

The Role of Private State (or nation state) law in a Federal System; is the process of NCCUSL transferable to the nations of the European Union?

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Since the subject of this Conference includes private law, this paper will discuss the subject of development of private law in a federal system, focusing on the development of uniform statutory law by the states in the United States.

FEDERALISM AND UNIFORMITY OF PRIVATE LAW

Much has been written about the values of federalism, particularly concerning the United States Federal system. At the risk of oversimplification, a rough summary¹ includes the following notions:

1. Our founding fathers saw virtue in having competing bases of governmental power. One example is the separation of powers both on a federal and state level into three branches, the Executive, the Legislative and the Judicial. The overriding principles in our Federal constitution apply to the states as well as the federal level to check usurpations of state government as well as the Federal government. There is justified concern about the bypassing of the democratic processes by federal bureaucracies in making public policy, as well as the heavy influence of interest groups on congressional committees, and Congress itself.

2. There is a strong educational dimension of citizens' imminent participation in small units of government. As De Tocqueville noted, participation in local government educates the public and through that education the public requires a taste for order and comprehends the complexity of issues and balance of powers.² It is axiomatic that the more local the government, the greater the opportunity for communication between those in office and those who elect them. Proximity tends to increase accountability through access. It is healthy that public officials feel a sense of accountability.

3. While we are right to insist on individual rights, there is an additional element of American constitutional theory, one that stresses shared or community values. A centralized government does not necessarily make republican virtues and a sense of community impossible,

¹ This portion of this Memorandum is based on and adapted from the following article: A.E. Dick Howard, "The Values of Federalism; Federalism for the New Europe", 1 New Eur.L.Rev. 143.

² Alexis De Tocqueville, *Democracy in America* 68.

but distance does tend to strain one's sense of benevolence and empathy. Federalism encourages the need to pay special attention to those people whose problems are close at hand.

4. The very existence of our states are reminders that traditions and attitudes do differ from one part of the country to the other. It is a fact of federalism that it encourages diverse attitudes to manifest themselves, and yet unity can arise from diversity. It also counters a monopoly of political power and political parties.

5. Federalism has its practical side. Many state and local problems do not require a federal solution.

6. As Justice Brandeis noted, one happenstance of the federal system is to serve as a laboratory.³ As students of the American federal system, we cannot help but appreciate the strength and dynamics that result from that laboratory.

7. Federalism has a dual purpose: to achieve unity while preserving diversity. While it is true that the allocation of power among levels of government introduces ambiguities into the processes of government, the process requiring reconciliation of competing interests results in a continuing dialog about basic principles and their sense of belonging to more than one level of government.

8. Federalism reminds us of the core value in democratic government: the right to become involved in public discourse that sets public policy.

All of this, of course, is not to say that uniformity of law is not necessary or desirable in significant areas of private law. A common body of law has advantages in that it makes it easier to apply the law and it lessens the differences in important private laws from jurisdiction to jurisdiction. There is an added complication that resides in different sets of laws in a federal system. This is simply one cost to be weighed in deciding whether and to what measure a country or group of countries should be federal. But a key issue in measuring the success of a federal system is its ability to achieve uniformity in significant areas of private law.

In creating a single economic unit with a common currency and under a federal constitution, the United States has struggled to create uniformity in private law by harmonization – the term used by the Canadian Uniform Law Conference in describing its work.

In the field of private civil law in the United States encompassing subjects of real property, family law, commercial law, contracts, torts, inheritance (or successions) and various business law subjects, states have achieved a high degree of uniformity or harmonization. This has resulted first from use of the common law system of judicial precedent with state and federal appellate courts giving due regard to the decisions of other jurisdictions under similar facts in applying state law. This decisional route toward uniformity has been assisted in great measure

³ New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932, (Brandeis, J., dissenting)).

by the Restatements of Law adopted by the American Law Institute and of course, learned articles appearing in law reviews and other journals. It is, however, the contribution of the National Conference of Commissioners on Uniform State Laws (NCCUSL) on which I want to focus.

NCCUSL

After the Civil War, as economic integration, interdependency and travel increased, the need for a more common and predictable nationwide system of private law became crucial. The method chosen was for the states to form a private conference to draft laws for the state legislatures to consider subjects where uniformity was necessary or desirable. This approach was seen as superior to interstate compacts that are mostly devoted to public law subjects. Today, the approach is also thought superior to Federal preemption through aggressive use of the commerce clause of our Constitution. Encouraged by the American Bar Association, the first meeting of seven states occurred in 1891. By 1894, 22 states were participating, and NCCUSL was born.

