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The Future of the Uniform Commercial Code Process in an Increasingly International World

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The domestic success of the Uniform Commercial Code as a unifying force within the United States has contributed to calls for similar unification on an international basis and the creation of an "International Uniform Commercial Code." As the focus of activity shifts from domestic to international lawmaking activities, the question of the continued relevance and viability of our domestic law is highlighted. To date, commercial law scholarship has been concerned primarily with the substance of these emerging international commercial law instruments; relatively little attention has been paid to the process by which these international commercial law instruments can and should become a part of United States law, and the procedural relationship between the various law-making processes. Yet the pressure is mounting, and the relative responsibilities of the federal and state governments to accommodate international developments deserve attention. The ability of the UCC drafting process to respond to the increasing internationalization of commercial law will put both its product and process to the test. This article explores the federal-state dynamics in the area of commercial law international treaty negotiation and implementation, and the continued role for our domestic lawmaking processes and actors in a world where the federal government is charged with power over foreign affairs and international negotiations.

I. INTRODUCTION

Almost fifty years have passed since the promulgation of a piece of legislation that swept the United States and gained virtually uniform enactment by states over the next ten years.[1] Despite initial questions about whether uniformity might best be achieved by federal enactment of the Uniform Commercial Code (UCC or Code), its widespread enactment on a state-by-state basis has made it the poster child for the uniform law process.[2]

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[1] Although the first "beta-version" of the UCC, the 1952 Official Text of the UCC, was enacted only by Pennsylvania, the 1957 revised Official Text (along with minor changes promulgated in 1958 and 1962) was enacted by all but one state in the United States by 1968.

[2] As a former president of the National Conference of Commissioners on Uniform State Laws, one of the two sponsors of the UCC, wrote: "Commercial law is epitomized

Nonetheless, over the intervening fifty years, the UCC has had to fend off attack after attack: criticism by academics and commentators who view the entire law revision process as a "private" law making process[3] that has been "captured" and does not produce rules "consonant with democratic values;"[4] attacks by Congress in the passage of legislation encroaching upon the domain of the UCC;[5] and attacks by those who oppose attempts to enact revisions to the UCC itself.[6] These attacks may simply be the natural impact of the passage of time and recognition of the importance of the Code or they may be rumblings of things to come. Central to these debates is the question of who is the appropriate decisionmaker when it comes to formulation, articulation, and enactment of the rules governing commercial transactions.

That same question—who should be the decisionmaker—is beginning to surface in another, somewhat less visible area: the continuing evolution of international law and the norms governing commercial law. The domestic success of the Uniform Commercial Code as a unifying force within the United States has contributed to calls for similar unification on an international basis and the creation of an "International Uniform Commercial Code." Ironically, as the focus of activity shifts from domestic to international lawmaking activities, the question of the continued relevance and viability of our domestic law is highlighted. On an international level, we begin to see potential conflicts: conflicts between the emerging international commercial code and our existing (domestic) Uniform Commercial Code; between the various interest groups advocating harmonization, unification, or internationalization of commercial law; and between the various governmental actors (state, national, supra-national) claiming competence

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by the Uniform Commercial Code which Professors White and Summers have called 'the most spectacular success story in the history of American law.'" Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 13 (1992) (citing JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE 5 (3d ed. 1988)).

[3] *See* Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1099–100 (2002); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 597 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1822–47 (1994).

[4] David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 448 (2003); Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 578–79 (1998); Schwartz & Scott, *supra* note 3, at 598.

[5] *See infra* notes 15–24 and accompanying text.

[6] While many of these attacks on attempts to amend the UCC have been based on the rationale that the UCC, written fifty years ago, works and is not in need of revision, these attacks may nonetheless be viewed as express hostility towards the codification movement as epitomized by the Uniform Commercial Code. *See* Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1017 (2002) [hereinafter Scott, *Article 2*].

over the subject matter. Will these potential conflicts result in a full scale collision—a true commercial calamity—or will the resolution of these conflicts add to the strength and endurance of our domestic commercial processes?

To date, commercial law scholars, to the extent they have become involved in international commercial law, have been primarily concerned with the substance of these emerging international commercial law instruments. Despite the amount of attention that has been paid to our domestic uniform law drafting process,[7] little attention has been paid to the process by which these international commercial law instruments can and should become a part of United States law, and the procedural relationship between the various law-making processes.[8] Yet the pressure is mounting, and the relative responsibilities of the federal and state governments to accommodate international developments deserve attention. As the UCC reaches middle age and suffers its own "mid-life crisis," it is understandable that both the product and the process need revitalization.[9] Its ability to respond to the increasing internationalization of commercial law will put both its product and process to the test.

Potentially at stake is our domestic law revision process itself. The latest revision process has not had a high degree of success in producing uniform enactments among the fifty states.[10] Just as the apparent failure of the enactment process, along with increasing federal encroachment into commercial law, has cast doubt on the continued vitality of the uniform law process, there is a recognition that the increasing commercial law activity on the international level may put pressure on our domestic commercial law

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[7] *See supra* notes 3–4.

[8] Janet K. Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 186 (2005) (challenging "private lawmaking scholars to take their analysis to the international stage"). Some attention has been paid to the process of international law making, however. *See* Paul Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 744–45 (1999).

[9] *See, e.g.*, Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625 (1993); Symposium, *Is the UCC Dead, or Alive and Well?*, 26 LOY. L.A. L. REV. 535 (1993).

[10] Revisions to Articles 2 and 2A were completed in 2003; as of the end of 2006, these amendments have not been adopted by any state. Revisions to Article 1 were completed in 2001. Although twenty-two states and the Virgin Islands have enacted the revisions, all (except the Virgin Islands) have rejected the revised choice of law rule, and several have rejected the revised good faith definition. Revisions to Articles 3 and 4, completed in 2002, have been enacted in only five states. *See* Scott, *Article 2*, *supra* note 6, at 1046; Robert E. Scott, *Is Article 2 the Best We Can Do?*, 52 HASTINGS L.J. 677, 686 (2001).

framework. At one extreme, if the United States ratified all existing conventions and implemented those treaties on a federal level, a good portion of the Uniform Commercial Code would be preempted,[11] the relevance of the UCC would be marginalized, and the UCC (as the core of commercial law in the United States) would be called into serious question. Moreover, were these conventions to be ratified and implemented federally, the role of the National Conference of Commissioners on Uniform State Laws (the Conference or National Conference) in the formulation of commercial law and its role as protector of state power in formulating commercial law would be drastically altered. Rather than being proactive and producing legislation that the Conference deems important to its constituent states based on input from local constituencies within the context of the internal domestic market and legal structure, the Conference would potentially be forced to revise its products and processes to take into consideration the international and federal incursions into its domain. To the extent these revisions were intended to "implement" the international instruments and carry out the international obligations of the United States, the ability of the National Conference to make changes to respond to concerns of local constituencies would be limited.

Whether or not this is a likely scenario, the growing specter and reality of internationalization of commercial law raises issues of whether and how the United States, at the federal or state level, will respond. The challenge may well be to find a continued role for our domestic lawmaking processes and actors in a world where the federal government is charged with power over foreign affairs and international negotiations.

II. FEDERAL-STATE RELATIONSHIP IN COMMERCIAL LAW

The battle over whether state or federal law should govern commercial transactions has existed since the conception of the Uniform Commercial Code, when early proposed drafts of the Uniform Commercial Code contained both state and federal versions for enactment.[12] Ultimately,

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[11] If the treaty were self-executing, the ratification of the instrument would automatically displace inconsistent domestic law. In the case of implementing federal legislation, there would also be preemption to the extent the legislation was inconsistent with state law. *See* A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 301 (2003) (noting commercial law federalism traditionally operates within a preemptive framework).

[12] Robert Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100 (1951). Ironically, the person celebrated as the "father" of the Uniform Commercial Code, the creator of the most successful piece of uniform state laws, was himself one of the more vigorous supporters of federalization of the area of sales law. *See* Karl Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 561

however, the UCC was promulgated as a uniform law for state rather than federal enactment. A variety of explanations have been advanced in favor of this choice. Professor Hunter Taylor has opined that many factors, including the rural (as opposed to the commercial) composition of Congress, Congress' poor track record with complicated commercial legislation, doubts about the power of Congress to legislate in the field, and the desire for flexibility to experiment favored the decision to pursue state-by-state enactment. He highlighted the importance of federalism concerns in the decision:

> This doubt [about the power of Congress to act] stems in part from . . . the deep-rooted, antifederalist, states' rights philosophy which produced the [T]enth [A]mendment. Influenced by territorial instincts and a self-identity need, the states' rights philosophy nurtures the concept that each state is unique and important unto itself. This provincial chauvinism, while related to constitutional doubt, is an important separate factor influencing choice of state-by-state enactment over federal legislation. . . . [An additional] consideration in the continuing vitality of the states' rights philosophy is the perception that the states' rights philosophy is more consonant with individual liberty and is thus a buffer against the threat of tyranny inherent in a large central government. Those embracing this view fear that federal intrusion into state commercial law could only be a step on the path to overall federal domination of the states.[13]

One would have thought that despite these initial debates over federal versus state enactment of the UCC, the widespread enactment of the Code

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(1940); David M. Phillips, *Secured Credit and Bankruptcy: A Call for the Federalization of Personal Property Security Law*, 50 LAW & CONTEMP. PROBS. 53, 54–56 (1987). The Spring 1950 Proposed Final Draft Text and Comments of the Uniform Commercial Code provided the following in the comments to § 1-105 of the federal version:

> The number of commercial transactions which pass between the states or which directly or indirectly affect interstate commerce is so great as to warrant the Congress of the United States in entering the field by enacting this Act to apply wherever the contract or transaction falls within the permissible jurisdiction of Congress under the commerce clause.

U.C.C. PROPOSED FINAL DRAFT § 1-105 cmt. 1 (1950).

[13] E. Hunter Taylor, Jr., *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 361–62 (1978). The history of the National Conference of Commissioners on Uniform States Laws reveals that the Conference itself was an attempt to protect states from federal incursion. Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 237 (1965) (noting that the uniform law process was "a means of removing any excuse for the federal government to absorb powers thought to belong rightfully to the states"); *see also* Fred. H. Miller, *Is Karl's Kode Kaput?*, 26 LOY. L.A. L. REV. 703, 706 (1993) (questioning federal-based system in light of the Tenth Amendment).

during the late 1950s and early 1960s would have put those discussions to rest, but that has not been the case. Although the original decision to enact the Uniform Commercial Code on a uniform state basis has, as Professor Taylor observed, been attributed in part to concerns about federalism and the relationship of the federal and state governments, there have been repeated calls over the years for the federalization of all or portions of the Uniform Commercial Code.[14] Indeed, over the past years, there have been a variety of federal enactments that have encroached upon the Uniform Commercial Code.[15] At least one commentator has called upon the National Conference to consider drafting legislation for federal as opposed to state legislation in order to remain relevant.[16] Despite the grant of power to the federal government to regulate interstate commerce, the preeminence of state law continues, fiercely defended by the "guardians" of the Code: the National Conference (the quintessential states' rights group)[17] and the Permanent

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[14] *See, e.g.*, Phillips, *supra* note 12, at 54–56; Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 778 (1993) (stating that Article 4 drafters demonstrated a "reverence for state law and distaste for the federal administrative process"). *But see* Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. PITT. L. REV. 442, 442–43 (1994). Even a champion of the Uniform Law Commissioners and the UCC has supported federal enactment. William A. Schnader, *The Uniform Commercial Code—Today and Tomorrow*, 22 BUS. LAW. 229, 229–31 (1966); *see also* Frank R. Kennedy, *Federalism and the Uniform Commercial Code*, 29 BUS. LAW. 1225, 1225–30, 1234 (1974).

[15] Examples include: The Food Security Act of 1985 (7 U.S.C. § 1631 (2000), overriding UCC § 9-307(1)); The Expedited Funds Availability Act (12 U.S.C. § 4001 (2000), superseding portions of Article 4 and authorizing the Federal Reserve to further preempt Article 4 with regard to the forward collection process of checks); The Market Reform Act of 1990 (15 U.S.C. §78-q1 (2000), authorizing the SEC to preempt entire sections of Article 8); The Magnuson-Moss Warranties Act of 1975 (15 U.S.C. § 2301 (2000), superseding part of UCC Article 2); The Door-to-Door Sales Rule (16 C.F.R. § 429 (2006) (making certain consumer sales contracts rescindable); The 1972 FTC Trade Practice Rule on the Preservation of Consumers' Claims and Defenses (16 C.F.R. § 433 (2006), overriding portions of Article 3); The 1984 Credit Practices Rule (16 C.F.R. § 444 (2006), overriding part of Article 3).

[16] Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 156–62 (1993) (suggesting that NCCUSL reconsider its role as protector of state autonomy and consider drafting legislation for federal enactment).

[17] *See* A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 686 ("Most importantly, institutional considerations support the NCCUSL maintaining its role in our federalist system as a protector of state control over commercial law.").

Editorial Board of the Uniform Commercial Code.[18] Over the past decade, federal efforts that threatened the states' domain of commercial law have prompted protective action. During the recent debates leading to federal enactment of the Check Clearing for the 21st Century Act (Check 21) and its implementing regulations by the Federal Reserve Board and the Office of the Comptroller of the Currency, for example, the ever vigilant Permanent Editorial Board submitted comments urging the regulators to avoid actions preempting uniform provisions of the UCC.[19]

A review of those areas where there has been federal legislation demonstrates that, viewed as a whole, the degree of displacement of the UCC has been minimal. To a large extent, these enactments have grown out of a Congressional concern with the substantive issues involved and the desire to achieve a given result. The Magnuson-Moss Warranties Act of 1975 grew out of a desire to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products,"[20] but it did not result in complete displacement of Article 2's warranty provisions. The Expedited Funds Availability Act was a response to consumer complaints about bankers' practice of placing "holds" on deposited checks.[21] Despite the grant of authority to the Federal Reserve

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[18] One of the functions of the Permanent Editorial Board is "monitoring developments in federal law preempting or otherwise affecting the state commercial law and devising recommendations or other methods to deal with the issues raised." Permanent Editorial Board, *Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board Uniform Commercial Code* (July 31, 1986) (amended Jan. 18, 1998), http://www.ali.org/ali/03-PEB%20for%20ucc%2003.pdf.

[19] *See* Letter from Fred Miller, President, National Conference of Commissioners on Uniform State Laws, and Lance Liebman, Director, American Law Institute, to Julie L. Williams, Office of the Comptroller of the Currency (May 12, 2004), *available at* http://www.nccusl.org/update/docs/FMiller_LetterToJWilliams_051204.pdf ("We seek clarification that the UCC is a state law that is not preempted as it is not 'inconsistent' with the powers of national banks."); Letter from Lance Liebman, Chair, Permanent Editorial Board, to Jennifer Johnson, Federal Reserve Board (May 3, 2005), *available at* http://www.ali.org/ali/PEBcommentsMay05.pdf (submitting comments on interaction of proposed regulations with Uniform Commercial Code and suggesting changes to proposal to assure "smooth functioning and transparency of the check collection system.")

[20] 15 U.S.C. § 2302(a) (1982). *See generally* CURTIS R. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT (1978).

[21] *See* Edward L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 OHIO ST. L.J. 1251, 1251–52 (1989). At one stage, the Federal Reserve Board suggested to NCCUSL that the provisions of subpart C of Regulation CC be "repatriated" and incorporated in the Code, but that project was abandoned. *See* Fred H. Miller, *The Significance of the Uniform Laws*

"to regulate . . . any aspect of the payment system, including the receipt, payment, collection, or clearing of checks,"[22] which could have resulted in complete preemption of Article 4, enacted regulations leave most of Article 4 intact.[23] The Food Security Act of 1985 grew out of a desire to protect purchasers of agricultural goods,[24] but the changes (to one section of the Code) have since been incorporated into the revisions of Article 9.[25]

While the potential or actual lack of uniformity in a field may have been a contributing factor,[26] these pieces of legislation were not motivated by any desire to usurp state power or expand authority.[27] Indeed, the fact that Congress has not enacted more commercial legislation in the field, and that federal agencies have not passed more regulations despite being authorized to do so,[28] may be the result of a disinclination to preempt or displace state legislation.

