

# THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE INTERNATIONAL UNIFICATION OF PRIVATE LAW

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## 1. INTRODUCTION

The National Conference of Commissioners on Uniform State Laws (the "Conference") celebrates its centennial in 1992. The Conference has much to celebrate. During the 100 years of its existence the Conference has promulgated over 200 uniform and model acts on topics ranging from adoption to water use, although it is perhaps best known for its co-sponsorship of the Uniform Commercial Code. Tributes published to acknowledge the Conference's anniversary duly note these many achievements.<sup>1</sup>

Few of these anniversary tributes mention, however, the

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<sup>1</sup> For publications celebrating the National Conference's centennial, see WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1991); Symposium, *One Hundred Years of Uniform State Laws*, 89 MICH. L. REV. 2073 (1991); Fred H. Miller, *Introduction to the Idaho Law Review Symposium on Uniform Commercial Code Article 2: In Celebration of the One Hundredth Birthday of the National Conference of Commissioners on Uniform State Laws*, 27 IDAHO L. REV. 409 (1990-91); Frederick H. Miller, Patricia B. Fry & John P. Burton, *Introduction to Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 BUS. LAW. 1449 (1991); and Randall Samborn, *ULC to Meet—for 100th Time; Shadow Super-Legislature*, NAT'L L.J., Jul. 29, 1991, at 3.

At the time of writing the last available National Conference Handbook is the volume for 1986. Proceedings of the annual meetings for 1984-1988 and 1990 are available on microfiches but do not include the documentation available in the handbook. See Uniform St. Laws 143.5-A(1)-(6) (Hein). Although nominally celebrating the Conference's centennial the following essay therefore can comment only on its first 95 years. Given that there are few other public sources of information about the Conference's actions and plans, it is unfortunate that the Conference is unable to prepare its handbook more promptly. The newly-appointed Executive Director, Frederick H. Miller, has informed the author that he has asked the Conference staff to address the issue. Conversation with Frederick H. Miller (Aug. 12, 1991).

Conference's record of concern for developments beyond our national borders. From its inception, of course, the Conference's principal objective has been "to promote uniformity of state laws" within the United States.<sup>2</sup> Yet if you pick up almost any issue of the Conference's annual handbook you are likely to find some reference to foreign law or a transnational project. Skim the content of these references and you will discover recurring themes and forgotten initiatives.

The historical record cannot, of course, answer whether the Conference *should* be concerned with foreign law or transnational initiatives. Yet the thoughtful answer will surely take into account what the Conference has done in this area. The record may illustrate, for example, ways in which the Conference might benefit from study of foreign developments. It may also suggest institutional constraints on such studies.

This essay first sketches the five chronological periods into which the Conference's historical record falls and then examines the composite picture for implications. Given growing interest in the international unification of private law, the essay assumes that a serious review of this history and its implications is a fitting tribute not only to the Conference's past but also to its future.

## 2. GETTING THE JOB DONE (1892-1910)

As one reads the published records of the National Conference's early years, one is reminded that the Conference did not initially jump "full blown" into the public arena. Emerging in the context of existing and proposed<sup>3</sup> bodies with

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<sup>2</sup> Art. I, section 2 of the Conference's first written constitution, adopted in 1905, states: "Its [the Conference's] object shall be to promote uniformity of state laws." 1905 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 6 [hereinafter 1905 PROC.]. Section 1.2 of the present Constitution states: "It is the object of the National Conference to promote uniformity in the law among the several states on subjects where uniformity is desirable and practicable." 1985 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 513 [hereinafter 1985 HANDBOOK].

<sup>3</sup> In the early 1890s, for example, a bill was introduced in the House of Representatives to create a national commission on uniform laws "to prepare codes of the substantive law upon subjects of commercial and mercantile law, and especially the law upon sales and sellers' liens, stoppage in transitu, the liability of carriers, negotiable paper, the making and execution of deeds, and the law of domestic relations, including marriage and divorce . . . and to prepare codes of civil procedure and criminal

related missions, the Conference struggled to define its role and its procedures. Its list of uniform laws to be drafted was eclectic and constantly changing. Questions of method remained open; procedures were not yet standardized. As late as 1904, the commissioners vigorously debated whether the Conference, consisting as it did of state-appointed delegations, could promote uniform law by endorsing federal legislation.<sup>4</sup>

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procedure for the courts of the United States." Frederic J. Stimson, *Uniform State Legislation*, 5 ANNALS AM. ACAD. POL. & SOC. SCI. 941 (May 1895), reprinted in 1899 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 34 [hereinafter 1899 PROC.].

<sup>4</sup> The history of the National Conference's consideration of the proposed uniform corporation law deserves further study. In 1903, Walter S. Logan, the chairman of the Committee on Uniform Corporation Law, thought it unwise for the Conference to take the initiative as to congressional action but he suggested that it might be feasible for Congress to enact legislation which states could then copy in state legislation. 1903 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 6-7 [hereinafter 1903 PROC.]. The Committee's 1904 report, however, stated: "The first thing to be done, it seems to us, is to secure the passage by Congress of a National Incorporation Law, and to require that a corporation to carry on interstate commerce under the Constitution should conform to the provisions of the national law." 1904 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 99. This language sparked extensive debate and parliamentary maneuvering with the result that the matter was postponed indefinitely. *Id.* at 24, 27-44. The following year, a chastened committee submitted a much more cautious report. See 1905 PROC., *supra* note 2, at 111 ("A national incorporation law would secure uniformity so far as it goes, but the field of national action in respect to corporations is at the best exceedingly limited").

In the course of the 1904 debate, Frederic J. Stimson, the Conference's secretary, stated:

The object of the appointment of commissioners to this Conference was to secure uniformity of legislation among the states, but the reason behind the object was to secure a remedy against the conflict of laws. . . . Our aim should be to secure wise laws operating uniformly throughout the United States. If that result can be most readily attained in some instances by national legislation, I see no harm in resorting to it. It may not be amiss for me, as the author of this movement for securing uniformity of legislation, to say that the chief motive for suggesting the necessarily cumbrous method of separate state action was that many of the evils arising from the conflict of laws could not be reached by Congress. . . . I do not deem it at all antagonistic to the spirit of our Conference to seek to procure harmony and uniformity in our laws by means of national legislation, wherever that course is clearly permissible under the United States Constitution, and otherwise appears to us expedient and desirable.

1904 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 41-42 [hereinafter 1904 PROC.]. See also 1902 PROC. NAT'L CONF. COMMISSIONERS

Spurred on by this debate, the Conference adopted its first written constitution the following year—the first year in which virtually all states sent delegations to its annual meeting.

Even without a written constitution, however, the commissioners apparently understood that transnational unification was no part of the Conference's objectives. There seemed to be an implicit assumption that other organizations,<sup>5</sup> such as the American Bar Association,<sup>6</sup> were more appropriate vehicles

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ON UNIFORM ST. LAWS 7-8 [hereinafter 1902 PROC.]. In his presidential address, Amasa M. Eaton stated:

Where uniformity cannot be secured by State legislation and can be secured by National legislation through the right of Congress to legislate thereon under the Constitution it is our duty to help in bringing about this desirable uniformity through Congressional legislation, as much as it is to help in bringing about uniformity through uniform State legislation in other cases where State legislation is the proper legal way to bring about uniformity, and where Congress has no power to legislate, except in the District of Columbia or in the national possessions.

*Id.*

<sup>5</sup> One should not overlook the fact that organizers of a "scientific" congress or conference at the end of the 19th century did not always assume that the meeting would be "institutionalized" in a permanent organization with established procedures. There had grown up a tradition, beginning with the 1851 International Exposition in London, of convening international scientific congresses in conjunction with "World Fairs." Thus, a Universal Congress of Lawyers and Jurists met in 1904 in St. Louis, Missouri at the time of the Universal Exposition celebrating the centennial of the Louisiana Purchase. *Official Records of the Universal Congress of Lawyers and Jurists held at St. Louis, Missouri, U.S.A., September 28, 29, and 30, 1904* (1905) [hereinafter *Official Records*]. Similarly, the conferences convoked during this period by the Government of the Netherlands to study private international law met at irregular intervals and did not have a permanent secretariat. These conferences are the forerunners of what is now known as the Hague Conference on Private International Law but the latter body did not become a permanent international institution until 1955. Hague Conference on Private International Law, *open for signature* October 31, 1951, *entered into force* July 15, 1955, 220 U.N.T.S. 121 (1955), 15 U.S.T. 2228, T.I.A.S. No. 5710. The Latin American private international law congresses of this period also did not result in permanent institutions. *The Inter-American System: Treaties, Conventions & Other Documents*, Part I, 25-27 (F.V. García-Amador ann., 1983).

<sup>6</sup> The relation between the Conference and the American Bar Association over the last 100 years deserves further study. When established in 1878 the Association had as one of its objectives the promotion of "uniformity of legislation throughout the Union." A.B.A. Const. art. I, 3 A.B.A. REP. 50 (1881). In 1889, the Association appointed a Committee on Uniform State Laws, which endorsed the call for states to appoint uniform law commissioners. See 13 A.B.A. REP. 336-37 (1890). See also 14 A.B.A. REP. 365-75

for the study of transnational issues. The A.B.A.'s proceedings for this period certainly provide numerous illustrations of the Association's active interest in foreign developments. In 1882, for example, an A.B.A. committee endorsed the draft rules on the validity of foreign divorces set out in David Dudley Field's draft International Code.<sup>7</sup> In 1895, the Association appointed a committee to "inquire into and collate facts relative to the movement now in progress to further a uniform system of legal procedure, and the study of comparative legislation on that subject throughout the English-speaking world."<sup>8</sup> There were, moreover, close ties between the Association and the International Law Association. In 1881, the A.B.A. appointed four delegates to a meeting of the I.L.A. (then known as the "Association for Reform and Codification of the Law of Nations") and the A.B.A.'s annual meeting approved the sending of a telegram stating that "[t]he American Bar Association (now in session), hoping to further the advancement of uniformity in the law of this country, wishes you success in your efforts to advance uniformity in the law of nations."<sup>9</sup> These ties were maintained, and in 1899 the two bodies met at the same time in Buffalo, New York.<sup>10</sup>

That the National Conference did not pursue international unification did not mean, however, that commissioners were unaware of foreign developments.<sup>11</sup> Many commissioners, of course, were also members of the American Bar Association and were aware of its proceedings. The Conference's records,

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(1891), reprinted in 1899 PROC., *supra* note 3, at 20 (summary of answers to survey about need for uniformity).

<sup>7</sup> See 5 A.B.A. REP. 293, 297 (1882). The committee's reference to Mr. Field's draft code is to DAVID DUDLEY FIELD, OUTLINE OF AN INTERNATIONAL CODE, arts. 674-677 (2d ed. 1876).

<sup>8</sup> 18 A.B.A. REP. 33 (1895). The committee reported the following year. 19 A.B.A. REP. 141 (1896). The Association accepted the report and subsequently discharged the committee. See 19 A.B.A. REP. 22-27 (1896); 22 A.B.A. REP. 33 (1899).

<sup>9</sup> 4 A.B.A. REP. 6, 10-11 (1881) (proposed wording of the telegram initially ended with the phrase "laws of the world" and was amended to read "law of nations").

<sup>10</sup> See 22 A.B.A. REP. 3 n.1 (1899).

<sup>11</sup> For a survey of late 19th century international unification initiatives, see GEORG COHN, *The Beginnings of the International Assimilation of Commercial Law*, in 11 CONTINENTAL LEGAL HISTORY SERIES 347 (1918) (essay first published in 1888).

however, also contain occasional references to foreign projects.<sup>12</sup> In his 1903 presidential address, for example, Amasa M. Eaton contrasted European attempts at unification by central governments with U.S. attempts to induce states to enact parallel laws.<sup>13</sup> The following year, Mr. Eaton noted with pride that "[t]he existence of [the Conference], as a permanent body, was one of the causes that encouraged the Netherlands to call the first Hague Conference [on private international law]."<sup>14</sup>

Of more practical importance than these presidential references was the "English presence." By letter and in person, a succession of distinguished informants called the Conference's attention to the late 19th century codifications of commercial law adopted in England. The Conference's uniform laws on negotiable instruments, sales, and partnerships—the

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<sup>12</sup> In addition to the examples cited in the text, see LEWIS N. DEMBITZ, *Uniformity of State Laws*, reprinted in 1899 PROC., *supra* note 3, at 58-59 (description of 19th century unification efforts in German-speaking countries from article originally printed in the *North American Review*).

<sup>13</sup> Mr. Eaton contrasted the attempts as follows:

There is a manifest tendency towards uniformity, not only in this country but also in Europe. But it seeks to effect this result in different ways. In Europe it is effected through increase of the central power, witness the transference of control over marriage and divorce in 1876 from the several Swiss cantons to the federal government; and more recently the enactment of a code of law for the whole German empire, superseding the local legislation of the several component kingdoms, duchies, etc. In the United States the tendency is to secure uniformity, not by transferring power to the national government, but by inducing the several states to legislate alike.

1903 PROC., *supra* note 4, at 29.

<sup>14</sup> 1904 PROC. *supra* note 4, at 66, quoting from Simeon E. Baldwin, *Recent Progress Towards Agreement on Rules to Prevent Conflict of Laws*, 17 HARV. L. REV. 400, 403 (1903). At the time of Mr. Eaton's address, the Netherlands Government had convened four conferences on private international law at The Hague. Papers analyzing the products of these Hague conferences were presented to the Universal Congress of Lawyers and Jurists held in St. Louis in September 1904. These papers were published in the Official Report of the Congress, together with the texts of draft conventions and a bibliography. See *Official Records*, *supra* note 5, at 117-77, 332-78 (papers by D. Josephus Jitta and Friedrich Meili; comments by Simeon E. Baldwin; draft conventions; bibliography) (Meili's paper is reprinted, with slight amendments, in 11 CONTINENTAL LEGAL HISTORY SERIES 470 (1918)). Several uniform law commissioners were delegates to the Congress and would therefore be aware of the work of the Hague conferences.

Conference's most lasting legacy from its early years—can be traced to these English sources.

