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Unification of Law in the United States : an Updated Sketch

Peter Winship *

Fifty years ago Professor Hessel Yntema sketched the progress of the unification of law in the United States.¹ This progress, he wrote, presents a "complex picture." A large, diversified country necessarily requires a complicated governmental structure that balances national interests and local liberties. The resulting complexity is accentuated by history. The United States traces its roots to geographically dispersed communities of inhabitants migrating from different countries and bringing with them different cultural baggage. Subsequent rapid industrialization introduced new problems and exacerbated old ones. Industrial accidents, complex corporate structures, labor unions, and urbanization have induced increasingly detailed regulation. Yet, despite this complexity and diversity, Professor Yntema suggests that there is a fundamental unity of law in the United States. He attributes this unity not only to basic cultural factors, such as a common language, but also to specific institutions:

- 1) federal legislation and the influence of the federal judiciary,
- 2) the conception of a common law, as especially inculcated by the leading law schools and the legal literature produced under their influence,
- 3) the activities of the national bar associations,
- 4) the National Conference of Commissioners on Uniform State Laws, and
- 5) the American Law Institute.²

With quick, deft strokes, Professor Yntema outlines each of these institutions. He concludes by observing that these institutions have focused on uniformity of domestic

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¹ Hessel E. Yntema, *Unification of Law in the United States*, in UNIDROIT, *L'Unification du droit/Unification of Law* 301 (1948). The first paragraph of the present text summarizes Prof. Yntema's essay using words and shorter phrases from the essay without specific attribution.

² *Id.* at 305.

law to meet domestic needs. This focus, he notes, has “virtually eclipsed effective participation in efforts to attain unity of law on an international scale.”³

Surprisingly little has changed in the intervening fifty years. Professor Yntema today would recognize the landscape even if not the details. Federalism remains vibrant. Cultural roots continue to diversify. Technological developments continue to spawn new problems and added complexity. Yet law in the United States is no less uniform than it was fifty years ago. Indeed, arguably, the law is even more uniform today. If so, the same five institutions Professor Yntema identifies are largely responsible.

In one respect, however, there has been change: the United States no longer ignores efforts “to attain unity of law on an international scale” and there is considerably more organized interest in the comparative study of law. In 1964 the United States joined the International Institute for the Unification of Private Law and the Hague Conference on Private International Law. Delegations from the United States now participate actively in the unification efforts not only of these bodies but also of the United Nations Commission on International Trade Law and the Organization of American States. These efforts have borne fruit. The United States is now a party to several uniform law conventions, most notably the 1980 United Nations Convention on Contracts for the International Sale of Goods. At the same time, all law schools now offer at least one comparative law course and a steady flow of comparative law studies appears in the law reviews. While there still is no official national center for comparative law studies on the model of UNIDROIT or the Max Planck Institute in Hamburg, there is an active American Society of Comparative Law – one of whose founders was Hessel Yntema. Professor Yntema would, if he were with us today, quickly note and approve these developments.

If asked today to sketch again the progress of the uniformity of law in the United States, Professor Yntema would no doubt delight to see both the old landmarks and the new growth. In his absence, the present essay revisits the scene of Professor Yntema’s earlier work. The essay first asks whether his sketch is accepted as an accurate rendering of the landscape. It then examines what has happened to the five “institutions” he identifies as influences on the promotion of unification. A comment on the development and implications of U.S. interest in transnational uniform law projects follows.

I. – Implicit in Professor Yntema’s essay is the suggestion that there is a trend toward greater unification of law in the United States and that this is a Good Thing. He begins his essay by stating that “the *progress* of unification of law in the United States presents a complex picture” (emphasis added). He later talks of institutions “promoting” unity, the “gradual expansion” of federal legislation, and the “not inconsiderable and yet not satisfactory” history of adoption of uniform State laws. At the same time, however, he suggests a more static picture: it is remarkable, he says, to find at the time he writes “fundamental unity in law” despite the diversity and complexity

³ *Id.* at 317.

of the political, social, and economic context in the United States. Not that there is complete uniformity, as he clearly recognizes elsewhere. Rather, the suggestion is that continuing movement towards uniformity has already achieved significant uniformity.

Not all historians would agree with this optimistic picture. Professor Lawrence Friedman, for example, writes that "[o]ne of the great, and constant, themes of American law is the pushing and pulling of these forces: uniformity and diversity, in constant tension over time."⁴ Professor Whitmore Gray, who, like Professor Yntema, teaches at the University of Michigan Law School, agrees. In a detailed 1986 report on the unification of law in the United States, Professor Gray cites Professor Friedman's comment with approval and adds that "the United States experience in unification to date is not very encouraging."⁵ While recognizing that there has been "considerable movement toward uniformity and harmonization" (due at least as much, he argues, to the desire to reform the law as to make the law uniform), Professor Gray concludes that the "tantalizing question" is why, despite this considerable movement, "diversity in private law [is] still the norm and uniformity the exception in the United States today?"⁶ Readers might reconcile this conclusion with Professor Yntema's view by noting that Professor Gray emphasizes private law, while Professor Yntema talks more generally about the "legal system," including federal public law that usually preempts State law and is therefore by definition uniform. But even if formally reconcilable, the two views reflect very different emphases on both the value of uniformity and the actual progress made in unification.