This sensitivity to the states' role in the commercial sphere is evident in several pieces of recent legislation. For example, under the Market Reform Act of 1990, Congress empowered the Securities and Exchange Commission to adopt regulations preempting state law on the transfer and pledge of securities if it concluded that the absence of a uniform federal rule substantially impeded the safe and efficient operation of the national

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Process: Why Both Politics and Uniform Laws Should Be Local: Perspectives of a Former Executive Director, 27 OKLA. CITY U. L. REV. 507, 515–16 (2002); *NCCUSL and ALI Establish New UCC Article 3-4-4A Drafting Committee to Reconcile FRB Regulation CC*, 54 CONSUMER FIN. L.Q. REP. 3 (2000).

[22] Expedited Funds Availability Act, 12 U.S.C. § 4008(c)(1)(A) (2000).

[23] Edward L. Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 559 (1991) (noting that the check return process's primary portion is affected by Regulation CC).

[24] *See* Charles W. Wolfe, *Section 1324 of the Food Security Act of 1985: Congress Preempts the 'Farm Products Exception' of Section 9-307(1) of the Uniform Commercial Code*, 55 UMKC L. REV. 454, 463–67 (1987).

[25] Although federal law displaces many of the provisions of Article 7 on bills of lading, the federal legislation in the field actually preceded the enactment of the UCC, and was in part in response to international treaty obligations. *See infra* note 54.

[26] *See* Wolfe, *supra* note 24, at 456. The potential lack of uniformity in the securities clearance and settlement areas was one of the major motivations behind the Market Reform Act of 1990. H.R. REP. NO. 101-477, at 6–7 (1990).

[27] *See, e.g.*, Rubin, *supra* note 21, at 1273 (discussing federalization through the Expedited Funds Availability Act, Rubin noted, "Congress has no conscious antipathy towards the UCC, nor any abstract policy of federalization."). As one commentator observed, "federal law challenges state law to update itself; or it may intervene to preempt the area." Guttman, *supra* note 9, at 632.

[28] The Federal Reserve was empowered to enact regulations that could preempt all of Article 4 of the Uniform Commercial Code. To date, however, this has not happened.

system.[29] The 1994 revisions to Article 8 were the response to that challenge,[30] and no federal regulation was adopted. Even where the power to preempt state law completely has been given to a federal agency and has been exercised, it has been used sparingly.[31]

A more recent example of sensitivity to the states is Congressional legislation enacted to deal with the growth of electronic commerce, the Electronic Signatures in Global and National Commerce Act (E-Sign).[32] Congress recognized that the states, through the National Conference of Commissioners on Uniform State Laws, were striving to promulgate a uniform law dealing with the issues of electronic commerce. At the same time, there was mounting pressure on Congress by certain industries and interest groups who urged federal legislation validating and supporting the growth of electronic commerce to eliminate the uncertainty and non-uniformity that existed in the field. E-Sign can be viewed as an attempt to respond to these two pressures by enacting federal legislation, while at the same time giving the states the ability to opt out of federal regulation by enacting their own legislation. Moreover, E-Sign specifically excluded communications under the Uniform Commercial Code.[33]

Whether this is an example of a new relationship between the federal government and the states,[34] and whether it signals a concern about the

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[29] The Market Reform Act of 1990 authorized the SEC to preempt entire sections of Article 8. Pub. L. No. 101-432, § 5(b), 104 Stat. 963 (codified as amended at 15 U.S.C. § 78q-1 (Oct. 16, 1990)). For a discussion of what precipitated the authorization of preemption, see Francis J. Facciolo & Richard L. Stone, *Avoiding the Inevitable: The Continuing Viability of State Law Claims in the Face of Primary Jurisdiction and Preemption Challenges Under the Securities Exchange Act of 1934*, 1995 COLUM. BUS. L. REV. 525, 560–61 (1995).

[30] WILLIAM D. HAWKLAND & JAMES S. ROGERS, 7A UNIFORM COMMERCIAL CODE SERIES § 8-101:04 (2006).

[31] *See supra* notes 22–23.

[32] Electronic Signatures in Global and National Commerce (E-Sign), Pub. L. No. 106-229, § 101, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001–7021 (2000)).

[33] 15 U.S.C. § 7003(a)(3) (2000). Not excluded were the provisions of UCC §§ 1-107, 1-206, and Articles 2 and 2A, as these provisions had not yet been revised to recognize electronic records and signatures; states enacting legislation to accommodate electronic records and signatures under those provisions could do so under § 7002 of E-Sign.

[34] According to Professor Brooke Overby, E-Sign is an example of what she calls "new federalism" or "cooperative" federalism, in contrast to the older and more traditional "dual" or "preemptive" federalism. Under the traditional view, power was divided between the federal and state governments (thus the duality), and either the federal legislature preempted the area or control over it remained with the states. By contrast, under her "New Federalism," power is shared on a cooperative basis, with only incremental or partial involvement by the federal government in state commercial law

power of the federal government to legislate in a particular field,[35] or to the federal government's power to direct states to do so,[36] the fact remains that at this stage in the evolution of commercial law in the United States the states continue to be the leaders, with minimal interference from the federal government. Indeed, federal agencies have been known to propose uniform commercial laws, participate fully in the drafting process,[37] and even adopt state law as part of the federal regulations.[38]

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areas. Overby, *supra* note 11, at 315–16. Of course, assuming there is a "new cooperative federalism," it did not originate in 2003; the Market Reform Act of 1999 would be an earlier example. *See supra* note 11 and accompanying text; *see also* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) (discussing how "the interaction of national and state governments, rather than their separation, [is] the primary means of realizing the aims of federalism"). Moreover, federal representatives have long participated in the UCC revision process.

[35] The expansion of Congress' power under the Commerce Clause followed by retrenchment in cases such as *United States v. Lopez* and *United States v. Morrison* may demonstrate the emergence of new views on federalism generally. *See* Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV 605, 609 (2001). In the commercial law area, however, there has been less of a sea change since the Supreme Court's decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which established the existence of federal common law in the commercial field. *Swift* was overruled by *Erie v. Tompkins*, 304 U.S. 64 (1938), which re-established the centrality of state law. Although Congress arguably has the power to pass legislation governing interstate commerce under the Commerce Clause, its expansions into the commercial sphere have been limited and circumscribed.

[36] Under the anti-commandeering doctrine of *New York v. United States*, 505 U.S. 144, 182 (1992), and *Printz v. United States*, 521 U.S. 898, 916 (1997), the federal government's ability to instruct states to implement federal law is limited by the Tenth Amendment. The notion of "conditional preemption" has been advanced as a way to encourage states to do something where the anti-commandeering doctrine would otherwise apply. *See* Carlos Manuel Vázquez, Breard, Printz, *and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1319 (1999).

[37] *See* Fred H. Miller, *The Uniform Law Process for the Development of Private State Law in the United States: A Model for Other Systems?*, 60 CONSUMER FIN. L.Q. REP. 4, n.9 (2006) (noting the cooperation of the Federal Reserve Board in drafting the payments provisions, and of the Treasury in the drafting of provisions on investment securities). For a discussion of the background of Article 4A and the involvement of the Federal Reserve, see Carlyle Ring, Jr., *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287 (1994).

[38] For example, the provisions of Article 4A are mirrored in rules of the Federal Reserve Board dealing with commercial wire transfers. 12 C.F.R. §§ 210.25–.32 (2006); *see also* Funds Transfers Through Fedwire, 55 Fed. Reg. 40791-01 (Oct 5, 1990) (to be codified at 12 C.F.R. § 11.210) ("The Board has adapted a comprehensive revision of Subpart B to Regulation J to make it consistent with the new Article 4A of the Uniform Commercial Code, Funds Transfers.").

III. INTERNATIONAL-STATE RELATIONSHIP IN COMMERCIAL LAW

The preeminence of state legislatures in the commercial law sphere may be challenged by a different development: the emergence of international commercial law. The evolution of an "International Commercial Code" is not a new phenomenon.[39] Since the enactment and widespread adoption of the United Nations Convention on the International Sale of Goods (Sales Convention),[40] there have been innumerable attempts to codify various aspects of commercial law on the international level from leasing[41] to factoring,[42] from bills and notes[43] to electronic funds transfers,[44] and from

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[39] *See* Amelia H. Boss & Patricia B. Fry, *Divergent or Parallel Tracks: International and Domestic Codification of Commercial Law*, 47 BUS. LAW. 1505, 1506 (1992) ("[A]ctivities are under way on the international level leading to the creation of what might be called an International Uniform Commercial Code."); *see also* UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, U.N. Doc. A/CN.9/SER.D/1 (May 1992) (reporting on a week-long congress devoted to the current state and the future of international commercial law unification).

There are debates about what such an International Code should look like. *Compare, e.g.*, Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 LA. L. REV. 677, 753 (2005) (stating that any attempt at achieving an international commercial code should be done in the form of a treaty or convention to minimize the level of confusion), *with* Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 92 (2001) (stating that global commercial law should give individual nations the ability to adopt variations and modifications to fit the Code within its own legal traditions). *See also* J. H. Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 BERKELEY J. INT'L L. 129, 132 (2006) (discussing that domestic laws can no longer adequately deal with the immense increase in the international flow of goods, services, payments, and capital necessitating the need for a new transnational law merchant).

[40] *See* United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 (1980), *reprinted in* 19 I.L.M. 671 (1980). The Convention became effective January 1, 1988. As of May, 2006, sixty-seven countries had become parties to the Convention on the International Sale of Goods. Information on the adoptions of the Convention, along with the status of all other UNCITRAL instruments, may be found at the website of the United Nations Commission on International Trade Law, http://www.uncitral.org.

[41] UNIDROIT Convention on International Financial Leasing, adopted at the Diplomatic Conference for the Adoption of the Draft UNIDROIT Conventions on International Factoring and International Financial Leasing, May 28, 1988, 27 I.L.M. 931.

[42] UNIDROIT Convention on International Factoring, adopted at the Diplomatic Conference for the Adoption of the Draft UNIDROIT Conventions on International Factoring and International Financial Leasing, May 28, 1988, 27 I.L.M. 943. Both the leasing and factoring conventions have been signed, but not ratified, by the United States.

letters of credit[45] to secured transactions.[46] It has been asserted that the domestic success of the Uniform Commercial Code was a driving force behind both international private law unification efforts and the decision of the United States to become a party to those efforts.[47] As the Secretary-General of UNIDROIT (the Institute for Private International Law) acknowledged: "Many of the most significant innovations in the field of commercial law have recently been introduced and developed within the United States."[48]

United States involvement in international commercial law-making dates back to 1964,[49] when, at the urging of industry and the legal profession,[50] it joined both the Hague Conference on Private International Law and UNIDROIT, two international inter-governmental organizations concerned with developing private international law.[51] Two years later, when the United

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[43] *See* United Nations: Convention on International Bills of Exchange and International Promissory Notes, U.N. Doc. A/43/820 (1988), approved by U.N. General Assembly Resolution 43/165 (Dec. 9, 1988), *reprinted in* 28 I.L.M. 170 (1989). The convention was signed by the United States in 1990, but has never been ratified.

[44] *See* UNCITRAL Model Law on International Credit Transfers, *in Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Fifth Session*, U.N. GAOR, 47th Sess., Supp. No. 17, Annex 1, U.N. Doc. A/47/17 (Nov. 25, 1992), *reprinted in* 32 I.L.M. 587 (1993).

[45] *See* UNCITRAL Convention on Independent Bank Guarantees and Letters of Credit, *in Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Eighth Session*, U.N. GAOR, 50th Sess., Supp. No. 17, at 92, Annex 1, U.N. DOC. A/50/17 (May 2–26, 1995).

[46] In addition to the UNIDROIT leasing and factoring conventions, there is the United Nations Convention on the Assignment of Receivables in International Trade, U.N. Doc. A/56/17 (2001), approved by U.N. General Assembly Resolution 56/81 (Jan. 31, 2001), 41 I.L.M. 776 (2002), and the UNIDROIT Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. Treaty Doc. No. 108-10, *available at* http://www.unidroit.org/english/conventions/c-main.htm [hereinafter Cape Town Treaty].

[47] Peter H. Pfund & George Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671, 674–75 (1986).

[48] Malcolm Evans, *Uniform Law: A Bridge Too Far?*, 3 TUL. J. INT'L & COMP. L. 145, 153 (1995).

[49] Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 500 n.218 (2004); Pfund & Taft, *supra* note 47, at 671 (discussing that 1964 "marked the beginning of full United States participation in international efforts to unify private [international] law").

[50] Pfund & Taft, *supra* note 47, at 675–76.

[51] The Hague Conference on Private International Law, http://www.hcch.net, dating back to 1983, is the oldest of the international private law making institutions. A global inter-governmental organization of over sixty members, it has developed conventions on topics ranging from choice-of-law and jurisdictional rules to inter-country adoption and

Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly,[52] the United States became a member, a position it has occupied since. These three organizations have been responsible for the bulk of international instruments in the commercial law area. From the beginning, the focus of United States involvement in the private international law process was one of influence: to have an opportunity to have input into the drafting process to "get the viewpoint of the United States heard in the initial drafting."[53]

One might surmise that this growing body of international commercial law might call into question the continued relevance and applicability of the Uniform Commercial Code, but a review of the implementation of these international instruments in the United States demonstrates that their impact on domestic state law has been minimal.[54] A brief consideration of the United Nations Convention on the International Sale of Goods, to which the

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child abduction. UNIDROIT, http://www.unidroit.org, the International Institute for the Unification of Private Law, set up in 1926 under the League of Nations, was re-established in 1940 as an autonomous international organization active in the harmonization of private international commercial law.

[52] *See* XI *United Nations Resolutions. Series I, Resolutions Adopted by the General Assembly* 215 (Dusan J. Djonovich, ed. 1966–1968). The United Nations Commission for International Trade Law (UNCITRAL), http://www.uncitral.org, was established to promote and "further the progressive harmonization and unification of the law of international trade." *See also* Henry D. Gabriel, *Reflections on the Future of the Harmonization of the Law by UNCITRAL, UNIDROIT, and the Hague Conference*, 2 CILE STUDIES 263 (2006).

[53] Pfund & Taft, *supra* note 47, at 671 n.1 (quoting *United States Participation in the Hague Conference and the Rome Institute: Hearings on H.R.J. Res. 732 Before the Subcomm. on International Organizations and Movements of the H. Comm. on Foreign Affairs*, 88th Cong. 1st Sess. 15 (1963) (statement of Joe Barrett, attorney and Commissioner on Uniform State Laws for the State of Arkansas)).

[54] One area where this statement is suspect is the area of bills of lading. The 1924 Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter the Hague Rules], was ratified by the United States in 1937 and implemented in 1936 by the Carriage of Goods at Sea Act, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. app. §§ 1300–1315 (2000)). This occurred prior to the drafting of the Uniform Commercial Code, although the result was the displacement of the Uniform Bills of Lading Act. Since then, however, the United States has not become a party to any of the other attempts to modernize the law of bills of lading on an international level. *See* Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729 (1987); Michael F. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. MAR. L.J. 1 (2000).

United States is a party,[55] demonstrates that the tension that exists between the evolving international code and the Uniform Commercial Code is limited.

The Sales Convention was ratified by the United States in 1986. As a self-executing treaty, it became the "law of the land," setting out the legal framework for transactions covered by the Convention without the need for any additional action by a legislature or executive official. Although it has been observed that "[t]he field of commercial law represents one of the most prominent examples of the influence of self-executing treaties,"[56] commentators at the time raised questions about the propriety of ratifying the treaty without implementing legislation.[57] The State Department however took the position that no implementing legislation on either the state or federal level was needed.[58]

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[55] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18, *reprinted in* S. Treaty Doc. No. 98–9, 98th Cong., 1st Sess., 19 I.L.M. 668 (1980) [hereinafter Sales Convention]; *see* 15 U.S.C.A. App. (Supp. 1995). The United States is also a party to the companion treaties on the limitation periods for international sales transactions.

[56] Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 922 (2004).

[57] *See, e.g.*, Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 304 (1984).

