The Federal Distribution and Exercise of Lawmaking Power

The location of lawmaking powers is rightly the first question in reporting on uniform laws in federal entities. Unification of laws is needed only if lawmaking powers rest with more than one entity. If lawmaking powers are reserved to the central government, laws are perforce uniform. But if states enjoy lawmaking power, uniformity of law is challenged. Absent concerted efforts to make laws uniform, anything like uniformity is apt to be the result of accident.[3]

Americans assume that extensive lawmaking powers are essential to every level of a multigovernmental entity. How can an entity be federal if its component states do not have independent law making authority? How can a locality have home rule if it cannot write its own laws? Foreign examples challenge this assumption. An entity can properly be seen as

[3] *Cf.*, TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW § 144, at p. 149 (1837).

federal, even though some, or perhaps all, lawmaking powers are concentrated with the central government. Component states are no less independent and decentralization is no less furthered by different models where lawmaking is a cooperative endeavor of the component states at the central level and lawapplying is devolved upon the component states. It is well to remember that there is no unitary form of federalism and that different forms may use different admixtures of these models.

This Part II addresses distribution of lawmaking powers in American federalism. The following Part III considers approaches used to bring uniformity when those powers are exercised in appyling law. Part IV deals with the institutional and social background of uniform law. Part V is a unification "scorecard," while Part VI is a conclusion.

1. The limited legislative jurisdiction of the central authority

a. Federal powers

The Constitution of the United States of America creates a federal government of limited powers. Article I, section 8 sets out the lawmaking powers of Congress. It is the principal source of federal legislative authority. Article VI prescribes that where the federal government has legislative power, federal law is supreme. Article 1, section 10, proscribes certain conduct by the states. The tenth amendment, adopted in 1791, reserves powers not delegated to the federal government, to the states.

Article 1, section 8 bestows upon the federal legislature (Congress) powers: 1. "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; …" (the "*General Welfare Clause*"); 2. to borrow money; 3. "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (the "*Commerce Clause*"); 4. "To establish an uniform Rule of Naturalization, and uniform Laws

on the Subject of Bankruptcies throughout the United States;" 5. to coin Money and fix the standard of weights and measures; 6. To punish counterfeiting; 7. To establish post offices and post roads; 8. To secure to authors and inventors the exclusive right to their respective writings and discoveries (the "Patent and Copyright Clause"); 9. To constitute Tribunals inferior to the Supreme Court; 10. To define and punish offences against the Law of Nations; 11. To declare war; 12. To raise and support Armies; 13. To provide and maintain a Navy; 14. To make rules for the same; 15. To call forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; 16. To make rules for the same; 17. "To exercise exclusive Legislation over the Seat of the Government;" and, 18. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof (the "*Necessary and Proper Clause*"). Article II, section 2 bestows upon the President, with "the advice and consent of the Senate (*i.e.*, the upper house of the legislature), the power to make treaties (the "*Foreign Affairs Power*"). Article III, section 2, provides that national judicial power shall extend to "all cases arising under this Constitution, the laws of the United States, and treaties made … under their authority" as well as certain other controversies involving the United States or parties from different states or nations.

While all lawmaking powers are in principle enumerated, some are so general that a power is available if the political will is present. Often it is. The federal government need not wait for states to take action. That it does take action, does not, however, as we shall discuss below, oust the states of lawmaking jurisdiction completely.

Education law is an example of how quickly leadership can change when political will is present. For a long time any federal involvement in education, other than in funding higher education, met with substantial resistance. States, often following the lead of national accrediting and testing bodies, deter-

mined the law. But the in the 2000s the central government sought to set national standards for local education.

b. Few federal lawmaking powers are exclusive; most are concurrent with lawmaking powers of component states

Were federal powers all exclusive—as was argued by some in the early years of the country[4]—federal law would be uniform and this report could be limited to areas outside federal lawmaking authority. But that view did not prevail. The Supreme Court rejected it in 1819 in the case of *Sturges v. Crowninshield*,[5] where it held that federal power to create uniform laws on the subject of bankruptcy is not exclusive so long as Congress is not currently exercising that power.

In those early years the Supreme Court followed the approach laid out in the Federalist, No. 32, which identifies three categories of exclusive federal powers in the Constitution.[6] The first category consists of those powers that the Constitution expressly designates "exclusive." The only such power is the power over the national seat of government (no. 17 above). In the second category are those powers that the Constitution grants to the federal government and expressly denies to the states (principally in article I, section 10). These include powers to enter into treaties, coin money, impose duties on imports or exports, maintain armies, and conduct war. The Federalist's third category cannot be linguistically, but only politically defined. It consists of those powers that the Constitution grants the federal government, where, according to the Federalist, "a

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[4] *See, e.g.,* Sturges v. Crowninshield, 17 U.S. (4 Wheaton) 122 (1819) (arguments of Daggett and Hopkinson for plaintiff). *See also* Joseph Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 444, p. 428 (1833); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 145-150 (1985).

[5] 17 U.S. (4 Wheaton) 122.

[6] JOSEPH STORY, CONSTITUTION, *supra* note 14, § 437, at 422.

similar authority in the states would be absolutely and totally CONTRADICTORY and REPUGNANT."[7]

Few federal powers fall into the Federalist's first and second categories; most are in the third. Since the Supreme Court has hesitated to find federal powers broadly exclusive, most federal lawmaking powers are concurrent with the powers of the states.

Concurrency conflicts with the objective of uniformity of law and is a catalyst for uniform lawmaking. For where federal legislative jurisdiction is concurrent with that of the states, absent uniform laws, and perhaps even then, law is anything but uniform. As we shall see, in this "interjurisdictional gray area" there is a "conflict and confusion."[8]

c. The most important federal powers

The most important constitutionally specified sources authorizing central government regulation are the General Welfare Clause, the Commerce Clause, the Patent and Copyright Clause, the various clauses related to national defense, the Foreign Affairs Power, and the Necessary and Proper Clause.

Where potential legislation does not clearly fall under one of the powers specifically stated, the most likely basis for federal regulation is either the Commerce Clause alone or the Commerce Clause in conjunction with the Necessary and Proper Clause.

Federal regulation is often piecemeal. State law is, in theory, organic. Federal law is to supplement state law to deal with specific issues that require national treatment. This is just the reverse of providing a general federal rule from which

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[7] 1 THE FEDERALIST: A COLLECTION OF ESSAYS WRITTEN IN FAVOUR OF THE NEW CONSTITUTION No. 32 (1788) [emphasis in original].

[8] So called by Erin Ryan in *Federalism and the Tug of War Within: Seeking Checks and Balance in the Intrjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007).

component states are permitted to deviate. It means that federal regulation is often neither comprehensive nor systematic.[9]

The Commerce Clause by its terms authorizes the federal government "To regulate commerce … among the several States." Some people at the time of its adoption thought that this was a power to regulate commerce generally among the states.[10] Instead, the Supreme Court viewed the power more narrowly. It sought to distinguish commerce that it saw as properly concerning the federal government and commerce that concerned only the component states. The task of drawing clear lines proved impossible to achieve. In the very case where the Supreme Court first attempted to measure state statutes against federal legislative power, *Gibbons v. Ogden*, Justice Johnson presciently warned that the competing powers "meet and blend so as scarcely to admit of separation."[11]

In nearly two centuries of interpreting the Commerce Clause the Supreme Court has vacillated from expounding it expansively to reading it restrictively. The Court has prescribed one test or another to judge whether a particular exercise of federal authority is proper (*e.g.*, "channels or instrumentalities of commerce," "in commerce," "affecting commerce").