Early Acts included notarial acts, negotiable instrument law, marriage and divorce, execution of wills, probate of foreign wills, commercial contracts or sales, warehouse receipts, partnerships, fraudulent conveyances and many others. Since those years, many of these acts have been updated. Other significant modern products include a uniform probate code, a uniform land transactions acts (which include condominiums), mortgage foreclosures, a uniform arbitration act and one on mediation, gifts to minors, collection of child support across state lines, definition of death, enforcement of non-U.S. money judgments, special procedural provisions relating to enforcement of judgments of sister states, powers of attorney, anatomical gifts, state administrative procedures, parentage, business organizations, rules of evidence, personal property leasing, and dozens of others. Perhaps the most significant work of the Conference, which it has undertaken in partnership with the American Law Institute, is the Uniform Commercial Code. It is of great significance to the federal system that the Uniform Commercial Code is uniform state law. If this had not been accomplished, most of it undoubtedly would have been federalized and innovation, amendment, and true input by all the competing interests would not have been possible.

Attached to this memorandum are some materials concerning the Conference, the appointment of its Commissioners, its funding and how it functions.⁴

The objectives of NCCUSL are:

- (1) to review state law, primarily private as opposed to public law, and

⁴ The balance of this section is based in large part on a paper entitled “U.S. and E.U. Financial Services Law – A Global Perspective” by Fred H. Miller (2002), the current President of NCCUSL.

(2) as appropriate, to restate it in statutory and occasionally in rule form to improve it and to promote uniformity in the law among the several states on subjects where uniformity is desirable and practicable.⁵ The Statement of Policy, at NCCUSL Reference Book 111, further provides: (1) there must be an obvious reason for an Act so its preparation will be a practical step toward uniformity or at least toward minimizing diversity; (2) there must be a reasonable probability that the Act will either be accepted and enacted into law by a substantial number of jurisdictions or will promote uniformity indirectly as by extensive adoptions in principle, and (3) uniformity on the subject of the Act among the states will produce significant public benefit. On the other hand, the Conference should avoid consideration of Acts on subjects on which there is little legislative or administrative experience, which are controversial because of differences in policies or philosophies among the states, or which are of mainly local or state concern. Accordingly, the primary goal of the uniform laws process is to, within an acceptable range of policy choices, produce legislation acceptable to those interests on which it will impact so that the uniform act will be widely enacted without significant amendment or delay.

An additional objective is to make the resulting law

- (1) clearer and more certain,
- (2) easier to find, and
- (3) consistent with sound policy and modern circumstances.⁶

What process does NCCUSL use to achieve its objectives, and how does that process relate to the alternative – the formulation of federal laws? First, most of NCCUSL’s products are in areas which are historically of state law jurisdiction and where there is no history of federal preemption. Indeed, some uniform state laws are drafted in cooperation with federal agencies that represent the federal interest in that legal area. Examples are the Uniform Commercial Code provisions on payments, prepared with the cooperation of the Federal Reserve Board; the UCC provisions on investment securities, prepared with the cooperation of the Treasury; and the Uniform Securities Act, prepared with the cooperation of the Securities and Exchange

⁵ Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts, August 2, 1998, NCCUSL 2000-2001 Reference Book (NCCUSL Reference Book) at 111-115; NCCUSL Constitution Article 1, Section 1.2 Purpose, NCCUSL Reference Book at 90.

⁶ On the virtues of codification and the limitations of the common law, a report of the Commissioners to Codify the Common Law of Massachusetts had this to say: “One great advantage, therefore, of a code, an advantage which in practical view can scarcely be overestimated, is, that it supercedes the necessity, in ordinary cases at least, of very elaborate researches into other books; and, indeed, it often supersedes...the necessity of consulting an immense mass of learned collections and digests of antecedent decisions.”

Commission. Further, federal agencies have turned to NCCUSL to prepare uniform state laws that complement federal legislation or policies, as in the case of the Uniform Money Services Act which coordinates with federal rules on money laundering, and the Uniform Interstate Family Support Act, which helps to implement federal policy in the collection of child support across state lines. Finally, in some instances federal legislation or regulatory rules have largely been derived from uniform laws, as in the case of the part of Regulation J of the Federal Reserve Board ⁷ dealing with commercial wire transfers, which mirrors UCC Article 4A, and the Uniform Electronic Transactions Act, which in large part was replicated in the federal “E-Sign” legislation. ⁸

Second, and focusing on the state law level, how does the work of NCCUSL compare with the federal level where uniformity can be achieved by one enactment? NCCUSL is able to bring extensive experience and perhaps unparalleled intellectual resources to a project. The drafting committees are, and the whole body of Commissioners who review their work is, composed of knowledgeable and politically astute practitioners with long practical experience in the working of the law. Moreover, through the academic members of NCCUSL, long experience in viewing the legal topic of an act in a historical and relational (to other law) context exists. Reporters for drafting committees are invariably established legal scholars with national reputations in the subject of an act, and the drafting committees are served and counseled by American Bar Association advisers, backed up by the membership of that organization, and also by numerous observers familiar with the environment in which the proposed new law must work and the practical considerations surrounding its application and operation.