> Congress and the President should reconsider the wisdom of ratifying this Convention under the treaty power, without implementing domestic legislation. Again, no advantage to this procedure nor any precedent for so significantly undercutting state legislative authority is apparent. Any advantages to this approach should be made explicit and balanced against the costs. Among the advantages of implementing a convention of this sort by legislation is the clear indication that Congress undertakes responsibility for continuing supervision of this subject matter. This responsibility can be exercised by simple legislative act or by delegation of power to the states without denunciation of the whole Convention.

Id.; *see also* Peter Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707, 723 (1986) (commenting on the fragility of the process by which the convention became law in the United States); Roger A. Brooks, *Why Congress Should Be Wary of the U.N. Convention on the International Sale of Goods*, THE HERITAGE FOUNDATION (1984), *available at* http://www.heritage.org/Research/InternationalOrganizations/upload/89645_1.pdf.

[58] Department of State, Letter of Submittal, Aug. 30, 1983, 22 I.L.M. 1368, 1369 (stating that a treaty is "self-executing and thus requires no federal implementing legislation to come into force throughout the United States"). The United States did enter a declaration, however, limiting the applicability of the convention to transactions between parties of two contracting states; it refused to extend its application to situations where one party was in the United States and the other in a non-contracting state, reasoning that the provision "would displace our own domestic law more frequently than foreign law" and that "the sales law provided by the Uniform Commercial Code is

A large factor in the State Department's recommendation was the fact that the Sales Convention's application was limited to foreign commerce; thus, the covered sphere of activity, international sales transactions, clearly fell within the competence of Congress and the federal government to regulate, even apart from the existence of a treaty.[59] Additionally, the convention only minimally encroached upon existing commercial law within the fifty states: purely domestic (i.e., non-international) transactions continue to be governed by state law.[60]

The existence of two regimes for sales transactions, one on the international level and one on the domestic level, gives rise to a different type of non-uniformity[61]—a clash between regimes or what has been referred to as the "cleavage of statutes."[62] The presence of two different bodies of law applicable to financing transactions produces a risk of "norm conflict" that potentially can cause confusion and uncertainty. In the sales area, this dissonance has been noted time and time again by scholars who have in turn called for modification of either or both the international law (e.g. the Sales

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relatively modern and includes provisions that address the special problems that arise in international trade." *Id.* at 1380.

[59] The State Department observed that a federal-state declaration was not necessary:

> In view of the Constitutional power of the United States federal government over foreign commerce (U.S. CONST. art. I § 8) and the treaty power (U.S. CONST. art. II § 2, art. VI), a declaration by the United States pursuant to Article 93 would be unnecessary and inappropriate. In the absence of a United States declaration, the Convention will extend to all territories under the jurisdiction of the United States.

Id. at 1378.

[60] *Id.* at 1370. Contributing to the limited application of the Convention is the fact that under Article 6, the parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions, a tactic used by many practitioners. *Id.* at 1371; *see also* Peter Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 INT'L LAW. 525, 537 (1995).

[61] *See, e.g.*, Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301, 321 (2005) (speaking of the clash that exists when there are differences between international rules, which the United States has adopted, and domestic ones).

[62] FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 11 (1992). This happens because the convention is not meant to be integrated into the national legal system, yet must be applied by the national courts to covered transactions. Professors Enderlein and Maskow note that this problem is unique to conventions and treaties, and does not arise in the case of "soft" or model laws: "[T]here is a *difference with uniform laws* insofar as this incorporation elucidates the international character of the respective rule, underlines its special position in domestic law, and furthers an interpretation and application which is [oriented] to the standardization of law." *Id.* at 8 (emphasis added).

Convention) and the domestic law (the UCC) to eliminate the differences.[63] Our limited history, however, shows that we can live with those differences. Despite entreaties to the contrary, international developments ended up playing a minor role in the revisions to Article 2 of the UCC.[64] The approach ultimately adopted in the recent revision process was that any danger resulting from the two separate regimes (in particular, the danger that counsel are unaware of the applicability of different international rules) could be met by discussion in the Official Comments to specific sections of the differences between the Code's rules and those for international sales under the Sales Convention.

This approach is consistent with other action by the Permanent Editorial Board over the past decade. Recognizing the growing international developments, there have been attempts during the last flurry of revisions of the UCC to place domestic commercial law within a broader framework. In its first foray into the field in 1994, the Permanent Editorial Board issued PEB Commentary No. 13 on "The Place of Article 4A in a World of Electronic Funds Transfers" comparing the provisions of Article 4A with the UNCITRAL Model Law on International Credit Transfers and resulting in a new official comment to Article 4A.[65] Since then, efforts have been made in other revision processes (including the revisions to Articles 2 and 2A) to include comparisons to international instruments in the official comments.[66] The goal of including discussions of international instruments is to alert and educate the practitioner of the existence of and differences in international

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[63] Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43 (1991).

[64] *See* David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 552 (1999); Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995, 1996 (1998); Richard E. Spiedel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165, 168–69 (1995).

[65] Article 4A was drafted at the same time as the UNCITRAL Model Law on International Funds Transfers. *See* Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 TUL. L. REV. 1931, 1949 (1998); Carl Felsenfeld, *Strange Bedfellows for Electronic Funds Transfers: Proposed Article 4A of the Uniform Commercial Code and the UNCITRAL Model Law*, 42 ALA. L. REV. 723, 746–50 (1991).

[66] On November 2, 2002, for example, the Permanent Editorial Board approved amendments to Article 3 comparing the Code provisions to their counterparts in the Convention on International Bills of Exchange and International Promissory Notes. U.C.C. § 3-102 cmt. 5 (2003).

commercial law.[67] The impact of such commentary, however, may be limited, and its mere existence demonstrates a reluctance of the drafters to align domestic law with international instruments.[68]

In other areas, the influence of international activities on the development of domestic commercial law has been greater. The revisions of Article 5 dealing with letters of credit (a device used frequently in international trade) proceeded concurrently with international drafting projects within UNCITRAL and the International Chamber of Commerce, and had substantial influence in the 1995 revisions.[69]

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[67] The differences between the law applicable to domestic transactions and that applicable to international transactions has had an impact in the attitude of the United States toward acceptance of the international instrument. Carl Felsenfeld, *The Compatibility of the UNCITRAL Model Law on International Credit Transfers with Article 4A of the Uniform Commercial Code*, 60 FORDHAM L. REV. 53 (1992) (noting that even if Article 4A and UNCITRAL Model Law on International Credit Transfers are essentially the same, the obvious benefit for enacting model law is difficult to discern and a possibility of loss exists). With respect to the Convention on the Form of an International Will, the potential for differences in the treatment of wills executed domestically as opposed to those executed abroad, along with the fact that probate lawyers were more familiar with looking to state law for guidance, led to the decision to pursue state enactment of legislation where federal action alone would have been sufficient. *See infra* notes 133–42 and accompanying text.

[68] The PEB (Permanent Editorial Board) observed that it was "unlikely in the extreme" that the UNCITRAL model would ever be enacted in the United States. Permanent Editorial Board for the Uniform Commercial Code, *PEB Commentary 13, The Place of Article 9A in a World of Electronic Funds Transfers to the* U.C.C. (14th ed. 1995); *see also* Mark Sneddon, *The Effect of Uniform Commercial Code Article 4A on the Law of International Credit Transfers*, 29 LOY. L.A. L. REV. 1107, 1128 (1996) ("The United States seems intent on ignoring the Model Law . . . ."); Luc Thevenoz, *Error and Fraud in Wholesale Funds Transfers: U.C.C. Article 4A and the UNCITRAL Harmonization Process*, 42 ALA. L. REV. 881, 893 (1991) (finding the UNCITRAL Model Law "less influential on the development and adoption of Article 4A than the opposite").

[69] According to the reporter for Article 5, the influence of international law and particularly the Uniform Customs and Practices for Documentary Credits "cannot be exaggerated." James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 NW. J. INT'L L. & BUS. 189 (1995); *see also* James G. Barnes, *Internationalization of Revised UCC Article 5 (Letters of Credit)*, 16 NW. J. INT'L L. & BUS. 215 (1995). The UCC itself specifically recognizes the extent of the influence. UCC § 5–101, Official Comment ("Article 5 is consistent with and was influenced by the rules in the existing version of the UCP."). The comments to Article 5 are replete with references to material borrowed from the UCP. *See, e.g.*, UCC § 5–102 (1995), cmt. 4, 6–7. Of course, the international character of letter of credit practice and the overlap of participants in both the domestic and international processes may explain the force of the international influence.

Probably the biggest reason why there is minimal tension in practice between evolving international commercial instruments and the Code is the simple fact that since the 1986 ratification of the Convention on the International Sales of Goods, the United States has not been receptive to ratification of international commercial law instruments. Over the past twenty years, the United States has ratified only one other convention that contributes to the "international UCC," UNIDROIT's Cape Town Convention on International Interests in Mobile Equipment.[70]

The extent of this dismal record can be seen by examining the instruments produced by the three major private international lawmaking bodies: UNCITRAL, UNIDROIT, and the Hague Conference.[71] Of the eight conventions produced by UNICTRAL, the United States has ratified only three dealing with the sale of goods[72] but has failed to ratify the other five conventions.[73] Similarly, of the ten conventions proposed by UNIDROIT, the only ones that have been ratified by the United States are the Cape Town Convention on International Interests in Mobile Equipment (2001) and the

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[70] The Cape Town Treaty was signed by the United States on November 16, 2001, and the United States Senate gave its consent on July 21, 2004. Cape Town Treaty, *supra* note 46. The instruments of ratification were deposited on October 28, 2004. *Id.*; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, art. XXVIII(1), Nov. 16, 2001, S. TREATY DOC. NO. 108-10, *available at* http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf [hereinafter Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment]. The Cape Town Treaty Implementation Act of 2004, Pub. L. No. 108-297, 118 Stat. 1095 (2004), required the amendment of United States regulations governing the registration and deregistration of civil aircraft, which were published by the Federal Aviation Administration (FAA) on January 3, 2005.

[71] *See supra* notes 51 & 52.

[72] The Convention on the Limitation Period in the International Sale of Goods (1974 and as amended in 1980), and the Convention on Contracts for the International Sale of Goods (1980). It has also ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Although this is not a UNCITRAL product, promotion of the convention is an integral part of UNCITRAL's program of work.

[73] It has signed but not ratified the Convention on the Carriage of Goods by Sea (1978); the Convention on the Liability of Operators of Transport Terminals in International Trade (1991); the Convention on Independent Guarantees and Stand-by Letters of Credit (1995); the Convention on the Assignment of Receivables in International Trade (2001), and the Convention on International Bills of Exchange and International Promissory Notes (1988). *See* Status of Conventions and Model Laws, Note by the Secretariat, U.N. DOC. A/CN.9/601 (May 29, 2006) [hereinafter Status of Conventions].

protocol to that convention relating to aircraft.[74] Lastly, of the twenty-seven conventions of the Hague Conference on Private International Law that are currently in force, the United States has become a party to only four, and none in the commercial field.[75]

Despite the lack of ratification of these international instruments, the United States has been a regular participant in these international law reform efforts, frequently proposing and supporting the work in particular areas.[76] As a result, the products of these efforts reflect the influence of domestic law in the United States.[77] Many of the participants in the international law-

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[74] The United States has not become a party to the following UNIDROIT conventions: Convention Relating to a Uniform Law on the International Sale of Goods (The Hague, 1964); Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964); International Convention on Travel Contracts (Brussels, 1970); Convention Providing a Uniform Law on the Form of an International Will (Washington, D.C., 1973); Convention on Agency in the International Sale of Goods (Geneva, 1983); Convention on International Financial Leasing (Ottawa, 1988); Convention on International Factoring (Ottawa, 1988); Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995). For the status of UNIDROIT Conventions, see http://www.unidroit.org/english/implement/i-main.htm. It should be noted that while the United States is not a party to the Convention providing a Uniform Law on the Form of an International Will, several states have effectively adopted the uniform law as written in the Uniform International Wills Act promulgated by the National Conference of Commissioners on Uniform State Laws. Although the Act has been described by some as "implementing the Convention," see Reitz *supra* note 61, at 321, it may be better to describe the Uniform Act as harmonizing United States law with that of those states that adopt the Convention. *See infra* notes 201–04 and accompanying text.

[75] The status of conventions promulgated by The Hague may be found on the website of The Hague Conference for Private International Law. *See* http://hcch.e-vision.nl/upload/statmtrx_e.pdf. Admittedly, most of The Hague instruments currently in force deal with private law matters other than commercial law, such as judgments, jurisdiction, and child adoption. Recently, the United States signed but has not ratified the Hague Convention of July 5, 2006 on the Law Applicable to Certain Rights in Respect of Securities Held by an Intermediary. *See* http://www.hcch.net/index_en.php (follow "Conventions" hyperlink; then select "Convention (36)" (5 July 2006) hyperlink; then follow "Status Table" hyperlink).

[76] *See* Henry Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 INT'L LAW. 29, 30–31 (1984) (describing in detail the impact of the United States delegation's contributions to the development of the Convention on the International Sale of Goods).

[77] *See* Bonell, *supra* note 39, at 89 (Uniform Commercial Code functions as important precedent for the construction of an international commercial code); *see also* E. Allan Farnsworth, *A Common Lawyer's View of His Civilian Colleagues*, 57 LA. L. REV. 227, 228–29 (1996) (labeling the UCC as "our best export[]"); E. Allan Farnsworth, *The American Provenance of the UNIDROIT Principles*, 72 TUL. L. REV. 1985, 1986 (1998) (discussing the influence of the Restatement (Second) of Contracts and the UCC on the

making environment have also been participants in the domestic uniform law process. It is somewhat ironic, therefore, that the United States has lagged in the ratification and implementation of these instruments.[78] Indeed, the failure of the United States to adopt final international texts has been criticized as having a negative effect on the perception of the United States by the rest of the world.

> The modest record of United States acceptance of the products of these international efforts has made other countries skeptical of the United States commitment to the international process of private law unification. This skepticism exists despite, and possibly in part because of the fact that the United States has actively participated in the preparation and negotiation of about three dozen conventions by four international organizations . . . since 1964.[79]

The influence of the United States in negotiations involving other international instruments has suffered as a result.[80] Whether the United States' failure to ratify affects the decision of other countries to ratify a

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CISG and the UNIDROIT Principles); Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1028 (1996). This influence may not always be positive if the United States does not ratify the treaty:

> On its part, the United States had a heavy influence on the Credit Transfer Model Law, resulting in disdainful reception by some in Europe. In sum, the Americans who are happy with the final product do not really need this Model Law, since it heavily bears the mark of UCC Article 4A. On their part, Europeans are far from being enthusiastic.

Benjamin Giva, *Uniformity in Commercial Law: Is the UCC Exportable?*, 29 LOY. L.A. L. REV. 1035, 1045–46 (1996).

[78] Of course, the United States is not the only country that has not ratified treaties, and it is instructive to consider the status of conventions *not* ratified by the U.S. "The binding nature of a convention as a vehicle for harmonization may itself be its Achilles heel." Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 152 (2004). For example, of the UNICITRAL conventions not ratified by the U.S., three have not received sufficient ratifications to come into force, and the other two have only been ratified by twenty-nine and seven States, respectively. *See* Status of Conventions, *supra* note 73.

[79] Pfund & Taft, *supra* note 47, at 680. These observations are as true today as they were twenty years ago.

[80] *Id.* (quoting Professor Reese); *see also* Peter H. Pfund, *International Unification of Private Law: A Report on United States Participation, 1985–1986*, 20 INT'L LAW. 623, 630–31 (1986) (noting that a failure to ratify "may have some detrimental effects on the influence of the United States in the pending work of these international organizations").

convention is disputed.[81] To the extent that these international instruments reflect United States concerns and have been driven by United States interests (particularly in the area of financing), the failure to achieve widespread adoption may not be in the best interests of United States business.