Which view is more accurate? The historical record surely supports the view that the general public and even the legal community place "unification of law" low on their list of values held. To the extent uniformity is introduced by federal legislation, history reflects the continuing tension between advocates of decentralized power and supporters of centralized regulation. Public debate between these proponents, however, rarely refers to the need for uniform law as opposed to other values, such as the need to protect "basic" rights or to correct problems of a national scope. If, therefore, Professor Yntema implies that there is a conscious desire for the unification of law he exaggerates the importance of this value. As for the extent of progress in unification, one is tempted to suggest that the two views are like those shown in a recent cartoon: one character is happy because the glass of wine is half full, while the other is unhappy because the glass is half empty. The suggestion, however, is too facile. From the perspective of persons trained in a different legal culture, Professor Yntema probably paints a more accurate picture. Despite the diversity in private law noted by Professor Gray and relatively limited application of federal legislation, the legal system – including not just formal legal rules, but also the participants,

⁴ Lawrence M. Friedman, *A History of American Law* 36 (2d ed. 1985).

⁵ Whitmore Gray, *E pluribus unum? A Bicentennial Report on Unification of Law in the United States*, 50 *Rabels Z.* 111, 112 (1986).

⁶ *Id.* at 112 & 155.

procedures and institutions that support and apply these rules – incorporates significant common assumptions and practices.

II. – Whether or not they agree on the progress that has been achieved, Professors Yntema and Gray have virtually identical lists of the institutions working toward unification. Professor Gray reports on the work of the Commissioners on Uniform State Laws, the American Law Institute, and the American Bar Association. He also examines the role of the federal and State legislation, as well as that of the opinions of federal and State courts. He concludes with comments on legal education, legal literature, and legal research tools. Although Professor Gray's analysis of these institutions is more recent and more detailed than that of Professor Yntema, there is a remarkable coincidence in the factors proposed. The following brief comments examine each of the institutions in the order Professor Yntema proposes.

(1) FEDERAL LEGISLATION AND THE INFLUENCE OF THE FEDERAL JUDICIARY

Federal legislation that preempts the law of individual States would provide formal uniformity because there would be only a single law. The U.S. Constitution, however, only delegates to the federal government specific limited powers over matters considered in 1789 as of national importance. All powers not so delegated are retained by the individual States and, ultimately, by the people.⁷ After sketching this constitutional setting, Professor Yntema observes that the federal government's constitutional power to provide for the general welfare and to regulate inter-State and foreign commerce authorizes federal legislation to address the "vital concerns" of a national economy. Writing after the extraordinary mobilization of national resources during the economic depression and World War II, he states that it is impossible to anticipate the limits on these constitutional powers given their elasticity. Only the Supreme Court's 1938 decision in *Erie R. Co. v. Tompkins*⁸ suggested some limit to the influence of federal bodies on the unification of law. That decision reversed Justice Joseph Story's nineteenth century decision in *Swift v. Tyson*,⁹ which legitimated application of a "federal common law" in many commercial disputes between parties from different States.

Developments since the 1940s bear out Professor Yntema's prognosis.¹⁰ Federal legislation regulating civil rights and providing for consumer and environmental protections are grounded on the commerce clause. There are intimations that the

⁷ U.S. Const. art. 1, § 8 and amend. X.

⁸ 304 U.S. 64 (1938).

⁹ 41 U.S. (16 Pet.) 1 (1842).

¹⁰ Although Professor Yntema recognized the potential for federal regulation he did not anticipate at least one technique used to encourage uniformity: the withholding of federal benefits to States that do not conform with stated behavior. Until recently, for example, the federal government withheld funds for highways if a State did not raise to twenty-one the age at which persons could purchase and consume alcoholic beverages.

sitting U.S. Supreme Court will establish some limits on the potential scope of this clause but so far it has done so only hesitantly and at the extremes.¹¹ As a constitutional matter, therefore, there are few areas in which the federal government could not legislate. This, however, merely converts the debate from one about what is constitutionally authorized to one about what is politically appropriate. The boundaries of what is appropriate will fluctuate, but there is remarkable agreement on basics. Private civil law is generally left to the States. Except for fiscal matters, for example, rules governing real property, personal status, and inheritance are found in State law. The Uniform Commercial Code, which governs the non-regulatory aspects of most domestic commercial transactions, is not federal law; it applies throughout the United States only because each State has enacted the text separately. Even where the needs of a national economy might suggest otherwise, there are surprising enclaves of exclusive or concurrent State regulation. Insurance companies, for example, are regulated by State agencies, while State banks coexist with national banks chartered under federal banking legislation. Contemporary debate about federal products liability legislation and limits on penal damage awards turns, in part, on the propriety of the federal government preempting existing non-uniform State law.

To accommodate these different perspectives, federal legislators have developed techniques that allow for a continuing role for State law – at the expense, however, of the unification of law. The several consumer laws incorporated at different times into the Federal Consumer Credit Protection Act, for example, adopt a formula that provides that the federal legislation does not “annul, alter, or affect [State law] . . . except to the extent that those laws are inconsistent with the [federal law].”¹² As a result there are minimum federal standards for consumer transactions subject to higher, non-uniform protections offered by individual States. Another technique is to regulate specifically a particular topic and delegate broader authority to a federal agency but leave consistent State law in place until that agency issues regulations. The 1987 Expedited Funds Availability Act, for example, regulates in detail the return of dishonored checks but delegates to the Board of Governors of the Federal Reserve System authority to regulate “any aspect” of the payment system or “any related function of the payment system with respect to checks.”¹³ Until such time as the Board acts, however, the relevant provisions of the Uniform Commercial Code will continue to regulate the collection of checks. That to date the Board has declined to exercise its delegated authority reflects, at least in part, its judgment that to do so would intrude on appropriate State legislation.

No matter where they stand in these debates about where to draw the line in these various debates, most commentators agree that federal legislation is the most

¹¹ *United States v. Lopez*, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (federal statute forbidding any person from possessing a firearm in a local school zone held to exceed commerce clause authority).