In deciding this question, the Supreme Court has little political legitimacy on which to rely, since it is not elected. Faced with demands for federal action in response to the Great Depression of the 1930s, the Court largely ceded this issue as a political decision to Congress. Only more recently, in the boom economic times of the 1990s, did the court—to general consternation—revisit the issue and invalidate a federal law

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[9] The approach is reminiscent of how common law courts construe statutes in derogation of the common law.

[10] *See., e.g.*, JAMES SULLIVAN, THE HISTORY OF LAND TITLES IN MASSACHUSETTS 352-355 (1801); *see generally* WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (3 vols., 1953, 1980).

[11] 6 U.S. (9 Wheaton) 1, 32 (1824). The Court did not accept the argument that whenever Congress "declines to establish a law, it is to be considered a declaration that it is unfit that such a law should exist."

based on the Commerce Clause.[12] The law in question prohibited carrying firearms in schools; it regulated "non-economic activity" and therefore, in this Court's view, fell outside the legislative authority of the federal government. The result of the Supreme Court's Commerce Clause jurisprudence is to complicate federal legislation and to inhibit, but not prohibit, broader national solutions to problems.

d. Important practice areas of federal regulation

In American legal practice, a common expression is "don't make a federal case out of it." While coined with litigation in mind, it speaks to the division in legal practice of federal and state matters. Commercially and politically important matters are largely issues of federal law; day-to-day mundane matters are typically issues of state law. Large law firms deal with the former; solo practitioners handle the latter. So matters of traditional private law, *e.g.*, contracts, family law, inheritance, real property, are largely state law. Major commercial matters, other than corporate organization itself, are usually federal law.

Some areas in which federal law has a strong or dominant role include:

Competition law. It consists of antitrust, unfair competition and trademark law. Although it is principally federal law, yet there are significant state and even municipal laws that also regulate the field. Moreover, local authorities not infrequently enforce federal laws.

Employment and labor law. Although the federal involvement is high, states still set the basic tenor. In practice, most states adhere to an employment-at-will doctrine which permits employers (and employees) largely unlimited freedom to sever the employment relationship. Federal law overlays this state law with many particular regulations governing such disparate topics as discrimination among employees based on personal

[12] United States v. Lopez, 514 U.S. 549 (1995).

characteristics (such as age, gender, national origin, race and religion), sexual harassment, equal pay, and labor unions.

Environmental law. Basic property law, including land-use planning, is quintessentially state law. Yet there is an overlay of all manner of federal law from A for Asbestos School Hazard Detection and Control, 20 U.S.C. §§ 3601 *et seq*., to T for Toxic Substance Control, 15 U.S.C. §§ 2601 *et seq*.

Securities law. The laws under which business organizations are formed are state laws, but the principal laws under which large public corporations are regulated and pursuant to which obligations to shareholders are determined, are federal.

Tax law is based on authority other than the Commerce Clause, namely on the General Welfare Clause. While the component states have extensive taxes of their own, excepting taxes on real estate and on turnover, federal tax law is the most important and largely sets the rules *de facto* by which state taxes are assessed.

2. The organic legislative jurisdiction of the component states

a. State powers

The component states are the organic sources of government authority in the United States. Each state has its own constitution from which authority to legislate arises. The federal Constitution assumes the existence of the component states. The federal government can not abolish the states or fundamentally alter the nation's composition. Article IV, section 3, while allowing Congress to admit new states, provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

The Constitution, with a minor exception relating to state militia, contains no explicit grant of exclusive legislative jurisdiction to the component states; its tenth amendment, however, reserves powers not delegated to the central government, to the component states.

Since the federal government is a government of limited authority, and the states maintain the organic law-giving competence, to this day state law dominates core areas of public and private law, including most criminal and civil law. The latter includes contracts, family, inheritance, property, tort and corporate law. States determine the organization of, and the procedures used by, their courts.

Areas where state law is dominant, but shares authority with federal law include consumer protection, criminal law, education law, gambling law and traffic and driving law.

3. Conflicts and coordination of state and federal law

a. Supremacy of federal law

Article VI, section 2 provides that federal law is supreme (the "Supremacy Clause")[13]. The lowest of federal laws is superior to conflicting provisions of state laws, including state constitutions.

The Supreme Court has given federal law a greater priority than the Supremacy Clause strictly requires. It has not limited the Supremacy Clause to being a mere choice-of-law rule that determines which law applies in the case of a conflict.[14] Instead, it has held that in certain situations, federal leg-

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[13] "This Constitution and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States; shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[14] *Cf.* JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 441, p. 425 ("Are the state laws inoperative only to the extent of the actual conflict; or

islation preempts state legislation entirely. This happens most easily, when a federal statute states that it preempts state law. In such cases, a court has only to determine whether state law is inconsistent with federal law. But federal law may also implicitly preempt state law if it "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress."[15] The Supreme Court may find this to be the case when there is "conflict preemption" or there is "field preemption." The former is the case where state law contravenes federal purposes or requires action that *conflicts* with federal law. The latter occurs when federal regulation of a particular *field* is "so dominant" that state laws on the same subject should not operate.[16]

State governments, and even municipal governments, in areas of concurrent state/federal legislative competency, sometimes adopt legislation that is inconsistent with federal legislation. This legislation is presumptively valid until such time as a court, acting in a concrete case or controversy, determines that the state legislation is invalid as preempted by federal legislation or by a grant of federal legislative authority.

b. Non-exercise of federal powers and state law

Non-exercise of federal powers in the early years of the country made it more difficult to determine when a power should be exclusive. For some things, the country could not wait. For example, for more than fifty years after the constitutional convention, Congress did nothing about setting national standards for weights and measures. So the "common understanding was, that until Congress should fix a general standard for the states, each state was "at liberty to fix one for itself."[17]

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does the legislation of congress supersede the state legislation, or suspend the legislative power of the states over the *subject matter?*").

[15] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[16] *See* English v. General Electric Company, 496 U.S. 72, 79 (1990).

[17] WALKER, *supra* note 3.

The difficulty non-exercise made for interpretation is well illustrated by the Supreme Court's contrasting treatment of the two powers the Constitution grants in clause 4 of article I, section 8: "4. To establish an uniform Rule of Naturalization, and uniform Laws on the Subject of Bankruptcies throughout the United States." Although the Constitution uses virtually the same language for both powers and combines them in the same clause, the Court held the former exclusive[18] and the latter concurrent.[19]

In the case of the Naturalization Power, the Court followed the argument of the Federalist: the Naturalization Power falls within the third category "because if each state had power to prescribe a DISTINCT RULE, there could be no UNIFORM RULE."[20] Of course, the same argument seems to be true equally of the Bankruptcy Power, which the Federalist did not address. But the Court held otherwise. The principal difference between the two cases is that Congress had always exercised the Naturalization Power while it had only intermittently exercised the Bankruptcy Power.[21]

The Supreme Court does not, however, allow state legislation in every instance of unexercised federal power. For example, in the case of state regulation of commerce, it applies the doctrine of the "dormant Commerce Clause." Under this doctrine it may invalidate state or local laws that "discriminate against"[22] or impose an "undue burden"[23] on "interstate commerce."

c. Coordination of state and federal law

Unlike more modern federal constitutions, the American Constitution of 1789 does not address directly how state and

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[18] Chirac v. Chirac, 15 U.S. (2 Wheaton) 259 (1817).
[19] Sturges v. Crowninshield, 17 U.S. (4 Wheaton) 122 (1819).
[20] 1 THE FEDERALIST: *supra* note 7 [emphasis in original].
[21] Sturges v. Crowninshield, 17. U.S. (4 Wheaton) 122 (1819)
[22] City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).
[23] Dean Milk Co. v. City of Madison, 340 U.S. 349, 353 (1951).

federal governments should coordinate their laws. It does not well demark areas where federal legislative jurisdiction is exclusive and where it is shared with the states. It does not define what exclusive and what concurrent might mean. But it does allow a high level of concurrency in lawmaking.