At the Conference's 1895 meeting, Judge Lyman D. Brewster read a letter from Lord Herschell, then Lord Chancellor of England, stating that:

there was a common agreement in that country that the code or act above referred to had been of great utility, and that it had been adopted one after another by all the self-governing British colonies, so that the code is now applicable to the whole of the British dominions; and stating his Lordship's opinion that a similar code for the United States of America would be a boon for the commercial community of both countries.<sup>15</sup>

Lord Herschell's suggestion struck a sympathetic chord. A uniform law governing negotiable instruments, for example, had been on everybody's list of necessary legislation for a number of years. The 1895 meeting requested its commercial law committee "to procure as soon as practicable a draft of a bill relating to commercial paper, based on the English statute on that subject, and on such other sources of information as may be deemed proper to consult. . . ."<sup>16</sup> The committee promptly hired a New York lawyer as draftsman, gave him several months to prepare a draft text, and then held meetings to review his text. At its 1896 meeting, the Conference promulgated this draft as a uniform act, the Negotiable Instruments Law.<sup>17</sup>

Speaking at the Conference's 1902 meeting, M.D. Chalmers, draftsman of both the Bills of Exchange Act and the Sales of Goods Act, suggested that the commissioners might study the feasibility of enacting uniform laws drawn from the English partnership and sales statutes.<sup>18</sup> He reported that

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<sup>15</sup> 1895 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 11 [hereinafter 1895 PROC.]. Farrer Herschell (1837-1899), 1st Lord Herschell, was Lord Chancellor in 1886 and 1892-1895. When still a member of the House of Commons Lord Herschell chaired the select committee that reviewed the Bill that became the Bills of Exchange Act of 1882.

<sup>16</sup> *Id.* at 13-14.

<sup>17</sup> *Unif. Negotiable Instruments Law*, 3A U.L.A. 479 (Master ed. 1981), SUPERSEDED BY U.C.C. art. 3 (1952).

<sup>18</sup> 1902 PROC., *supra* note 4, at 15-16, 22. See also SIR MACKENZIE DALZELL CHALMERS, DIGEST OF THE LAW OF BILLS OF EXCHANGE (1878).

"[t]he mercantile community in England is strongly in favor of codification and the three acts on negotiable instruments, sales of goods, and partnership have proven real practical helps given by the lawyers to the men of business."<sup>19</sup> The following year, Sir Frederick Pollock, draftsman of the Partnership Act, also reported to the commissioners that "the code on that subject [partnership] in England having been in force about 12 years and having proven so satisfactory, would be an excellent working model for an American statute."<sup>20</sup> Although it took the Conference somewhat longer to respond to these suggestions than was the case with the Negotiable Instruments Law, its Uniform Sales Act and Uniform Partnership Act also "borrowed" from the English acts.<sup>21</sup>

It is tempting to cite these borrowings as an illustration of the strength of a "Anglo-American legal community" that flourished at the turn of the century. In a recent study of this period, Professor Richard Cosgrove describes "[t]he formation of a community dedicated to the celebration of the common law for its unifying force dated from about 1870, reached a zenith of influence in the years before World War I, and then declined until about 1930, when it ceased to attract loyalty on either side of the Atlantic."<sup>22</sup>

When addressing their American audience, these English visitors did appeal to the common legal heritage of England and the United States. In a paper on "Codification of Commercial Law" delivered at the 1902 annual meeting of the Ameri-

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This publication became the basis for Chalmers's draft of the Bills of Exchange Act 1882. He subsequently drafted the Sales of Goods Act 1893. In 1902 Chalmers was Parliamentary Counsel to the Treasury.

<sup>19</sup> 1902 PROC., *supra* note 4, at 22.

<sup>20</sup> 1903 PROC., *supra* note 4, at 8. Sir Frederick Pollock (1843-1937) is known in the United States as a correspondent with Oliver Wendell Holmes, Jr., and as co-author with Frederic Maitland of the classic study of medieval English legal history. See HOLMES-POLLOCK LETTERS (Mark de Wolfe Howe ed., 1941); FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (1895). For a fuller study of Pollock as a member of the Anglo-American legal community, see RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930 134-60 (1987) [hereinafter COSGROVE].

<sup>21</sup> Compare *Unif. Sales Act*, 3A U.L.A. 447 (Master ed. 1981) (*superseded* by U.C.C. art. 2 (1952)) and *Unif. Partnership Act*, 6 U.L.A. (Master ed. 1969)) with *Sales of Goods Act 1893*, 56 & 57 Vict. c.71 (*superseded* by *The Sales of Goods Act 1979* (1979 c.54)).

<sup>22</sup> COSGROVE, *supra* note 20, at 1.



can Bar Association and reprinted in the Conference's proceedings, M.D. Chalmers spoke eloquently of this heritage:

Whether we be American or English lawyers, we have in the common law the same foster mother, and from that foster mother we have both alike imbibed the principles which guide us in the practice of our profession. Though I am a strong advocate of codification, I am no disparager of the common law, which is unsurpassed for its collection of reasoned principles and applied precedents. Every American or English code must presuppose the common law. I think you may compare a code to a building and the common law to the atmosphere which surrounds that building, and which penetrates every chink and crevice where the bricks and mortar are not.<sup>23</sup>

That such an eminent authority as Chalmers could report that this English "codification" coexisted with the common law answered critics who objected to codification on jurisprudential and political grounds.<sup>24</sup>

Yet nothing in the Conference's sparse records suggests that the commissioners saw this "borrowing" from foreign sources as remarkable. Having identified a task (i.e., the need to draft a uniform law on negotiable instruments), the Conference would set to work with whatever was ready at hand. Judge Lyman D. Brewster's reaction to a book arguing that the law should be evolved by judges rather than legislatures captures this practical approach:

Into the great question of general codification, which the learned author discusses with a keenness of logic, and stress of special pleading, that would not discredit the a priori speculations of the School men of the Middle Ages, I have no desire, at this time, to enter,

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<sup>23</sup> M.D. CHALMERS, *Codification of Commercial Law*, reprinted in 1902 PROC., *supra* note 4, at 41. See also 1902 PROC., *supra* note 4, at 15 (summary of similar address to Conference). One should remember, of course, that glorification of the common law continues to be standard fare for after dinner speeches and similar occasions.

<sup>24</sup> Cf. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 70-72 (1977) (a defense of the apparent paradox that "early twentieth-century codifiers were interested in common law preservation rather than statutory reform").

believing the whole subject, like most practical matters in politics, finance, and law, to be best solved by experiment, and experience and that the real truth on this topic, the wise solution of the problem, lies between the extremes, and in Partial Codification. It is, at least in England, no longer a question of everything codified, or nothing codified, but as to what branches of law can be best codified.<sup>25</sup>

The Conference, moreover, did not slavishly copy the English legislation. The Conference's 1895 request for a commercial paper draft stated that it was to be based not only "on the English statute" but also "on such other sources of information as may be deemed proper to consult."<sup>26</sup> The draftsman and the subcommittee that advised him modified both the form and the substance of the English Act. The resulting 1896 uniform law, as Judge Brewster informed the American Bar Association several years later, is "an American, rather than an 'Americanized' Act."<sup>27</sup>

Judge Brewster emphasized the differences from the English model, rather than the similarities:

While Mr. Crawford has made use of the English Act, and Continental codes, so far as they served his purpose, he has been especially careful to state the law as it has been laid down in the American cases; and it may be safely said that there is not an important provision in the Act which is not supported by some well considered decision of an American court, of high authority, or by some American statute, which has been tested, and proved by experience.<sup>28</sup>

Moreover, Judge Brewster stressed that the drafters had taken pains to ensure that the substantive legal rules conformed with American case-law authority:

Where the decisions of the state courts were conflicting, the decisions of the Supreme Court of the United States

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<sup>25</sup> Lyman D. Brewster, *Uniform State Laws*, 21 A.B.A. REP. 315 (1898), reprinted in 1899 PROC., *supra* note 3, at 47, 52.

<sup>26</sup> See *supra* note 16.

<sup>27</sup> Brewster, *supra* note 25, at 51.

<sup>28</sup> *Id.* at 50-51.

were followed, when any changes were made from the language of the English Bill. Care has been taken to preserve, as far as possible the use of words which have had repeated construction by courts, and have become recognized terms in the Law Merchant.<sup>29</sup>

Later commentators have noted, in particular, the important influence of the California Civil Code on the structure and language of the uniform law.<sup>30</sup>

This need to find authority for the uniform law in American case-law posed problems for the American draftsman which his English counterpart did not confront—a factor that did not go unnoticed. Judge Brewster, for example, noted:

In speaking of the decided advantage the Conference of Commissioners has in following, if found advisable, the action of the Mother Country, in digesting branches of commercial law with a clear, and systematic statement of their established principles, it should always be remembered that, in the nature of the case, there is much more need of this sort of codification here, than in England. In Great Britain there is but one court of final resort. Conflicting opinions there mostly arise in points not carried to that court. In our country, there are fifty courts of final resort, and how widely they sometimes differ in the result of their discovery of what is supposed to be the common law, on the same state of facts, the conflicting decisions of each Annual Digest of

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<sup>29</sup> *Id.* at 51. See also 1895 PROC., *supra* note 15, at 12 ("Judge Brewster then pointed out that in some respects our law had improved on the British Act"). When copies of Mr. Crawford's draft were circulated for comments, the text of the English act was attached for comparison together with Mr. Crawford's annotations referring to American case-law, treatises, and statutes. See 1899 PROC., *supra* note 3, at 50.

<sup>30</sup> See, e.g., BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW 74-79 (Frederick K. Beutel ed., 7th ed. 1948) (California Code influenced outline and scope of uniform law). Note, however, that Beutel's seventh edition of BRANNAN footnotes each section of the American Act with appropriate cross-references to the English Act and sets out the full text of the English Act in an appendix. See *id.* at 1390. Other commentators have noted that Section 20 (liability of agent who signs instrument) of the Negotiable Instruments Law had been taken deliberately from the German law. Lyman Denison Brewster, *The Negotiable Instruments Law—A Rejoinder to Dean Ames*, 15 HARV. L. REV. 26, 26 (1901).

over 3,000 pages of marginal notes fully attest.<sup>31</sup>

Dean James Barr Ames later echoed this observation:

The English draftsman has a very different problem from the American draftsman because he is dealing substantially with the law of one jurisdiction, and his object is to make a digest which shall receive Parliamentary sanction, while our attempt is to bring about uniformity in the laws of between forty-five and fifty jurisdictions.<sup>32</sup>

Dean Ames, who had been charged with drafting a uniform partnership act, then pointed out that partnership concepts and rules were not as uniform as commercial paper and sales law. To make the law uniform, in other words, would require potentially significant amendments to the English legislation.<sup>33</sup>

Although both Judge Brewster and Dean Ames were Anglophiles—note Judge Brewster's reference to the "Mother Country"—neither suggested that the American draftsman's task was to unify the commercial law of a wider Anglo-American legal community. Only later did those resisting change suggest that it is necessary to retain the common legislation of the English-speaking world.<sup>34</sup>

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<sup>31</sup> Brewster, *supra* note 25, at 51.

<sup>32</sup> See 1905 PROC., *supra* note 2, at 24.

<sup>33</sup> *Id.* at 24-25.

<sup>34</sup> See *infra* notes 43, 44, & 76 and accompanying text. See also Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 564 (1950) ("When the American Act was drafted it was thought to be of considerable advantage that the statute so closely resembled the English statute. . . . It is surprising, when the scope of the world is now narrowed by increased speed of transportation, and when there is an earnest desire for foreign commerce, that the advantage of similarity to the English law should be so lightly set aside"). But see *Extract from the President's Annual Address delivered at the Meeting of the American Bar Association, 1902*, reprinted in 1902 PROC., *supra* note 4, at 40 ("Thus, seemingly, the day cannot be far distant when the law relating to this important subject will be substantially the same wherever the English language is spoken. . . .").

### 3. PARTICIPATING IN INTERNATIONAL UNIFICATION (1910-1930)

By 1910, the National Conference began to discover a world beyond the Anglo-American legal community. United States flirtation with colonial power following the Spanish-American War<sup>35</sup> raised issues that came to the Conference's attention. The Conference's Secretary reported in 1910 that the Governor of Puerto Rico had agreed to appoint three Commissioners,<sup>36</sup> and that he had corresponded with the Committee on Codes of the Philippine Islands.<sup>37</sup> In 1913, the Conference met in Canada for the first time, an event that stimulated the president to suggest that the meeting might lead "to a

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<sup>35</sup> The United States had acquired control of Puerto Rico and the Philippine Islands in the settlement of the Spanish-American War. Spanish law had been the governing law in these territories. Although Spanish law was hardly primitive, it was "continental." See generally, WINFRED LEE THOMPSON, *THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO, 1898-1905* (1989).

Proposals were made to introduce uniform laws into the Philippines by the United States. See, e.g., Charles Sumner Lobingier, *Codification in the Philippines Uniting the Civil and Commercial Codes*, 3 COMP. LAW BUREAU OF THE A.B.A., ANN. BULL. 42, 46 (1910):

But with these exceptions [in existing legislation] the adoption of the work of the Commissioners on Uniform State Laws would not only supply certain immediate needs in the Philippines but it would tend to place their legislation in line with the most advanced, give them the benefit of previous American judicial construction, and place at their disposal the results of the best professional and expert effort in the direction of legislative reform. Such an opportunity cannot wisely be ignored.

Judge Lobingier, a lawyer from the United States, attended the 1917 meeting of the National Conference as a guest from the Philippine Islands. 1917 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 134-35 [hereinafter 1917 PROC.]. Although the Philippines did adopt several uniform acts, a later Conference report notes that the Philippines were represented only once at a Conference meeting. 1938 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 48. See also 1930 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 214. The representative, Col. Blanton Winship, is only very distantly related to the author.

<sup>36</sup> Charles Thaddeus Terry, *Report of the Secretary*, 1910 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 125, 126 [hereinafter 1910 PROC.]. For a fuller report regarding Puerto Rico, see 1918 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 37-38 [hereinafter 1918 PROC.].

<sup>37</sup> Charles Thaddeus Terry, *Report of the Secretary*, 1910 PROC., *supra* note 36, at 125, 126.

recognition of the need of international uniformity.<sup>38</sup> At its 1916 meeting, safely back on U.S. soil, the Conference heard an address by an American citizen resident in China, who spoke of the need to enact U.S. private law to be enforced in the consular courts of China.<sup>39</sup>

For the first time, too, the Conference began to notice international conferences held to consider private law matters. The Secretary's Report for 1910 calls the Conference's attention to the secretary's extensive discussions with Mr. Charles A. Conant, the U.S. delegate to a 1910 Conference at The Hague assembled to prepare uniform rules to govern bills of exchange.<sup>40</sup>

[Y]our Secretary expressed his present view to the effect that it would be unavailing at this time to change the Negotiable Instruments Act approved by the Conference and enacted into law in thirty-eight states, territories and federal districts, but that the advisable course would be to model the regulations, relating to International Bills of Exchange, at the Conference to be held at The Hague, as far as possible after the provisions of the Negotiable Instruments Act of this country.<sup>41</sup>

The following year, President Walter George Smith included in his address to the Conference a lengthy report on

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<sup>38</sup> 1913 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 97-98 [hereinafter 1913 PROC.].