¹² See, e.g., Consumer Credit Protection Act, 15 U.S. Code § 1610 (1988) (“truth in lending”).

¹³ 12 U.S. Code § 4008(c)(1) (1988).

likely vehicle for providing unification of law in the United States. "Federal legislation and regulations issued by federal agencies are," reports Professor Gray, "the major sources of uniformity in the United States today. . . . At the present time [1985] we are in the midst of an explosion of federal activity, including some intrusion into private law areas traditionally reserved to State law."¹⁴ He cites, in particular, consumer legislation and related agency regulations as an illustration of burgeoning federal law-making. Professor Morris Shanker, a self-confessed believer that uniformity is a worthwhile objective, concurs.¹⁵ While conceding that the best way to achieve uniformity is through federal legislation, he favors uniform acts prepared by the Commissioners on Uniform State Laws because they produce legislation of a higher quality than that of congressional staff committees.¹⁶ He fears, however, that interest groups will seek federal action because relatively few uniform acts have been widely enacted.¹⁷

Recent political elections may suggest that Professor Shanker's fears are exaggerated. Leaders of both political parties talk about down-sizing the federal government and returning authority to the States. Many of these leaders are not only willing to tolerate non-uniform State regulation, but they even welcome it. Historical perspective suggests, however, some skepticism that there has been a "revolution" that will stem the outpouring of federal law. Predictions of a similar trend in the decisions of the Supreme Court may also be premature despite intimations that the court is willing to reexamine earlier decisions upholding federal power.

From the perspective of promoting unification, however, the principal observation about the role of federal courts is left unstated by Professor Yntema. For, despite its name, the Supreme Court does not exercise general supervision of the private law decisions of State courts. When disputes arise between citizens of different States, federal courts exercising "diversity jurisdiction" may apply State law. When doing so, the federal courts defer to State law as directed by the *Erie* decision noted by Professor Yntema. Few of these diversity cases, however, end up in the Supreme Court or appellate courts so decisions in the cases have little unifying effect.

As for court-created federal common law, Professor Yntema's reports of its demise were premature although it lives on in an attenuated form to fill the interstices of federal legislation or to govern the conduct of federal entities.¹⁸

¹⁴ Gray, *supra* note 5, at 122-123.

¹⁵ Morris Shanker, *The American Experience on Harmonization (Uniformity) of State Laws*, 12 Canadian Bus. L.J. 433, 439 (1986-87).

¹⁶ *Id.* at 438-440.

¹⁷ *Id.* at 441.

¹⁸ Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883 (1986).

(2) THE CONCEPTION OF A COMMON LAW, AS ESPECIALLY INCULCATED BY THE LEADING LAW SCHOOLS AND THE LEGAL LITERATURE PRODUCED UNDER THEIR INFLUENCE

Homogenous instruction in national law schools is, Professor Yntema suggests, an even more basic force for uniformity. Graduates from a few elite law schools become instructors in other schools. These instructors bring with them a common technique of instruction and they use a limited number of casebooks that usually follow a common pattern. Textbooks, treatises, and a national system of case reports reinforce the uniform educational experience of law students and lawyers. It is, writes Professor Yntema, "scarcely possible to over-emphasize the importance of this tradition."¹⁹

In the intervening years the scene he sketched has become much more varied. Following the significant expansion of law study in the late 1960s and early 1970s, the professorate is no longer dominated by instructors from a few elite schools. Many schools in this same period also eliminated curriculum requirements, especially in the last two years of the standard three years of law study. Students were offered a greater choice of specialized courses, ranging from supervised clinical experiences to interdisciplinary seminars. Instruction by the "Socratic method" is now the exception as acceptable methods have proliferated. The photocopy machine and computers have also made it possible for instructors to prepare their own teaching materials rather than rely on the few published casebooks.

Scholarship in this same period has also diversified to the point that one author recently wrote that "[t]he conceptual disarray of legal scholarship has become so familiar to us that we have ceased to regret it."²⁰ Doctrinal studies are *déclassé*. With few exceptions, treatises of "national law" in the tradition of Joseph Story and Samuel Williston are no longer written – or valued by the academy.²¹ In this context it is difficult to know what vision students have of law.

During this same period the institution of continuing legal education or CLE has taken root. Many State bars now require practicing attorneys to attend a certain number of lectures each year. Many of these courses focus on the practical needs of attorneys whose practice consists in the application of local law. Much of this practice, moreover, requires attention to local statutes and regulations because in this same period statutes have encroached more and more on the traditional common law based on case precedents. In any event, systematic citation of court decisions from other jurisdictions is unlikely. CLE lecturers naturally examine the peculiarities of this local practice rather than emphasizing a general concept of a common law.

¹⁹ Yntema, *supra* note 1, at 309.

²⁰ Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 Harv. L. Rev. 1393, 1393 (1996).

²¹ A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632, 676-679 (1981); *Contemporary Commercial Law Literature in the United States*, 43 Ohio St. L.J. 643, 653-657 (1982) (survey of the fate of treatises in the field of domestic commercial law).

Professor Yntema concedes that it is difficult to measure the influence – which he says cannot be overemphasized – of these elements of legal culture. Given the developments traced above one can at least suggest that law schools and legal literature no longer reinforce a concept of a national law to the same extent as they might have fifty years ago.

(3) ACTIVITIES OF THE NATIONAL BAR ASSOCIATIONS

In a brief paragraph, Professor Yntema argues that national bar associations have also been a powerful influence in the unification movement. One of the objectives of the founders of the American Bar Association in 1878 was to promote “uniformity of legislation throughout the Union.”²² It was subsequently instrumental in the formation of the National Conference of Commissioners on Uniform State Laws and the American Law Institute.