The combination of these two factors—lack of constitutional coordination and a high incidence of concurrent jurisdiction—contributes mightily to non-uniformity and uncertainty. It creates a certain competition between state and federal law.

Competition between state and federal law need not lead to substantial legal uncertainty, if conflicts between state and federal authority are determined before laws take effect. [24] For this, coordination prior to litigation is essential. It is not enough to say that one government level has authority to legislate, and to the extent that it does, its law governs and supersedes competing laws.

A particular weakness of American federalism is that questions of legislative competency are often decided not beforehand, but only as a legal rule is applied, and therefore at the risk and expense of those trying to comply with the law, whichever one it may be that is applicable. The issue of legislative competency may even be an element of a party's case. For example, to apply a federal law may require proof that this particular instance of application has a specific connection to "interstate commerce," such as an "effect" on "interstate commerce" [25] or use of an "instrumentality of interstate commerce, or of the mails." [26] Conversely, to apply state law may require a

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[24] *See* James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TUL. J. INT'L & COMP. L. 541, 596 (2007) (discussing German federalism).

[25] For example, the antitrust laws. *See, e.g.*, Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

[26] For example, the securities laws. *See, e.g.*, Rule 10b-5, 17 CFR 240.10b-5.

showing that this specific application does not infringe on a possibly not yet adopted federal law.[27]

There is a point of view that such case-by-case review is work worth doing notwithstanding the obvious greater efficiency of an *ex ante*, generalized decision. Some see that "the challenge faced by the new commercial federalism [to] be in establishing and policing the limits on federal power."[28] This approach would "enable redress whenever a plaintiff with standing shows that regulatory activity in the gray area unduly threatens Our Federalism [with tyranny]."[29]

5. Municipalities

The Constitution makes no provision for municipalities. As a matter of state law, municipalities have only such authority as the states grant them. Originally, the states strictly limited municipal authority. Beginning in the latter part of the nineteenth century, however, states began extending to municipalities "home rule." Often, in addition to authority to administer their own affairs, states granted municipalities authority to legislate. Today municipalities are seen as the intrastate analogue of federalism. Most states apply a rule that all powers are granted until retracted. This includes authority to issue laws as significant as creating criminal offenses, imposing requirements on employment, prohibiting trade practices and controlling construction through zoning laws. There are approximately 40,000 sub-state government entities in the United States.

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[27] Some American law professors now see this "*competitive federalism*," i.e., non-uniformity of law, as a good thing! *See, e.g.*, Bruce Johnson & Moin A. Yahya , *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403 (2004).

[28] *See* A Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 356 (2003).

[29] Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Intrjurisdictional Gray Area*, 66 MD. L. REV. 503, 648 (2007).

III.

The Means and Methods of Legal Unification

The means and methods of legal unification are the same as the means and methods of lawmaking and law applying in general. Thus unification takes place, or does not take place, within the context of existing approaches to legal methods. In this regard, the United States operates within its own peculiar version of the common law.

The common law heritage is both blessing and bane for American legal unification. It is a blessing, because it brings a strong central court and a tradition of consistent case law. But it is a bane, because conditions in the United States are different than they were in 18th century England, when American common law methods developed in England. American courts are less centralized than were their 18th century English counterparts; the limitations of a law of precedents are much greater in a modern economy of 300 million people than they were in a pre-industrial economy of fewer than 10 million people.[30]

In its Supreme Court the United States shares the common law benefit of a strong court at the seat of national government. Insofar as the Supreme Court is competent—both legally and practically—its pronouncements in Washington can have much the same salutary effect for legal unification as those of its counterparts in Westminster had in the 18th and 19th centuries.

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[30] According to the first British census, in 1801 the population of England was 8,331,434. ABSTRACT OF THE ANSWERS AND RETURNS, MADE PURSUANT TO THE ACT, PASSED IN THE FORTY-FIRST YEAR OF HIS MAJESTY KING GEORGE III, INTITULED, 'AN ACT FOR TAKING AN ACCOUNT OF THE POPULATION OF GREAT BRITAIN, AND THE INCREASE OR DIMUTION THEREOF, ENUMERATION 4 (1802), *available at* Online Historical Population Reports, http://www.histpop.org/ohpr/servlet/PageBrowser?path=Browse/Census%20(by%20date)&active=yes&mno=2&tocstate=expandnew&tocseq=100&display=sections&display=tables&display=pagetitles&pageseq=first-nonblank.

As we have seen, however, for most of American law, the Supreme Court is not legally competent. It therefore often is not able to contribute substantially to unification of law. In most areas of law, the Supreme Court of the United States is not the highest court, instead the highest courts of the states have the last word. There are fifty such courts. There are no formal and only limited informal means for coordinating the decisions of those fifty supreme courts.

Moreover, the precedents of the Supreme Court share the deficiencies of case law generally. Precedents decide single cases; they find a rule applicable to one case. They are not designed to decide abstractly and consistently a generality of cases. More precedents in theory clarify the law, but they also muddy it by increasing exponentially the number of "authoritative" texts. Most American precedents these days descend from the federal appellate courts or the state courts, and are not decisions of the Supreme Court. They have binding effect only on subordinate courts and do not bind coordinate courts or their respective subordinate courts. Only the Supreme Court can bind all courts and then only in matters of federal law. But it renders full opinions in only about 80 cases a year.

While in 1837, the common law provided most American law, by 1937, if not sooner, statute law had displaced common law as the principal source of American law. Yet the United States has difficulty adopting and implementing statutes. The American legal system has yet to develop efficient and effective methods of legislation.[31] The United States, says Judge Richard A. Posner, has no "overall theory of legislation."[32] An overall theory of legislation requires methods of drafting and methods of statutory interpretation. While the American legal system has methods of statutory interpretation, these are, ac-

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[31] *See* James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VALPARAISO U. L. REV. 517, 528 (2006).

[32] Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 800 (1983).

cording to Justice Antonin Scalia, unintelligible.[33] It has no method of legislative drafting, which it has long neglected.[34] Individual Congressmen, not government ministries, are responsible for drafting legislation. Coalitions of Congressmen must negotiate with each other and strike deals with the President to get laws adopted. The consequences for legal unification are substantial and negative: new legislation is difficult to adopt and;[35] its technical quality is apt to be poor.

1. Legal unification and harmonization by exercise of central power

a. Through constitutional norms

The Constitution as adopted in 1789 had few norms directly applicable to component states. Most of these concern establishing state recognition of the laws and legal acts of other states and of the federal government or prohibiting certain state conduct (*e.g.*, imposing customs duties, making treaties with foreign countries). Among those few designed to create uniform norms, perhaps the most important and surely the most controversial, was article IV, section 3, the nefarious "Fugitive Slave Clause." It requires (*requires*, for it has never been repealed), that persons "held to service or labor in one State under the laws therefore, escaping into another," shall not be freed, "but shall be delivered up on claim of the party to whom such service or labor may be due."

The Bill of Rights (the first ten amendments), adopted in 1791, also did not create norms directly applicable to the states; it applied only to the federal government.[36] That changed, however, following the adoption of the fourteenth amendment

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[33] Antonin Scalia, *A Matter of Interpretation*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (Amy Gutmann ed., 1997).
[34] Mary Ann Glendon, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 33, at 96.
[35] *See* Donald J. Smythe, *Commercial Law in the Cracks of Judicial Federalism*, 56 CATHOLIC U. L. REV. 451, 459-461 (2007).
[36] Barron v. Baltimore, 32 U.S. (7 Pet.) 32 (1833).

in 1868. While the amendment did not itself apply the Bill of Rights to the states, the Supreme Court has interpreted its Due Process Clause, which does apply to the States, to incorporate the most important protections of the Bill of Rights.