<sup>39</sup> 1916 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 51 [hereinafter 1916 PROC.]. The Conference later sent copies of its publications to the Law Codification Commission of China. 1918 PROC., *supra* note 36, at 175.

<sup>40</sup> The 1910 Hague conference did not complete its work and a second conference was held at The Hague in 1912. For reports on these Hague conferences, see Francis M. Burdick, *International Bills of Exchange*, 6 ILL. L. REV. 421 (1912); Ernest G. Lorenzen, *The Hague Convention of 1912, Relating to Bills of Exchange and Promissory Notes: A Comparison of Anglo-American Law*, 11 ILL. L. REV. 137, 137-140 (1916).

<sup>41</sup> Charles Thaddeus Terry, *supra* note 36, at 126. See also Amasa M. Eaton, *Address of the President*, 1909 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 55, 57-58 (report on Council of English Institute of Bankers on proposal to unify bills of exchange law). Mr. Eaton merely notes, however, that "[t]he appetite for uniform legislation is spreading even beyond the limits of the United States."

the 1910 Hague conference.<sup>42</sup>

The Conference will be specially interested in this subject as it shows that the desire for uniformity in commercial matters has spread beyond the borders of any one country, and although the project of a commercial law, uniform among all the nations of the world, is not at present attainable, the prospect of uniformity among the nations other than those of the Anglo-Saxon family and a close approach on many subjects to uniformity substantially existing in that family of nations, is significant and gratifying.<sup>43</sup>

To explain why international uniformity is unattainable, Mr. Smith quoted the statement made by Mr. Conant at The Hague:

[T]here is great reluctance in America to undo the long and arduous work which has brought about uniformity in thirty-five American states, four territories, and in Great Britain and her dependencies. The scope and policy of American laws differ in some respects from the systems of the countries of the continent. We have no code of commerce distinct from the common law, we recognize no distinction between merchants and others who draw bills or sign notes, and we have no separate tribunals for dealing with commercial cases.<sup>44</sup>

With evident satisfaction, Mr. Smith observed that "[t]he conclusions reached by Mr. Conant and by the British delegates were the same as those that our Committee on Commercial Law expressed to Mr. Conant in response to his request for an expression of opinion both before and after The Hague Conference."<sup>45</sup>

Several years later, the National Conference reacted in much the same way to unification efforts among the countries of the western hemisphere. Following the outbreak of war in

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<sup>42</sup> Walter George Smith, *Address of the President*, 1911 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 95, 109-13 [hereinafter 1911 PROC.].

<sup>43</sup> *Id.* at 112.

<sup>44</sup> *Id.* at 111.

<sup>45</sup> *Id.* at 112-13.

Europe, the U.S. government recognized the strategic advantage of developing pan-American relations. In 1915, the first Pan-American Financial Conference met in Washington, D.C. and called for the unification of commercial law. The following year, the Inter-American High Commission (originally the "International High Commission") was created with one of its objectives being to eliminate legal barriers by the promotion of uniform law.<sup>46</sup>

The National Conference of Commissioners on Uniform State Laws first heard of these initiatives at its 1915 meeting. A commissioner introduced a resolution calling for the appointment of a special committee to confer with the Committee on Uniform Laws of the Pan-American Conference.<sup>47</sup> President William H. Staake promptly expressed his doubt that the National Conference could take official action:

I have no doubt that if authorized representatives of the Pan-American Republics should desire our assistance we may be able to send them copies of our annual reports and to furnish them with any information which we have control of, as a matter of courtesy; but that we could do so officially I doubt.<sup>48</sup>

Given these doubts, the 1915 meeting referred the resolution to the executive committee for further consideration.

In his presidential address to the 1916 meeting, Mr. Staake returned to the subject. He set out in detail the proposed program of the High Commission<sup>49</sup> and observed that the objectives of the two bodies were essentially the same:

Our friends of the International High Commission think there is every reason why the Conference of Commissioners on Uniform State Laws should look with

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<sup>46</sup> For the early history of the Inter-American High Commission, see John Bassett Moore, *The Pan-American Financial Conferences and the Inter-American High Commission*, 14 AM. J. INT'L L. 343 (1920). The United States section of the High Commission was authorized by an Act of Congress of February 7, 1916. *Id.* at 345.

<sup>47</sup> 1915 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 85.

<sup>48</sup> *Id.* at 86. President Staake also stated that "If we are going to take up the subject of uniformity of Pan-American laws we might perhaps as well take up the subject of uniform laws for the Dominion of Canada." *Id.*

<sup>49</sup> William H. Staake, *Address of the President*, 1916 PROC., *supra* note 39, at 165, 183-86.



friendly interest upon the work inaugurated at Buenos Aires [where the Commission held its first meeting in April, 1916], and as a result of some of its deliberations and studies the International High Commission can give an undoubted stimulus to the work of the Conference itself; while the Conference can only be gratified at the sight of the expansion of its own model laws throughout Central and South America.<sup>50</sup>

Nevertheless, President Staaque concluded, "[i]n the judgment of your President, organic connection of the Conference with the Commission is not feasible"<sup>51</sup> and he recommended that the Committee on Commercial Law be asked to consider his remarks.

The Committee on Commercial Law, chaired by former-president Walter George Smith, promptly endorsed Mr. Staaque's position. The Committee's report concludes:

This Conference is composed of commissioners of the various states and possessions of the United States and is strictly limited to the consideration of matters relating to the uniformity of laws in the United States and its possessions. It has no authority to extend its work to foreign countries or to invite delegates from other bodies to sit with it or to send delegates to sit with them, and while that is so it is the subject of great satisfaction to know that some of the uniform laws prepared by it have met the approval of the very important and eminent body which represents the republics of South America and of the United States, and are under consideration for adoption by those republics.<sup>52</sup>

Recognizing, however, that the "uniformication and co-ordina-

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<sup>50</sup> *Id.* at 185-86. Earlier, President Staaque notes the High Commission's interest in the National Conference's uniform laws on negotiable instruments, bills of lading, and warehouse receipts. *See id.* at 184-85. For later reports of the adoption of uniform laws in Central and Latin America, see Moore, *supra* note 46, at 347; William A. Blount, *Address of the President*, 1920 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 101, 104-06 [hereinafter 1920 HANDBOOK].

<sup>51</sup> *Id.* at 186.

<sup>52</sup> *Id.* at 120.

tion of law is a consummation that has enlisted the attention of the world," the Committee recommended that the Conference's Secretary "assure the High Commission of the warm interest of this Conference in the work of the commission and its earnest hope that its labors will be crowned with success."<sup>53</sup> The report was adopted without debate.

At the same time that it endorsed a narrow view of its own objectives, the Conference recognized that the federal government had limited constitutional power to participate in the international harmonization of private law. In his lengthy report on the work of the International High Commission, for example, Mr. Staake quoted with approval from a memorandum prepared by Samuel Untermyer, a U.S. delegate to the High Commission's Committee on Negotiable Instruments:

It is hardly necessary to remind you that under our Constitution and because of the apportionment of powers between sovereign states and the Federal government, it is not within the province of the latter to legislate on this subject. Nor do I need to remind you that each state, under our Federal Constitution, is assured of its complete independence and is charged with the enforcement within its borders of contract obligations (including even the instrumentalities of foreign and interstate commerce as distinguished from such commerce itself) as though it were a sovereign nation, except that no state may by its constitution or through legislation take property without due process of law.<sup>54</sup>

The Conference's Committee on Publicity also accepted this constitutional analysis in its 1918 report:

The work of the International High Commission with respect to international jurisprudence presents an

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<sup>53</sup> *Id.* Former president Walter George Smith was chair of the Committee on Commercial Law and presented its report.

<sup>54</sup> 1916 PROC., *supra* note 39, at 184-85. Mr. Staake also summarizes a report on uniform corporation law submitted by Professor Roscoe Pound. "The regulation of commerce is committed to the Federal government; the regulation of instruments of commerce is committed to the states. This he says, 'permits the local interests of a single community to defeat the general commercial interests of the nation.'" *Id.* at 185.

interesting anomaly. In dealing with other nations on commercial subjects, we speak nationally. When we come to act we act locally. The International High Commission may agree with the countries of South America upon uniform commercial laws. It then becomes necessary to have these laws enacted by the several states.<sup>55</sup>

This apparent impasse left the United States impotent. This troubled John Henry Wigmore, dean of Northwestern Law School and a uniform law commissioner from Illinois.<sup>56</sup> The problem of how America could participate in the preparation of "world-legislation" was, he wrote in 1917, "the greatest problem of the future for our law."<sup>57</sup> He summarized his diagnosis and proposed cure in three assertions:

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 interstate and foreign commerce; (b) The second is its power to make treaties for solving conflicts of law.<sup>58</sup>

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<sup>55</sup> 1918 PROC., *supra* note 36, at 281, 288.

<sup>56</sup> For references to Dean Wigmore's participation in the National Conference, see WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER (1977). Wigmore, who became dean at Northwestern University Law School, was known by the uniform law commissioners as "Colonel" Wigmore. To avoid confusion, this essay refers to "Dean" Wigmore.

<sup>57</sup> John Henry Wigmore, *Problems of World-Legislation and America's Share Therein*, 4 VA. L. REV. 423, 423 (1917). By "world-legislation" Wigmore meant "the international aspect of the substantive national law affecting the relations between individuals of different States—the law of contracts, property, and commerce generally—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." *Id.* at 424. As editor of volume 11 of the CONTINENTAL LEGAL HISTORY SERIES prepared for the Association of American Law Schools, Dean Wigmore was well aware of the long history of attempts to encourage the international unification of private law. See *The Movement for the International Assimilation of Law*, 11 CONTINENTAL LEGAL HISTORY SERIES 345-548 (1918).

<sup>58</sup> Dean Wigmore retreated somewhat from his statement that the treaty power was extremely limited. Noting the recent Supreme Court decision in

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.

III. The several state legislatures do have the power to share individually in world-legislation, by availing themselves of the constitutional liberty under Art. I, Section 10, to make agreements or compacts with a foreign power, with the consent of Congress;<sup>59</sup> and it is therefore absolutely necessary, for the future international self-respect of this country, that this power should be promptly exercised by the leading commercial States of the United States.<sup>60</sup>

For much of his later career, Dean Wigmore spoke, wrote, and acted in support of these assertions.<sup>61</sup>

At the suggestion of Dean Wigmore and another commissioner, the National Conference appointed a Committee on Compacts and Agreements between States in 1916. With Dean Wigmore as chair, this Committee reported in 1921 on the possible role of interstate compacts both among states and

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Missouri v. Holland, 252 U.S. 416 (1920), the 1921 Report of the Conference's Committee on Inter-State Compacts, written by Dean Wigmore, concludes that although the Federal treaty power might theoretically be broader than previously thought, there were practical reasons why it would not be important in the immediate future. 1921 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 297, 348-49 [hereinafter 1921 HANDBOOK].

<sup>59</sup> Section 10 of Article I of the U.S. Constitution provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power". U.S. CONST. art. I, § 10.

<sup>60</sup> John Henry Wigmore, *supra* note 57, at 430.

<sup>61</sup> See, e.g., John H. Wigmore, *The International Assimilation of Law—Its Needs and Its Possibilities from an American Standpoint*, 10 U. ILL. L. REV. 385 (1916); John H. Wigmore, *A Comment on Mr. Lee's Suggestions*, 23 U. ILL. L. REV. 734 (1929). For further commentary by Wigmore, see his oral report to the Conference in 1920. 1920 HANDBOOK, *supra* note 50, at 132-34. For a survey of Dean Wigmore's general interest in international and foreign affairs, see ROALFE, *supra* note 56, at 248-74.

between states and foreign nations.<sup>62</sup> The report's analysis of the use of compacts for international unification incorporates verbatim many of Dean Wigmore's earlier writings on the subject. With respect to "world-legislation" the report recommends that the relevant federal authorities be asked "that in future international conferences and negotiations affecting commercial interests, arrangements be made for securing the coöperation and assent of the several States in matters not exclusively within the specific Federal powers under the Constitution."<sup>63</sup>

The proposed procedure—also taken from Dean Wigmore's earlier publications—would authorize state representatives to participate as delegates at international conferences and would permit individual states to implement uniform legislation adopted at such conferences:

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.<sup>64</sup> 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;<sup>65</sup> hence their arguments and

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<sup>62</sup> *Report of the Committee on Inter-State Compacts*, 1921 HANDBOOK, *supra* note 58, at 297. The report addresses "world commercial legislation." See *id.* at 321-28, 345-50.

<sup>63</sup> *Id.* at 355-56.

<sup>64</sup> In a subsequent illustration of the procedure, the Committee's report envisions Congressional legislation only after the state delegates return from the international conference. *Id.* at 346.

<sup>65</sup> In its later illustration of the procedure, the Committee's report provides:

At the Conference they [representatives from the individual states] figure as United States delegates, but in the voting by States they have only as many votes as the United States has, presumably one vote; they, however, have floor privileges and committee status individually. . . . At the close of the Conference, it [presumably the

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 class of commercial transactions will induce, and in some cases will compel, other States to follow the example. And thus uniformity will gradually be attained.<sup>66</sup>

The procedure did not, in other words, envision a role for the National Conference of Commissioners other than as promoter of the use of compacts.<sup>67</sup>

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Conference] votes that each of the United States accrediting delegates may become signatory to the convention. The delegates then sign for their respective States.

*Id.*

<sup>66</sup> 1921 HANDBOOK, *supra* note 58, at 297, 326-27. This text may also be found in Wigmore, *supra* note 57, at 433. In the committee's 1924 report, the methods suggested in the 1921 report are described as "merely tentative" and yet another possible scenario is set out. *Report of the Committee on a Uniform Act for Compacts and Agreements Between States*, 1924 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 674, 677 [hereinafter 1924 HANDBOOK]. The new scenario would have the State Department "call upon the Governors of the four or five principal commercial states [including, presumably, Illinois] to nominate representatives to consult with the Department of State and to agree upon a national policy and measures concerning the subject of the negotiation." *Id.* Delegates appointed by the State Department would then apparently represent the United States at the international conference:

Presuming also the state governors would sign the international convention along with the Secretary of State and the President of the United States, the obligatory and entitling clauses of the convention would go into full force and effect not only in interstate commerce but in intrastate commerce in the four or five leading commercial states. By aid thereafter of the National Conference on Uniform State Laws or otherwise, the other states would sooner or later follow suit.