The American Bar Association continues to contribute primarily through the voluntary participation of its members in committee law reform projects. Examples can be found in virtually every Section of the Association. Recent revision of the Uniform Commercial Code, for example, has relied heavily on A.B.A. committee task force reports.²³ Rapid growth in membership has provided a pool of potential participants in these efforts. Toleration not only of the proliferation of committees and subcommittees but also of overlapping committee mandates even within a single Section have provided opportunities for virtually any project a particular member might be interested in. Although membership in committees is usually subject to appointment, it is rare that a volunteer is turned away.

Reform of the law rather than unification of the law is the usual motive of these participants. Nevertheless, there are more formal links with the unification process. Uniform laws prepared by the National Conference of Commissioners on Uniform State Laws are usually presented to the A.B.A. House of Delegates for its approval and anticipated objections by delegates may delay adoption of a final text. For specific uniform law projects there may also be formal A.B.A. participation. It has become the custom, for example, for the Association to appoint a “liaison” to drafting committees revising the various Articles of the Uniform Commercial Code. Circulation of the reports by these liaisons ensure widespread knowledge of proposed revisions.

These activities have the advantages and disadvantages of a lawmaking process that relies on volunteers. Not having to pay for the time of volunteers, the cost of producing draft legislative texts is less. Volunteers often bring expertise that would not

²² 1 A.B.A. Rep. 30 (1878).

²³ See, e.g., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 Del. J. Corp. L. 984 (1991) (prepared by a task force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of title, Committee of the Uniform Commercial Code); *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 Bus. Law. 1521 (1990) (prepared by the task force on the study of U.C.C. Article 5).

otherwise be readily available. At the same time, a volunteer system that does not regulate rigorously a conflict-of-interest policy may skew drafts to favor some interest groups to the disadvantage of the less organized. Volunteers also turn over frequently as professional demands on their lives may require them to drop in and out of committee work. In the absence of a detailed study of the American Bar Association's impact on legislative initiatives, an assessment of its volunteer system must be impressionistic.

(4) NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

Professor Yntema briefly summarizes the work of the National Conference of Commissioners on Uniform State Laws in the production of uniform and model laws for enactment by individual States. He traces the organization of the National Conference to the appointment of New York commissioners under an 1890 State law and a first national meeting of commissioners from different States in 1892. As of 1945, the Conference had prepared over 100 uniform acts or model laws of which seventy were on the active list. Only two acts – the Uniform Negotiable Instruments Law and the Uniform Warehouse Receipts Act – were adopted by all States. Thirty or more States had adopted six other uniform acts, and twenty or more States had adopted an additional thirteen acts. This product, as has already been pointed out, Professor Yntema characterizes as “not inconsiderable and yet not satisfactory.”

The National Conference's greatest successes during the first fifty years were its uniform commercial law act. Its greatest success during the ensuing fifty years has been the Uniform Commercial Code, which consolidated and reformulated the earlier uniform acts. At the time of its centenary there were 99 uniform acts, twenty-four model acts, and twelve other recommended acts on the Conference's approved list. Over the years the Conference had withdrawn 141 texts from that list.²⁴ Only eight of the uniform acts had been adopted by all fifty States and approximately 40% of these acts had become the law in less than ten jurisdictions.²⁵ Virtually all of the texts set out substantive legal rules; the Conference has shown little interest and even less aptitude when it comes to conflict of laws issues.²⁶

Commissioners continue to have a quasi-official status. They are appointed as uniform commissioners under non-uniform State laws which rarely specify qualifications. Although their expenses are usually covered their time is volunteered. They commit to promoting the uniform texts adopted by the Conference even if their State delegation may have voted against the text when proposed. Their interests and exper-

²⁴ Walter P. Armstrong, Jr., *A Century of Service: A Centennial History of the National Conference of Commissioners on Uniform State Laws* 130 (1991).

²⁵ Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. Legal Stud. 131, 134-135 (1996).

²⁶ See, however, a recent proposal that the National Conference should undertake to prepare a uniform choice-of-law code. Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 Mich. L. Rev. 2134 (1991).

tise range widely but they share a belief that unification through uniform State legislation is virtually always preferable to federal action. As the National Conference's centennial history states, "[t]he voluntary enactment of uniform State laws by the State legislatures seems to be generally accepted as more desirable and more feasible than an expansion of federal power."²⁷

Although it relies, in effect, on volunteers and thus suffers from some of the same defects outlined above in the discussion of the activities of American Bar Association members, the National Conference does have an Executive Director, a permanent staff, and a coherent committee structure. Its budget is limited although a recently-established foundation provides endowment income to support its activities. These funds permit the hiring of reporters who are not uniform law commissioners to prepare the texts reviewed by the drafting committee.

Recent criticism of the National Conference's lawmaking process has stirred heated debate. Professor Kathleen Patchel writes that in the light of modern group theory this process is "an inadequate mechanism for drafting commercial legislation designed to reach reasonable accommodation among the interests of all affected groups."²⁸ Using the tools of "structure-induced equilibrium," Professors Alan Schwartz and Robert Scott conclude that the institution (a) has a strong *status quo* bias that induces it to reject significant reform; (b) frequently produces highly abstract rules that delegate substantial discretion to courts; and (c) produces clear, bright-line rules that confine judicial discretion commonly when and because dominant interest groups influence the process.²⁹

From yet another perspective, Professors Larry Ribstein and Bruce Kobayashi draw on economic analysis to support the conclusion that States efficiently select National Conference proposals that are efficient, but also adopt many inefficient Conference texts because of lobbying efforts by the commissioners.³⁰ They also suggest that in some cases a uniform legal – and efficient – rule would evolve if courts enforced choice-of-law clauses.³¹

These critiques are too recent for observers to evaluate whether they will have a long-term impact on the National Conference's procedures. An immediate response has been for the Conference to make a concerted effort to support participation by consumer interest groups. The Conference has also extended invitations to non-commissioners to observe its annual meetings. In a recent conciliatory response to the

²⁷ Armstrong, *supra* note 23, at 129.