The Supreme Court can and does—albeit infrequently—use the protections of the Bill of Rights to create uniform law throughout the land. The advantage of this approach is that one Supreme Court decision instantly brings legal unification. For example, on January 21, 1973, abortion was legal in some states and illegal in others. On January 22, 1973, when the Supreme Court decided the case of *Roe v. Wade*, 410 U.S. 113 (1973), it became legal in all states.

Necessarily only the Supreme Court can create such national unity. Since its authority extends only to deciding specific cases, it can not promulgate comprehensive legislative-like solutions to problems. As a consequence the Court is better able to harmonize law than it is to unify law. What the Court does best is prohibit contradictory legislation. Less well can it prescribe positive legislation, although it does occasionally prescribe specific rules. Where the Court does prescribe such national norms, typically these norms overwhelm any state rules. Most commonly they are procedural. Typically they take their names from the cases that promulgated them. Here are several examples:

"*Brady materials*"[37]. In criminal procedure prosecutors must disclose certain information that may exculpate defendants or may impeach the testimony of witnesses against the defendant (*e.g.*, deals in exchange for testimony).

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[37] Brady v. Maryland, 373 U.S. 83 (1963). *See* California Commission on the Fair Administration of Justice, Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence, available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20BRADY%20COMPLIANCE.pdf (March 6, 2008) (noting at 2 that "The prosecutor's *Brady* duty to disclose exculpatory evidence under the due process clause of the United States constitution is wholly independent of any statutory scheme. It is self-executing and needs no statutory support to be effective.")

"*Miranda warnings*."[38] In criminal investigations, before questioning a suspect, the police must inform the suspect of his or her fifth amendment right not to make self-incriminating statements. In the decision itself the Court prescribed specific language.[39]

While this approach has the virtue of immediate applicability, it has serious drawbacks. Constitutionalizing an issue largely eliminates legislative solutions. Legislative solutions can be political compromises. They can change as political temperaments change. They can draw bright lines that are easy to apply, even if they are not always easy to justify. Constitutional solutions are, by the nature of American constitutional decision-making (see below), judge-made solutions normally devoid of bright lines. They invite litigation to change them or just to determine what they mean, for there is no other way to obtain an authoritative interpretation.[40]

b. Through directly applicable central legislation (or executive or administrative rules)

In a few areas of law, *i.e.*, where the Constitution gives Congress a clear grant of power, or where the courts hold that grant to be exclusive, federal legislation brings uniform law. These areas include naturalization, patents and copyrights.[41]

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[38] Miranda v. Arizona, 384 U.S. 436 (1966)

[39] *Id.* ("You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense.")

[40] *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 45 (1987) ("But if the courts unnecessarily decide such controversies on constitutional grounds, these potentially creative and collaborative processes are brought to a halt.")

[41] To promote uniform interpretation and application of patent and copyright law, in 1982 Congress created a new appellate court to decide all such appeals. It is an unusual creature in a system that prefers generalist to specialist courts.

In those areas where Congress shares legislative authority with the states, it has been hesitant to oust states of concurrent jurisdiction and timid even in asserting its own. The working assumption is that the federal role should be limited unless there is a compelling reason to assert federal leadership exists.[42]

Congress has usually resisted requests that it occupy systematically a distinct field of law to the exclusion of the states. Indeed, unless one defines distinct field narrowly, it may never have done so.

For example, many have long looked to Congress for a national commercial law; for more than two centuries, all who have done so, have been disappointed. Already in 1801, James Sullivan, then attorney general and later governor of Massachusetts, urged that "[t]here ought to be one uniform rule throughout the nation, on bills of exchange, promissory notes, policies, and all personal contracts [for these] all arise from commerce, and the regulation of them is the regulation of commerce itself."[43] Other equally distinguished jurists and well-placed advocates made similar proposals in the 1880s and again in the 1920s and 1930s. Their calls induced not national commercial law, but did contribute to efforts to find state alternatives to a national law. They were catalysts for creation of the National Conference of Commissioners of Uniform States Laws in 1892 and for the drafting of the Uniform Commercial Code in the 1940s and 1950s.[44]

Congress, when it does act, often does not cover a whole field, but only sections of it, or even only specific problems within a section. An example is data protection, which is also known as privacy law. The United States was among the first countries to adopt a data protection law, but applied it only to

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[42] *See*, *e.g.*, William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVIRONMENTAL L.J. 108, 110 (2005).
[43] SULLIVAN, *supra* note 10, at 353.
[44] *See* E. Hunter Taylor, *Federalism or Uniformity of Commercial Law*, 11 RUTGERS-CAMDEN L.J. 527, 529-530 (1980).

consumer credit reports.[45] Since then many countries have adopted data protection laws; most have adopted what are referred to as "omnibus" laws that apply to personal data generally. The United States, even as it slowly followed the lead of other countries in expanding data protection, stayed true to what is called a "sectoral" approach. The sectoral approach made the United States something of a laughing-stock in international discourse in the 1990s, when the United States protected video tape rental and sale records[46] long before it protected financial[47] and health records.[48]

The protection of health records is an example of Congress delegating authority to create uniform rules through administrative rule rather than federal statute.

Federal direct legislation is thus paradoxical: federal law can be found in nearly every aspect of life, yet there are surprisingly few areas of practice based exclusively on federal law.

c. Through central legislation inducing state legislation

The federal government cannot compel states to adopt legislation. Such measures are considered an infringement of the sovereign prerogatives of the component states.[49] Thus the United States is not able to adapt the directive approach of the European Union or the framework laws approach of Germany.

While Congress hesitates to preempt state lawmaking power, it practically rushes to use federal legislation to induce states to adopt laws that coordinate with federal policies and

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[45] Fair Credit Reporting Act, adopted in 1973, 15 U.S.C. § 1681 *et seq.*

[46] Video Privacy Protection Act, adopted in 1988, 18 U.S.C. § 2710. The Act does not cover DVDs, since they had yet to be commercialized.

[47] Gramm-Leach-Blilely Privacy of Consumer Financial Information, adopted in 1999, 15 U.S.C. § 6801, *et seq*.

[48] The *Standards for Privacy of Individually Identifiable Health Information* ("Privacy Rule"), *45 CFR Part 160 and Subparts A and E of Part 164,* implementing the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Public Law 104-191.

[49] Printz v. United States, 521 U.S. 898 (1997).

thereby harmonize with one another. Congress uses approaches far too numerous to detail here. Most go under the name of "cooperative federalism." That the result is cacophony rather than harmony is not an unusual judgment.[50]

A mundane example suggests the problematic nature of such cooperation. The *Consumer Patient Radiation Health and Safety Act of 1981*[51] directed the Secretary of Health and Human Services to develop minimum standards for state certification and licensure of personnel who administer ionizing or nonionizing radiation in medical and dental radiologic procedures. The Act does not require adoption of the standards and does not sanction non-adoption. Only 35 states developed standards. According to the professional organization behind such licensing, these standards "vary dramatically" from state-to-state. The remaining 15 states, the professional organization reports, essentially have no standards (requiring two weeks, not two years of training). [52]

This lack of success of the law illustrates the limits of the cooperative federalism approach. Without compulsion, either binding law or a practically equivalent fiscal measure, not all states go along; those that do, do not do so uniformly. The result, at best, is harmonized law; it is not uniform law.

It is sometimes suggested that the threat of federal legislation leads to states adopting legislation as a lesser evil. This

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[50] *See, e.g.*, Jonathan Adler, *Jurisdiction Mismatch in Environmental Federalism*, 14 N.Y.U. ENVIRONMENTAL L.J. 130 (2005) ("The division of authority and responsibility for environmental protection between the federal and state governments lacks any cohesive rationale or justification."). *See also* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVIRONMENTAL L.J. 179 (2005); A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297 (2003).