*Id.*

<sup>67</sup> For cryptic clues as to the potential role of the Conference, see the 1920 *Report on Compacts and Agreements Between States*:

The Conference nevertheless circulated its Committee's recommendations widely.<sup>68</sup> In the field of domestic law, the Committee reported in 1924, so many bodies were aware of the potential usefulness of interstate compacts that the Committee expected its role in the future to be limited to consulting with these bodies.<sup>69</sup> In the field of international commercial law, however, the report observed that "practically everything remains to be done."<sup>70</sup> Once again, the 1924 report urged use

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The idea in appointing the Committee was that this little used provision of the Federal Constitution seemed to promise a door of hope for carrying out the work which may come before this Conference in the future, in a way not presented by any other expedient. . . . If under Article 10 of the Constitution that method of compacts by States can become an aid, it would seem that it falls to us to ascertain what that way is and to present it.

1920 HANDBOOK, *supra* note 50, at 132, 134. The 1927 *Report of the Committee on Uniform Act for Compacts and Agreements Between States* is clearer:

If it be true that the Federal Government has not the full power by treaty or otherwise, to co-operate with other nations, in harmonizing and making uniform International Commercial Law, because of the reserved power of the States, then it would seem that this subject is a proper one for consideration by this Conference, and that this Conference should aid in determining to what extent action on the part of the states is necessary, in order that the United States may secure the advantage of the progress which is being made along the lines of International Commercial Agreement, and that this Conference should aid in working out an effective plan, by which the Federal Government and the separate States may co-operate in the accomplishment of that purpose.

1927 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 775, 776 [hereinafter 1927 HANDBOOK] (emphasis added).

<sup>68</sup> The 1921 Report of the Committee on Inter-State Compacts included the following recommendation adopted by the Conference:

That the President of the Conference be directed to present copies of this Report to the President of the United States, to the Secretary of State of the United States, and to the Committees on Foreign Affairs and on Interstate and Foreign Commerce of the U.S. Senate and House of Representatives, with the request that in future international conferences and negotiations affecting commercial interests, arrangements be made for securing the coöperation and assent of the several States in matters not exclusively within the specific Federal powers under the Constitution.

1921 HANDBOOK, *supra* note 58, at 297, 355-56.

<sup>69</sup> *Report of the Committee on a Uniform Act for Compacts and Agreements Between States*, 1924 HANDBOOK, *supra* note 66, at 674.

<sup>70</sup> *Id.*

of the compact clause,<sup>71</sup> and it asks that the Committee's chair (i.e., Wigmore) be authorized to meet with the Secretary of State in order to urge the feasibility of using the proposed procedure.<sup>72</sup>

By 1927, however, the Committee—no longer chaired by Dean Wigmore, who had lost his job as a uniform law commissioner after a falling out with the Illinois Governor<sup>73</sup>—could report little progress. The Committee's 1927 report states:

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.<sup>74</sup>

Nevertheless, the Committee urged further consultations with federal authorities.<sup>75</sup>

When, in 1932, the Committee next submitted a comprehensive report, it saw little future in the use of compacts in the international area:

The conception entertained by your committee in 1921 of the part that interstate compacts might be made to play in the field of world legislation is a significant one, but one which has as yet failed to achieve more than academic distinction. The Anglo-Saxon countries with their age-old price in the pre-eminence of their gnarled and twisted common law have not responded to the

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<sup>71</sup> *Id.* at 674-77.

<sup>72</sup> *Id.*

<sup>73</sup> See ROALFE, *supra* note 56, at 228 (Wigmore first served from 1908-1924). A subsequent Governor reappointed Dean Wigmore as a uniform law commissioner in 1933 and he served from that date until his death in 1943.

<sup>74</sup> *Report of the Committee on Uniform Act for Compacts and Agreements Between States*, 1927 HANDBOOK, *supra* note 67, at 775, 777 (note that pages 776 and 777 of the HANDBOOK are transposed).

<sup>75</sup> The following year the Committee suggested that its personnel should be changed. Membership should include, it urged, commissioners from the east who could meet with federal authorities and experts, such as Dean Wigmore, who could determine whether the Committee should be continued. 1928 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 45.



movements for world uniformity with more than a passing enthusiasm. It is from the continent and such countries, as those of Latin America, bred to continental law that the impetus for world uniformity comes. At the moment we are intent both upon unifying our law through legislation and upon ordering and clarifying it by a process of restatement. It may well be that these two tasks behind us, we will tend to reach out more readily towards aiding in bringing about world clarification. But, so far as the imagination of this committee carries it, no immediate demand for the use of interstate compacts in this field is likely to exist, and when such demand arises there may well be other and more effective legal weapons in our federal arsenal. Certainly, the conception of the part that interstate compacts might play in the field of world legislation entertained by your committee in 1921 should be kept alive, even though no possibility for its use in the visible future seems to exist.<sup>76</sup>

With this 1932 report, Dean Wigmore's proposal effectively died, although reports endorsing it were made as late as 1962.<sup>77</sup>

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<sup>76</sup> *Report of the Committee on Uniform Act for Compacts and Agreements Between States*, 1932 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 280, 294 [hereinafter 1932 HANDBOOK] (footnote omitted).

<sup>77</sup> Subsequent comments on the use of compacts suggest that Dean Wigmore's proposal is impractical. For example, in a 1961 report James C. Dezendorf remarked:

I agree with Professor Wigmore that the compact method is a possible solution to our problem and that if it were used it would permit the United States to participate usefully in international conferences on subjects which are beyond the constitutional power of the Federal Government.

While his suggested method of having individual states send their own delegations to each such international conference is theoretically possible, and while it would work if it were undertaken, the fact that no state has so participated in the years that have intervened since his report was published in 1921, undoubtedly proves that it is impractical.

*Report on the Ninth Session of the Hague Conference on Private International Law*, 1961 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 178, 181-82 [hereinafter 1961 HANDBOOK].

However, a 1962 report of the Standing Committee on Compacts and Agreements Between States sets out its belief that "progress in the solution

The Conference endorsed Dean Wigmore's proposal principally because of the force of his personality. Many commissioners no doubt shared his view of the constitutional limitations on federal power. No evidence of a recorded debate exists, however, to reveal whether the Conference was to have a role beyond providing Dean Wigmore with official backing when he spoke with federal authorities about his proposal. This remains somewhat puzzling because the assumption underlying such approval, that only the leading commercial states would participate in international projects with the smaller states following their lead, runs counter to the Conference's tradition of having each state's vote count equally.

#### 4. SPLENDID ISOLATION (1930-1955)

Even before the 1932 report of the Committee on Compacts and Agreements between States, the Conference proceedings abound with evidence of its waning concern for international developments. In 1930, the Committee's report questions whether "world commercial law" is desirable.<sup>78</sup> Quoting from a letter from a member, the 1930 report goes on to state: "In addition to the questions as to whether our Conference is in a position to work for uniformity of world commercial law and whether it is practical or attainable, there is a fundamental question of whether it is desirable from the point of view of the United States."<sup>79</sup> It is one thing to unify domestic laws, but

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of international legal problems can be made by enlisting the aid of universities in the study of the utilization of compacts between states and foreign countries as a means of solving international legal problems." *Report of the Committee on Compacts and Agreements Between States*, 1962 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 158, 185 [hereinafter 1962 HANDBOOK]. The committee also recommended that other Conference committees concerned with international matters should consider the utility of compacts. *Id.*

<sup>78</sup> *Report of Committee on Uniform Act for Compacts and Agreements Between States*, 1931 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 357, 358 [hereinafter 1931 HANDBOOK].

<sup>79</sup> *Id.* The Committee member Donald E. Bridgman, was a commissioner from Minnesota. While he argued against the desirability and feasibility of worldwide unification, Mr. Bridgman urged the need to cooperate with the Canadian uniform law conference—although he may only have been thinking of English-speaking Canada. 1932 HANDBOOK, *supra* note 76, at 130-31. The 1931 Report notes that the Committee "did not discuss or

another "to make uniform the commercial law of the world, with its different systems of law, and with nations of different races, traditions, and commercial customs and conditions."<sup>80</sup> For example, in 1930, at yet another international conference convoked to draft uniform rules for bills of exchange, the United States and England took the position that they would prefer to retain the relatively uniform Anglo-American laws based on the English Bills of Exchange Act rather than make the changes required by the proposed uniform rules, which was inspired by the civil law.<sup>81</sup> At the Conference's 1931 meeting, the Committee reported that "[i]n view of the experience of the United States Government in the whole question of securing a uniform world law we [the Committee] believe that it is not desirable to pursue the matter further."

Thus began a period of splendid isolation which would last 25 years. References to foreign or international developments virtually disappear from the official reports of Conference proceedings. Whereas prior to 1930 the Conference had occasionally looked to foreign sources,<sup>82</sup> now the few references to foreign law were largely negative. The Conference

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consider the matter from an international point of view, except as to such contiguous nations as Canada and Mexico, which have a joint interest with us in water rights of one sort or another." 1931 HANDBOOK, *supra* note 78, at 357.

<sup>80</sup> 1931 HANDBOOK, *supra* note 78, at 358.

<sup>81</sup> *Id.* at 358-59. For analysis of the uniform laws adopted at the 1930 conference (and subsequent 1931 conference), see Manley O. Hudson & A.H. Feller, *The International Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333 (1931); A.H. Feller, *The International Unification of Laws Concerning Checks*, 45 HARV. L. REV. 668 (1932). The United States sent an observer to these conferences but did not sign any of the six international conventions adopted at the conferences.

<sup>82</sup> See, e.g., the foreign sources cited in discussion of the following proposed uniform legislation: 1906 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 52 [hereinafter 1906 PROC.] (pure food); 1908 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 129-32 [hereinafter 1908 PROC.] (validity of marriage); 1910 PROC., *supra* note 36, at 107 (divorce); 1911 PROC., *supra* note 42, at 45-51 (workmen's compensation); 1914 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 124 [hereinafter 1914 PROC.] (same); 1913 PROC., *supra* note 38, at 138 (Torrens registration); 1916 PROC., *supra* note 39, at 68 (same); 1917 PROC., *supra* note 35, at 127-28, 304-06 (occupational diseases); 1919 PROC. NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 190-91 [hereinafter 1919 PROC.] (same); *id.* at 252-53 (declaratory judgments); 1920 HANDBOOK, *supra* note 50, at 173-81 (same); 1925 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 298 [hereinafter 1925 HANDBOOK] (pistol legislation).

rejected consideration of the English revision of the law of intestacy, for example, because it was "a little too advanced for us at the present time."<sup>83</sup> The coming of World War II and the consequent renewed governmental interest in relations with Latin America left traces in the Conference's records. Work on a proposed Uniform Code for Judicial Assistance was endorsed on the ground that "[n]o proposal more important to working solidarity with Latin America is before the country."<sup>84</sup> Preparation of a Uniform Commercial Code was likewise justified because it would help develop trade relations with Latin America.<sup>85</sup> But these references have little to do with the substance of these proposals and, when asked, the Conference declined to participate in the newly-organized Inter-American Bar Association.<sup>86</sup>

Only with their Canadian counterparts did the Conference

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<sup>83</sup> 1932 HANDBOOK, *supra* note 76, at 126-27. See also 1927 HANDBOOK, *supra* note 67, at 221 (1925 English real property law reform studied and rejected).

<sup>84</sup> *Consolidated Report of the Sub-Committee on Scope and Program*, 1941 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 143, 148-49 (work to be conducted in cooperation with the A.B.A.'s Section of International & Comparative Law, the Department of State, and the Department of Justice).

<sup>85</sup> 1942 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 134 [hereinafter 1942 HANDBOOK]. Additionally, the grant application to the Maurice and Laura Falk Foundation states:

The lack of statutory law governing foreign transactions and especially the inability of foreign business men to obtain in small compass an authoritative exposition of American commercial law among the most serious deterrents to the expansion of our foreign commerce. . . . It will be of the greatest benefit in the distribution of articles of commerce between various parts of our own country and between us and many foreign countries with whom we hope greatly to expand our foreign trade.

1944 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 156, 164-65 [hereinafter 1944 HANDBOOK].

The Report accompanying the Second Draft of the Revised Uniform Sales Act calls attention to "an interesting and significant" draft Uniform Law on International Sale of Goods prepared by the International Institute for the Unification of Private Law. *The Revised Uniform Sales Act: Report and Second Draft* 4 (1941). This 1941 draft does not, however, show signs of any specific influence of the international text, and comments to later drafts of the Revised Uniform Sales Act make no reference at all to the international text.

<sup>86</sup> 1948 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 121.

begin, fitfully, to develop relations. In 1932, the Committee on Scope and Program opposed systematic study of the topics addressed by the Canadian Conference.<sup>87</sup> Several years later, however, the Conference did agree to send a set of its handbooks and proceedings to the Canadians.<sup>88</sup> In 1940, the Conference even invited the Canadians to meet jointly but the Canadians reluctantly declined because of the war in Europe.<sup>89</sup> The two bodies did meet together, however, in 1942 and again in 1950.<sup>90</sup>

The year 1950 signalled a return of interest in things foreign. At the 1950 meeting, for example, several European banking specialists were asked, as guests, for their reactions to the proposed Uniform Commercial Code—although their response is not recorded.<sup>91</sup> Not until the mid-1950s, however, did the Conference itself begin to take an active interest in international developments.

#### 5. INTERNATIONAL UNIFICATION IN THE COLD WAR (1955-1972)

The presence of Mario Matteucci as a guest at the Conference's 1954 meeting marked yet another turning point for the Conference.<sup>92</sup> Signor Matteucci, the Secretary-General of the International Institute for the Unification of Private Law ("Rome Institute" or "UNIDROIT"),<sup>93</sup> was well aware of past international efforts to unify private law.

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<sup>87</sup> 1932 HANDBOOK, *supra* note 76, at 175. See also *id.* at 197-98.

<sup>88</sup> 1939 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 48.

<sup>89</sup> 1940 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 75.

<sup>90</sup> 1942 HANDBOOK, *supra* note 85, at 74-75, 84-85 (authority to invite; brief address by the president of the Canadian Conference); 1949 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 183 (invitation for 1950) [hereinafter 1949 HANDBOOK]; 1950 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 43-44 (joint meeting in Washington, D.C.) [hereinafter 1950 HANDBOOK].

<sup>91</sup> 1950 HANDBOOK, *supra* note 90, at 97-98.

<sup>92</sup> 1954 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 114-15.

<sup>93</sup> For an introduction to the International Institute for the Unification of Private Law (also known as the "Rome Institute" or "UNIDROIT"), see Mario Matteucci, *UNIDROIT, The First Fifty Years*, in 1 *NEW DIRECTIONS IN INTERNATIONAL TRADE LAW* xvii (1977).

Invited to make brief remarks at the meeting, he observed that the Conference's techniques and expertise had much to offer those who worked in the international arena.<sup>94</sup> After his return to Europe, Signor Matteucci organized a conference in Barcelona of organizations concerned with the unification of private law, and invited the Conference to send a delegate.