²⁸ Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 Minn. L. Rev. 83, 162 (1993).

²⁹ Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595, 597 (1995).

³⁰ Ribstein & Kobayashi, *supra* note 24, 186-187.

³¹ *Id.* at 179-181.

critics, the Conference's Executive Director concludes that "[a]s long as NCCUSL continues to listen to serious suggestions for improvement – and allows the process to evolve and adapt to changed circumstances – there is no reason to believe that the success of the last one hundred years cannot be carried forward."³²

(5) AMERICAN LAW INSTITUTE

Professor Yntema writes at far greater length about the American Law Institute. Established in 1923 to clarify the common law, the Institute had, at the time he wrote, worked principally upon a Restatement of the Law. This Restatement constitutes "a singular species of codification." It is, he says, essentially an unofficial digest of the common law "as it is" stated as black-letter rules. These rules were accompanied by comments and illustrations but without citation of authority. While the Institute had prepared a Code of Criminal Procedure and had agreed in 1944 to collaborate with the National Conference in the drafting of a Uniform Commercial Code, the Institute was known for restating law rather than reforming it. Professor Yntema is not uncritical. He recognizes deficiencies in the restatement project, especially its "curious theory" that law should be restated as it is rather than to resolve divergent cases or to clarify obscurities. Nevertheless, he points to the value of both the process and the product. By stimulating discussion of numerous topics, the process has educated participants and laid the foundation for further developments. The product itself has been frequently cited by the courts, although Professor Yntema concedes that whether the Restatement has increased uniformity remains inconclusive.

Professor Yntema today would find the Institute transformed. Despite talk of winding itself up following completion of the final components of the Restatement of Law in the early 1940s, the Institute continued. While it remains elitist its membership has both grown significantly in numbers and in diversity, especially within the last decade. Its membership is now limited to 3,000, making it approximately ten times the size of the National Conference of Commissioners on Uniform State Laws. At the same time, many more members than in the past now have an opportunity to participate in the work of the Institute not only at its annual sessions but also in members' consultative groups for each project. Additional membership has meant additional sources of revenue and these funds have been used to pay reporters and commission preliminary studies.

The Institute's work product has also evolved and diversified. The Restatement is now in its third iteration and has been transformed. The printed text of the recently-adopted Restatement Third of the Law of Suretyship and Guaranty, for example, now includes the Reporter's Notes listing the authority relied upon.³³ Although nominally

³² Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 Minn. L. Rev. 861, 876 (1995).

³³ Restatement (3d) of the Law of Suretyship and Guaranty (1996).

building on the 1941 Restatement of the Law of Security, the new Restatement relies more heavily on legislation and on the practices of professional sureties and guarantors. For the most part, the reporter ably reconciles the different practices of the professional sureties and the commercial guarantors. Debates among the advisers, however, sometimes were more similar to those found in committees of legislatures and some comments can only be explained as an accommodation to one group or the other.

The Restatement Third, however, is not the only work product. The Institute continues to participate with the National Conference in work on the Uniform Commercial Code and it does not hesitate to suggest legislation when appropriate. The Institute has, for example, recently begun work on a project to propose revisions to the Federal Judicial Code.³⁴ In areas where a component of the Restatement is considered inappropriate, the Institute has produced Principles setting out appropriate policies to be observed by courts and legislatures. At present, for example, the Institute is working on Principles of the Law of Family Dissolution.³⁵ The Institute has also undertaken "Projects" that explore particular subjects. As part of a transnational insolvency project, for example, reporters have prepared narrative descriptions of U.S. and Canadian bankruptcy rules and practices; a similar narrative for Mexico will round out the initial stage of the project.³⁶ Both Principles and Projects lay the groundwork for unification but do not necessarily lead to uniform legislation.

At least some critics of the National Conference of Commissioners on Uniform State Laws extend their critique to the work of the Institute. Much like the Conference, the Institute has responded to specific suggestions for improvement in procedures. There is, however, little criticism of the form of the Restatement which Professor Yntema found so curious. The evolution of the Restatement format and the flexibility of the Institute's other work products satisfy many of the concerns expressed by earlier critics.

III. — To the preceding review of Professor Yntema's "institutions" must now be added a new factor: participation by the United States in international unification projects. As noted earlier, Professor Yntema bemoaned the failure of the United States to participate in these international efforts. He later had the opportunity to support the proposal that the United States join UNIDROIT and the Hague Conference on Private International Law but he never had an opportunity to develop his thoughts on what this implied for unification of law within the United States. Yet of all the developments in the last fifty years, this new need to relate domestic and international unification efforts has perhaps the most long-term significance for future legal developments.

³⁴ Report of the Director, in *The American Law Institute Annual Reports* 1, 7 (1996).

³⁵ *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Tent. Draft No. 2 (March 14, 1996).

³⁶ *International Statement of United States Bankruptcy Law*, Discussion Draft (Apr. 17, 1996); *International Statement of Canadian Bankruptcy Law*, Prel. Draft No. 2 (May 1, 1996).