[51] 42 U.S.C. §§ 10001-10008.

[52] American Society of Radiologic Technologists, Background Information on State and Federal Licensure Issues, https://www.asrt.org/content/GovernmentRelations/LegislativeGuidebook/LicensureBackgroundInfo.aspx

seems to have been an explanation for the creation of the Uniform Commercial Code. But in most instances, where legislation does not go through the NCCUSL process, if there is such a reaction, *i.e.*, if it leads to legislation, that legislation is likely to be disparate and not uniform, and is likely to be adopted by some, but not by all states.

This approach is less likely to come out of the central government than from local constituencies. What is more likely to happen is that one constituency, with greater or lesser access to legislative influence, suggests a need for a national rule. It, or other constituencies then seek state legislation as an alternative to federal legislation.

d. Through information exchanges among the component states

Information exchanges among component states are an important source of coordination, but these are rarely managed by the central government. More commonly, national organizations, e.g., the National Association of Attorneys General, the National Center for State Courts, or national trade associations, do the managing.

2. Legal unification through formal or informal voluntary coordination among component states

a. By component state legislatures imitating others

Imitation, which is a form of informal coordination, is one of the most important methods for attaining harmonization, if not unification, in American law. Uniform and model laws promote this imitation, but do not exhaust it. Success with formal uniform laws voluntarily adopted has been limited. See 3.a. and 3.b. below.

b. By component state judiciaries, e.g., through state court consideration of practice of sister states

This is essentially the restatement approach, considered below, but without the validation of the precedents reviewed by the American Law Institute. Little can be expected of this approach. It cannot possibly be systematic or comprehensive, nor can it be uniform or universal. Owing to the vagaries of litigation, a court can consider only issues that arise in a specific case. Owing to limitations of case law, a court can decide only issues on the facts of this case. Owing to the proliferation of precedents, a court can hardly review all those precedents that might possibly come into play. No longer is it reasonable to expect a judge—especially a trial judge—to review decisions around the country.[53] Owing to the irregularity of litigation, it should not be expected that the same issue would even come before the highest courts of all fifty states, not to mention be decided in the same way.

c. By agreements among component states

Component states in the United States may agree with each other to legislation or administrative rules. Article I, section 10, clause 3 of the Constitution requires that the federal government approve such "interstate compacts." While use of interstate compacts has become more common in recent years, the focus of most compacts is not on creating uniform law. Typically interstate compacts are regional and are concerned with matters of administration rather than of legislation.

3. Legal unification promoted by non-state actors

Two non-state actors play a prominent role in promoting legal unification: the National Conference of Commissioners of Uniform State Law ("NCCUSL") and the American Law Institute ("ALI"). The two bodies differ in their basic approach, but

[53] *See* Maxeiner, *Legal Indeterminacy*, *supra* note 31, at 543.

both depend on voluntary adoption of their products. Besides these two law reform organizations, a host of other private organizations ranging from associations of government officials to university think tanks offer model laws to the nation's legislatures for possible adoption.[54]

a. Uniform laws and NCCUSL

The National Conference of Commissioners of Uniform State Law was founded in 1892 by the states themselves. The states are represented in NCCUSL as state delegations. NCCUSL drafts and proposes uniform laws for state legislatures to adopt. The ideal goal is that all states will adopt all uniform laws without changes. NCCUSL began work with commercial and divorce law.

The optimism of NCCUSL's founders was palpable; its first report asserted: "It is probably not too much to say that this is the most important juristic work undertaken in the United States since the adoption of the Federal [C]onstitution."[55] While uniform laws have had some success, it has not matched these hopes. While it had fair success with commercial law in its first years, it flopped with divorce law. In the first century of its existence, NCCUSL proposed approximately 200 uniform acts. Only about ten percent of these acts were adopted by as many as forty states; more than half were adopted by fewer than ten states. [56]

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54 *See, e.g.*, United States Ombudsman Association, Model Ombudsman Act for State Governments (1997), available at http://www.usombudsman.org/documents/PDF/References/USOA_MODEL_ACT.pdf; Centers for Law and the Public's Health: A Collaborative at Johns Hopkins and Georgetown Universities, The Model State Emergency Health Powers Act (2001), available at http://www.publichealthlaw.net/Resources/Modellaws.htm.

55 *See* Leonard A. Jones, *Uniformity of Laws Through National and Interstate Codification, in* REPORT OF THE SIXTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 157, 169 (1894), *reprinted in* 28 AM. L. REV. 547 (1894).

56 James J. White, *One Hundred Years of Uniform State Laws:* Ex Proprio Vigore, 89 MICH. L. REV. 2096, 2103-05 (1991).

Uniform laws encounter a host of problems some of which are inherent in the task and some of which are peculiar to the American form. These problems range from the political to the technical. They include:

(i) *A perception that they lack drafting legitimacy*. Legislation is normally subject to political compromise. But there is no democratic representation in the drafting of uniform laws. While drafting sessions are open to the public, not surprisingly, the industries most immediately concerned are best represented. There is a perception in many members of the bar and public that the uniform laws projects are "captured" by those industries. (*E.g.*, Article 9, bankers; UCITA/proposed Article 2B, software).

(ii) *A perception that they are supportive of status quo*. This perception is often reality. Uniform laws are sold to state legislature as mere technical matters that rationalize existing law and acknowledge industry practices. They should not launch off in the direction of law reform. Even the perception that they are new can lead to defeat. Many of the provisions attacked in UCITA/proposed Article 2B were challenged by consumer groups even though they did not go beyond existing law. Already approved amendments to Article 2 were cut back to garner support.

(iii.) *Non-universal adoption*. If uniform laws are to provide legal unification, all fifty states should adopt them. There is no political base that can help bring that about; the sponsoring organization must rely principally on good will. It is thus no wonder that so few uniform laws have been adopted universally.

(iv.) *Non-uniform adoptions*. As laws of the individual states, the adopting states may vary the uniform laws as they see fit. Many do. Indeed, some of the uniform laws (*e.g.*, Article 2 of the U.C.C.) even offer legislatures alternative provisions. Insofar as there are interest groups that care about those laws,

those groups get fifty chances to get changes made in the law that they could not get made at the drafting stage.

(v.) *Non-uniform interpretation*. No statute is perfect nor can any statute anticipate all issues that are likely to arise under it. Judicial interpretation has a critical role in keeping uniform law current. Yet, since uniform laws are by definition laws of the several states, there is no court that can authoritatively interpret them. Until there is such a court—as was proposed as long ago as 1917—no uniform law that has been the subject of judicial interpretation is likely to be uniform.[57]

(vi.) *Not amendable*. Recent experiences with the Uniform Commercial Code call into question whether uniform laws can be effectively amended. While the drafting process was concluded in less than ten years, the adoption process in the following eight has few successes to claim.

(b) Restatements and the American Law Institute

The American Law Institute was founded in 1923 by practicing jurists and academics. Its membership consists of individual jurists and is self-selecting. Its initial project was the creation of a "Restatement" of American law. As originally conceptualized, the Restatement was to define scientifically legal terminology and through the intellectual strength of its system, to be relied upon by courts in deciding lawsuits. What was originally to be a single restatement turned into restatements of particular areas of the law. Most commonly these are areas where state law dominates. The American Law Institute branched out from restatement to develop "model laws" and to join the NCCUSL in the Uniform Commercial Code. Model laws differ from uniform laws in that there is no expectation that a model law will be adopted by all states verbatim.

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[57] *See* Herbert Pope, *The Federal Courts and a Uniform Law*, 28 YALE L. J. 647, 651 (1919) (proposing entrusting federal courts of appeal with the task of reviewing uniform legislation with a newly established federal court to review their decisions)

Restatements have as their audience principally the judiciary. They are not adopted by legislatures as a whole but by judges piecemeal. While they help to systematize legal analysis, they have not brought about unification. They do promote harmonization and often (but not always) ward off worst cases of conflicting rules.