When reporting this invitation to the mid-year meeting of the Conference's executive committee in 1956, President Barton H. Kuhns stated:

I realize that the Conference's agenda is full with our own program and projects, but I am not sure that the real basis for better international understanding among all the Nations of the World may not rest in more uniformity of laws on an international basis. This may be our service toward World Peace, and I think we should not pass over it lightly.<sup>95</sup>

He reiterated this thought at the annual meeting when reporting favorably on the invitation,<sup>96</sup> although he did not hide from the commissioners the potential difficulties:

The problem of preserving through uniformity our state and local governments on the one hand, while seeking uniformity at an international level on the other, presents a sort of obstacle course into which one may tread only with extreme caution. The somewhat obvious method of unifying international law by treaty or convention might, at the same time, destroy the very sovereignty of the states which uniformity of state laws is designed to protect. And yet, as the far corners of the world are gathered closer and closer together we will soon be reaching a point where the desirability of uniformity of the laws of different nations will become more and more apparent.<sup>97</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> 1956 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 53, 59 [hereinafter 1956 HANDBOOK].

<sup>96</sup> *Id.* at 42, 50 ("I cannot help but feel that in some now vague and intangible way the discussion of the promulgation of uniformity of local laws on an international level can be a truly great contributing factor to the attainment of World Peace").

<sup>97</sup> *Id.*

It was decided that Joe C. Barrett, the immediate past President of the Conference, would represent the Conference in Barcelona.<sup>98</sup> Mr. Barrett would also attend a session of the Hague Conference of Private International Law as an official U.S. observer.<sup>99</sup>

Mr. Barrett submitted a detailed report to the Conference following his return from Europe. In the report he noted the apparent constitutional limitations on U.S. participation in international private law unification initiatives.<sup>100</sup>

For the United States to make use of international conventions in this field would not be politically expedient. It would present a head-on collision between Article 6 and Amendment No. 10 of the Constitution of the United States. Even if we assume that under the treaty making power federal jurisdiction can be found in fields where it would not otherwise exist, it would be wholly unwise for the United States to make use of such power because to do so would be contrary to the basic philosophy that in this country power of government is handed up from the people rather than down from the government.<sup>101</sup>

He recognized, however, the importance of these initiatives to the United States and he recalled his surprise on learning that the Conference had "already done some work that could have had international aspects."<sup>102</sup> He concluded rather hesitant-

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<sup>98</sup> *Id.* at 42, 50, 59. Joe C. Barrett (1897-1980) was a commissioner from Jonesboro, Arkansas. For a memorial tribute, see 1981 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 109 [hereinafter 1981 HANDBOOK].

<sup>99</sup> 1956 HANDBOOK, *supra* note 95, at 50, 59. For the background of the Hague Conference on Private International Law, see *supra* notes 5 and 14.

<sup>100</sup> Joe C. Barrett, *Report on the 1956 Barcelona and Hague Conferences on Unification of Law*, 1957 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 299 [hereinafter 1957 HANDBOOK].

<sup>101</sup> *Id.* at 307.

<sup>102</sup> *Id.* at 306. The minutes of the UNIDROIT meeting record several interventions by Mr. Barrett. His comments suggest some skepticism that the National Conference had anything to learn from the other organizations. "We in America are intrigued by this meeting. If we have anything of benefit to you, you may ask." 1956 UNIDROIT Y.B. (vol. 2) at 353 (1957). "Perhaps some of the experiences of the Conference of the Commissioners on Uniform State Laws may be of some benefit in formulating the ideas to

ly that the Conference should continue to monitor these international developments:

Perhaps it would be desirable for this Conference to continue its observation of the activities of various International groups for the purpose of aiding them, where possible, to adopt methods that would fit into our legal structure as well as for the purpose of giving to this Conference, when considering changes in the internal law having international aspects, the benefit of the views of international lawyers. The way is not clear and the road is difficult but at least a start has been made.<sup>103</sup>

Mr. Barrett's report has had several long-term consequences.<sup>104</sup> By approving this report, the Conference implicitly accepted his recommendation that it continue to send delegates to the meetings sponsored by UNIDROIT<sup>105</sup> and to

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be used by this group in the stage we are now discussing, i.e. the preparation and the formulation of uniform rules." *Id.* at 391. At the second meeting of these organizations, however, there is a change of tone. "I don't [sic] believe that we have been fully conscious in the past that what we have been doing has as many international aspects as it now appears to have. The presence of three commissioners here, is an indication that we have a growing realization of this fact, and we would like to have fuller cooperation with similar bodies in other nations while we are preparing drafts of this kind." 1959 UNIDROIT Y.B. 48, 421 (1960).

<sup>103</sup> 1957 HANDBOOK, *supra* note 100, at 307. In this connection Mr. Barrett specifically urged the Conference to re-examine its relation with the Canadian conference. "On two different occasions," he wrote, "we have met in the same city with the Canadian Commissioners but, so far as I know, there has been no serious attempt by either group to consider the views of the other when drafting in areas presenting similar problems to both sides of the border." *Id.*

<sup>104</sup> One should not, of course, exaggerate the contributions of any one person or any one institution—even when writing tributes to an important institution. Mr. Barrett would not have had the effect suggested in the text unless he had the support of Conference and A.B.A. leaders. Moreover, those bodies did not act in isolation. Among persons outside the Conference who were catalysts in this period was Kurt H. Nadelmann, who provided the intellectual groundwork for the movement. *See, e.g.,* Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules on Private Law*, 102 U. PA. L. REV. 323 (1954).

<sup>105</sup> 1960 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 66 (report on second meeting); 1963 HANDBOOK NAT'L CONF. COMMISSIONERS UNIFORM ST. LAWS 52-53 (report on third meeting) [hereinafter 1963 HANDBOOK]; 1964 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST.



provide members of official delegations to international conferences.<sup>106</sup> Ultimately, the United States became a party of UNIDROIT and the Hague Conference. At Mr. Barrett's suggestion, the Conference recommended to the American Bar Association that it appoint a special committee to study the international unification of private law.<sup>107</sup> The Association created the committee in 1958 and appointed Mr. Barrett, in his capacity as an A.B.A. member, as the chairman. As a result of the committee's efforts,<sup>108</sup> and upon the urging of the Conference itself,<sup>109</sup> the A.B.A. ultimately adopted a resolution recommending that the United States become a party to the Hague Conference on Private International Law and the International Institute for the Unification of Private Law.<sup>110</sup> With this support, the recommendation was referred to Congress, which enacted legislation authorizing the United

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LAWS 233 (report on third meeting) [hereinafter 1964 HANDBOOK]; 1968 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 175 (report on fourth meeting) [hereinafter 1968 HANDBOOK].

<sup>106</sup> Commissioners Joe C. Barrett and James C. Dezendorf were the most active participants. See note 98 *supra* and note 112 *infra*. They represented the United States at 1960 and 1966 sessions of the Hague Conference on Private International Law. See 1961 HANDBOOK, *supra* note 77, at 71-74, 178-85 (report on 1960 meeting); 1966 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 72 (Barrett designated delegate, Dezendorf as alternate, to adjourned session in 1966 to consider the recognition of judgments) [hereinafter 1966 HANDBOOK]. Mr. Dezendorf also was a delegate to the 1968 session of the Hague Conference.

Messrs. Barrett and Dezendorf also represented the United States at a 1964 diplomatic conference convened to consider two uniform sales law conventions. *Report of the Special Committee on Uniform International Sales of Goods Act*, 1964 HANDBOOK, *supra* note 105, at 83, 236. Because this diplomatic conference was held at The Hague the resulting conventions are sometimes referred to as the Hague Sales Conventions. For a report on this 1964 conference, see John Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROBS. 326, 326-32 (1965).

<sup>107</sup> *Report of President of National Conference of Commissioners on Uniform State Laws to the American Bar Association*, 1957 HANDBOOK, *supra* note 100, at 152, 153.

<sup>108</sup> For reports of the special committee, see 1958 A.B.A. REP. 584; 1959 A.B.A. REP. 421; 1960 A.B.A. REP. 219; 1961 A.B.A. REP. 219. The committee's recommendations were referred to the A.B.A. Section of Corporation, Banking and Business Law and the A.B.A. Section of International and Comparative Law. 1962 A.B.A. REP. 387; 1963 A.B.A. REP. 339.

<sup>109</sup> 1963 HANDBOOK, *supra* note 105, at 52-53, 58.

<sup>110</sup> 1963 A.B.A. REP. 107 (resolution re U.S. membership adopted).

States to become a member of these organizations.<sup>111</sup> When the United States did so at the end of 1963, the Secretary of State established an Advisory Committee on Private International Law with representation from the National Conference of Commissioners.<sup>112</sup>

While the Conference's leadership supported these initiatives, the rank and file were restive. In 1962 the commissioners had approved two new acts—the Uniform Foreign Money-Judgments Act<sup>113</sup> and the Uniform Interstate and International Procedure Act<sup>114</sup>—addressing issues that arise when a domestic U.S. court is faced with a non-U.S. judgment or a non-U.S. party.<sup>115</sup> In 1964, however, the chair of the Executive Committee circulated a questionnaire asking commissioners for their opinion about whether the Conference had authority to participate in private international law projects. "A substantial number" thought the Conference lacked this authority.<sup>116</sup>

The leadership promptly responded to this unrest. Mr. Barrett and Mr. Dezendorf, both past presidents of the Conference and delegates to several international conferences,

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<sup>111</sup> 77 Stat. 775 (1963), *codified as* 22 U.S.C. § 269g (1988).

<sup>112</sup> For a brief history of the Secretary of State's Advisory Committee on Private International Law, see Patricia B. Rogers, *Private International Law*, 23 INT'L LAW. 207, 209-12 (1989).

<sup>113</sup> UNIFORM FOREIGN MONEY-JUDGMENTS ACT, 13 U.L.A. 261 (Master ed. 1986). The following states have adopted the Act: Alaska, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Texas, Virginia, and Washington. *Id.* (1991 Supp.).

<sup>114</sup> Uniform Interstate and International Procedure Act, 1962 HANDBOOK, *supra* note 77, at 219 (withdrawn); 1977 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 118-19 [hereinafter 1977 HANDBOOK].

<sup>115</sup> The two procedural acts were the product of studies prepared by the federal Commission and Advisory Committee on International Rules of Judicial Procedure and the Columbia Law School Project on International Procedure. An Act of September 2, 1958 had established the federal commission. 72 Stat. 1743 (1958). In 1961 the Conference appointed a special committee to work with these two other bodies. 1961 HANDBOOK, *supra* note 77, at 47, 74 (action by executive committee; explanation by representatives from the Columbia project). The Conference adopted the proposed uniform acts in 1962. 1962 HANDBOOK, *supra* note 77, at 219 (prefatory note outlining history of project).

<sup>116</sup> *Report on Conference Participation in Activities Relating to Unification of Private International Law*, 1964 HANDBOOK, *supra* note 105, at 249.

promptly filed a brief in support of Conference participation.<sup>117</sup> "We submit," they wrote, "that participation, to the extent that the Conference will be requested to participate, is not only within its power, but is essential to the most efficient performance of the duties of this Conference to the several States."<sup>118</sup> The National Conference, they argued, is the most appropriate body for this task. United States citizens are vitally affected by rules of private international law when they trade, invest or travel in foreign countries—and foreign trade, investment and travel are expanding rapidly. The National Conference is the only body in the United States that specializes in the unification of laws and the unification of laws between nations involves many of the same techniques the Conference currently uses to unify law in our federal system. The Conference has studied the laws of foreign countries when preparing its own legislative proposals<sup>119</sup> and to ensure that its proposals are the best possible, has a duty to continue doing so. Furthermore, while the Conference's international activities are not central to its mission, the topics addressed by the international projects it undertakes are within the scope of state not federal control and thus help the Conference to better perform its tasks.<sup>120</sup> An added benefit of these studies is the assistance they provide to the State Department in

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 250-51. The authors exaggerate the Conference's use of foreign law studies in the preparation of its uniform laws. Early records make relatively numerous references to knowledge of foreign law, including, of course, references to the English commercial law codifications. Later records make relatively few such references. See, e.g., 1906 PROC., *supra* note 82, at 52 (pure food); 1908 PROC., *supra* note 82, at 129-32 (validity of marriage); 1910 PROC., *supra* note 36, at 107 (divorce); 1911 PROC., *supra* note 42, at 45-51 (workmen's compensation); 1914 PROC., *supra* note 82, at 124 (same); 1913 PROC., *supra* note 38, at 138 (Torrens registration); 1916 PROC., *supra* note 39, at 68 (same); 1917 PROC., *supra* note 35, at 127-28, 304-06 (occupational diseases); 1919 PROC., *supra* note 82, at 190-91 (same); *id.* at 252-53 (declaratory judgments); 1920 HANDBOOK, *supra* note 50, at 173-81 (same); 1925 HANDBOOK, *supra* note 82, at 298 (pistol legislation); 1927 HANDBOOK, *supra* note 67, at 221 (real property); 1932 HANDBOOK, *supra* note 76, at 126-27 (intestacy); 1933 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 44 (presumption of death); 1944 HANDBOOK, *supra* note 85, at 308-09 (recognition of foreign judgments); 1958 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 151-52 (same).

<sup>120</sup> 1964 HANDBOOK, *supra* note 105, at 249-52.

effectively participating in private international law initiatives.

The leadership followed up the Barrett-Dezendorf brief by scheduling sessions to review several Hague Conference texts at the 1964 annual meeting.<sup>121</sup> Distinguished experts were invited to attend<sup>122</sup> and—in a break with recent custom—the session transcripts were published.<sup>123</sup> Walter D. Malcolm set a tentative tone in his presidential address when he noted the scheduled discussion of these projects:

I call to your attention the fact that here again the Conference is moving into novel areas and relatively uncharted seas. The reason and justification for its doing so is simply that many of the subjects taken up for the drafting of uniform legislation in the international area are subjects which under our federal system traditionally have been in the jurisdiction and domain of the several states. Consequently, if any one or more of these internationally drafted acts are to be considered for legislation in the United States, appropriately they should be enacted by the legislatures of the several states. . . . [T]he National Conference has been drawn upon by the State Department of the United States very heavily and significantly as the best available and

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<sup>121</sup> These draft texts include: Draft Convention on International Adoption of Children (*infra* note 146); Draft Convention on General Jurisdiction of Contractual Forums (*infra* note 142); Draft Convention on Recognition and Enforcement of Foreign Judgments; Draft Convention on Service and Transmission Abroad of Judicial and Extrajudicial Documents (*infra* note 144); and a Questionnaire on Draft Convention on Recognition of Status Judgments.

<sup>122</sup> These guests included Dr. Alfred von Overbeck, First Secretary of the Hague Conference on Private International Law, Professor Willis Reese of Columbia Law School, Philip W. Amram a lawyer from Washington, D.C., Mr. Charles Bevans, Deputy Legal Adviser in the Department of State, and Professor Abram Chayes, former Legal Adviser in the Department of State.