Writing in the mid-1940s, however, Professor Yntema could not anticipate the shift in thinking about the propriety of the United States government participating in international unification efforts. It had long been assumed that there were constitutional limitations on such participation.³⁷ As early as 1876, for example, the United States declined an invitation to participate in a Congress of Jurisconsults on various legal topics, such as uniformity in the form of contracts. The Secretary of State's letter states:

"[P]ursuant to the Constitution of the United States, the several States have reserved powers which it is not competent for this government to trench upon either by Act of Congress or by Treaty with a foreign power. Some of the subjects indicated [in the invitation] as proper for consideration by the proposed Congress, are such as this Government has no authority to entertain, as they are under the exclusive jurisdiction of the several States of the Union."³⁸

Subsequent Secretaries of State took a similar stand. When U.S. delegations did attend later international conferences they repeated the same reservations on the possibility that the United States would become a party to any treaty produced. Even after the Supreme Court's 1920 decision in *Missouri v. Holland*³⁹ held that a validly-concluded treaty⁴⁰ on migratory birds authorized Congressional legislation even though Congress had no specific authority under the Constitution, the executive was reluctant to act. A 1928 Statement by Charles Evans Hughes, before he became Chief Justice of the Supreme Court, is frequently cited. Use of the treaty power for "the conduct of international relations" is proper but use of the power "to control matters which normally and appropriately were within the local jurisdiction of the States" might be unconstitutional.⁴¹

Most scholars agreed with this constitutional analysis. In 1917 John Henry Wigmore, author of *Wigmore on Evidence* as well as a uniform law commissioner from Illinois, wrote that the problem of how America could participate in the preparation of "world-legislation" ("the international aspect of the substantive national law affecting the relations between *individuals* of different States – . . . private law, so-called – in short, law of the kind that the practicing lawyer ordinarily uses in the affairs of clients; the kind that constitutes 99% of the law of daily life for all of us") was "the greatest problem of the future for our law."⁴² His conclusion rested on the following analysis:

³⁷ For a historical review of the U.S. position, see Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. Pa. L. Rev. 323 (1954).

³⁸ Letter of Hamilton Fish (Jan. 24, 1876), quoted in *id.* at 325-326.

³⁹ 252 U.S. 416 (1920).

⁴⁰ U.S. Const. art. II, § 2 (The President "shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur").

⁴¹ Quoted in *Report of the Special Committee on International Unification of Private Law*, 1961 A.B.A. Rep. 219, 248.

⁴² John Henry Wigmore, *Problems of World-Legislation and America's Share Therein*, 4 Va. L. Rev. 423, 423-424 (1917).

- I. The Federal Legislature of the United States has no power to adopt a uniform international rule which shall be actually effective throughout the country; it has only two very limited powers, each of which will still leave at least two distinct rules of law in operation within each State: (a) The first is its power over inter-State and foreign commerce; (b) The second is its power to make treaties for solving conflicts of law.
- II. The several State legislatures have all the remaining power to adopt a uniform international rule; but they never have exercised and never will unitedly exercise this power by adopting some uniform international rule; and therefore the prospect of any share for us in world-legislation is hopeless by this method.⁴³

He later qualified this analysis in the light of *Missouri v. Holland*, admitting that the federal treaty power might theoretically be broader than previously thought but concluding that it was unlikely to be used in the near future.⁴⁴

Dean Wigmore was, however, one of the few persons to propose a solution to the constitutional inhibitions: resort to the "compact" clause of the federal constitution, which authorizes States to enter into agreements or compacts with foreign governments with the consent of Congress.⁴⁵ In a report to the National Conference of Commissioners on Uniform State Laws, he outlined how his proposal would work:

First of all, Congress would by general law give its consent in advance that a State may make a compact with one or more foreign powers upon a specified subject of law – let us say, for example, the law of warehouse receipts. Next, when an international conference is called on the law of that subject, one or more important commercial States will, by their legislatures, authorize delegates to be sent to that conference to sign a convention. The delegates will include a senator, a representative, and two or three eminent professional experts in the legal and commercial fields involved. These delegates will have voting powers in the conference; hence their arguments and votes will avail to secure some compromise in favor of important American ideas. Finally, the draft adopted by the conference will be brought back directly to each State Legislature for ratification. And the personal interest of the delegation, the influence of the legislative members in the delegation, and the State pride in having shared in a world-conference, will present some strong prospect of securing adoption. Thus, the international rule will become the rule for that State. Thereafter, its acceptance by one or more powerful American States for that

⁴³ *Id.* at 430.

⁴⁴ 1921 *Handbook Nat'l Conf. Commissioners on Uniform St. Laws* 297, 348-349. A 1924 report sets out yet another possible scenario. *Report of the Committee on a Uniform Act for Compacts and Agreements between States*, 1924 *Handbook* 674, 677.

⁴⁵ U.S. Const. art. I, § 10 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power").

class of commercial transaction will induce, and in some cases will compel, other States to follow the example. And thus uniformity will gradually be attained.⁴⁶

When, however, representatives of the National Conference approached the State Department they were politely but firmly rebuffed. "We find the officials of the State Department who have been consulted to be reluctant to concede in advance, any lack of constitutional power on the part of the Federal Government to deal with the subjects referred to or to acknowledge any limitation upon the power of the United States which would render it necessary for the States to co-operate with the Federal Government in such respects by means of State Compacts."⁴⁷ The Conference quietly dropped the proposal.