The founders of the American Law Institute were no less optimistic about their work than were the foundeers of NCCUSL about theirs. The ALI founders compared their task to that faced by the lawyers of Justinian's day who "produced the codification and exposition of that law which has been the main foundation of all the law of the civilized world except the law of the English speaking people."[58]

Top down or coordinate involvement in (a) restatements, (b) uniform law and (c) private standard setting appears both to be possible and yet rare. Its rarity is fairly easily accounted for. On the one hand, the federal and state authorities do not have the political interest required for continued involvement. On the other hand, the level of continued involvement required is great. Yet the effect of that involvement is uncertain and indirect. Restatements, uniform laws and private standards do not have the force of law by themselves, but require action by other players to attain that status. Constituencies with particular interests are more likely to be able to rouse themselves to participate in such activities. In such cases proposed legislation can become identified with those constituencies and then fail of adoption (*e.g.,* Uniform Computer Information Transactions Act).

4. The role of legal education and training in unification of law

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[58] REPORT OF THE FORTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 90 (1923); William Draper Lewis, *The American Law Institute*, 25 J. COMP. LEGIS. & INT'L L. 25, 28 (1943).

Legal education has been a major force for harmonization, if not unification of law, through law schools, their professors and bar examinations. Legal training has not been a force for harmonization, but neither has it been a force promoting non-uniformity of law, because it no longer exists. While apprentice training was one the exclusive path to the bar, it largely disappeared in the course of the 19th century. The United States is alone among the world's major legal systems in not having a system of formal practical training corresponding to "articling" in other Common Law countries, similar apprenticing in other civil law countries or to government training known in Germany and Japan.

a. Law schools

Law school began as supplement for law office training and, in the course of the 19th century, became their substitute. Before the Civil War (1861-1865) there were few law schools. All were private and some were independent of institutions of higher learning. From their earliest days, law schools, for financial self-preservation, sought students from outside their immediate states of location. Law students, having few schools to choose from, attended schools outside their home states.

Today, nearly all American law schools draw significant numbers of students from states outside their states of location. Not all law schools, however, draw from throughout the federal system to the same extent. Some do so nationally, some regionally and some locally. Over the last century all have tended to expand the areas from which they draw. To similar extents, graduates of these law schools practice outside the states of their law schools' locations.

Today, and for a very long time, most American law schools have not focused on teaching the law of their states of location. They concentrate on federal law in areas where federal law predominates, such as bankruptcy, constitutional law,

intellectual property, antitrust, securities regulation and taxation, as well as in other areas where federal law serves as model law, such as civil and criminal justice and administrative law. In areas where state law predominates, such as contracts, property, torts, family law and inheritance law, they concentrate not on the law of specific component states but on a hypothetical law of an amalgam of all states.

American legal methods tend to support this homogenizing approach. American law schools stress the skill of arguing specific points in issue rather than skills of interpreting and applying systematic statutes to facts. Since argument take priority, skill at identifying the precedents needed to make the argument are more important than systematic understanding of a specific body of law.

American law schools have a positive effect for harmonization of law. That effect is widely recognized. When they teach state law, they teach an homogenized law the basics of which applies equally well in all states. When they teach federal law, they teach a presumptively superior law on which states ought to model their laws.

Oddly, American law schools do not have such a positive effect on unification of law. Indeed, they may have a negative effect. This effect is scarcely noticed.

Uniform law by its nature cannot be case law—at least, not where there is a multitude of case-law making courts. It must be statutory law; that is, it must consist of, ideally, a single authoritative text. But law schools generally give statutes short shrift. The issue-focused nature of American litigation tends to prefer study of case law based solutions. For example, to this day, some American law school first year contracts classes study only the common law of contracts and do not give the the Uniform Commercial Code ("UCC") much attention. Those who do include it, are forced to alert their students to the inconsistencies that exist among the states in interpreting it. In

general, the technique of teaching a non-existent national law, means that there is no single authoritative text for state law. They do not study a single authoritative text for one state with a mind toward determining whether the state where teaching is occurring, ought to adopt that law.

When law schools teach federal law, teaching does tend to promote a single national interpretation of that federal law. But federal law is, as we have seen, often only an overlay on state law. Yet it is an overlay that sometimes focuses on problems that are quite different from the same problems in state courts. For example, federal courts in so-called diversity jurisdiction cases consider only cases of at least $75,000. Procedures suitable for such larger cases are not necessarily suitable for smaller cases that the state systems address.

b. Law professors

Three of the nation's first law professors, James Wilson, James Kent and Joseph Story, were also leading judges of their era and leading promoters of uniform national law. All three conceptualized—and Kent and Story actualized—plans for law commentaries designed to bring certainty and uniformity to law in America.

For most of the nation's history, through such commentaries, law professors have contributed positively to increasing harmony and uniformity in law. They typically played the leading role in third party legal harmonization through uniform laws, restatements and model laws. They typically serve as principal "reporters" for these projects.

In recent years, however, many, if not most, law professors have turned away from activities that promote unification and towards more particularist pursuits. At elite law schools professors now prefer social science scholarship about law and rarely engage in doctrinal writing that might contribute to unification of law. At non-elite schools professors prefer clinical

and other practical education to legal scholarship. Focused as this education is on local practice, it does little to promote unification of law.

c. Admission to practice

Admission to practice is admission by component state. While some federal courts have their own procedures and some have special rules, the states are responsible for issuing licenses to practice law.

Testing for admission to practice is, however, only partly by component state. To a degree that varies among the states, they incorporate in their own testing procedure tests developed by a third-party, independent, non-governmental body, the National Conference of Bar Examiners.

All but two states, Washington and Louisiana, use the Multistate Bar Exam, for one day of their two-or-three day state bar exams. The Multistate Bar Exam consists of 200 multiple choice questions on the topics of contracts, torts, constitutional law, criminal law, evidence, and real property. These questions are not jurisdiction-specific but test issues that should have the same solutions in all states.

Louisiana does not participate, presumably, because its own legal heritage, while much influenced by the common law, has a predominantly civil law origin. So in core private law areas of contracts, torts and real property, its legal approaches differ from those of other states and are non-uniform.

d. Post-Graduate Legal Education and Post-Admission Legal Training

The United States has no independent legal research institutes comparable to the renowned Max Planck Institutes in Germany. American law schools do not have a tradition of scientific study of law and do not offer American law students

as a matter of course the opportunity to do doctoral work in law.[59] They do offer American and foreign law students alike many opportunities for a fourth year of legal education in the form of studies for masters' degrees. Often, these degrees have a particular subject matter focus.

While practical training is not required for admission to practice, most jurisdictions now require practitioners participate in what is called "continuing legal education" ("CLE") following admission to practice. Requirements vary state-by-state. Most CLE programs are independent of the law schools and are offered by bar associations, other lawyer associations or proprietary bodies. While directed generally by practitioners with practice in mind, they are not apprentice-type programs. They take place in classroom settings.

Graduate and continuing legal education in their relationship to unification of law tend to mirror law school education. Graduate education tends more toward central, while continuing legal education tends more toward component state law.

5. Influence of international law on legal unification

Where the federal government enters into a treaty obligation, that obligation can create uniform domestic law. This can occur where the federal government may otherwise not have authority to act.[60] There is no need for the states to take separate action. International law is American law. Thus when the United Nations Convention on the International Sale of Goods took effect, it became uniform law for all fifty states.

Such cases are rare and are likely to be all the rarer in the future. Since ratification of CISG, the Congress has shown in-

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[59] The J.S.D., or S.J.D. (doctorate of juridical science), is not routinely offered or granted to others besides foreign jurists and American academics already holding teaching positions.