If the United States has been a key player in the negotiations and United States interests are furthered by these international interests, what explains the failure of the United States to ratify these private international law treaties? Explanations put forward in other areas of international law for the failure of the United States to become parties to international treaties, such as nationalism or a state's reluctance to cede sovereignty over a field in which it is vitally interested,[82] are not central to commercial topics. Substantive reasons for non-action may exist. First, domestic law may be sufficiently similar to the proposed international law so that no action is needed (an argument made particularly in the case of proposed international model laws). Alternatively, our domestic law may be preferable to the international version, which may represent a less sophisticated framework aimed at countries with different legal systems. Finally, there is a further possibility: the international rules may be sufficiently different from our domestic rules that application of the two might create confusion and conflict. The federal government may therefore chose not to intervene. The subject matter may not be of sufficient importance to United States foreign affairs to risk an action that results in either outright conflict with state law or state preemption (however minimal).[83] One participant in international private law

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[81] Pfund & Taft, *supra* note 47, at 680 (quoting Professor Reese) (discussing how United States ratification "does not seriously factor into a country's decision to ratify a convention"). *But see* Pfund, *supra* note 80, at 631 ("[A] number of other countries seem to expect and await United States leadership in ratifying these conventions before initiating the domestic legal steps to enable them to become parties themselves.").

[82] This is the explanation given for the failure of the United States to ratify maritime law treaties. William Tetley, *Uniformity of International Private Maritime Law—The Pros, Cons, and Alternatives to International Conventions—How to Adopt an International Convention*, 24 TUL. MAR. L.J. 775, 810 (2000).

[83] The reluctance of the United States to become involved in private international law unification efforts has been explained in part by concerns that "the United States could not enter into such treaties without violating state autonomy." Ku, *supra* note 49, at 500; Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 357–62 (1954) (noting that the government is concerned about its lack of authority to command state governments to follow international law treaties).

> [E]xecutive treaty-making incorporates an internal dialogue of national and state interests, which may actually adjust U.S. positions to accommodate state laws and powers. As such, whether or not there are, or should be, external judicial or

negotiations observed that state preemption is a possible cause of political resistance to conventions: "The good news is that you preempt state law, and the bad news is that you preempt state law."[84]

The presence of these international commercial law instruments and the continued involvement of the United States in these international lawmaking efforts raise concerns about the continued relevance of our domestic uniform law process. The potential of implementation of commercial laws in the United States through federal legislation or through self-executing instruments puts pressure on state law-making bodies to avert "nationalization." At the same time, the failure of the United States to ratify or accede to these international instruments creates an opportunity for these state law bodies to make a role for themselves in the growing internationalization of commercial law. The question then is how the uniform state law process can retain its relevance in a time of growing internationalization.

IV. LIMITATIONS ON STATE INVOLVEMENT IN INTERNATIONAL LAWMAKING

Given the growing number of international commercial instruments in existence, and the failure or inability of the federal government to respond by ratifying or implementing these instruments, what is the role that states can or should play to fill the void? The potential role of the state in the development of an "international commercial code" must take into consideration the developing body of writing in two areas: the views of domestic constitutional scholars on the division of responsibilities between the state and federal governments; and the view of international scholars on the role of what are known as "sub-states" in the negotiation, conclusion, and implementation of international agreements.

Constitutional issues and federalism issues are rarely encountered in the area of commercial law.[85] Yet, questions such as whether the federal

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legislative safeguards on federalism in the treaty context, there are undoubtedly *internal* executive safeguards of federalism.

Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1388 (2006).

[84] Susan Burke, *The Increasing Focus of Public International Law on Private Law Issues*, 86 AM. SOC'Y INT'L L. PROC. 456, 474 (1992) (comments of Lea Brilmayer). According to the State Department official who led many of the United States delegations to The Hague, "federalism problems and problems related to the feasibility of U.S. ratification of conventions unifying private law is first and foremost on my mind during international negotiations." *Id.* (remarks of Peter Pfund).

government has the power to enter into certain treaties, whether the federal government should exercise that power, and whether the individual states have a role on the international level, raise fundamental and important issues of federalism and constitutional law that are currently the subject of extensive debate and discussion.

The role of the federal government vis-à-vis the states in the conduct of foreign affairs was relatively settled—until a decade ago. Under the Constitution, the President is given the power, with the advice and consent of the Senate, to enter into treaties.[86] In turn, treaties entered into by the United States are the "supreme law of the land,"[87] binding at the state level under *Missouri v. Holland*,[88] even where the subject matter of the treaty is not within one of the federal government's enumerated powers. When the federal government chooses to exercise its exclusive authority over treaty-making, it acts at the apex of its power to displace state law. "[T]here may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . ."[89]

Over the past decade, however, the traditional conception of the distribution of power between states and the federal government has come under increased scrutiny and criticism.[90] Roughly paralleling the debate over Congress' powers under the Commerce Clause over domestic matters, the new debate is between what Professor Duncan Hollis has termed the "nationalists," who believe that federalism and the Tenth Amendment do not limit the treaty power,[91] and the "new federalists, who would overrule

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[85] There are instances where these issues do arise; for example, the constitutionality of self-help repossession. *See, e.g.*, James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Bichel Optical Lab. Inc. v. Marquette Nat'l Bank of Minneapolis, 487 F.2d 906 (8th Cir. 1973).

[86] U.S. CONST. art. II, § 2, cl. 2.

[87] U.S. CONST. art. VI, § 2.

[88] Missouri v. Holland, 252 U.S. 416, 432 (1920).

[89] *Id.* at 433. "[T]he notion that treaties must deal only with matters of 'international,' that is external, concern" has been labeled a notion "that deserves continuing interment." Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1299 (1999).

[90] For an excellent introduction to the debate, see Hollis, *supra* note 83.

[91] Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1091 (2000); Thomas Healy, *Is* Missouri v. Holland *Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1731 (1998); Hollis, *supra* note 83, at 1330 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 189–94 (2d ed. 1996)); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1965 (2003); *see also* Flaherty, *supra* note 89, at

Missouri v. Holland[92] and restrict the subjects that the United States may regulate by treaty to those covered by its enumerated powers.[93] The new federalists rely on the new Commerce Clause jurisprudence as demonstrating a more conservative and, as they would argue, proper interpretation of the Constitution, which should apply equally to the interpretation of the scope of the Treaty Power.[94] The new federalists are particularly concerned with the growing use of treaties to govern relationships between private individuals rather than the obligations of the states.[95] Further, the transactions regulated by international agreements are no longer only those with an international character, but potentially cover transactions that lack any international characteristics.[96]

While much of the "new federalism" critique has involved the implementation of international human rights treaties and international criminal law treaties, the critique encompasses private international commercial law treaties as well.[97] Although the proposed international

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1279 (stating that federal foreign affairs authority trumps the anti-commandeering doctrine which bars the federal government from enlisting state officials); Martin S. Flaherty, *More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 U. KAN. L. REV. 993 (1997); Richard E. Levy & Stephen R. McAllister, *Defining the Roles of the National and State Governments in the American Federal System: A Symposium*, 45 U. KAN. L. REV. 971, 979 (1997).

[92] *See, e.g.*, Nicholas Q. Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1935–36 (2005) (arguing that *Missouri* is wrongly decided and should be overruled).

[93] Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 392 (1998) [hereinafter Bradley, *The Treaty Power and American Federalism*]; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) [hereinafter Bradley, *The Treaty Power and American Federalism, Part II*]; Hollis, *supra* note 83, at 1330–31 (citing Rosenkranz, *supra* note 92, at 1882); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 473 (2003) [hereinafter Swaine, *Does Federalism Constrain the Treaty Power?*].

[94] *See, e.g.*, Khoi D. Nguyen, Note, *Invisibly Radiated: Federalism Principles and the Proposed Hague Convention on Jurisdiction and Foreign Judgments*, 28 HASTINGS CONST. L.Q. 145, 160–61 (2000) (arguing that any enabling legislation passed by Congress to implement a proposed Hague convention governing the recognition and enforcement of foreign judgments would be unconstitutional under the Supreme Court's recent interpretation of the Tenth Amendment and the principles of federalism).

[95] Bradley, *The Treaty Power and American Federalism*, *supra* note 93, at 433; Hollis, *supra* note 83, at 1343. *But see* Golove, *supra* note 91, at 1101, 1305.

[96] This was the type of coverage also present in the Convention against Transnational Organized Crime. U.N. Convention Against Transnat'l Organized Crime art. 7 & Letter of Submittal from Secretary of State Powell, TOC Convention and Two Protocols (2004), S. TREATY DOC. NO. 108-16.

[97] *See* Ku, *supra* note 49, at 457 (developing the role that states may play in the implementation of international obligations).

treaties all have an international component[98] and thus fall under Congress' Treaty power,[99] with the advent of electronic communications and electronic commerce, the distinction between international transactions and domestic ones has become increasingly blurred. The inability of a party to the transaction to determine at the outset whether the transaction is international or domestic has given rise to increased demands for consistency between the rules applicable domestically and those applicable internationally.[100]

Clearly, the new federalism, if accepted, potentially leaves a void where the federal government cannot act; this, in turn, raises the question of the possibility for state action in international matters.[101] The question of the power of the federal government to ratify and implement treaties, however, may not always be dispositive of what actions the federal government will ultimately take with respect to any individual treaty. In deciding whether to ratify and how to implement a treaty, the executive branch may decide to exercise self-restraint for a variety of reasons: concerns about the extent of its power; concerns that even if it is satisfied that it has the power, there will be lengthy litigation challenging its actions; concerns that the ratification and federal implementation may run contrary to professed political positions taken by the administration on the appropriate role of federal government within our system; and the desire to accommodate state governments.[102] As

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[98] *See* United Nations Convention on Contracts for the International Sale of Goods, 19 I.L.M. 668, 673 (1980); United Nations Convention on the Use of Electronic Communications in International Contracts (2005), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html; United Nations Convention on the Assignment of Receivables in International Trade, 41 I.L.M. 776 (2002); Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=72 (2006).

[99] The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8.

[100] The concern that a domestic regime differs from the international legal regime was central to the "two-tier" approach advocated for giving effect to the Uniform International Wills Act. *See infra* notes 132–48 and accompanying text.

[101] There is the argument, however, that if the treaty-making power is limited to matters within Congress's enumerated powers, the United States would be hindered in its ability to conduct foreign relations as states are themselves prohibited from entering into agreements with foreign powers. *See* Golove, *supra* note 91, at 1095; Swaine, *Does Federalism Constrain the Treaty Power?*, *supra* note 93, at 413 (suggesting use of state compacts approved by Congress).

[102] Professor Hollis has argued that this "executive self-restraint" may in fact preclude Congress, the courts, and ultimately the political system from deciding the constitutional scope of the treaty power by effectively removing controversial cases from the ambit of public debate. Hollis, *supra* note 83. He concludes that:

might be expected, over time different administrations have demonstrated very different approaches to federalism in the determination of whether to ratify and implement treaties in areas traditionally regulated by the states.[103] "On occasion, [the Executive] has taken advantage of *Missouri*'s import and insisted on a nationalist conception of the treaty power. But, just as often, it has invoked federalism as a continuing break on its exercise of that power, even if only as a matter of policy."[104] According to the State Department, the Executive has exercised this self-restraint "to limit or clarify its treaty obligations because of federalism policy concerns" in a variety of ways.[105] The tactics include: negotiation of treaty provisions to avoid federalism concerns; attaching understandings to ratifications that clarify the United States understanding that the treaty's obligations do not require action beyond existing federal authorities; using reservations or understandings that accept the treaty obligations, but clarify that implementation will occur at the federal, state, or local level as appropriate; negotiation of a "new" federalism clause that the United States could invoke as a matter of policy, rather than as a matter of law; and entering treaty reservations modifying United States obligations to an acceptable level for the federal government.[106]

As noted above, when the federal government exercises its treaty power over a particular subject matter, that matter is transformed into one of national concern. Because the federal government forms treaties through negotiation with a foreign power, a treaty by its nature reflects an exercise of federal power that is beyond the "traditional competence" of the states. But, where the federal government has refrained from exercising its treaty power

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> [w]e can talk about whether particular methods of Executive Federalism better protect the states or which are most harmful to U.S. negotiating objectives. We can debate why the [E]xecutive should use one form of accommodating federalism over another . . . . We can talk about the relevance of, and how best to preserve, the roles of other actors in the treaty process.

Id. at 1395.

[103] For an historical development of such practices, see Hollis, *supra* note 83.

[104] *Id.* at 1370.

[105] *See* Memorandum Summarizing U.S. Views and Practice in Addressing Federalism Issues in Treaties (Nov. 8, 2002), http://www.state.gov/s/l/38637.htm [hereinafter Memorandum Summarizing U.S. Views].

[106] *Id.* In the ratification of treaties, the United States has entered into reservations stating that it reserves the right to assume its treaty obligations "in a manner consistent with its federal principles of federalism." *Id.* This was the tack used in the ratification of the Convention against Transnational Organized Crime. 151 CONG. REC. S11334–11335 (daily ed. Oct. 7, 2005) ("The United States of America reserves the right to assume obligations under this Protocol in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to conduct addressed in the Protocol.").

in a particular area, one can say that no displacement has occurred. States continue to have the competence to legislate in this area, and arguably may do so taking into consideration international considerations, but what role can they constitutionally play in the emerging international commercial code? Are there limitations on the ability of states to become involved in international lawmaking? May the states take the steps necessary to implement a treaty? If state law is already in accord with the treaty, are the states precluded from changing that law? If the states fail to fulfill the treaty obligations, who bears the responsibility?

The United States Constitution provides that "[n]o state shall enter into any Treaty, Alliance, or Confederation,"[107] but may enter into an "Agreement or Compact" with a foreign power subject to congressional approval.[108] Neither constitutional history[109] nor case law[110] provides much guidance as to what is meant by a "compact,"[111] and few have been entered into by U.S. states, especially in recent years.[112] Nonetheless, rhetoric

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[107] U.S. CONST. art. I, § 10, cl. 1; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 311 cmt. a (1987) ("A State of the United States or a subdivision of another state is not a state having capacity to conclude an international agreement.").

[108] U.S. CONST. art. I, § 10, cl. 3.

[109] *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694 (1925); Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?,"* 3 U. CHI. L. REV. 453 (1936).

[110] The only case to consider the application of the clause to a potential state compact with a foreign power involved an agreement by Virginia to extradite a criminal to Canada. Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840). Only three judges ever reached the question of the applicability of the Compact Clause; Chief Justice Taney wrote that "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties" is covered by the Compact Clause and requires Congressional assent. *Id.* at 572.

[111] In the context of compacts with other states, however, the Supreme Court has held that the prohibition on compacts without congressional approval is not absolute; rather "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." Virginia v. Tennessee, 148 U.S. 503, 519 (1893). As to whether the holding of *Virginia v. Tennessee* applies to compacts with foreign powers, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 155 (2d ed. 1996); Raymond S. Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021, 1023 (1967).

[112] Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 150 & n.56 (2005) [hereinafter Hollis, *Why State Consent Still Matters*].

abounds that in foreign relations "state lines disappear," states "do[ ] not exist," and "state constitutions, state laws and state policies are irrelevant."[113]

Just as there is an increasing body of literature examining the power of the federal government in a federalist system, and the appropriate scope of the treaty power, there is an increasing body of literature discussing the role that states can and should play in negotiating and "implementing" international instruments, particularly in areas of traditional state competence and power such as criminal law, human rights law,[114] and commercial law.[115] Despite the orthodox view that the states have no role in United States foreign relations law, and that a dormant treaty power bars state activity in foreign affairs,[116] the "new federalists" particularly argue that the new federalism including state involvement on an international level is "perfectly consistent with globalization . . . . [T]he best governance is one that optimizes the governing abilities of each level of government. Even as the world gets smaller, and government more global, there will remain some things better done at home."[117] Some, such as Professor Edward Swaine, maintain that doctrines restraining state action, such as the Constitution's "dormant" bar on state participation on the international level, should not be an automatic preclusion of state participation from activity that does not involve bargaining with foreign powers.[118] This shift in favor of a "states' rights" approach can also be seen in the emergence of arguments that constitutional doctrines such as the Tenth Amendment's anti-commandeering limitation on the power of the federal government to implement national

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[113] United States v. Belmont, 301 U.S. 324, 331–32 (1937).

[114] *See, e.g.*, Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 580 (1997) ("Where subnational authorities enjoy effective decision-making control on issues of international legal concern, and because subnational authorities are very much a part of the international dynamic, they should also be held legally responsible for violations of international law."). Professor Spiro, in the context of human rights treaties, has proposed that there be a mechanism for subnational authorities to become treaty partners. *Id.* at 588–89.