So matters stood when Professor Yntema wrote. United States economic hegemony in the years immediately following World War II forced a reassessment. A more immediate catalyst was the visit to the United States by Dr. Mario Matteucci, then Secretary-General of UNIDROIT. As Joe C. Barrett, a uniform law commissioner from Arkansas who was then president of the National Conference, later testified before Congress, Dr. Matteucci's appearance before the annual session of the National Conference turned on the light bulb.⁴⁸ Mr. Barrett successfully persuaded the American Bar Association to appoint a special committee on international unification of private law in 1958. The A.B.A. House of Delegates approved in principle the special committee's report in 1961⁴⁹ and, after the endorsement of established Sections of the A.B.A., the House of Delegates adopted a resolution in 1963 recommending that the United States become a party to UNIDROIT and the Hague Conference on Private International Law.⁵⁰ In a masterful brief in support of its recommendation, the 1961 Report concludes that the treaty power is limited to genuine international concerns but that what is an international concern fluctuates to adjust to changing circumstances and that existing political organs will be sensitive to the political as well as constitutional checks in the federal system.⁵¹ With this support from the private sector, the State Department undertook to have Congress approve membership in these international bodies.

⁴⁶ 1921 *Handbook*, *supra* note 27, at 326-327.

⁴⁷ *Report of the Committee on Uniform Act for Compacts and Agreements between States*, 1927 *Handbook Nat'l Conf. Commissioners on Uniform St. Laws* 775, 777.

⁴⁸ Hearing on U.S. Participation in the Hague Conference and the Rome Institute (Sept. 16, 1963) before the Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs of the House of Representatives, 88th Cong., 1st Sess. at 13 (1963).

⁴⁹ Report of the Special Committee on International Unification of Private Law, 1961 A.B.A. Rep. 219, 248.

⁵⁰ 1963 A.B.A. Rep. 107 & 339-343.

⁵¹ *Report of the Special Committee*, *supra* note 50, at 248.

In his submission of the proposal to Congress, Acting Secretary of State George Ball emphasized that "[s]uccessful efforts to harmonize laws relating to international trade, commerce, and financial interchange will go far to facilitate transactions crossing international boundary lines."⁵² For this and other reasons, Mr. Ball recommended membership subject, however, "to the working out of suitable arrangements to meet the special requirements of the U.S. Federal system."⁵³ A Statement by the State Department's legal adviser, Abram Chayes, reflected similar concerns when he noted that uniform legislation would be preferable to conventions.⁵⁴ Mr. Barrett also testified, stating that because international trade had an impact on the agricultural economy of his State "[w]e are not talking here about super government, and one world, but it is a very practical problem of harmonizing rules of private law."⁵⁵ Even Professor Yntema, who was unable to be present in person, wrote the House committee. With respect to constitutional concerns, he submitted that fear that membership would infringe on areas of private law reserved to the States by the Constitution was specious. "[F]acilitation of international commerce in this manner by Federal offices, and the improvement of the laws by which it may be affected, does not, and should not, import implementation by federal legislation, except as expressly authorized by the Constitution. In matters within the province of State legislation, there is no apparent reason why the results of such participation requiring legislative action should not be treated exactly as the uniform and model laws prepared by the National Conference of Commissioners on Uniform State Laws."⁵⁶

Persuaded by these arguments, among others, the Senate and the House of Representatives adopted a joint resolution supporting U.S. membership in the two international bodies and President Lyndon Johnson signed the resolution into law on December 30, 1963.⁵⁷

Having overcome previous inhibitions, supporters of U.S. participation in the unification projects of these and other bodies faced two questions: how best to implement a process by which State interests can be accommodated, and how to integrate domestic law and legal rules generated by the international process. That the answers to these questions are often unsatisfying reflects both the difficulty of the issues and institutional limitations.⁵⁸

⁵² Letter of George W. Ball to Hon. John W. McCormack, Speaker of the House of Representatives (Aug. 9, 1963), reprinted in House Hearing, *supra* note 49, at 4.

⁵³ *Id.*

⁵⁴ *Id.* at 6.

⁵⁵ *Id.* at 17.

⁵⁶ *Id.* at 25.

⁵⁷ 77 Stat. 775 (1963), codified as 22 U.S. Code § 269g (1988).

⁵⁸ For a history of the U.S. approach, see Peter H. Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, Académie de droit international, Recueil des Cours, 1994-V, t. 249, 8-144.

As for the question of how to ensure that State interests are properly accommodated, commentators had made various recommendations, some of which are referred to earlier in this essay. The Secretary of State promptly appointed an Advisory Committee on Private International Law with representatives from the major legal bodies interested in harmonization of private law.⁵⁹ The committee was to advise the State Department on the policies to be put forward by U.S. delegates to the international bodies. Members of the committee were also frequently selected as delegates to attend international meetings and conferences.

The National Conference of Commissioners on Uniform State Laws initially undertook work in this field with enthusiasm.⁶⁰ The personal interest of leading commissioners, such as Mr. Barrett, ensured that the Conference participated actively. For several years it had financial support from the Ford Foundation to fund studies of projects proposed by the international bodies. Interest among all participants waned during the 1970s and into the 1980s. Leadership in the National Conference changed; its Executive Director had little interest in the international projects. The office within the State Department's Legal Adviser's Office charged with private international law affairs was not given support and the first incumbent in that office, Ambassador Richard Kearney, retired in protest. The few persons that had participated in the Secretary of State's Advisory Committee mobilized to prevent the shutting down of that office but knowledge of the private international law process was confined to a small, but elite number. Only after the United States ratified the United Nations Sales Convention was there widespread interest once again. This, together with open government rules that required the Advisory Committee process to be opened up, encouraged wider knowledge of developments in this field. A change in leadership in the National Conference has led to support for active participation in the international projects. Coordination tends so far, however, to be *ad hoc*.