<sup>123</sup> 1964 HANDBOOK, *supra* note 105, at 103-130, 141-153. An "Editor's Note" at the beginning of the transcript explains:

Although for some years it has not been customary to print in the Handbook the record of Committee of the Whole discussions, it is believed that a portion of these deliberations regarding certain proposed International Conventions are of sufficient significance to be preserved. The record of these discussions follows.

*Id.* at 103-04.

perhaps the only organization in the country that can officially assist in the process of developing uniform international legislation for submission to the several states. By no means do we see or understand fully how this process will work or where our initial steps will lead.<sup>124</sup>

The subsequent discussion revealed two issues that troubled many commissioners: the constitutional allocation of power between the federal government and the states, and the appropriate role of the Conference.<sup>125</sup> Towards the end of the discussion Mr. Malcolm succinctly summarized the two issues:

In the discussion this morning it has been brought out that particularly in the subject matter currently being discussed it is the judgment of the State Department that it is a perfectly proper and legitimate subject for a convention or a treaty to be signed or entered into by the United States. . . .

Now, on the other hand, we are Commissioners on Uniform State Laws. We are state officers, and our primary responsibility is to the states. It has seemed to us that certainly some of the subject matters that have been considered in these Conventions lie in a general area in which the states traditionally have had jurisdiction, and have been within the domain of the states, and we have understood that potentially at least some of these subjects dealt with in The Hague Conference and the Rome Institute would be of such a nature that at some time it would reach the stage of having something in the nature of a uniform act to be considered by this Conference and submitted to the various states for enactment by the state legislatures.

Now, I begin to feel and I think possibly other Commissioners have felt: Are we on the horns of a

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<sup>124</sup> 1964 HANDBOOK, *supra* note 105, at 59.

<sup>125</sup> Although many commissioners participated in the debate, it is worth a footnote to call attention to the intervention of one commissioner who later went on to higher office. 1964 HANDBOOK, *supra* note 105, at 142-43 (William H. Rehnquist's remarks regarding jurisdiction in draft service convention).

dilemma here? Either this is subject matter that is appropriately within the jurisdiction of the Federal Government, to be dealt with by the Federal Government, in which event the states should not be functioning, and conceivably this Conference should not be functioning.<sup>126</sup>

In effect, Mr. Malcolm was asking what role the State Department thought the Conference should play.

Professor Abram Chayes, who had recently stepped down as Legal Adviser at the Department of State, assured the Conference that the Department would not act on private law matters, such as transnational adoptions, unless advised to do so by associations of private lawyers, including the Conference.<sup>127</sup> The initiative, in other words, lay with the Conference: it could advise the Department whether or not to participate in private international law initiatives. He concluded with the following observation:

The State Department is interested in getting the advice of every other organization which in some sense can be said to speak for American lawyerdom, but the Commissioners' advice will be more significant and more important, and you will be more interested in giving advice on some things rather than others, depending upon what the particular item is and how it fits in with your organization's responsibilities and interests.<sup>128</sup>

Although neither Professor Chayes nor Charles Bevens, the State Department's Deputy Legal Adviser, conceded limitations on the treaty power, both reassured the Commissioners that the Department would not ignore state interests. Mr. Bevens, for example, concluded by stating:

Before any treaty is negotiated or signed there must be a real need for it, and there must be a worth-while purpose to be served. We must carefully study whether

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<sup>126</sup> *Id.* at 147.

<sup>127</sup> 1964 HANDBOOK, *supra* note 105, at 148-49 (Chayes' remarks).

<sup>128</sup> *Id.* at 150.

the treaty can be appropriately included within the framework of our constitutional structure and whether the treaty method is the most feasible procedure for meeting the need.<sup>129</sup>

Professor Chayes added that, where the nature of the subject matter made it appropriate, the U.S. delegation would seek the inclusion of a federal-state clause in a draft international convention or the formulation of a uniform law rather than a treaty.<sup>130</sup>

Mr. Malcolm then undertook to summarize the potential role of the Conference in this area:

In the first place, . . . [there is the] very real possibility of the Commissioners, by virtue of our organization and our techniques, rendering assistance to the United

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<sup>129</sup> 1964 HANDBOOK, *supra* note 105, at 146 (Bevans' remarks). Other speakers were equally sanguine that the State Department would observe constitutional proprieties. See, for example, the remarks of Philip W. Amram, a private practitioner in Washington, D.C., who had represented the United States at several international conferences:

I don't think any of us in Washington have many illusions about the position that would be taken by the State Department or by the Senate with respect to a convention in a complicated area of this kind [*i.e.*, adoption]. If there were any ratification, I presume the ratification would have to be narrowly limited. I presume that the Department would strongly consider the necessity for the kind of federal-state clause which is used so frequently in our bilateral treaties of friendship and commerce with other countries. The questions that have been raised are those which are inherent in the discussions we will have this October at The Hague, and I think that the Department itself, as well as all the members of the delegation, will be fully prepared to point out the fact, as this very useful discussion already has disclosed, that there are almost impossible and insoluble problems in connection with state participation which may make it quite impossible for the United States to ratify any convention in this particular area.

*Id.* at 127. See also the related remarks of Mr. Dezendorf:

Now, as we envision it, let's assume that some Draft Convention such as this [*i.e.*, on adoption] were adopted at The Hague Conference in October. I am confident that our State Department would take the position that the question of adoption is one of state law and not of federal law, and I believe that the maximum that our Congress would do would be to permit any state which wished to to pass a uniform act which would follow the terms of the Convention which might be adopted among European countries.

*Id.* at 126.

<sup>130</sup> *Id.* at 150 (Chayes' remarks).

States Delegations that go to The Hague Conference and the Rome Institute, to give you a cross-section of ideas and views emanating from the fifty States which we do represent.

Secondly, I understand that it is certainly a distinct possibility that, if positive action results from participation in The Hague Conference and the Rome Institute, there may well be cases where a convention will be signed by the Federal Government which will have so-called federal-state provisions, which in turn would produce the result that that particular convention would not be operative unless and until action by the legislatures of the several states was taken.

Third, there is a distinct possibility that as The Hague Conference and the Rome Institute evolve, there may be an increasing number of uniform acts or model acts drafted which could well be designed for enactment by the states of the United States, as distinguished from the Federal Government.

And, fourth—I will add a fourth possibility that occurs to me in listening to your explanation—and that is that even in an area where it is clearly and appropriately the subject of jurisdiction of the Federal Government, that that subject matter might well be so closely integrated with and related with the laws of the several states that it would make a good deal of sense for people thinking of this subject matter from the point of view of the states to cooperate with the Federal Government, to try and get reasonable integration and avoidance of conflicts between the two.<sup>131</sup>

Discussion ended with a reference to the increasing number of transnational cases handled by ordinary lawyers and the growing demand for international law courses in law schools. As Frank F. Jestrab, a uniform law commissioner from North Dakota, remarked:

I think it might be useful for us here to remember that every lawyer—I'm sure, every practitioner in the

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<sup>131</sup> *Id.* at 151 (Malcolm's remarks).



room—has had some experience in the field of international law. To those of us who have practiced in coastal or border states, the relationship is rather clear, but deep in the heart of America people are working in the field of estate law all the time, and we are continuing writing letters and communications, in our case with the Scandinavian countries, and I know that that's true of other lawyers, so that it seems to me in the light of the last speaker's exposition and explanation that there is some possibility for future work in that area, I think, within the limits expressed by the President of the Conference.<sup>132</sup>

The leadership had, in other words, successfully dampened dissent among the commissioners at large.

Not content to rest on the success of the 1964 meeting, the leadership asked the Conference's Executive Director to analyze the problems raised by participation in international projects.<sup>133</sup> Professor Allison Dunham first examined the

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<sup>132</sup> *Id.* at 150-51. It is perhaps no coincidence that Mr. Jestrab is the Conference nominee to the Secretary of State's Advisory Committee on Private International Law!

<sup>133</sup> *Problems of Participation by Commissioners and National Conference in Deliberation and Drafting at the Rome Institute and the Hague Conference*, 1965 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 83-92 (appendix to 1965 Report of the Executive Director) [hereinafter 1965 HANDBOOK]. In his 1964 report Professor Dunham had gone on record in support of Conference participation, stating:

One area where pressure for uniformity of state law is likely to develop is the area where business and other pressure for international uniformity of private law is likely to increase. . . . It is possible that under current interpretations of the United States Constitution the federal government can now enact these proposed internationally uniform private laws and thus compel state uniformity. Whether this is true or not, the State Department has asked the National Conference to participate as United States delegates in the international drafting of the proposed uniform private law. The Conference should take this opportunity to participate in drafting such laws for the end product can, in most instances, be promulgated as a uniform law of the Conference so that international uniformity is furthered by the voluntary adoption by our states of a uniform law where uniformity seems desirable for international reasons.

1964 HANDBOOK, *supra* note 105, at 89-90 (1964 Report of the Executive Director). See also Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233

power of the Conference and the Commissioners to participate in the work of the Hague Conference and the Rome Institute. He concluded:

(1) Unless the subject matter is so exclusively one for federal jurisdiction that it is next to impossible to imagine any state law on the subject, the Commissioners may participate in deliberating and preparing draft legislation for the Rome and Hague Institute, assuming the subject is one where 'uniformity of state law' within the United States is desirable in order to facilitate international uniformity of law on the subject. . . .

(2) In some states, statutory or constitutional provisions concerning holding of two public offices may interfere with or prevent the acceptance of an appointment by a Commissioner from a state as a member of the National Advisory Committee constituted by the Department of State, or as a delegate of the United States to the Rome Institute and The Hague Conference.<sup>134</sup>

Having concluded that the Conference had authority to participate in these international projects, Professor Dunham then examined how the Conference could participate effectively. He assumed, as a matter of policy, that participation should not be limited merely to endorsing the drafts prepared by other organizations. He therefore proposed the following procedure:

1. The Committee on Scope and Program, following its usual procedure, should be the agency of the Conference to recommend topics to the United States for submission to the governing body of The Hague and Rome organizations as subjects worthy of uniform treatment. Our own constitutional standards for qualified subjects would serve as a base.

2. The State Department should be requested to submit to the Conference the questionnaire for which answers are desired. A Standing Committee of the

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(1965) (extensive references to the parallels between transnational unification and the U.S. experience with unification of state laws).

<sup>134</sup> 1965 HANDBOOK, *supra* note 133, at 84.

Conference (see later recommendation) should prepare a draft answer which it recommends that the State Department adopt as the United States answer.

3. If the United States has a member of a Special Commission on a subject, that member should be urged to seek informal advice, through the Standing Committee, from members of the Conference and any special committees it may have on a similar or related subject.

4. When a draft has been submitted to a member state for comment, the State Department should be urged to seek the comments of the National Conference. The Standing Committee should examine the draft and prepare a report for the Committee of the Whole on the draft together with proposed resolutions as to the position the United States delegation should take. If the draft involves a subject exclusively within federal jurisdiction, the report should so state, and the Conference as an organization should make no formal recommendation on the merits of a draft. Individual Commissioners as individuals may do so if they wish.

5. The State Department should be urged to designate at least one Commissioner as a delegate to each meeting of The Hague Conference. If it asks for recommendations as to nominees, the President on recommendation of the Standing Committee should nominate a Commissioner of standing and, if possible, knowledgeable on the subjects under consideration.

6. After a convention has been approved, the Standing Committee should report to the Conference a recommendation which the Conference should make concerning ratification. At the same time, the Committee should recommend to Scope and Program topics on which state legislation would be desirable or necessary to implement the ratified convention.<sup>135</sup>

Appointment of a standing committee was an essential element of this proposed procedure. Professor Dunham therefore suggested that membership include "the best generalists" with the power to co-opt additional members when

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<sup>135</sup> *Id.* at 91.

considering a specific topic.<sup>136</sup>

On the basis of the Dunham memorandum and the discussions at the 1964 meeting, Mr. Malcolm reported in his 1965 presidential address that the Executive Committee had concluded that:

it is an appropriate function of the Conference to assist in the development and drafting of laws which will be uniform between countries as well as between states, and again, within limits, to render assistance to the State Department of the United States in meeting its responsibilities in developing and approving conventions in the field of private international law.<sup>137</sup>

To carry out these functions, the Executive Committee appointed a Special Committee on International Uniformity of Private Law "to make recommendations to the National Conference on proposals concerning conventions and other methods of obtaining international uniformity on subjects suitable for state law in the United States."<sup>138</sup> Because the Secretary of State's Advisory Committee on Private International Law could not be the recipient of a foundation grant, the Conference also agreed to coordinate research funded by the Ford Foundation.<sup>139</sup> The groundwork was thus laid for

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<sup>136</sup> *Id.*

<sup>137</sup> 1965 HANDBOOK, *supra* note 133, at 57 (Malcolm presidential address).

It was the consensus [of the executive committee] that if a subject matter before the Rome Institute and the Hague Conference is one which has been customarily, in our federal system, the subject matter of state law, then the National Conference of Commissioners on Uniform State Laws, in furthering its objective of promoting uniformity in state law, should advise the Department of State as to the desirability and feasibility of international uniformity of law on the subject and as to the content of any proposed conventions or internationally uniform laws designed to secure uniformity of law on the subject.

*Id.* at 72-73.

<sup>138</sup> 1965 HANDBOOK, *supra* note 133, at 73 (statement of the special committee's purpose). The initial members of the Special Committee were James C. Dezendorf (chair), Joe C. Barrett, A. Fairfield Dana, Harold C. Havighurst, and William V. Roth, Jr.

<sup>139</sup> 1965 HANDBOOK, *supra* note 133, at 75. The Ford Foundation required periodic reports from the Conference. The only report published by the Conference covers the period January 1, 1970 to June 30, 1971. 1972

further action by the Conference.

The Special Committee on International Uniformity of Private Law undertook its work with enthusiasm. Its initial reports to the Conference called attention to a number of projects, especially those undertaken by the Hague Conference.<sup>140</sup> The first fruits of the Special Committee's efforts was a Model Choice of Forum Act,<sup>141</sup> inspired by a Hague Convention addressing the issue.<sup>142</sup> After reviewing the draft convention, the Special Committee agreed with the Secretary of State's Advisory Committee recommendation that the United States should proceed by state legislation rather than by federal action:

This Act is the first result of the Conference participation in the National Advisory Committee of the Secretary of State on World Unification of Private Law. Although the Hague Conference on Private International Law has under consideration a treaty requiring the signatory states to recognize agreements of the type dealt with in the Model Choice of Forum Act, the tentative conclusion of the National Advisory Committee was that this would be better dealt with as far as the United States is concerned by a law which the

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HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 74. The Conference records do not reveal when the Ford Foundation grant expired. Ford Foundation support for legal projects waned in the early 1970s.