[115] Ku, *supra* note 49, at 499.

[116] Thus, states may not act in a way that interferes with the federal government's autonomy over foreign affairs. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416–17 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 363 (2000); Zschernig v. Miller, 389 U.S. 429, 441 (1968); *see also* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1141 (2000) [hereinafter Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*].

[117] Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1482 (1994).

[118] Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, *supra* note 116, at 1138.

policy[119] apply also to limit the federal power over foreign affairs under the treaty power.[120]

Whether the individual states have the ability to enter into international agreements, or implement international agreements, involves not just issues of United States constitutional law, but international law as well. The individual states could be categorized for international law purposes as "sub-state actors," i.e., "semi-autonomous territorial entities that are legally dependent upon, or associated with, independent sovereign states."[121] Traditionally, other countries have recognized the ability of sub-state actors to enter into treaties, subject to two requirements: authorization by the state of which the sub-state is a part, and recognition by the sub-state's treaty partner of the sub-state's ability to enter into treaty obligations.[122] Sovereign states may authorize their sub-state entities to enter into treaties directly and in their own name on an individual basis, or through formal recognition of sub-state treaty making power.[123] The requirement that other nation states be willing to recognize the sub-state's ability to negotiate independently may pose additional problems for sub-state involvement. Even if the treaty is seen as more properly the province of the sub-state (dealing with issues within its unique competence), other sovereign states may well refuse to allow those

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[119] New York v. United States, 505 U.S. 144, 144 (1992); Printz v. United States, 521 U.S. 898, 898 (1997); *see* Martin Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1279 (1999).

[120] The anti-commandeering doctrine has thus been invoked in the context of the on-going dispute over the implementation and application of the Vienna Convention on Consular Relations. *See, e.g.*, Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 324 (1999) (noting that it is unresolved whether the treaty power is also limited by constitutional provisions other than the Bill of Rights); Van Alstine, *supra* note 56, at n.354; Vázquez, *supra* note 36, at 1318 n.7–8 and accompanying text; *see also* Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1024–25 (2001); Carol E. Head, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. REV. 123, 138 (2000).

[121] Hollis, *Why State Consent Still Matters*, *supra* note 112, at 146 (citing Oliver J. Lissitzyn, *Territorial Entities Other than Independent States in the Law of Treaties*, *in* III RECUEIL DES COURS 66–71 (1968)).

[122] *Id.* at 147 (citing Lissitzyn, *supra* note 121, at 84).

[123] *Id.* at 148. Even assuming a sub-state enters into a treaty obligation, there remains the question of who is responsible under the treaty—the sub-state or its sovereign state. On an international level, "states generally take the view that, where a sub-state actor concludes a treaty within the conditions laid down by the state, it is the state, and not the sub-state component, that bears international legal responsibility under the resulting agreement." *Id.* at 154–55.

sub-states to become parties on the ground that treaties should be limited to states, and the sovereign state should act on behalf of its sub-states.[124]

Of course, sub-states may be viewed as a sub-category of a broader group of "non-state actors." The argument that states should have a role on the international level is bolstered by changes at the international law-making level, with the evolution of supranational organizations,[125] "superstate" or regional organizations,[126] and the increasing participation of non-state parties in international deliberations. This is particularly true in the international commercial law area.[127] The argument that states may and should play some role in the unification of international commercial law may be an illustration of the "world of liberal States" posited by Professor Anne-Marie Slaughter:

> [A] world of individual self-regulation facilitated by States; of transnational regulation enacted and implemented by disaggregated political institutions—courts, legislatures, executives and administrative agencies—enmeshed in transnational society and interacting in multiple configurations across borders . . . . It requires a rethinking of the relationship between public and private international law, a reconceptualization of the rules that can be said to serve international order.[128]

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[124] *Id.* at 152. There are, of course, exceptions to this statement, and there are a few treaties that specifically contemplate participation by sub-state actors. *Id.* at 153–54.

[125] Domestic constitutional law scholars have debated the question of whether in the United States the exercise of power by these supranational organizations is consistent "with the principles of national democracy rooted in the domestic Constitution." David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority*, 55 STAN. L. REV. 1697, 1699 (2003).

[126] The classic example is the European Union. One writer has observed that

> traditional state-based approaches to the creation of international commercial law are becoming unsuitable as regional organizations play an increasingly important role in lawmaking at the international level. There is a distinct transferal of sovereignty by nation states to regional organizations with the consequence that international law making is not a game played purely by sovereign states any longer.

Gopalan, *supra* note 78, at 167.

[127] *Id.* at 117 (explaining that international law, "[a]fter decades of being held hostage to state-centered ideas" has become "more solution oriented"; "nation states are becoming less important in creation of international commercial law," and are replaced by regional organizations and non-state actors); *see also* Levit, *supra* note 8, at 126, 209 (stating that "bottom up" lawmaking denies nation states a monopoly on the generation and enforcement of international law; states being replaced by transnational groups composed of private actors and public technocrats who generate, interpret, and enforce rules that reflect and shape commercial practices).

[128] Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 538 (1995).

V. STATE INVOLVEMENT IN "IMPLEMENTATION" OF INTERNATIONAL TREATY OBLIGATIONS

Despite the vesting of the treaty power in the federal government, the prohibition on states from entering into compacts with foreign governments, and the dormant treaty clause, it has been argued that historically states have exercised control over compliance with international law obligations.[129] Different models for state involvement in the "implementation" of non-self-executing private international law treaties have been advanced.[130] Yet a critical question is whether the state actions are actually "implementing" international commercial law treaties, in the sense that these actions are necessary to carry out international treaty obligations of the United States, or whether they are "harmonizing," that is, attempts to align domestic law with federal or international law. "Harmonizing" state action, for example, can occur before the United States incurs any international obligations under the treaty. Harmonization that occurs prior to ratification eliminates federalism concerns and arguably increases the chances of ratification by the United

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[129] Ku, *supra* note 49, at 476–98 (stating that in many areas of law, "states have acted to implement treaty obligations by adopting legislation" while "the federal government has played a largely passive role," requesting rather than commandeering state action). Professor Ku rightly notes, however, that such a relationship may not be constitutionally mandated, but may be the result of prudence and comity. *Id.* at 461.

[130] *Id.* at 500–01. Professor Ku identifies *three* models: state implementation prior to ratification, state implementation after ratification, and joint federal-state implementation. Upon closer analysis, however, his categories break down. For example, he cites the experience with the Convention on the Form of an International Will as illustrative of state implementation after ratification. *Id.* at 501. However, although he states that the Senate ratified the Wills Convention in August 1991, he mischaracterizes the situation. Under article 2, section 2, clause 2, of the Constitution, the Senate only gives its advice and consent. U.S. CONST. art. II, § 2, cl. 2. The definitive act for international purposes is the deposit of the instrument of ratification by the president with the named depositary under the convention. As of this date, the United States has not deposited any instrument of ratification with UNIDROIT, and it is still not a party to the Wills Convention. Status of the Convention Providing a Unif. Law on the Form of an Int'l Will, http://www.unidroit.org/english/implement/i-73.pdf. This, then, is merely another illustration of the states "implementing" a treaty to which the United States is not (yet) a party.

Professor Ku's "joint federal-state implementation" category discusses two conventions, the Hague Convention on the Civil Aspects of International Child Abduction and the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, where there was federal implementing legislation but the states also enacted legislation "ensuring implementation." Ku, *supra* note 49, at 505–06. It is not clear that state legislation was necessary to implement those treaties; rather, these may better be described as illustrations of state attempts to align their domestic law with the federal legislation and the treaties.

States. Alternatively, the "harmonizing" state action can occur after ratification by the United States, not to fulfill the treaty obligations of the United States, but to fill any gaps existing between domestic law and those obligations and ensure a better fit between the two.[131] State implementation theoretically could occur before or after; but if there is no treaty obligation undertaken, it is difficult to say that implementation is occurring.

The most frequently cited illustration of state involvement in the "implementation" process is the 1973 UNIDROIT Convention on the Form of an International Will.[132] A non-self-executing treaty by its terms, the Convention obligated each contracting country, within six months of becoming a contracting state, to introduce into its law the Uniform Law on the Form of an International Will, attached as an annex to the Convention. From the perspective of United States law, the Uniform Law dealt with traditionally international matters (state recognition of wills concluded in other foreign States) as well as traditionally local matters (the state requirements for wills concluded within that state). United States federalism concerns were raised early on in the history of the Wills Convention,[133] and the federal government had a series of options on how to proceed. Three approaches were possible. The United States could have invoked the federal-state clause provided by the Convention allowing a nation-state to limit the territorial entities to which the Convention applied (e.g. to those states that

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[131] For example, revisions to the Uniform Child Custody Jurisdiction and Enforcement Act were proposed because of the gaps in the convention that required resort to domestic law in international disputes. *See* D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 553 (2004) ("[W]hile the Hague Abduction Convention does provide an important remedy to left-behind parents in international disputes involving the wrongful removal or retention of children, it has not displaced the need for additional jurisdictional and enforcement regulation.").

[132] Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, 12 I.L.M. 1298, 1302–11, *available at* http://www.unidroit.org/english/conventions/1973wills/main.htm [hereinafter Wills Convention] (signed, but not yet ratified by the United States).

[133] *See* Jerome J. Curtis, Jr., *The Convention on International Wills: A Reply to Kurt Nadelmann*, 23 AM. J. COMP. L. 119, 120 (1975) (explaining that drafters "knowingly undertook the subversion of the traditional role of the American states in enforcing their own rules"). The concern was addressed primarily not to recognition of wills executed abroad, but to state requirements for the execution of wills by its own residents. *See* Richard D. Kearney, *The International Wills Convention*, 18 INT'L LAW. 613, 628 (1984) ("A great deal of thought led these experts to the conclusion that each state should be free to determine whether or not it would permit the making of international wills within its borders as an additional form of will.").

passed conforming state legislation).[134] The United States could, however, refrain from using a federal-state clause and pass federal legislation incorporating the convention's uniform law.[135] The third option was a "two-tier" approach under which the federal government ratified the convention making it the "law of the land," passed minimal legislation providing that international wills are valid throughout the country, but relied upon the states to clarify the application of their own laws.[136] Arguments were made that the federal government had the power to pass implementing legislation on its own,[137] but the federal government in consultation with state law-making institutions,[138] ultimately proposed the "two-tier approach,"[139] under which

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[134] Wills Convention, *supra* note 132, art. XIV. Such clauses are frequently used by Canada. *See infra* note 199.

[135] The Prefatory Note to the Uniform International Wills Act, which discusses at length the possible modes of implementation, cited *Missouri v. Holland* for the proposition that the "federal statute on wills could be rested on the power of the federal government to bind the states by treaty and to implement a treaty obligation to bring agreed upon rules into local law by any appropriate method" but noted that the main difficulty with this approach would be the likelihood that probate lawyers, used to relying upon state probate statutes, would be misled. UNIF. INT'L WILLS ACT § 2, 8 U.L.A. 467, 470 (1998) (citing Missouri v. Holland, 252 U.S. 416, 434 (1920)).

[136] *See* Prefatory Note to the UNIF. INT'L WILLS ACT, *supra* note 135, at 470.

[137] *See* Kearney, *supra* note 133, at 627–28 (discussing that the Wills Convention and the Uniform Law are "proper subjects of negotiation" and hence within power of federal government); Kurt Nadelmann, *The Formal Validity of Wills and the Washington Convention Providing for the Form of an International Will*, 22 AM. J. COMP. L. 365, 375 (1974). Of course, saying the federal government has the power is different from saying it is prudent for them to exercise this power. *See, e.g.*, Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1302 (1992):

> While the federal government could almost certainly enter this area of law as a constitutional matter, this would have enormous consequences from the standpoint of our system of federalism. It would also likely transform estates practice. These concerns have been avoided because the Senate has acted so that each state can decide whether it will enact the provisions of the Convention into its own law.

Id.

[138] Drafting of the Convention paralleled similar domestic drafting efforts by the National Conference of Commissioners on Uniform State Laws, who were also involved in the international process. Kearney, *supra* note 133, at 619; *see also* Prefatory Note to the UNIF. INT'L WILLS ACT, *supra* note 135, at 469–70 (describing federal-state collaboration and various means of implementing the convention).

[139] RONALD REAGAN, MESSAGE TO THE SENATE TRANSMITTING THE CONVENTION ON INTERNATIONAL WILLS, S. Doc. No. 385-17, at 1 (1986), *reprinted in* 2 PUBLIC PAPERS OF THE PRESIDENT: RONALD REAGAN 905 (1989) ("To give full effect to the Convention in the United States, implementing legislation will be required at the Federal level.

federal legislation would cover recognition in the individual states of international wills executed abroad and state legislation would cover recognition of wills executed in-state.[140] As one writer observed:

> The only alternative to adopting the two-tiered system or doing nothing would have been to invoke federal treaty power to bind all the states to absolute recognition of the international will form . . . . The federal approach, however, would have required that the states be bound to an international convention to which they were not a party, and at which they were not individually represented . . . . It seems reasonable to speculate that the State Department did not wish to subject an important piece of international law to an all-out political struggle.[141]

When this "two-tiered" implementation scheme is broken down, however, it appears that the federal legislation that was contemplated may well have satisfied the United States' obligation under the treaty: the federal legislation would provide for the enforceability within the United States of international wills executed abroad. State legislation was desirable to conform or harmonize domestic probate law with the federal legislation, and to assure that persons in the United States could execute wills conforming to the federal legislation that would be recognized by their state of residence.[142]

The Convention was signed by the United States in October of 1973, submitted to the Senate in 1986,[143] and received the advice and consent of the Senate to ratification in 1991.[144] Despite the high hopes that the federal

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Legislation will also be required in those States of the United States that wish to make it possible for testators to execute international wills in their jurisdiction.").

[140] *See* 137 CONG. REC. S12131-05 (1991):

> Two phases of implementing legislation are contemplated: First, Congress will have to enact an International Wills Act, containing the rules as to form and providing for the recognition of international wills throughout the United States. Second, individual States will have to subscribe, by their own legislation, to a Uniform International Wills Act, and will need to designate an "authorized person" as described in the Convention, thereby enabling international wills to be executed in such States. The administration has assured the Senate that the instrument of ratification will be deposited only after the necessary Federal legislation is enacted.

Id. For a discussion of the proposed federal legislation, which was never passed, see Kearney, *supra* note 133, at 630–31; Peter Chase, *The Uniform International Will: The Next Step in the Evolution of Testamentary Disposition*, 6 B.U. INT'L L.J. 317, 322–23 (1988).

[141] Chase, *supra* note 140, at 330.

[142] *See supra* notes 133 & 134.

[143] Wills Convention, *supra* note 132, at 1301–05.

[144] 137 CONG. REC. 21, 866 (1991).

and state participants in the Wills Convention had for implementing its provisions, only sixteen states to date have enacted the legislation that was contemplated under the two-tiered approach,[145] and Congress never passed the federal legislation that was contemplated.[146] The instruments of ratification have never been deposited, and as a result the United States is not a party to the Convention, nor is it in breach of the treaty provision requiring contracting states to enact international will legislation within six months of ratification. It is questionable whether the action by the United States in passing the Convention had the anticipated effect of encouraging other nation states to ratify the Convention.[147]

The Wills Convention experience may be viewed as a model for federal-state cooperation in treaty implementation. Federal and state representatives collaborate in the drafting of the treaty; the United States signs the treaty and the President submits it to the Senate; time passes, allowing states to pass conforming legislation to avoid any clash between domestic and international law; the Senate gives the treaty its advice and consent (thereby making the matter one of national importance); the states are given additional opportunity to pass legislation that would satisfy any obligation the United States would have upon ratification of the treaty;[148] federal legislation is proposed to deal with matters of clear federal importance; and, the instruments of ratification are deposited when "implementation" is complete.

Alternatively, the experience of the Wills Convention can be viewed as demonstrating the failure of federal-state cooperation in treaty implementation: twenty-three years after United States signing of the Convention, and fifteen years after Senate action, the convention is still not in force in the United States. A third view is that the Wills Convention experience is simply another demonstration of the limitations of a uniform law approach to uniformity in the United States, compared to federal

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[145] *See* NCCUSL, A Few Facts About The Uniform International Wills Act (Uniform Probate Code, Article II, part 10), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uiwa.asp. Of these enacting states, nine passed the legislation prior to the Senate action in 1991; only seven have done so since.