[60] *See, e.g.*, Missouri v. Holland, 252 U.S. 416 (1920).

creased hostility to treaties, such as CISG, that are self-executing, i.e., that require no further legislation by Congress. Still, insofar as Congress adopts law, either through a self-executing treaty or through legislation implementing a non-self-executing treaty, the international law will become a uniform American law.

Compliance with international legal obligations only exceptionally plays a role in unification and then a minor one.

Voluntary international coordination play a role, but it is very minor. Although the United States participates in such voluntary coordination, American legal institutions not infrequently ignore or even rebuff actual cooperation.

IV. Institutional and Social Background

1. Judicial branch

a. Judicial review of federal and state action

The United States Supreme Court polices whether either Congress or the states have impermissibly exceeded their respective lawmaking powers. The procedure and substance of that review, however, contribute substantially to making American law non-uniform and uncertain.

(a) The Court cannot review legislation before it takes effect; it has no authority of *abstract* review. Early in its history it created the "case or controversy" requirement. That doctrine demands that the courts may review the constitutionality of a law only when the law is applied in a concrete case. This delays resolution of these questions. Until overturned, laws are presumptively valid; the law-abiding must comply with them if they can.

(b) The Court does not have a monopoly of judicial review of constitutionality; review is not *concentrated*. Lower and state courts may determine the issue of constitutionality. The Supreme Court reviews exercises of lawmaking powers only in the ordinary course of appellate decision making. Parties must raise constitutional questions in the first instance of proceedings. Those courts cannot refer the questions to a constitutional court. The court of first instance may try to avoid the constitutional issue. If it does reach the issue, the disappointed party must then appeal the decision. Since most cases raising an issue of distribution of power end up in an intermediate federal or state appellate court, an exercise of lawmaking authority may be upheld in one jurisdiction and not in another.

(c) The subject of the Court's review—perhaps because of the case or controversy requirement—tends to be application of the law to an individual case, rather than a validation or invalidation of the law as a whole.

b. Judicial review and harmonization of state legislation

The United States Supreme Court is not authorized to interpret state law authoritatively. Only exceptionally—and then against substantial criticism—does it do so.[61]

No single court has authority to interpret authoritatively the uniform laws that the states adopt. This is possibly the biggest deficiency of the Uniform Commercial Code and of other uniform laws. It has long been recognized. Issues of interpretation remain unresolved decades after the Uniform Commercial Code first became law.

The Supreme Court has original jurisdiction to resolve controversies between component states. Art. III, § 2.

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[61] *See, e.g.,* Bush v Gore, 531 U.S. 98 (2000); West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951).

c. Dual court structures

There are parallel state and federal courts in both first and appellate instances. The Constitution did not require, but it does authorize, such dual structures[62] out of fear that state courts would not enforce federal law. This system of competing competencies complicates coordination and wastes judicial and private resources. This waste is by and large accepted as a necessary evil.

Most states now permit federal courts of appeals and some other courts[63] to "certify" to their state's highest court questions of state law that may determine a cause and for which there is no controlling state law precedent. In New York the procedure has been available since 1986. From 1986 through the end of 2005 federal courts certified 71 cases to New York's highest court, of which the court accepted 66. While there are reasons peculiar to New York that explain this very low rate of referral, New York's experience tends to confirm this Reporter's impression that this procedure has not become a measure used routinely to promote uniformity and coordinate judiciaries.[64]

2. Relations between the central and component state governments

The central government cannot compel states to adopt legislation. Such compulsion would considered an infringement of the sovereign prerogatives of the component states.

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[62] U.S. CONST. art. III, § 1

[63] Whether other courts are allowed to certify questions varies by state. Other courts that may certify are federal district courts, federal bankruptcy courts and the highest courts of sister states.

[64] Advisory Group to the New York State and Federal Judicial Council, Practice Handbook on Certification of State Law Questions by the United States Court of Appeals for the Second Circuit to the New York State Court of Appeals (2nd ed. 2006), available at http://www.nycourts.gov/ctapps/Cert.pdf. The New York procedure is available only to the federal courts and may be used by them *sua sponte* only after a case has been fully-briefed and argued. At that point, certification is not a time-saver, but a time waster.

Nor, on the same ground, can the central government compel component states to execute central government law.[65]

The component states and their government are not represented at the central level. They have not been since 1913 (amend. XVII). Until 1912 each of the legislatures of the component states (art. 1, § 3, cl. 1) selected two senators in the United States Senate. Since 1913 the people of those states have elected the senators directly.

Component state representatives at the central level are elected by the people of the component states: senators by all the people in the state, representatives by districts.

3. Bureaucracy

The civil service of the central government is separate from the civil services of the component states. There is no mobility between the separate civil service systems.

The lack of continuity in the upper levels of the bureaucracies—both of the central government and of the component states—is a significant hindrance to unification of law.

4. Social, regional and environmental factors

a. Social factors

In contemporary America social factors do not contribute greatly to disharmony of law. Federal law affirmatively prohibits laws that discriminate based on race or ethnicity, which thus largely assures harmony in these areas.

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[65] Printz v. United States, 521 U.S. 898 (1997). The *Printz* decision is at odds with earlier federal practice. The first Congress, in providing for implementation of the Congressional power "[t]o establish a uniform rule of naturalization, art. 1, § 2, cl. 4, provided for state court application of that uniform law. An Act to establish an Uniform Rule of Naturalization of March 26, 1790, Statutes at Large, 1st Cong., 2nd Sess., 103.

The social factor with the greatest present potential for disharmony is gender-orientation. Although the Supreme Court in 2003 in *Lawrence v. Texas*[66] invalidated state criminal laws prohibiting consensual sexual conduct among same sex couples, states continue to vary in their legal treatment of civil relationships among same sex couples.

In the past, social factors were much more productive of disharmony. Historically race was the most important. Even after the Civil War put an end to the non-uniform law of slavery, the former slave states sought to preserve *de jure* social separation of people (segregation) through so-called Jim Crow laws. In contrast, northern states generally did not require *de jure* segregation; some even prohibited *de facto* segregation. The result was substantial disharmony from state-to-state. Some states prohibited people of one race from attending school with people of another race; other states did not. Some states prohibited people of one race from marrying people of another race; other states did not. Some states prohibited innkeepers from housing people of different races in the same facilities; other states prohibited innkeepers from not housing people of different races in the same facilities. [67] The Supreme Court's decision in *Plessy v. Ferguson*,[68] which validated separate ("but equal") treatment of people based on race as consistent with the equal protection clause of the fourteenth amendment, is today nearly as infamous as the Supreme Court's *Dred Scott* decision, which held that Negros were not citizens of the United States.[69] Not until nearly a half-century later, in 1954, in an equally famous decision, *Brown v. Board of Education*,[70] did the Supreme Court overturn *Plessy*. Subsequent to *Brown* the Court invalidated other state laws making racially-based distinctions. For example, not until 1967 did it invalidate prohibitions on inter-racial

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[66] 539 U.S. 588.

[67] For a listing of the disparate laws as they stood in 1950, see STATES' LAWS ON RACE AND COLOR (Pauli Murray, ed., 1950). American race and nationality legislation was of particular interest in Nazi Germany as a precedent for its own racist laws.

[68] 163 U.S. 537 (1906)

[69] Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

[70] 347 U.S. 483 (1954).

marriages (anti-miscegenation laws).[71] While the *Brown* decision is widely regarded as a triumph of American (litigation- and case law-based) constitutional jurisprudence, it took a federal statute, the Civil Rights Act of 1964, to impose national uniformity.[72]

While most state laws distinguishing people by race were directed against persons of African descent, many found applicability to persons of Asian descent as well to Native Americans (American Indians). Some states also adopted laws specifically directed to persons of Asian descent. These too, of course, worked against uniformity of law.