<sup>140</sup> 1965 HANDBOOK, *supra* note 133, at 114, 179; 1966 HANDBOOK, *supra* note 106, at 156; 1968 HANDBOOK, *supra* note 105, at 175 (Dezendorf report on conference sponsored by UNIDROIT).

<sup>141</sup> *Model Choice of Forum Act*, 1968 HANDBOOK, *supra* note 105, at 219 (withdrawn 1975).

<sup>142</sup> Convention on the Choice of Court, 1965. This Convention is not in force and has been signed only by Israel. 1991 NETH. INT'L L.R. 230. The Hague Conference had earlier recommended a choice of forum convention limited to international sales contracts. *See* Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods, 1958, translated in 5 AM. J. COMP. L. 653-55 (1956) (unofficial English-language translation). The Conference had earlier reviewed this convention on the recommendation of Professor Kurt H. Nadelmann and a resolution of the American Branch of the International Law Association. 1958 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 64-65. The Conference's special committee, chaired by Mr. Barrett, recommended that the United States take no action on the convention. 1959 HANDBOOK NAT'L CONF. COMMISSIONERS ON ST. LAWS 194. The convention has not come into force. 1991 NETH. INT'L L.J. 221.

states having interest in the subject matter could adopt. . . . This type of agreement on the location of the court to hear controversies is quite customary in international transactions and states which have particular interest in such matters may find this a model which they may use.<sup>143</sup>

On the Special Committee's advice, the Conference recommended that the United States ratify the Hague Service<sup>144</sup> and Evidence<sup>145</sup> Conventions. The Conference also concurred with the Special Committee's recommendation that the text of the Hague Convention on adoption should be referred to the special committee appointed to review the Uniform Adoption Act.<sup>146</sup> It reached a similar conclusion with respect to a proposed Uniform International Arbitration Act that would complement ratification of the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards.<sup>147</sup>

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<sup>143</sup> 1968 HANDBOOK, *supra* note 105, at 163-64.

<sup>144</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force [including for the U.S.] February 10, 1969). For the Conference recommendation, see 1965 HANDBOOK, *supra* note 133, at 115-17, 179-80. For a transcript of discussion of the draft Convention by the Conference's Committee of the Whole, see 1964 HANDBOOK, *supra* note 105, at 141-52.

<sup>145</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (entered into force [including for the U.S.] October 7, 1972). For the Conference recommendation, see 1970 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 80 (executive committee approval of Special Committee recommendation).

<sup>146</sup> 1965 HANDBOOK, *supra* note 133, at 117-18, 180. See also 1964 HANDBOOK, *supra* note 105, at 103-128 (transcript of Committee of Whole proceedings with respect to draft Adoption Convention). There is no record of any action on international adoption by the special review committee.

<sup>147</sup> The Special Committee on Uniformity of Private Law reported in 1976 that the Secretary of State's Advisory Committee would consider ratification of the Arbitration Convention and would probably ask the Conference for its recommendation. 1966 HANDBOOK, *supra* note 106, at 157. The following year Messrs. Barrett and Dezendorf recommended the drafting of a Uniform International Arbitration Act to complement federal implementing legislation. The proposal was referred to the Special Committee on Uniformity of Private Law with the addition of Mr. Pirsig, the chair of the committee that had drafted the Uniform Arbitration Act. 1967 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 96, 103. The United States ratified the Arbitration Convention in 1970. Convention on the

By the end of the 1960s, in other words, the Conference not only had accepted that it should participate in international projects but it had also made significant contributions to U.S. efforts to participate effectively.

## 6. FADING INTEREST (1972-1992)

The Conference's interest in international projects began to wane in the early 1970s. The Special Committee on International Uniformity of Private Law slowly faded away in the Conference's records.<sup>148</sup> In 1974 it recommended that the executive committee be advised about draft conventions proposed by UNIDROIT and the Hague Conference.<sup>149</sup> It also recommended that Ambassador Richard Kearney of the State Department be made an Advisory Member of the Conference—a recommendation which was promptly acted on.<sup>150</sup> After 1974, however, the Committee was inactive.<sup>151</sup> In 1982, only a few years after the deaths of the Committee's principal supporters, James C. Dezendorf and Joe C. Barrett, the Conference discharged the Committee.<sup>152</sup> Several years later, in recognition of a shift in emphasis, the Conference transferred the duties of the discharged committee to a newly-appointed Committee on Liaison with Uniform Law Conference

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Recognition and Enforcement of Foreign Arbitral Awards, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (entered into force June 7, 1959; for the U.S. December 29, 1970). Federal implementing legislation is now codified as Part II of Title 9 of the United States Code. 9 U.S.C. §§ 201-214 (1988).

<sup>148</sup> After the 1960s the Conference's HANDBOOK becomes leaner, with fewer appendices to reports and summaries of the substance of Conference proceedings. Because I reconstruct the Conference's interest in international matters from its published records it is important to note this change.

<sup>149</sup> 1974 HANDBOOK NAT'L CONF. COMMISSIONERS ST. LAWS 171 [hereinafter 1974 HANDBOOK].

<sup>150</sup> *Id.* The Conference decided to create a new category of membership to provide for liaison between the Conference and other bodies, including the Department of State. See 1974 HANDBOOK, *supra* note 149, at 70-71.

<sup>151</sup> 1976 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 113 (committee inactive) [hereinafter 1976 HANDBOOK]; 1977 HANDBOOK, *supra* note 114, at 154-55 (committee inactive); 1978 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 109 (meeting with Kearney) [hereinafter 1978 HANDBOOK]; 1979 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 117 (no report) [hereinafter 1979 HANDBOOK]; 1981 HANDBOOK, *supra* note 98, at 63 (committee inactive)

<sup>152</sup> 1982 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 70, 100 (committee discharged).

of Canada and International Organizations.<sup>153</sup>

During the slow decline of the Special Committee, the Conference had continued to work on several international projects during the 1970s. The most fruitful of these was the draft uniform law on the form of an international will. In 1973, the United States agreed to host a diplomatic conference in Washington, D.C., to consider a draft text on this topic prepared under the auspices of UNIDROIT. To implement the resulting Washington Wills Convention,<sup>154</sup> the National Conference of Commissioners referred the Convention text to the Editorial Board for the Uniform Probate Code. The Editorial Board recommended that the Conference adopt a uniform state law implementing the Convention and, in 1977, the Conference adopted the Uniform International Wills Act.<sup>155</sup>

Until very recently, however, action at the federal level languished. It was not until 1986 that the White House finally submitted the Convention to the Senate for its advice and

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<sup>153</sup> 1984 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 33 (membership), 68 (report). Dean Lindsey Cowen, who had become chair of the discharged committee following Dezendorf's death, became chair of this new committee. Subsequent Handbooks (through 1986) suggest that this committee as well has been inactive. *Id.* at 68 (committee did not meet but its report notes contact with Department of State regarding implementation of the Uniform International Will Act); 1986 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 79 [hereinafter 1986 HANDBOOK] (committee inactive). *But see* 1983 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 110 [hereinafter 1983 HANDBOOK] (consideration of Transboundary Enforcement of Support Act).

<sup>154</sup> Convention providing a Uniform Law on the Form of an International Will, 1973. (The English-language text of the Convention is reprinted in 1977 HANDBOOK, *supra* note 114, at 364-69.) The Convention entered into force in 1978 and is presently in force in the following countries: Belgium, Canada, Cyprus, Ecuador, Italy, Libya, Niger, Portugal, and Yugoslavia. For a brief history of the project, see *id.* at 358-59 (Prefatory Note). *See also* Kurt H. Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will*, 22 AM. J. COMP. L. 365 (1974).

<sup>155</sup> [Uniform International Wills Act; International Will Information Registration] Prefatory Note, 1977 HANDBOOK, *supra* note 114, at 358 (appendices include the convention and related documents). States may adopt the Act as a free-standing act or as an amendment (new Part 10) of Article 2 of the Uniform Probate Code. UNIF. PROBATE CODE, 8 U.L.A. 178 (Master ed. 1983). Three states (California, Minnesota, and Oregon) have adopted the act; four others (Colorado, Connecticut, Illinois, and North Dakota) have adopted the act with amendments. *Id.* (1991 Supp.).



consent, and only in August 1991 did the Senate finally give its consent to ratification subject to enactment of federal implementing legislation.<sup>156</sup>

The 1970 Hague Convention on recognition of foreign divorces faced similar delays at the federal level.<sup>157</sup> The Conference gave a first reading to a Uniform Recognition of Foreign Divorces Act in 1975, but fearing that the United States would not ratify the Convention, the Conference withdrew the Act from its agenda and informed the Secretary of State's Advisory Committee of its action.<sup>158</sup> When the Senate had still failed to ratify the Convention by 1979, the Conference discharged its standby committee for the Act.<sup>159</sup>

The Conference did even less with the Hague Convention's law on products liability.<sup>160</sup> Noting that the Convention was to be submitted to the American Bar Association's House of Delegates in 1975, the National Conference of Commissioners deferred action.<sup>161</sup> That the proposal did not gain A.B.A.

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<sup>156</sup> Harold S. Burman & Peter H. Pfund, *Review of Developments from May 1990 to August 1991* at 11-12 (L/PIL Doc. AC/44/4) (memorandum distributed at 44th meeting of Secretary of State's Advisory Committee on Private International Law, October 4, 1991). The Conference's Executive Committee supported the State Department's 1986 decision to proceed. National Conf. of Commissioners on Uniform St. Laws, *1986 Proceedings* at 130 *microformed on* Uniform St. Laws 143.5-A(3) (Hein) ("The Executive Committee resolved that the U.S. Senate should ratify the Washington Convention dealing with international wills, and that the U.S. Senate be advised of this resolution and additional notices of this resolution should be forwarded by Commissioners to their respective Senators"). See also Richard Kearney, *The International Wills Convention*, 18 INT'L LAW. 613 (1984).

<sup>157</sup> Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, COLLECTION OF CONV. OF THE HAGUE CONF. ON PRIVATE INT'L LAW 128 (1951-80).

<sup>158</sup> 1975 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 102 [hereinafter 1975 HANDBOOK]; 1979 HANDBOOK, *supra* note 151, at 95.

<sup>159</sup> 1979 HANDBOOK, *supra* note 151, at 95.

<sup>160</sup> Convention on the Law Applicable to Products Liability, Oct. 2, 1973, COLLECTION OF CONV. OF THE HAGUE CONF. ON PRIVATE INT'L LAW 192, entered into force October 1, 1977. The Convention is in force in the following countries: France, Luxembourg, Netherlands, Norway, Spain, and Yugoslavia. The following states have signed but not ratified the Convention: Belgium, Italy, and Portugal.

<sup>161</sup> 1975 HANDBOOK, *supra* note 158, at 95.

approval and thus promptly died in the United States<sup>162</sup> suggests that the Conference leadership suspected that the products liability convention would gain little support.

During the 1970s the Conference also quietly dropped several "international" procedural acts, including the Model Choice of Forum Act.<sup>163</sup> The executive committee's report notes that while two states had adopted the Act, there were constitutional questions about the enforceability of choice-of-forum clauses, and that it might not be feasible to draft an Act to deal effectively with all possible contexts.<sup>164</sup> It was concluded that development of the law was better left to the courts and the legislature.<sup>165</sup> A few years later the Conference withdrew the Uniform Interstate and International Procedure Act because it had been superseded by developments since 1962, most notably the adoption of long-arm statutes.<sup>166</sup>

Waning enthusiasm for these international initiatives within the Conference coincided with difficulties within the State Department. Frustrated with the lack of official support for private international law projects, Ambassador Richard Kearney resigned from the State Department in July 1978 and the work of his office was dispersed within the Legal Adviser's Office.<sup>167</sup> This informal arrangement lasted until the end of 1979, when Peter H. Pfund was appointed assistant legal

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<sup>162</sup> See 100 A.B.A. REP. 242-43 (1975) (action deferred at mid-year meeting because of opposition on ground that the Convention harmed both American consumers and manufacturers). The Convention was not resubmitted to the annual meeting.

<sup>163</sup> In 1989, however, the Conference adopted a Uniform Foreign-Money Claims Act. UNIFORM-FOREIGN MONEY CLAIMS ACT, 13 U.L.A. (1991 Supp.). The following states have already adopted the Act: Colorado, Connecticut, Hawaii, Illinois, and Utah. After carefully reviewing this U.S. Law, the Uniform Law Conference of Canada has decided not to adopt it. Uniform Law Conference of Canada, *Proceedings of the Seventy-First Ann. Meeting* 178-216 (1989) (report); Uniform Law Conference of Canada, *Proceedings of the Seventy-Second Ann. Meeting* 38 (1990).

<sup>164</sup> 1975 HANDBOOK, *supra* note 158, at 142.

<sup>165</sup> *Id.* In 1985 the Conference declined to proceed with a proposal for a uniform law on choice of law and choice of forum. See 1985 HANDBOOK, *supra* note 2, at 126.

<sup>166</sup> 1977 HANDBOOK, *supra* note 114, at 118-19.

<sup>167</sup> Letter from Richard Kearney to members of the Secretary of State's Advisory Committee on Private International Law (July 21, 1978) (on file with the University of Pennsylvania Journal of International Business Law).

adviser for private international law.

During his tenure, Mr. Pfund has had to reestablish working procedures for the Secretary of State's Advisory Committee on Private International Law and for his own office. His frequent reports on the work of his office show a growing list of international projects sponsored not only by the Hague Conference on Private International Law and UNIDROIT but also by the U.N. Commission on International Trade Law and the Organization of American States.<sup>168</sup> With the U.N. Convention on Contracts for the International Sale of Goods and several other private international law conventions coming into force, the work of Mr. Pfund's office has taken on greater significance for the average American citizen.

The National Conference of Commissioners has not, however, been a key player in this process.<sup>169</sup> In August 1987 the Conference's executive committee discussed reestablishing the uniform private law committee discharged in 1982. In response to a query from the author at that time, Professor Fred H. Miller, who has subsequently been appointed Executive Director of the Conference, wrote:

The Conference is aware of developments with respect to and is deeply interested in international legal unification, not only in relation to international wills but also in relation to the sales convention and other developments including those relating to payments and

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<sup>168</sup> See, e.g., Peter H. Pfund, *Overview of the Codification Process*, 15 BROOK. L. REV. 7 (1989) (contribution to symposium on Codification of International Commercial Law); Peter H. Pfund, *International Unification of Private Law: A Report on U.S. Participation—1987-88*, 22 INT'L LAW. 1157 (1988); Peter H. Pfund, *International Unification of Private Law: A Report on U.S. Participation—1985-86*, 20 INT'L LAW. 623 (1986); Peter H. Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985).