[146] There may be a "catch 22" here. The federal legislation was delayed because of the lack of widespread state enactment, and widespread state enactment was delayed because of the absence of federal legislation. *See* Chase, *supra* note 140, at 334 (opining that arguments for state passage may rest on federal passage).

[147] *Id.* at 334 (stating Senate passage would "provide an impetus for more countries to join the Convention").

[148] If, in fact, that is what the state legislation would do. As noted above, however, that may not have been the case with the Wills Convention.

legislation.[149] The National Conference of Commissioners on Uniform State Laws and the United States State Department are currently revisiting the Uniform International Wills Act to persuade states that have not already done so to enact the Uniform Act.[150] So although it has been asserted that the Wills Convention "illustrates the modern incarnation of the system of state control over international law,"[151] it is open to speculation both as to whether that is true and whether that is good.[152]

The Wills Convention experience is undoubtedly a demonstration of the impact of federalism. The concern is not that the federal government lacks power to enter into treaty obligations in a given area; the power of the federal government to enact legislation fully implementing the Wills Convention appears to have been conceded.[153] The primary concerns are that the federal government in utilizing its power should ensure that it has the support of the states in so doing and that it delay incurring international obligations if the result would confuse and complicate domestic law. If, as in the case of the Wills Convention, a majority of the states are reticent to align their domestic

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[149] *See* Nadelmann, *supra* note 137, at 375–76 ("Of course, one could wait for enactment of the Uniform Law by all states. The experience with our own uniform laws tells us that this approach is not practicable. . . . A strong case can be made for using the treaty-making power [in the interest of the conduct of international relations] to make the international will available nationwide.").

[150] *See* Reitz, *supra* note 61, at 323–24.

[151] Ku, *supra* note 49, at 504. Professor Ku may overstate the manner in which states have "control" over international laws. *See supra* note 130. There is another unifying explanation in each of these instances that Professor Ku describes. States are unilaterally deciding to align their domestic law with international norms and instruments, where no international obligation to do so exists. The distribution of federal and state responsibility in giving effect to international treaty obligations may be different, however, in other areas. In the context of the implementation of the United States' obligations under the Vienna Convention on Consular Relations, the questions of whether and to what extent the states must implement an affirmative treaty obligation are clearly present. *See* Vadnais, *supra* note 120, at 307; Vázquez, *supra* note 36, at 1319.

[152] There are other examples of state adoption of uniform laws intended to give effect to international treaty instruments prior to United States ratification: the Uniform Probate Code's provisions drawn from the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, and the Uniform Child Custody Jurisdiction and Enforcement Act drawn from the Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures of the Protection of the Child. Ku, *supra* note 49, at 504–05. The United States is a party to neither convention, although it has signed the former. *See id.* These may be considered illustrations of domestic attempts at international harmonization of the law rather than state implementation of international treaty obligations.

[153] The issue of the federal power to pass implementing legislation does not appear to have been raised in the congressional proceedings leading to implementation.

law with international instruments, the federal government will not exercise its treaty power to displace state law.

The Wills Convention may be an illustration of a different phenomenon. Although the states may not have the capacity to conclude an international agreement, they are not necessarily precluded from enacting legislation (again on the state level) that has the effect of harmonizing their domestic law with principles laid out in international agreements. This may occur in situations where the United States is contemplating becoming a party to the agreement (the Wills Convention), where the United States is already a party,[154] or even if the United States has no intentions of becoming a party or otherwise implementing those conventions. States often become involved in international harmonization efforts through the adoption of international model laws (or portions thereof) into their own domestic laws, even though there is no obligation to do so.[155] Treaties may result in unified law (where all contracting states agree to a single set of rules), but cross-border harmonization can occur in the absence of treaties when countries adopt as part of their domestic law the same or similar legal principles. International model laws, for example, may serve as models for use in drafting domestic legislation.[156]

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[154] The Hague Convention on the Civil Aspects of International Child Abduction, for example, was implemented by federal statute. The International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (codified as amended at 42 U.S.C. §§ 11601–11610 (2000)). Nonetheless, states adopting the Uniform Child Custody Jurisdiction and Enforcement Act assured that the enforcement remedies granted to state custody orders were also given to orders issued under the federal implementing legislation. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 302, official cmt., 9 U.L.A. 690 (1990).

[155] Of the six model laws proposed by UNCITRAL, five states within the United States have enacted the Model Law on International Commercial Arbitration (1998). *See, e.g.*, CONN. GEN. STAT. § 50a-100–50a-136 (1994). Forty-three states have enacted the Uniform Electronic Transactions Act (UETA), which is based on UNCITRAL's Model Law on Electronic Commerce (1996); the Model Law and the UETA were also the basis for federal E-Sign legislation. *See supra* note 32; UNIF. ELECTRONIC TRANSACTIONS ACT, 7A U.L.A. 225 (1999). Model laws can, of course, be adopted at the federal level, particularly where the subject matter is within the constitutional power of the federal government. Congress enacted the Model Law on Cross-Border Insolvency in its revisions to the federal bankruptcy code. The Model Law appears as the new Chapter 15 to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 § 256 (2005).

[156] *See* Boss, *supra* note 65, at 1953; Amelia H. Boss, *The Uniform Electronic Transactions Act in a Global Environment*, 37 IDAHO L. REV. 275, 279 (2001); Sandeep Gopalan, *Transnational Commercial Law: The Way Forward*, 18 AM. U. INT'L L. REV. 803, 813–14 (2003). For a discussion of the concepts of "unification" as opposed to "harmonization" in international commercial law, see Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699, 702–03 (1991) (harmonization is

Since the United States ratification of the Sales Convention, the only other commercial law treaty ratified by the United States is the Cape Town Convention on International Interests in Mobile Equipment. The Convention on International Interests in Mobile Equipment, as modified by the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, collectively, the Cape Town Convention,[157] was completed in 2001.[158] The United States played an active role in the formulation of the Cape Town Convention.[159] In little over a year after the United States signed the treaty, implementing legislation was passed by Congress and signed into law,[160] and the instruments of ratification were

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traditionally understood as an effort by policymakers to adapt domestic rules to the rules of other jurisdictions in light of the existence of private transactions across borders); David W. Leebron, *Claims for Harmonization: A Theoretical Framework*, 27 CAN. BUS. L.J. 63, 68–72 (1996) ("The degree to which a harmonization requirement continues to tolerate difference is the harmonization 'margin.' The 'unification' of law, or the adoption of uniform laws, is harmonization with zero margin.").

[157] The structure of the Cape Town Treaty is unique among international commercial instruments. It consists of a base or main convention setting forth the general governing rules, and a series of supplemental protocols, setting forth industry specific rules for particular type of collateral (e.g., aircraft). The convention does not enter into force for any contracting state unless that contracting state also ratifies a protocol. This novel approach has been credited with eliminating deadlocks in the negotiations and allowing for a speedy conclusion to the negotiations. *See* Mark J. Sundahl, *The "Cape Town Approach": A New Method of Making International Law*, 44 COLUM. J. TRANSNAT'L L. 339, 362 (2006) (stating that Cape Town protocol technique "promotes 'hard' international law by avoiding the 'softening' of the law that results when parties are forced to compromise in order to reach agreement on a controversial provision").

[158] Cape Town Treaty, *supra* note 46; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, *supra* note 70. On the general coverage of the convention and its protocols, see Jeffrey Wool, *The Next Generation of International Aviation Finance Law: An Overview of the Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applied to Aircraft Equipment*, 20 U. PA. J. INT'L ECON. L. 499 (1999); Lorne S. Clark, *The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines*, 69 J. AIR L. & COM. 3 (2004); Roy Goode, *Transcending the Boundaries of Earth and Space: The Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment*, 3 UNIF. L. REV. 52 (1998) [hereinafter Goode, *Transcending the Boundaries of Earth and Space*].

[159] "The United States Government was a leader in the development of the Cape Town Treaty." The Cape Town Treaty Implementation Act of 2004, Pub. L. No. 108-297, § 2(a)(6), 118 Stat. 1095 (2004). Indeed, Article 9 of the Uniform Commercial Code provided the initial template for the drafting of the Convention. Goode, *Transcending the Boundaries of Earth and Space*, *supra* note 158, at 60.

[160] Implementing legislation, the Cape Town Treaty Implementation Act, was adopted on June 22 by the House of Representatives and on July 21 by the Senate, with

deposited with UNIDROIT.[161] The Cape Town Convention permits declarations allowing a contracting state to limit the application of the convention to less than all of its territorial units,[162] declare the convention inapplicable to internal or domestic transactions,[163] or delay the effective date of the provisions of the convention.[164] None of these declarations was used by the United States.

The Cape Town Convention and its protocol dealt with a matter traditionally within the competence of state legislatures: the validity and enforcement of security interests. Nevertheless, federalism concerns were not evident in the ratification and implementation process. Three factors undoubtedly contributed to the speed with which the treaty was ratified: the nature of the problem involved; the degree of support for the treaty from industry; and the lack of any substantial argument that ratification and implementation by the federal government would encroach on the domain of the states.

Professor Roy Goode has observed that the *raison d'être* of a successful international commercial convention "is not simply the existence of differences in national laws but the fact that these were wholly inadequate to cater to the needs of those engaged in international trade."[165] The Cape Town Convention exemplifies that statement. Although there are differences in the rules governing all types of secured transactions, it is in the area of mobile goods, aircraft in particular, where the failure to have an international legal framework affected the sellers of aircraft, their financiers, and the airline industry. During the drafting of the convention, an "economic impact assessment" of the need for such a convention, rather than the more

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the Senate consenting to U.S. ratification at the same time. On August 9, 2004, President Bush signed the legislation into law. Cape Town Treaty Implementation Act § 2(a)(6). Ratification instruments were deposited October 28, 2004 (the date of official ratification), and the treaty came into force February 1, 2005.

[161] While the implementing legislation was signed on August 9, 2004, the legislation did not become effective until the Cape Town Treaty came into force for the United States; the United States officially ratified the Convention on October 28, 2004, and it came into force for the United States on February 1, 2005. Status of the Convention on International Interests in Mobile Technology, http://www.unidroit.org/english/implement/i-2001-convention.pdf.

[162] Cape Town Treaty, *supra* note 46, at art. 52(1).

[163] *Id.* at art. 50(1).

[164] *Id.* at art. 60.

[165] Roy Goode, *Contract and Commercial Law: The Logic and Limits of Harmonisation*, ELECTRONIC J. OF COMP. L., Nov. 2003, at 5, *available at* http://www.ejcl.org/ejcl/74/art74–1.pdf [hereinafter Goode, *Contract and Commercial Law*].

traditional comparative law study, was commissioned.[166] Savings to the aircraft industry from the creation of a stable international legal framework for aircraft financing (including creation, perfection, priority and enforcement issues) were estimated at up to $4 billion a year in borrowing costs.[167] The report has proven correct: since 2003, Export-Import Bank of the United States (Ex-Im Bank) "has offered a one-third reduction of its exposure fee on . . . financings of new U.S.-manufactured large commercial aircraft for buyers in countries that ratify . . . and implement the Cape Town [Convention]."[168] This announcement shows in dramatic form the enormous potential value of a sound international legal regime for the protection of international interests in aircraft, which was deemed "vital to U.S. aviation and aerospace interests given the challenges faced by the industry today."[169] The Cape Town Convention was "designed to reduce the risk assumed by creditors in financing transactions in [other areas] of the world"[170] and "grants tremendous economic opportunities to its adherents."[171] Thus, the nature of the problem was not merely the existence of disparities between the laws of various countries, but the lack of a legal system to support the purchase, sale and financing of aircraft. It is not surprising, therefore, that the airline industry played a significant role in the drafting of the convention, and actively supported its ratification by the United States.[172]

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[166] Herbert Kronke, *Methodological Freedom and Organizational Constraints in the Development of Transnational Commercial Law*, 51 LOY. L. REV 287, 292 (2005).

[167] Goode, *Contract and Commercial Law*, *supra* note 165, at 5.

[168] News Release, Cape Town Treaty on Cross-Border Financing of Aircraft, Helicopters and Aircraft Engines, Takes Effect Today (Mar. 1) (Feb. 28, 2006), http://www.exim.gov/pressrelease.cfm/B635813C-EED9–A037–6F8C0E8D07DFAEB6.

[169] H.R. REP. NO. 108-526 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 967, 968.

[170] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 852, 853 (2004); *see also* Lorraine B. Holloway, Mark J. Andrews, Kenneth E. Siegel & Dean Saul, *International Legal Developments in Review: 2004 Industries: International Transportation*, 39 INT'L LAW. 417, 421 (2005).

[171] Sandeep Gopalan, *Securing Mobile Assets: The Cape Town Convention and Its Aircraft Protocol*, 29 N.C. J. INT'L L. & COM. REG. 59, 59–60 (2003).

[172] *See* Clark, *supra* note 158, at 14–16; Iwan Davies, *The New* Lex Mercatoria*: International Interests In Mobile Equipment*, 52 INT'L & COMP. L.Q. 151, 161–64 (2003). One of the most influential persons during the drafting of the project was an attorney from the United States, Jeffrey Wool, who was the chair of UNIDROIT's Aviation Working Group (an industry-based consultative group) and was UNIDROIT's consultant on aviation finance. Goode, *Contract and Commercial Law*, *supra* note 165, at 6 (noting the importance of "the enthusiasm and commitment of a single individual [Jeffrey Wool], whose self-appointed task is to generate interest and support for the project, draw in participants and secure their active and continuous involvement in the work"); Goode, *Transcending the Boundaries of Earth and Space*, *supra* note 158, at 52.

The fact that there is a problem and that industry wants a solution does not eliminate federalism concerns; other factors contributed to the ability of the United States to ratify the Convention without any overriding federalism concerns. First, the convention was limited in application to transactions with international characteristics (international interests in aircraft and aircraft engines).[173] To the extent contracting states are concerned about potential application of the convention to purely domestic transactions, contracting states may make it clear by means of a declaration that domestic transactions are not covered.[174] Second, the Convention's requirement that international registration facilities be set up by the contracting state to deal with international interests in aircraft was readily met by the adoption of federal technical amendments to legislation regulating the Federal Aviation Administration.[175] The FAA already administered the registration system for aircraft in the United States, a fact long recognized in the Uniform Commercial Code,[176] so this implementing legislation in no way diminished the sovereignty of state law in the field. Moreover, the existence of a link between the state domestic laws and the federal filing system assured that

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[173] The internationality of the transaction is determined, however, from the nature of the movable assets rather than traditional "internationality" characteristics.

[174] Cape Town Treaty, *supra* note 46, at art. 50. The United States did not take advantage of that declaration possibility.

[175] The Cape Town Treaty would clearly benefit creditors who financed the purchase of aircraft in foreign countries with the Convention in force by giving them needed protection; this, in turn, would benefit the U.S. sellers of aircraft by increasing their markets:

> For countries such as the U.S. that manufacture aircraft, those reduced costs should encourage increased exports and export-related economic growth—not just by major manufacturers, but also by smaller companies that make the parts and provide related aviation services. In addition, the Convention and Aircraft Protocol will benefit the companies that provide the capital that finance the sale of such equipment around the world. U.S. financial institutions are major players in aircraft financing. The creditor protections provided for by the Convention and Protocol will benefit them by significantly reducing the risk they now incur when financing aircraft in countries whose laws do not meaningfully protect creditors in the event of a default or insolvency.

Cape Town Treaty Implementation Act of 2004: Hearings on H.R. 4226 Before the S. Subcomm. on Aviation, 108th Cong. 1 (2004) (testimony of Federal Aviation Administration administrator Marion Blakey), 2004 WL 1113615 [hereinafter *Cape Town Treaty Implementation Act: Hearings*]; *see also* B. Patrick Honnebier, *The Fully-Computerized International Registry for Security Interests in Aircraft and Aircraft Protocol that Will Become Effective Toward the Beginning of 2006*, 70 J. AIR L. & COM. 63, 64 (2005); Murphy, *supra* note 170, at 853.