Federal laws that made distinctions based on race principally involved immigration. They did not create non-uniformity of law, since immigration law is exclusively federal law. The national government's responsibility for native Americans tended to minimize state legislation and hence non-uniform treatment of that group.[73]

Formerly, ethnicity played a significant role in creating disharmony in law among the states. Different states reacted to immigrants with different laws. Some states supported immigrants by facilitating immigrants' use of their mother tongues; others sought to suppress such use.[74] Political considerations of the day often played a part. During World War I there was a wave of legislation prohibiting use of German and other languages. In 1923 in *Meyer v. Nebraska* the Supreme Court invalidated a state statute that prohibited teaching students in lan-

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[71] Loving v. Virginia, 388 U.S. 1 (1967) (overturning Pace v. Alabama, 106 U.S. 583 (1883).

[72] Pub. L. 88-352. *See* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 440 (1999).

[73] Although even here, there was some non-uniformity. In 1950 thirteen states prohibited sales of liquor to Native Americans, five prohibited marriages of Native Americans to white persons, and three provided for separate schools. STATES LAWS ON RACE AND COLOR, *supra* note 67, at 19.

[74] For a catalogue and analysis of such legislation, see HEINZ KLOß, DAS VOLKSGRUPPENRECHT IN DEN VEREINIGTEN SYAATEN VON AMERIKA (2 vols., 1940-1942).

guages other than English.[75] The Civil Rights Act of 1964 put an end to laws discriminating on the basis of an individual's place of national origin. But different states and jurisdictions still treat differently the extent to which public services are to be provided in English only or in additional languages.

The candidacy of Barack Obama for the presidency of the United States well demonstrates that racial and ethnic differences are of declining importance. It also demonstrates, however, that race remains more important than ethnicity. He is usually identified as a "black" candidate and only rarely as a "second generation Kenyan or African" candidate.

b. Regional Factors

That different groups settled the United States at different times and places has led to regional variations in law. These variations go back to the earliest days of the country. Massachusetts was settled initially by Puritans from England, while Pennsylvania was settled by Quakers from England and Germans from the Palatinate. Maryland was settled as a refuge for Roman Catholics. Other southern states were settled by second sons of the English aristocracy and the enslaved African-Americans they brought to tend their properties. In the Middle West, Missouri, Illinois, Iowa, Ohio and Wisconsin were much settled by Germans, while Scandinavians settled Minnesota. Utah was founded by Mormons fleeing persecution in New York, Illinois and Missouri. California was settle by Mexicans and by Americans seeking gold.

These different patterns of settlement have played a role in the uniformity and in the disharmony of the nations' laws. Before the Civil War northern states were seen to prefer settling disputes by law, while southern states were thought to prefer duels pursuant to "codes of honor." Massachusetts has long

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[75] 262 U.S. 390. Justice Holmes would have upheld the prohibition [sic!]. *See* WILLIAM G. ROSS, FORGING NEW FREEDOMS. NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 (1994).

been considered to have creditor-friendly laws, while Texas and Florida are seen to favor debtors.[76] Missouri is widely considered to have stayed in the Union in the Civil War because of the strong hostility of the new German immigrants to slavery. Utah was admitted to the Union only when the Mormon inhabitants agreed to outlaw bigamy, which was permitted by their religion.

How much these different patterns of settlement continue to contribute to disparate law is well beyond the scope of this report. It is a matter of social science. In terms of continuing day-to-day influences on law, regional environmental variations, with only a few exceptions, are of more significance than are differences in ethnic or religious make-ups of the inhabitants of different states. Only in areas of recent immigration is there a noteworthy possibility of material disharmony in law based on population characteristics. Even then, disharmony among the states is likely to be limited to the availability of services in non-English languages.

c. Environmental Factors

Both the nature of the land and the patterns of settlement contribute to significant differences among the laws of the states. In most of the West land is plentiful, but desert. In a desert, issues of water rights take center stage. On some western highways, livestock enjoy the right-of-way ("open range country"), while on eastern roads the owner is strictly liable for them. Rights to the seashore vary from state-to-state.

More densely-settled areas were quicker to institute zoning controls. But Houston, a large and sprawling Texas city of about two million people, still has no formal zoning code.

Laws controlling firearms vary enormously. Densely-populated cities—using home rule authority—often have very

[76] As we have seen in considering the homestead exemption in bankruptcy.

restrictive controls. Thinly populated states oppose controls of almost any kind.

V. Unification Scorecard

See Unification Scorecard.

VI. Conclusion

"Unification" does not well describe the legal system of the United States. Unification is found only when law is exclusively federal. In most areas of the law there are significant non-uniformities between state and federal law and among laws of states and of municipalities. The government presents the people not with one law, but with a multitude of laws. The people are left to sort out the various laws at their peril.

Yet if law in the United States is not uniform, it is largely harmonized.[77] While there are numerous inconsistencies in law, only rarely are these inconsistencies substantive at a societal level (*e.g.*, death penalty is some states, but not others; stringent control of firearms in some places, lax in others). Usually inconsistencies are in matters of detail only. These details can, however, be extremely important in individual cases (*e.g.*, death penalty, statutes of limitation).

In everyday life, the devil is in detail. The inconsistencies, while only in detail, nonetheless have very real societal costs. American lawyers spend inordinate time worrying which law applies and determining what that law is.

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[77] *Accord*, E. Hunter Taylor, *Federalism or Uniformity of Commercial Law,* 11 RUTGERS-CAMDEN L.J. 527, 531 (1980) ("In sum, likeness rather than exactness—harmony rather than uniformity—has been the history of the "Uniform" Commercial Code, as will inevitably be the result of any code or model act which must depend for its uniformity on state-by-state enactment.")

For half a century, if not longer, American jurists have accepted these inefficiencies as "the price we pay for our federalism."[78]

This price is so-well recognized, that most lawyers simply assume that the system could not exist without it. In blissful ignorance of alternative solutions, they and the public at large do not regularly challenge this enormous waste.

Less-well recognized, are other costs that some may debate, but that seem real to this Reporter:

(1) Undermining respect for law. Law is realized when people abide by and enforce it. Numerous inconsistencies in law complicate abiding by law and enforcing it. Law-abiding begins to look like a game that only suckers play. In short, they strike at the efficacy of law.[79]

(2) It little recognized that disparate laws are deficient laws. When all solutions are equally valid, none is preferred. When each component state goes its own way willy-nilly, no way is identified as the best way. Instead of one law being subject to careful consideration in drafting and improvement in application, many laws are haphazardly drafted and carelessly applied.

(3) Disparate laws invite undue influence or particularist influence.

To this Reporter, neither the recognized, nor the unrecognized costs seem worth paying. The cacophony of non-uniform law should long ago have been replaced by the harmony of uniform or better national law. The legal system is indeed a lagging indicator. More than a century and a third ago one critic rightly noted:

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[78] Knapp v. Schweitzer, 357 U.S. 371, 380 (1958) (opinion by Frankfurter, J.).
[79] Taking a similar view, see Herbert Pope, *The Federal Courts and a Uniform Law*, 28 YALE L. J. 647 (1919).

> [A]s the country has grown older, the people of the United States as a whole—in their personal relations—have become far more united and harmonious than have the various systems of State law by which their commercial and domestic interests are largely governed. For this reason the constant conflict of law which daily arises in the affairs of our national life, with its consequent uncertainties, is becoming an evil so serious that it must soon pass from the hands of the theorist to those of the practical statesman.[80]

[80] HANNIS TAYLOR, AN INTER-STATE CODE COMMISSION (1881), *reprinted in* REPORT OF THE ORGANIZATION AND OF THE FIRST, SECOND AND THIRD ANNUAL MEETINGS OF THE ALABAMA STATE BAR ASSOCIATION 210 (1882).