Congress, of course, has formidable resources as well, but its legislation often is shaped by staff out of structured testimony rather than give and take discussion during actual drafting among all the persons attending the meeting, a hall-mark of the NCCUSL process. Moreover, because Congress is not, and cannot be, fully familiar with all the ramifications and details of proposals, all too often Congress does no more than set forth broad statements of policy in legislative form, and leaves the details to an administrative agency or the courts. An administrative agency may bring expertise to the resulting legal rules, but it also is less responsive to the type of participation which allows those to be governed by the law substantial influence in its formulation. Courts, of course, only act after the fact and on a case by case basis, which is not conducive to certainty or planning. For these reasons, constituencies to be governed by a proposed law being formulated very often state a preference for the uniform laws process. This process is the essence of democracy, and produces the soundest law, so long as the overall public good also is observed. To the extent some constituencies at times instead pursue legislation on the federal level, the usual reason is fear of substantial non-uniform amendments to the uniform product, or of the potential for failure to secure widespread enactment of that

⁷ 12CFR §210.25 et seq.

⁸ 15 U.S.C. §7001 et seq.

product.⁹ However, where experience has demonstrated the uniform law process works, as in the case of the Uniform Commercial Code, federal law remains a second choice, as long as the uniform law process is kept active.¹⁰

Another reason the uniform law process survives, even though the primary cause for its creation has lessened somewhat in the all-enveloping reach of present day federal power, is that the law is developed by state representatives, the Commissioners, who are familiar with both the state law sources from which the new law will evolve and the remainder of state law into which the new law must fit. They also, in the aggregate, are familiar with any diversity in existing state laws, and the virtues or deficiencies of those differences, which will influence the provisions of the new law. In short, the uniform laws process is well suited to smoothly fit the new legal effort, represented by the uniform law, which derives from diversity of thought in the states, into the overall existing legal structure that is state contract, property, and other fundamental law. Congress is not well suited to do this. Accordingly, its product often represents a rough fit rather than smooth integration. In part, this difficulty exists because there is no broad body of similar fundamental federal law; Congress in the United States structure more commonly acts with reference to specific topics rather than legislating a complete body of law for all occasions, and there is no general federal common law.¹¹

BEYOND STATE UNIFORM LAWS

NCCUSL has long had an interest in international issues for international efforts may override state laws; e.g. NCCUSL recognizes that its products are impacted not only by possible federal legislative preemption but also by treaties and that it must consider foreign law as well in its deliberations. For many years, these interests were largely confined to a close working

⁹ Another reason the federal level sometimes is preferred is the perception that in a particular circumstance that level will be more receptive to a certain point of view in the political process; in short, industry may be able to achieve more at the federal level and consumers less than in the state arena, or vice versa. While this factor can be involved, at times both industry and consumers have been able to achieve far reaching protections on the federal level, so perhaps allowing this factor to control poses as great a risk as it does a possible benefit, absent a careful evaluation which perhaps never can carry any real assurance of accuracy.

¹⁰ “Without a doubt, the reason for increasing demands on the Federal Government is that the States have not discharged their full duties. * * * So demand has grown up for a greater concentration of powers in the Federal government. If we will fairly consider it, we must conclude that the remedy would be worse than the disease. What we need is not more Federal government, but better local government.” This quote is attributed to President Coolidge, but many of the more recent federal excursions into traditional areas of state law indicate the accuracy of the observation.

¹¹ Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

relationship with the Uniform Law Conference of Canada, which was formed by the Canadian provinces in a manner similar to the United States Conference. After all, Canada is as close to many of our states as are other states. For many years, representatives of the Canadian Conference have attended NCCUSL Annual Meetings and NCCUSL's constitution designates the President of that Conference as an advisory member of NCCUSL with privileges of the floor. The Canadian Law Conference reciprocates and generally two representatives of NCCUSL, including NCCUSL's President attend their annual meetings. There are close exchanges of information, discussion of projects, and there has even been a joint meeting of the two Conferences.