[176] U.C.C. § 9–302(3)(a), cmt. 8 (2000); U.C.C. § 9–311(a), cmt. 2 (2004) (referring to federal filing system for aircraft).

there would be no confusion about the application of federal or international requirements. Last, no steps were necessary (either on a federal or state basis) to implement the Convention's remaining substantive rules, as those substantive rules were the same as those in Article 9. There was no need to "harmonize" domestic law with that of the Cape Town Convention; harmonization had taken place in the drafting of the treaty. As Congress observed, the Convention "extends modern commercial laws for the sale, finance, and lease of aircraft and aircraft engines to the international arena in a manner consistent with United States law and practice."[177] The provisions of the Convention setting forth rules for the creation, perfection, and enforcement of security interests either were "self-executing" and presumably did not require implementing legislation,[178] or were met by the provisions of the Uniform Commercial Code as enacted in the states.[179] As a result, the House report on the implementing legislation specifically notes that it "does not preempt any state, local, or tribal law."[180] Thus, federalism concerns in the enactment of the Cape Town Convention appear minimal, and federal implementation was unavoidable.

The same year that the Cape Town Convention was completed by UNIDROIT, the United Nations Convention on the Assignment of Receivables in International Trade (the Receivables Convention) was finalized by the United Nations General Assembly and opened for signature by states;[181] it will enter into force upon being adopted by five states.[182] As

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[177] *Cape Town Treaty Implementation Act: Hearings*, *supra* note 175.

[178] *Id.* ("The financing provisions on secured interests under the Treaty do not require any implementing legislation here in the U.S., because they are fully consistent with U.S. law under the Uniform Commercial Code. To this extent, the Treaty is self-executing.").

[179] An interesting question is what ability the states now have to amend the rules in a manner inconsistent with the Convention.

[180] H.R. REP. NO. 108-526 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 967, 975.

[181] United Nations Convention on the Assignment of Receivables in International Trade, G.A. Res. 56/81, U.N. Doc. A/RES/56/81 (Jan. 31, 2002), *available at* http://www.uncitral.org.uncitral/en/commission/resolutions.html [hereinafter Receivables Convention]. *See generally* Spiros V. Bazinas, *Multi-Jurisdictional Receivables Financing: UNCITRAL's Impact on Securitization and Cross-Border Perfection*, 12 DUKE J. COMP. & INT'L L. 365 (2002) [hereinafter Bazinas, *Multi-Jurisdictional Receivables Financing*].

[182] On the Convention generally, see Spiros V. Bazinas, *UNCITRAL Draft Convention on Assignment of Receivables in International Trade: Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade*, 9 TUL. J. INT'L & COMP. L. 259 (2001); Mara E. Trager, *Towards a Predictable Law on International Receivables Financing: The UNCITRAL Convention*, 31 N.Y.U. J. INT'L L. & POL. 611 (1999).

was the case with the Cape Town Convention, the Receivables Convention draws heavily from Article 9 of the Uniform Commercial Code, and participants in the Article 9 revision process were involved in the international negotiations.[183] Over the past five years, however, the Receivables Convention has received only two ratifications, much to the consternation of financiers in the United States.[184] Although both the Receivables Convention and the Cape Town Convention were drafted and completed at the same time, deal with secured transactions, and reflect the influence of domestic law,[185] the Receivables Convention has yet to be ratified. One could argue that the Receivables Convention lacks the support of a critical large industry, such as the aviation industry, that led to the ratification of the Cape Town Convention.[186] Is that the only explanation?

A major difference may, however, be in the substantive provisions. The Cape Town Convention required that each country maintain international registration facilities established for purposes of the Convention.[187] Registration of security interests in aircraft was governed by federal legislation and regulation; consequently, amendments to those regulations were necessary in order for other countries to recognize international interests in aircraft registered in the United States. The Receivables Convention, on the other hand, does not contemplate any specific filing system for purposes of perfection and priority, and an existing federal dimension is completely lacking. Aside from a few limited provisions, the

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[183] One of the reporters for Revised Article 9, Professor Charles W. Mooney, Jr., of the University of Pennsylvania School of Law, served as U.S. Delegate and Position Coordinator at the Diplomatic Conference leading to the signing of the Cape Town Convention; Professor Neil B. Cohen of Brooklyn Law School and Edwin E. Smith, Esq., of Bingham McCutchen, two members of the Article 9 Drafting Committee, served as U.S. Delegates to the UNCITRAL for the Receivables Convention.

[184] *See* Letter from Richard M. Kohn, Co-General Counsel, Commercial Finance Association to Howard Swibel, President, National Conference of Commissioners on Uniform State Laws (Dec. 7, 2005) (on file with author).

[185] *See* Memorandum Prepared by the Office of Private International Law Providing an Overview of the UN Convention on the Assignment of Receivables in International Trade, http://www.state.gov/s/l/2003/44341.htm (memorandum from William H. Taft, IV, requesting authority to sign Receivables Convention) ("The Convention was negotiated in close coordination with state law bodies and trade associations in the United States. Support for the negotiation by the United States was based on a request to undertake that effort by the leadership of the National Conference of Commissioners on Uniform State Laws (NCCUSL).").

[186] The ratification of the Cape Town Treaty may be largely due to the involvement of Boeing, the largest United States exporter in dollar terms; Boeing was a key proponent of the Cape Town Treaty from its inception. *See* Clark, *supra* note 158, at 4–5.

[187] Cape Town Treaty, *supra* note 46, at art. 16. Registration is key, as it gives the registered interest priority over all subsequent interests. *Id.* at art. 29(1).

convention does not contain many substantive rules.[188] The convention does not set out any rules governing such issues as the validity of competing claims and priority disputes; it does, however, provide choice-of-law rules stating that the law of the state where the assignor is located governs these issues.[189]

There are, however, subtle differences between the choice-of-law rules in the Receivables Convention and Article 9.[190] While in theory it is possible to simply ratify the convention and apply one set of rules to international receivables transactions[191] and another to domestic transactions,[192] the difficulty of determining at the time of contracting which rules apply

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[188] Bazinas, *Multi-Jurisdictional Receivables Financing*, *supra* note 181, at 370. The main substantive provisions are those validating assignments prohibited by national laws and restrictive contractual language, Receivables Convention, *supra* note 181, at art. 8–10, providing certain default rules relating to the mutual rights and obligations of the assignor, *id.* at art. 11–14, and protecting the debtor's interests. *Id.* at art. 15–21.

[189] Receivables Convention, *supra* note 181, at arts. 22, 30; *see* Michel Dechamps, *The Priority Rules of the United Nations Receivables Convention: A Comment on Bazinas*, 12 DUKE J. COMP. & INT'L L. 389, 393 (2002).

[190] Two examples will suffice. Under Article 9, the rules for perfection and priority of a security interest for a corporate debtor turn on the place of incorporation. U.C.C. § 9–301 (2004). Under the former Article 9, the rules defined a debtor's location as the place of "organization" in the case of a registered organization under state law. U.C.C. § 9-307(e) (2001). Under the Receivables Convention, the debtor's place of business or, if it has more than one place of business, the place where its central administration is exercised, would govern. Receivables Convention, *supra* note 181, at art. 5(h). For tangible chattel paper where the credit perfects by taking possession, the place of possession determines which perfection and priority rules govern under Article 9; under the Convention, the location of the debtor (its sole place of business or its place of central administration) controls. *See* Harry C. Sigman & Edwin E. Smith, *Toward Facilitating Cross-Border Secured Financing and Securitization: An Analysis of the United Nations Convention on the Assignment of Receivables in International Trade*, 57 BUS. LAW. 727, 749–50 (2002); Catherine Walsh, *Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade*, 106 DICK. L. REV. 159, 175–76 (2001).

[191] The Receivables Convention is limited to transactions with an international element. The receivable is "international" if the assignor and debtor are located in different states, while an assignment is international if the assignor and the assignee are in different states. Receivables Convention, *supra* note 181, at art. 3.

[192] In seeking authorization to sign the convention, then legal advisor William Taft wrote: "No amendments to any state or federal law are expected, nor is any other action by state authorities necessary to implement this Convention. The Convention was carefully negotiated to harmonize with existing state law under the UCC." Memorandum Prepared by the Office of Private International Law Providing an Overview of the UN Convention on the Assignment of Receivables in International Trade, http://www.state.gov/s/l/2003/44341.htm.

potentially creates unwanted uncertainty for commercial parties. It is worth noting that the Receivables Convention relies on choice-of-law provisions, leaving intact the substantive rules of contracting states, which may differ from jurisdiction to jurisdiction.[193] The Cape Town Convention, by contrast, provides substantive rules that would displace any inconsistent domestic law. In that respect, the former project may be viewed as a "harmonizing" project and the latter as a "unifying" one.[194] Nonetheless, the lack of an overriding federal interest, coupled with the presence of some minor but nonetheless important questions involving the integration of domestic and international principles, may explain the lack of current plans for the United States to ratify the Receivables Convention.[195]

The United States is not alone in needing to reconcile the provisions of the Receivables Convention with domestic law. Article 9 has been the model for legislation in both Mexico[196] and Canada,[197] and changes in their

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[193] *Id.*; *see also* U.C.C. § 9-307(e)(2000).

[194] *See* Iwan Davies, *The New* Lex Mercatoria*: International Interests in Mobile Equipment*, 52 INT'L & COMP. L.Q. 151, 153 (2003) (stating that Cape Town "is not a type of harmonisation process but rather a unification of laws process").

[195] A former State Department official responsible for the negotiation of private international law instruments once responded to the question about whether there was a "political will" in the U.S. to develop international commercial law.

> The answer, I believe, is a strong "yes" when there is a compelling social or economic reason for the harmonization. The answer is "no" where the reason is not so clear or is itself very controversial . . . The general policy goal of greater unification and harmonization does not drive U.S. actions because of the established role the states play in private law in the U.S. federal system. In the United States most harmonization is initiated through private institutions like the Uniform Law Commissioners and the American Law Institute.

Jeffrey D. Kovar, *The United States as an Actor in Private International Law*, 2 CILE STUDIES 153 (2005). He observed that "the needs of the private sector are what drive U.S. treaty practice, not specific policy goals of the federal government." *Id.*

[196] *See generally* Hale E. Sheppard, *Overcoming Apathetic Internationalism to Generate Hemispheric Benefits: Analysis of and Arguments for Recent Secured Transactions Laws in Mexico*, 10 J. TRANSNAT'L L. & POL'Y 133 (2001); Alejandro Lopez-Velarde & John M. Wilson, *A Practical Point-by-Point Comparison of Secured Transactions Law in the United States and Mexico*, 36 UCC L.J. 3 (Spring 2004); John M. Wilson, *Mexico: New Secured Transactions and Commercial Registry Laws*, 7 INTER-AM. TRADE REP. 1815 (2000); Boris Kozolchyk, *The Basis For Proposed Legislation To Modernize Secured Financing In Mexico*, 5 U.S.-MEX. L.J. 43 (1997).

[197] Ronald C.C. Cuming, *Harmonization of Secured Financing Laws of the NAFTA Partners*, 39 ST. LOUIS. U. L.J. 809, 814 (1995). *See also* Ronald C.C. Cuming, *Article 9 North of 49: The Canadian PPS Acts and the Quebec Civil Code*, 29 LOY. L.A. L. REV. 971 (1996) "One of these features is that Canadian law reformers in common-law provinces of Canada were able to take Article 9 as a starting point and build into it

domestic law would also be required to conform to the Convention. Canada faces an additional problem: for the Convention to form part of Canadian law requires implementing legislation that accords with Canada's constitutional division of powers—at the federal level for matters within federal legislative jurisdiction, and at the provincial level for matters within provincial jurisdiction.[198] It is for this reason that Canada frequently uses the "federal-state" declarations available in ratifying or acceding to treaties.[199]

Recognizing that each country needed to adapt its domestic laws to conform to the rules of the Receivables Convention—thereby harmonizing with international developments, whether or not the Convention was ultimately ratified, the law reform bodies of Canada (the Uniform Law Conference of Canada),[200] Mexico (the Mexican Center for Uniform Laws)

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refinements and other features that reflect Canadian legal traditions and public policies." *Id.* at 971. Indeed, the Uniform Law Conference of Canada is already considering amendments to its Personal Property Security Act in light of the recent revisions to Article 9 of the Uniform Commercial Code. R.C.C. Cuming & Katherine Walsh, *A Discussion Paper on Potential Changes to the Model Personal Property Security Act of the Canadian Conf. on Personal Property Security Law*, *available at* http://www.ulcc.ca/en/cls/index.cfm?sec=2&sub=2g.

[198] *See* Maruice Copithorne, *National Treaty Law and Practice: Canada*, *in* NATIONAL TREATY LAW AND PRACTICE 91–92 (Duncan B. Hollis, Merritt R. Blakeslee, & L. Benjamin Ederington eds., Martinus Nihjoff 2005); *see also* A.G. Can. v. A.G. Ont. [1937] D.L.R. 673, 682–83 (stating that federal government cannot pass implementing legislation in areas that fall within provincial jurisdiction). For an interesting comparison of the constitutional structures of the treaty power in Canada and the United States, see Jeffrey L. Freisen, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415, 1416–18 (1994).

[199] For example, in accession to the Sales Convention in 1991, Canada declared that, in accordance with Article 93 of the Convention, the Convention would extend to certain specified provinces; it entered subsequent declarations expanding the application to other provinces and territories. *See* Status 1980-United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[200] The body responsible for the drafting of the Personal Property Security Act is the Uniform Law Conference of Canada. *See* Uniform Law Conference of Canada, http://www.ulcc.ca. The Uniform Law Conference of Canada has endorsed reform recommendations that would bring the Civil Code and the Personal Property Security Act (the Canadian equivalent of Article 9) into general alignment with the Convention on both these points (effectiveness of anti-assignment clauses and the choice-of-law for priority). UNIFORM LAW CONFERENCE OF CANADA, CIVIL LAW SECTION, UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE: PRE-IMPLEMENTATION REPORT 24 (2005), *available at* http://www.nccusl.org/update/docs/RecIntlTrade/AssignmentConvention_Report_E.pdf. It is contemplated that Canada will ratify the convention, but by declaration have the

and the United States (the National Conference and the American Law Institute) embarked on a joint project.[201] The theory for the project is simple. In order to give effect to the Convention's provisions in Canada, legislation is necessary at the provincial level that would harmonize the provisions of the Personal Property Security Act and the Convention. Similarly, if the law in the U.S., which in this case is Article 9 of the UCC, were to be harmonized with the provisions of the Convention, it might be done at the state level through uniform legislation; ratification and implementation of the legislation at the federal level would involve many of the federalism concerns addressed above, and appears unlikely. In Mexico, there is also a two level government, with authority distributed between the federal government and the states in many areas.[202] To the extent Canada, Mexico, and the United States undertake to revise existing uniform legislation based on a common model,[203] a cooperative effort would have the advantage of allowing cross-border harmonization. Political advantages may exist as well, particularly for Canada and Mexico, for whom implementation and ratification of the Convention may be assisted by the fact that the United States is moving in the same direction.

The receivables project is being undertaken independently of any plans to ratify the Receivables Convention, and consequently it would be a mistake to speak of the project involving implementation. Rather, it is an attempt to harmonize the choice-of-law provisions of domestic law with those of our NAFTA neighbors, and with the provisions of the Receivables Convention. As such, the project is consistent with prior projects involving attempts to harmonize law among the NAFTA countries,[204] and attempts within the

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convention only apply to those provinces that enact the necessary changes to their domestic law.

[201] Howard Swibel, *Message from the President*, UNIFORM ACTIVITIES E-NEWSLETTER, May 2006, http://www.nccusl.org/nccusl/newsletters/UniformActivities/UniformActivities_long_May06.htm. Since this article was written, the nature of the project has changed to more of a focus on achieving ratification and implementation of the Convention by the three countries. Nonetheless, the original contours of the project raise interesting questions about law revision processes generally.

[202] For a description of the Mexican legal system and its federal civil code, see Jorge A. Vargas, *The Federal Civil Code of Mexico*, 36 U. MIAMI INTER-AM. L. REV. 229 (2005).

[203] *See supra* note 197.