<sup>169</sup> Only recently have the Conference's published records listed Mr. Pfund and his associate, Harold S. Burman, as Advisory Members of the Conference. National Conf. of Commissioners on Uniform St. Laws, 1990 *Proceedings* at 86 *microformed on* Uniform St. Laws 143.5-A(6) (Hein). When Ambassador Kearney resigned from the State Department in 1978 the Conference recognized Robert E. Dalton as the Advisory Member in his place. 1978 HANDBOOK, *supra* note 151, at 87. Mr. Dalton remains listed as an Advisory Member in the HANDBOOK published in 1986, the most recently published HANDBOOK as of this date. See 1986 HANDBOOK, *supra* note 153, at 79.

letters of credit. However, these matters seem better approached through other committees of the Conference relating to the subject matter involved, rather than through a general purpose standing committee. In addition, Frank Jestrab has agreed to continue to supply the Executive Committee with periodic reports to make sure no subjects are inadvertently unnoticed, and also to explore Conference representation or participation in some of the ongoing projects.<sup>170</sup>

It is not yet clear whether the executive committee's approach will successfully address the numerous international projects now being generated by the U.N. Commission on International Trade Law and other international bodies.

There is one significant development, specifically the growing coordination between the Conference and its Canadian counterpart. While the two bodies had met together in 1942 and 1950,<sup>171</sup> it was in the 1970s that the relation between the two bodies became institutionalized. In 1976 the Conference made the president of the Canadian Conference or the president's designee an Advisory Member.<sup>172</sup> Several years later the Conference established a liaison committee with the Canadian Conference to deal with transfrontier pollution

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<sup>170</sup> Letter from Fred H. Miller to Peter Winship (August 17, 1987) (on file with the University of Pennsylvania Journal of International Business Law). The minutes of the Executive Committee meeting referred to in Professor Miller's letter state: "Michael Sullivan will prepare a report on international private law activities and the appropriate role of the Conference. Frank Jestrab will continue to inform the Conference as to activities in this area . . . ." National Conf. of Commissioners on Uniform St. Laws, 1986 *Proceedings* at 163 microformed on Uniform St. Laws 143.5-A(3) (Hein). There is no record of Mr. Sullivan's report.

<sup>171</sup> See 1942 HANDBOOK, *supra* note 85, at 74-75, 83-87; 1949 HANDBOOK, *supra* note 90, at 183; 1950 HANDBOOK, *supra* note 90, at 43-44. In 1966 the Conference met in Montreal, Canada and a Minister of the Justice of the Province of Quebec addressed the commissioners. 1966 HANDBOOK, *supra* note 106, at 44-47.

<sup>172</sup> See 1976 HANDBOOK, *supra* note 151, at 86. See also 1977 HANDBOOK, *supra* note 114, at 54-55 (presidential address reciting history of relations between the two bodies); 1978 HANDBOOK, *supra* note 151, at 49-52 (address by H. Allan Leal, the President of the Uniform Law Conference of Canada). In 1988 the Conference named a retiring president of the Canadian Conference as an Associate Member representing the Province of Nova Scotia. National Conf. of Commissioners on Uniform St. Laws, 1988 *Proceedings* at 67 microformed on Uniform St. Laws 143.5-A(5) (Hein).

problems.<sup>173</sup> In 1984 the Conference appointed a more general standing committee "on Liaison with Uniform Law Conference of Canada and International Organizations"—a committee which, by its title, suggests the change of emphasis in the Conference's interest in matters beyond the United States borders.<sup>174</sup>

## 7. REFLECTIONS

Readers familiar with the topography of U.S. history will have noted that the preceding sketches trace the same contours as a more general history. Created at a time of widespread migration and a rapidly-expanding domestic economy, in its early years (1892-1910) the Conference addressed the domestic problems created by this migration and expansion. When, at the end of this period, commissioners discovered a world beyond our national borders the Conference spent the next two decades (1910-1930) wrestling with how the United States might participate in the international arena and at the same time retain traditional notions of federalism. Following the collapse of the world economy in the early 1930s the Conference's work appeared increasingly marginal: problems were so vast that federal, rather than state, solutions appeared to be necessary. During a period of almost 25 years (1930-1955) the Conference was preoccupied with domestic projects—most notably the Uniform Commercial Code, which can be seen as an attempt to reaffirm the role of state law in a federal system. International unification efforts were ignored.

With the advent of the Cold War in the 1950s, however, Conference leaders turned to international projects as a way to contribute to the spread of the Rule of Law. Over a

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<sup>173</sup> See 1979 HANDBOOK, *supra* note 151, at 108, 116; 1980 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 93 (authorizing the creation of a Joint Drafting Committee on Transboundary Pollution Remedies Act); 1983 HANDBOOK, *supra* note 153, at 73 (noting that the Montana legislature passed the Uniform Transboundary Pollution Reciprocal Access Act during the last year and discussing the activity of the Joint Standing Committee of the Act); 1986 HANDBOOK, *supra* note 153, at 79 (regarding Uniform Transboundary Act). This work was initiated by a recommendation of a Joint Working Group on Settlement of International Disputes of the American and Canadian Bar Associations.

<sup>174</sup> See *supra* note 152.

relatively short period (1955-1972) the Conference actively addressed transnational matters. It adopted uniform laws concerned with transnational litigation and individual commissioners participated in international unification efforts. By the early 1970s, however, this enthusiasm waned. Since then Conference participation in international initiatives has petered out, to be replaced by closer institutional contacts with the Conference's Canadian counterpart.

Constitutional historians reviewing this same history will also recognize familiar perspectives. Implicit in much of the Conference's early work is the assumption that state law solutions were essential because congressional power was limited. This same assumption also underlies Dean Wigmore's ingenious proposal to send state delegations to international conferences with authority to act granted under the "compact clause." By the end of the 1930s, Supreme Court decisions on the scope of the commerce clause and the treaty power shook these assumptions. Commissioners began to speak of the need to resist encroachment by the federal Government on those matters "traditionally reserved" to the individual states. Thus, in the 1960s, when the Conference turned once again to international matters, Conference leaders stressed the constitutional propriety of Conference participation in international unification projects that would displace state law.

Whether by constitutional mandate or as a matter of constitutional propriety, the Conference has hoped to preserve a vision of federalism that leaves nearly all areas of private law to state regulation. "From the very beginning," wrote Allison Dunham in 1965, "it has been a theme that uniformity of law by voluntary state action was a means of removing any excuse for the federal government to absorb powers thought to belong rightfully to the states."<sup>175</sup>

In recent years the Conference has moved quickly to preserve this vision of federalism from "federalization." The need to preserve the Uniform Commercial Code as state law has been a prominent concern in Conference deliberations. "Rapid and uniform enactment of article 2A," Professor Frederick H. Miller recently wrote, "is crucial to the continued

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<sup>175</sup> Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 *LAW & CONTEMP. PROBS.* 233, 237 (1965).

viability of the U.C.C. as state law."<sup>176</sup> Professor James J. White expresses even broader concerns in his essay written to honor the Conference's centenary. Citing recent federal forays into the law governing payment systems, consumer rights, investment securities, and secured transactions, Professor White inveighs against the tearing down of constitutional "barriers" to create a "less federalist society."<sup>177</sup>

Yet the Conference and these authors have ignored the implications of the increasing "internationalization" of those areas of private law—commerce, procedure, and succession—in which the Conference's uniform laws have been most successful. The implications, for example, of U.S. ratification of the United Nations Convention on Contracts for the International Sale of Goods went virtually unnoticed during the ratification process and even when it was suggested that U.C.C. Article 2 (Sales) be revised.<sup>178</sup>

Of course, whether the Conference should be concerned with these international projects cannot be answered from the historical record traced in this essay. This record can, however, suggest whether participation in international unification efforts is compatible with the Conference's traditional objectives and its working methods. It may also highlight institutional constraints on such participation.

This history confirms, for example, that one potential constraint does not exist: the Conference's *authority* to participate in preparing and deliberating on "international" uniform laws is unquestioned. Allison Dunham's 1965 report to this effect remains un rebutted, as has his conclusion that

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<sup>176</sup> Frederick H. Miller & Ralph J. Rohner, *Introduction to the Uniform Commercial Code Annual Survey*, 44 BUS. LAW. 1439, 1441 n.10 (1989).

<sup>177</sup> James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2103 (1991). See generally *id.* at 2099-2103 & 2132-33 (detailing federal "encroachment").

<sup>178</sup> See Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOYOLA L. REV. 43, 44-50 (1991) (noting Article 2 study group's failure to develop systematic strategy with respect to Convention). As for some of the "federalism" implications of the Convention, see Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 299-302 (1984) (criticizing Convention because it displaces state law), and Peter Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707, 716-24 (1986) (partial response to Rosett).

most commissioners may accept appointment to official U.S. delegations.<sup>179</sup>

That the Conference has authority to act does not mean that the Conference will—or should—act. Indeed, the historical record suggests that enthusiasm for international unification projects has been primarily the enthusiasm of individuals rather than of the Conference. It is true that the Conference leadership led a concerted effort in the mid-1960s to promote participation. Mandated rotation of leadership positions, however, has meant that individual supporters of these international efforts have influenced policy over the long term principally by participation in committees and personal suasion. When, however, these individuals die or leave the Conference interest wanes.

Support for these projects by the Executive Director might provide greater permanency, but here again the individual interests of a Director will nudge the Conference in one direction or another. Allison Dunham, the first Executive Director (1963-1969), was enthusiastic about international projects, but William J. Pierce, his successor (1969-1992), has had other interests that may arguably be more closely associated with the Conference's traditional goals.

The Conference's working methods also may not lend themselves well to effective participation in international projects. I have described the Conference's working methods as following a "Bargaining Table" model of lawmaking rather than a "Ministry of Justice" model of lawmaking in another article.<sup>180</sup> Conference drafting committees seek to include representatives of different interest groups who arrive at a final text by bargaining across the table. It is assumed that the representatives will bring with them relevant knowledge of existing law and practices so that preliminary surveys of the law and empirical research are usually not considered necessary. The Ministry of Justice model, on the other hand, looks to independent "experts" to prepare studies that form the basis of "apolitical" recommendations for changes in the law.

A Bargaining Table model does not adapt well to international projects. In the international arena the Conference is

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<sup>179</sup> See *supra* note 134 and accompanying text.

<sup>180</sup> See Peter Winship, *Lawmaking and Article 6 of the Uniform Commercial Code*, 41 ALA. L. REV. 673, 695-98 (1990).



not the final forum where "bargaining" takes place. Representatives of non-U.S. interest groups are unlikely to participate in Conference deliberations. One cannot assume, therefore, that participants at Conference meetings will have a common understanding of current transnational practices or of the foreign legal concepts that will be brought by non-U.S. participants to the international forum. To educate those who do participate in Conference deliberations, preliminary studies of these practices and of comparative law become highly desirable. Yet, at present, the Conference has neither a research tradition nor the resources to carry out such research.

To the extent, moreover, that international projects seek to unify choice-of-law rules, rather than substantive law, the Conference itself has little experience. There are several uniform laws that address specific conflicts problems,<sup>181</sup> but the Conference has generally declined to codify choice-of-law rules.<sup>182</sup> Few commissioners will have the necessary background in "comparative conflict of laws" to appreciate proposals that may emanate from outside the United States. Moreover, because the individual states appoint commissioners, it is unlikely that a sufficiently large number of conflicts experts will be appointed as commissioners. While the Conference might appoint non-commissioners as individual experts to specific international projects, it once again has neither a tradition of doing so nor the necessary resources to do so.

One is left, therefore, with a dilemma. Drafting and implementing "international" uniform laws pose "federalism" questions that deserve serious answers. What better body to respond to these questions than the Conference, which not only has relevant experience in the unification of laws but also is dedicated to a vision of federalism that may challenge accepted orthodoxies? At the same time, however, the Conference may not have an institutional structure that would

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<sup>181</sup> See, e.g., U.C.C. § 1-105 (1990 Official Text); UNIF. CONFLICT OF LAWS - LIMITATIONS ACT, 12 U.L.A. 59 (Master ed. 1991 Supp.).

<sup>182</sup> See 1949 HANDBOOK, *supra* note 90, at 79-80 (Goodrich on codification of conflicts rules); 1955 HANDBOOK NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS 127 (experts advise against codification of conflicts rules). See generally Larry Kramer, *On the Need for A Uniform Choice of Law Code*, 89 MICH. L. REV. 2134 (1991) (recommending that the Conference codify choice-of-law rules).

permit it to participate effectively. Nor may participation in international unification efforts be sufficiently central to the Conference's mission to persuade it to devote enough resources for effective participation. "While there is a place for the Conference in the field of international law," writes Walter P. Armstrong, Jr., "its function in that field is necessarily limited."<sup>183</sup>

To raise serious—and potentially highly-charged—issues of federalism without at least seeking an effective solution is irresponsible. Few items on the Conference's agenda for its next century are as challenging as determining the role it should play in international unification efforts.

## 8. EPILOGUE

After completing this manuscript I spoke with Professors Fred Miller and Curtis Reitz, who report recent developments that deserve to be noted because they portend greater interest in international unification efforts.<sup>184</sup>

In 1991 the Conference created a Committee on Liaison with the State Department's Advisory Committee on Private International Law. The committee is chaired by Frank F. Jestrab, who continues as the Conference's representative on the Advisory Committee but who now has the benefit of the advice and support of the two other commissioners appointed to this liaison committee.

Recent changes in the Committee on Liaison with the Uniform Law Conference of Canada and International Organizations also suggest new directions. After consultation with Canadian colleagues in 1991, the two Conferences agreed to coordinate work on subjects of common interest. With the

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<sup>183</sup> Armstrong, *supra* note 1, at 130. Mr. Armstrong does not explain why the Conference's role is "necessarily" limited. It certainly doesn't follow necessarily from the history he traces in his text. He probably means merely that participation in international projects should be subordinate to the Conference's principal objective of harmonizing domestic legislation.

<sup>184</sup> Conversations with Frederick H. Miller, Professor of Law, Univ. of Oklahoma College of Law (March 17, 1992) and Curtis R. Reitz, Professor of Law, Univ. of Pennsylvania Law School (March 17, 1992). As noted *supra* note 1, Professor Miller will become Executive Director of the Conference in 1992. Professor Reitz is presently a member of the Conference's Executive Committee as well as its newly-appointed Committee on Liaison with the State Department's Advisory Committee on Private International Law.

thought of developing contacts with Mexico and other countries in Central and South America, the president has appointed Professor Alberto Ferrer, a commissioner from Puerto Rico, to the committee. The president has also appointed Professor Harry D. Krause, a new commissioner from Illinois with significant comparative family law background.