For many years, NCCUSL has also worked closely with the Office of the Legal Adviser at the United States State Department¹², and with ACPIL, but it was not until more recent years that it had formalized its efforts through its International Legal Developments Committee presently chaired by Curtis Reitz, Professor of Law at the University of Pennsylvania. Just this last month, as guests of the Senate of the Republic of Mexico, two representatives of our National Conference including myself, and two representatives of the Canadian Uniform Law Conference addressed a special session of a Mexican Senate committee and the Mexico City Bar Association. We also had meetings with members of the Mexican Supreme Court, state Supreme Court judges, and with the Mexican State Department to explain our respective processes so that they could evaluate how they might be adapted for use in Mexico where their federal system includes 32 states and a federal district, modeled on the U.S. Constitution. NCCUSL has also established contacts with Australian and New Zealand Conferences. More recently, one or more of NCCUSL's Commissioners have participated with the U.S. delegation in negotiations at the Hague, UNIDROIT and most notably, UNCITRAL. The process of UNCITRAL is most similar to that of the Conference in that their focus is adoption of model laws which then have to be adopted by member states.

Through increased contact with like organizations abroad, international agencies and organization and other groups, NCCUSL believes that increased international harmonization will result, supplementing the treaty process and enhancing world trade and larger public interests.

Private Law in the European Union: Central Bureaucratic Regulation or ?

There has been much discussion, academic and otherwise, over the issue of whether the EU is moving in a federalist direction because it lacks a constitution and because its structure has been based on treaties.¹³ Thus, many scholars have said that the EU should be categorized as a

¹² Both Harold Burman and Jeffrey Kovar, who are participating in this Conference, are Advisory Members of NCCUSL, as are representatives of the American Bar Association and the American Law Institute.

¹³ This portion of the Memorandum is adapted in part from Weiler, "*Emerging Issues on Compliance and Effectiveness of Community Law*", 91 Am. Soc'y Int'l L Proc. 159.

unique entity in its own right that takes on some of the forms of a state, some of a federation, and some of an international organization. The EU is now moving in the direction of a constitution. At least in legislative matters, the EU has generally taken a federal approach through what is called a principle of “subsidiarity” in which, in theory, the EU has jurisdiction over those policies that cannot be effectively handled at the nation state level of government.

There are obvious parallels between the evolving status of federalism in the EU and the early development of the federal form of government in the U.S. Just as the sovereign states of Europe are reluctant to give up their sovereignty to Brussels, states were cautious about creating a powerful central government. There are strong elements of nationalism in the European Community which will take many years to overcome.

Insuring compliance with subsidiarity can be seen as a way of attempting to insure that power is not exercised outside the range of the Council’s competency. This is particularly apt when considering the profound differences between the need for constitutional rights at the EU level to protect the individual, and the need for federal public law, versus the need for private law and its administration and remedies. We should expect the political bodies of the member states, as well as the national courts, to be much more resistant to attempts to impose uniformity on areas of action by the EU in its seemingly ever increasing areas of competence. The principle of subsidiarity has been seen by some as a attempt on the part of the member states to limit the Community’s use of the implied powers doctrine. On the other hand, others have pointed out that it is supportive of integration in that it reinforces the supremacy of Community action in its areas of competence.

While the Community constitutes a new legal order for which member states have limited their sovereign rights in limited fields, there has been a sense from many commentators that those fields areas limited as once, or are limited in a very arbitrary way. No one knows exactly what those limits are. Some argue that the European Community suffers from a profound democracy deficit. Community law, which is supreme and which is given very effective mechanisms for enforcement in the member states, in many cases is adopted in a way that is at great variance with what we call democratic accountability in the member states. Certainly there is a risk of losing much of the advantages of a federal system as enumerated in the first part of this paper.

On the other hand, many commentators have pointed to the decentralization trend in the enforcement of EC law. This is based on the fact that the Commission is a small institution and does not have the resources to adequately safeguard the rule of law in the EU, the fact that member states do not want the Commission to take the lead in many issues, and the fact that the Commission itself may realize the political necessity of decentralizing the processes of enforcement of EC law.

Conclusion

With necessary adaptations, it certainly should be possible to clone the American/Canadian uniform law process for the nations of the European Union. While the line drawn as between what is appropriate for Community legislation or regulation and that which is appropriate for the states may be somewhat different than that drawn in the United States or Canada, there is certainly still plenty of work available where uniformity or harmonization of private law would be useful and helpful. It certainly would be in keeping with all the advantages and ideals of federalism and, to this observer at least, would have the most promise of producing a dynamic and reasonably uniform or harmonized system without the risks inherent in the present tendency toward central bureaucratic regulation.

While certainly our efforts have been aided by the presence of an independent well organized bar and our openness to the views of all interested affected groups, these factors, although more difficult perhaps to reproduce, should be possible in the European context.