[204] One such example is the AMERICAN LAW INSTITUTE, FORWARD TO TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES (2003). Much of the coordination and harmonization among the three countries has occurred in informal ways; the National Conference of Commissioners on Uniform States Laws, the Uniform Law Conference of Canada, and the Mexican Uniform Law Center are in frequent contact with regard to ongoing projects, for example.

United States to harmonize state law in certain areas with international instruments.[205] There is no constitutionally prohibited "agreement" being negotiated or entered into between the states and "foreign powers," any more than the normal process of drafting uniform laws in the United States violates the prohibition against states that resort to international instruments or foreign law for authority. From that perspective, there should be no concerns about states running afoul of the Compact Clause, or engaging in activities prohibited under the dormant Foreign Affairs Clause; the states, in revising their commercial laws, are acting within the ambit of their traditional competence.

There are advantages to such a collaborative lawmaking process. The most evident advantages are from a domestic-international perspective. Harmonization of the choice-of-law provisions among the three countries eliminates the potential for confusion and inconsistent results where results depend upon the place where suit is brought. It also demonstrates the commitment of the United States to an international process of harmonization, and to the rules that result. Moreover, if the provisions of domestic commercial law were to be harmonized with the provisions of the Convention, it would be a much easier step for the United States to ratify the Convention as any federalism concerns would be minimized; the congruence of domestic law with the Cape Town Convention was a factor in the decision of the United States to ratify it.[206] The experience with the Wills Convention might cause some to doubt the ability to achieve sufficient state adoptions to justify federal action. Nonetheless, the experience in achieving enactment of Revised Article 9 within a relatively short timeframe is encouraging. Moreover, activity within the United States, even short of ratification of the convention, which demonstrates a commitment on the part of the states to align themselves with international developments, provides evidence of United States' support and endorsement of these international instruments. This has been true in other areas, where state adoption of provisions of

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[205] Several of the projects to revise the Uniform Commercial Code or to adopt uniform laws in the commercial law area have been done in conjunction with similar efforts proceeding on the international level. *See* Boss, *supra* note 65, at 1940–41.

[206] One of the arguments made in favor of the Cape Town Treaty was that its financing provisions were aligned with those of the Uniform Commercial Code, and therefore required no revision. All that was required were changes to the federal registry system. *See Cape Town Treaty Implementation Act of 2004: Hearings*, *supra* note 176 ("The financing provisions on secured interests under the Treaty do not require any implementing legislation here in the U.S., because they are fully consistent with U.S. law under the Uniform Commercial Code.").

international instruments has been cited approvingly as akin to enactment of proposed international model laws.[207]

From a private domestic law-making perspective, however, the advantages are not so clear. The proposed project replaces the traditional drafting committee with a cross-border regional drafting committee, and introduces additional complexities in the uniform laws drafting process.[208] The uniform law process has been criticized as a "private legislature," dealing with issues better resolved in the ordinary political process where competing value claims can be accommodated more effectively.[209] One could argue that to the extent that the typical uniform law process is removed from the political arena, a "regional" cross-border harmonization effort is that much more removed. The interest groups that are present at a cross-border harmonization effort may not be the same as those involved domestically; the international process may preclude active participation by domestic interests who lack the financial or other resources to participate, or who perceive that "their issues" are not central to the endeavor. The process will therefore be more prone to capture by certain other interest groups.[210]

Alternatively, the internationalization of the drafting process, with cross-border attempts to harmonize, may strengthen rather than weaken the uniform law process. Private interest groups who would otherwise be able to control the domestic process may be limited in their ability to control the harmonization efforts by the international character of the process. Participation in a regional harmonization effort,[211] as opposed to participation in international efforts, may have procedural advantages as

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[207] The best example is the widespread adoption of the Uniform Electronic Transactions Act, which was based on the UNCITRAL Model Law on Electronic Commerce. UNCITRAL's website lists adoption by forty-seven states plus the District of Columbia. Status 2001-UNCITRAL Model Law on Electronic Signatures, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html.

[208] *See, e.g.*, A. Brooke Overby, *Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce*, 7 TUL. J. INT'L & COMP. L. 219, 232 (1999) ("Accommodating this added [international] dimension within the NCCUSL's already intensive legislative methodology adds a new complexity to the uniform state laws process. In addition, the international nature of the issues evoked by e-commerce suggests that, perhaps, an international rather than domestic solution may follow those issues.").

[209] Schwartz & Scott, *supra* note 3 (the ALI and NCCUSL should not propose uniform rules for transactions where the distributional effects are asymmetric and prices are unlikely to adjust efficiently so as to compensate for a single group's victory in the legislative process).

[210] Stephan, *supra* note 8, at 744.

[211] For a discussion of regional harmonization efforts, see Gopalan, *supra* note 78.

well: Presumably, the United States will have a greater voice among three than among sixty countries.[212] Moreover, the common heritage that the United States shares with at least one of the two other parties, and the fact that all three share a common law with regard to secured transactions, improves the likelihood of reaching an acceptable accommodation. These factors potentially offset a frequent criticism of the internationalization process: that international instruments are inferior in quality, representing compromise and dilution.[213] Since the three countries are starting in roughly the same place, dealing with very similar bodies of substantive domestic law, the likelihood of them adopting an "inferior" product is unlikely.

Of course, whatever the product of the international lawmaking effort, it will not be binding upon the states within the United States without further steps. Any proposed revisions to Article 9 of the UCC which may come out of the receivables harmonization project would still need to be approved by the sponsors of the Uniform Commercial Code, the National Conference of Commissioners on Uniform State Laws and the American Law Institute; these two organizations serve as the first line of defense against any capture of the process. Moreover, any revisions these organizations adopt as changes to Article 9 would still require enactment by the fifty states, another potential check against capture.

A further potential check is the ratification and implementation process. If the uniform law process is unable to accommodate international consensus in a responsible way, then the states' roles as international actors may become marginalized in two ways. First, the door will open to the federal government to assume the reins and preempt the field.[214] Second, as commercial law is increasingly international in scope, law making bodies

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[212] Currently, the Hague has sixty-five member states, while both UNIDROIT and UNCITRAL have sixty. A listing of those member states may be found on the websites of each organization. Hague Conference on Private International Law, http://www.hcch.net; UNIDROIT, http://www.unidroit.org; UNCITRAL, http://www.uncitral.org; *see also* Gopalan, *supra* note 78.

[213] Gopalan, *supra* note 78; Stephan, *supra* note 8, at 749–50.

[214] *See, e.g.*, Overby, *supra* note 208, at 234.

> [T]he NCCUSL process no longer must proceed solely in the shadow of federal preemption in areas of e-commerce, but now arguably also must be responsive to international lawmaking bodies. To the extent the domestic uniform laws process is unwarrantedly subverted or hindered, to the point that largely uniform enactment is impeded, the potential exists that United States domestic law will be marginalized from the emerging international law of e-commerce. With this may come the possibility that international and federal bodies, rather than local domestic ones, could play the predominant role in harmonization through proposed legislation such as the Model Law.

Id.

such as UNCITRAL and UNIDROIT may become the effective leaders and preempt domestic bodies such as NCCUSL: domestic entities will "follow rather than lead in the globalization harmonization projects of the future."[215]

Two other recent conventions will similarly raise issues as to whether, if their provisions are to be adopted, it will be done on a federal or state basis. The first is the UNCITRAL Convention on the Use of Electronic Communications in International Contracts (E-Commerce Convention),[216] which is based in large part on two model laws previously drafted by UNCITRAL.[217] Unlike the Wills Convention, which required contracting states to affirmatively adopt legislation, the E-Commerce Convention, like the Sales Convention, purports to set forth all the rules to which the parties agree; arguably, no further action is needed other than ratification to make the convention's provisions operative. As the E-Commerce Convention is limited solely to international transactions, the power of the federal government in the field is not disputed. The larger question is whether federal ratification without any attempt to meld the provisions of the E-Commerce Convention with those of domestic law is advisable. Just as there are subtle differences between this new convention and the prior two model laws, there are subtle differences between the E-Commerce Convention and both the federal E-Sign law and the Uniform Electronic Transactions Act, enacted in forty-eight states and the District of Columbia. There are already questions about how to reconcile state adoptions of the Uniform Electronic Transactions Act with the E-Sign legislation;[218] if the United States were to

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[215] *Id.*

[216] United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, A/RES/60/21 (Nov. 23, 2005), *available at* http://www.uncitral.org/pdf/english/texts/electcom/2005Convention.pdf [hereinafter E-Commerce Convention]; *see* Anjanette H. Raymond, *Electronic Commerce and the New UNCITRAL Draft Convention*, 19 INT'L L. PRACTICUM 66 (2006); Charles Martin, *The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?*, 17 PACE INT'L L. REV. 261, 262 (2005).

[217] They are the UNCITRAL Model Law on Electronic Signatures, adopted by UNCITRAL on July 5, 2001. *See* G.A. Res. 56/80, U.N. Doc. A/RES/56/80 (Jan. 24, 2002), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html; Model Law on Electronic Commerce, A/RES/51/162 (Dec. 16, 1996), *available at* http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf. The UETA, enacted in forty-seven states and the District of Columbia, was based on the earlier model law.

[218] *See, e.g.*, Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 WIS. L. REV. 527, 557–62 (stating that UETA and E-Sign both govern state writing requirements, based on E-Sign's statutory language, caption, structure, and policy arguments); Donald C. Lampe, *Electronic Commerce: The Uniform Electronic*

become party to the E-Commerce Convention, additional questions would arise as to relationship of the convention to these other two bodies of law. While they are substantially similar, there are subtle differences in nomenclature,[219] minor differences in requirements,[220] and major differences in approach to some key points.[221] This may create a situation where the existence of a dual scheme (one for international transactions subject to the E-Commerce Convention, the other a domestic transaction subject to the UETA) would be confusing and counter-productive. This may be another area where reconciliation of domestic state law with the international instrument would be the logical first step in achieving harmonization.[222]

Another newly completed treaty is the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("PRIMA Convention"), promulgated by the Hague Conference in 2002.[223] Responding to the emergence of a new international market in

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Transactions Act and Federal E-Sign Law: An Overview, 55 CONSUMER FIN. L.Q. REP. 255, 256 (2001); Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures Under the Federal E-SIGN Legislation and the UETA*, 56 BUS. LAW. 293, 328 (2000); Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws*, June 22, 2006, http://www.nccusl.org/nccusl/uniformact_articles/uniformacts-article-ueta.asp.

[219] For example, the E-commerce Convention speaks of "communications" and "data messages," where the UETA and E-Sign speak of "records." E-Commerce Convention, *supra* note 216; UETA, *supra* note 155, § 106; E-Sign, *supra* note 32, § 2(13).

[220] For example, to satisfy mandatory writing requirements, Article 9 of the E-Commerce Convention requires an electronic communication to be "accessible so as to be usable for subsequent reference;" section 7 of the UETA requires the communication be "retrievable in perceivable form." E-Commerce Convention, *supra* note 216, at art. 9; UETA, *supra* note 154, § 7.

[221] The Convention continues the signature requirement of the Model Law on Electronic Commerce that the "signer" use a method which is "as reliable as appropriate" to identify the party and to indicate its intent with regard to the communication; the UETA eschewed this approach for a simpler one that merely requires the "signer" to use a sound or symbol "executed or adopted by a person with the intent to sign the record." E-Commerce Convention, *supra* note 216, at art. 9(3); UETA, *supra* note 154, § 2(8).

[222] Admittedly, however, the area of electronic commerce is complicated by the presence of E-Sign, which preempts state law in certain instances; revisions to E-Sign may ultimately be required to completely align the three different bodies of law: state, federal and international.

[223] The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72. *See generally* James Steven Rogers, *Conflict of Laws for Transactions in Securities Held Through Intermediaries*, 39 CORNELL INT'L L.J. 285 (2006).

which electronic securities are used as collateral,[224] there was industry demand for certainty in the conflict of law principles applicable to such transactions.[225] The PRIMA Convention departs radically from traditional choice-of-law rules by following the actual industry standards and practice.[226] Although the PRIMA Convention is primarily a choice-of-law convention, UNIDROIT has a complementary project underway that would provide substantive rules governing the indirect holding of securities.[227]

VI. MOVING FORWARD

The growth of international efforts to harmonize and unify commercial law on a global scale raises important questions about the allocation of responsibility between the federal government and the states in that process. Both the Constitution and concerns about federalism play a role in determining that allocation. Yet the fact remains that at this stage the uniform law process still plays a large part in articulation of domestic commercial law principles, and that role can easily be expanded to encompass harmonizing those domestic commercial law principles with international developments.

The National Conference of Commissioners on Uniform State Law in recognition of the realities of globalization is working to establish itself in the international arena:

> With the movement toward globalization, the federal government increasingly participates in the promulgation of private international law conventions that, upon ratification, become preemptive federal law. This disrupts the law in areas such as commercial and family law that historically have been regulated at the state level and that have been the subject of numerous uniform and model laws promulgated by the Conference. The

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[224] *See generally* Steven L. Schwarcz, *Intermediary Risk in a Global Economy*, 50 DUKE L.J. 1541, 1557–61 (2001).

[225] Kovar, *supra* note 195. A controversial aspect of the PRIMA Convention is whether it is an "attempt by US intermediaries to gain an advantage over European intermediaries." Harry C. Sigman & Christopher Bernasconi, *Myths About the Hague Convention Debunked*, INT'L FIN. L. REV., Nov. 2005, at 31 *available at* http://hcch.e-vision.nl/upload/bibl_iflr36.pdf.

[226] For securities held by intermediaries, the "traditional" choice-of-law principle based on the location of the securities was rejected in favor of "place of the relevant intermediary," which is the place where the intermediary is organized. The convention derives its name, PRIMA, from this rule: Place of the Relevant Intermediary Approach. This rule is triggered, however, only in the absence of a choice-of-law provision in the agreement between the customer and the intermediary establishing the account. *See* Rogers, *supra* note 223.

[227] Sandra M. Rocks & Kate A. Sawyer, *Survey of International Commercial Law Developments During 2003*, 59 BUS. LAW. 1663, 1672–73 (2004).

> states have a profound interest in, to the extent practicable, having international conventions mesh with their existing laws, influencing the law's development in other countries so that it is compatible with American legal concepts, and harmonizing their own laws with the laws of other countries.[228]

The references to international conventions "meshing" with domestic law, encouraging other countries to develop concepts "compatible" with the law in the United States, and "harmonization" may well be admissions by the Conference that its role is not the implementation of treaties once they have been executed. Their role is a more traditional one: Ensuring that, through traditional domestic law revisions processes, the legal regime extant on the state level meshes with the federal and international legal regimes and disparities among countries are minimized.

Of course, action by the states alone may never be sufficient to allow the United States to fully adopt the emerging "International Commercial Code." Some issues may require federal legislation; federal legislation was necessary to implement the registry system required under the Cape Town Convention as the federal government already controls aircraft registration systems; legislation in the form of the new federal bankruptcy code was required to implement UNCITRAL's Model Law on Cross-Border Insolvency as bankruptcy is an area committed to the power of the federal government by the Constitution.

Yet in those areas of commercial law that have traditionally been within the competence of the states, the challenge is to develop mechanisms and procedures that permit the United States to be a player in harmonizing with those developments. The ability of the Uniform Commercial Code—the product and the process—to accommodate these international developments will be the test of its continuing resilience and relevance.

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[228] *Policy Position on International Activities*, UNIFORM ACTIVITIES ENEWSLETTER (National Conference of Commissioners on Uniform State Laws), May 2006, at 6, http://www.nccusl.org/nccusl/newsletters/UniformActivities/UniformActivities_long_May06.htm#Article6; *see also* NCCUSL, SUB-COMMITTEE REPORT REGARDING CRITERIA FOR DETERMINING POSSIBLE NCCUSL INVOLVEMENT IN INTERNATIONAL LEGAL DEVELOPMENTS, http://www.nccusl.org/Update/Docs/Rpt_Criteria%20for%20NCCUSL%20Involvement_072405.pdf; Criteria for NCCUSL International Projects, http://www.nccusl.org/Update/Docs/Criteria_IntlProjects.pdf (last visited Aug. 16, 2006).