Answers to the question of how to integrate domestic law and legal rules generated by the international process have also been *ad hoc*, perhaps of necessity. Integrating the Hague Service and Evidence Conventions into domestic rules of court, for example, suggests the need to adjust domestic rulemaking procedures to ensure participation by persons knowledgeable about relevant international norms and procedures.⁶¹ Different challenges are involved in the case of the U.N. Sales Convention. Revision of domestic sales law raises the difficult question of determining when, if at all, it is desirable to integrate the two sets of sales rules. Challenged to

⁵⁹ Charter of the Secretary of State's Advisory Committee on Private International Law, art. I (November 20, 1992). For a brief overview of the work of the State Department office, see Patricia B. Rogers, *Private International Law*, 23 *Int'l Law* 207 (1989).

⁶⁰ See generally Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 *U. Pa. J. Int'l Bus. L.* 227, 260-279 (1992).

⁶¹ See, e.g., Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 *Law & Contemp. Probs.* 103 (1994).

articulate a systematic approach to this issue,⁶² the reporter for revision of Article 2 (Sales) of the Uniform Commercial Code has recently responded with a thoughtful brief in support of the drafting committee's decision that "vertical" uniformity with the Convention is not advisable: "(1) absence of compatible background law; (2) Article 2 is part of an integrated commercial code; (3) nature of the code; (4) limitations in scope; (5) differences in drafting process; (6) differences in substance; and (7) technological and transactional obsolescence."⁶³ Revision of the Uniform Commercial Code's rules on letters of credit are, in turn, also *sui generis* because a significant number of letters of credit involve transnational transactions, there is well-established custom, and the International Chamber of Commerce's *Uniform Customs and Practice for Documentary Credits* (UCP 500) are incorporated into the credits by reference.⁶⁴

Thus, at present open questions of process and substance remain. Professor Yntema would surely have enjoyed the challenge of working out effective answers.

IV. – Several concluding brief thoughts. Professor Yntema and others who have reported on unification of law in the United States do not report what happens in practice outside the courts. The reason is clear: to gather the empirical evidence would be an extraordinary task even for a limited subject area. Nevertheless, formal unity may be an empty shell if it does not reflect actual practice. Similarly, the reports – with the exception of the 1961 A.B.A. Special Committee report – do not explore unification efforts by informal trade and industry groups through codified trade usages and form contracts. Gathering this information is somewhat less daunting and should not be ignored.

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L'UNIFICATION DU DROIT AUX ETATS-UNIS: MISE A JOUR DE LA SITUATION (Résumé)

par Peter Winship (Professeur de droit "James Cleo Thompson Sr. Trustee" - S.M.U School of Law, Dallas, Texas)

Il y a près de 50 ans, le Professeur Yntema examinait dans un article publié dans *l'Unification du droit* (1948, p. 301) l'état de l'unification du droit aux Etats Unis; il relevait alors le rôle prépondérant de cinq institutions: la structure fédérale de l'union et l'influence des tribunaux, la nature de la Common Law (et la contribution de la doctrine à travers l'enseignement et les écrits), l'activité des barreaux des Etats, la National Conference of Commissioners on Uniform State Laws, et le American Law Institute.

⁶² Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 Loy. L. Rev. 43, 45-50 (1991).

⁶³ Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 Nw. J. Int'l L. & Bus. 165, 171 (1995).

⁶⁴ James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 Nw. J. Int'l L. & Bus. 189, 210-214 (1995).

Quelle est la situation aujourd'hui? Reprenant l'articulation du Professeur Yntema, et rapportant les opinions principales qui se sont exprimées dans le débat doctrinaire sur l'attitude aux Etats-Unis à l'égard de l'unification du droit, l'auteur constate en définitive que peu de changements sont intervenus. L'attachement aux compétences nationales locales reste profondément ancré: si la législation fédérale serait le meilleur moyen pour atteindre une uniformisation du droit, les Etats ont des compétences très larges en vertu de la Constitution mais qui résultent surtout de considérations d'opportunité, avec une tendance actuelle au renforcement de leurs compétences. La Cour suprême elle-même n'exerce pas de contrôle des décisions de droit privé rendues par les juridictions étatiques. Tout en rapportant le rôle de la National Conference of Commissioners on Uniform State Laws (à travers l'élaboration du Code de commerce uniforme dont la mise en application relève des Etats) et de l'American Law Institute (auteur des Restatements dans différents domaines du droit, ainsi que de Principes et de Projets) qui ont permis d'incorporer un grand nombre de pratiques communes dans le système juridique américain, l'uniformisation du droit n'est pas en général perçue comme une priorité.

C'est en revanche dans la participation des Etats-Unis dans les efforts d'unification internationale que se trouve la véritable nouveauté. A l'époque où écrivait le Professeur Yntema, la structure fédérale de l'Union et la compétence des Etats soulevaient des objections majeures à l'introduction de lois uniformes conclues au niveau international. Après un processus de conviction, l'adhésion des Etats-Unis en 1963 à Unidroit et à la Conférence de La Haye de droit international privé a marqué une évolution radicale d'attitude. Un comité consultatif de droit international privé fut alors constitué auprès du Secrétariat d'Etat, qui procède aux consultations nécessaires, notamment avec la National Conference of Commissioners on Uniform State Laws.

Comment préserver les intérêts des Etats, comment combiner le droit interne et les règles juridiques créées par le processus international d'unification: des réponses ont été apportées au cas par cas, laissant à ce jour le problème général, tant de fond que de procédure, en suspens. En conclusion, c'est plutôt à travers la codification des usages commerciaux par les milieux professionnels, et la pratique contractuelle, que l'auteur envisage la réalité du droit uniforme.

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