

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1912

Unifying Tendencies in American Legislation

Ernst Freund

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Ernst Freund, "Unifying Tendencies in American Legislation," 22 Yale Law Journal 96 (1912).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

UNIFYING TENDENCIES IN AMERICAN LEGISLATION¹

By Professor Ernst Freund.

There is no political organization in the world in which the efforts to produce national unity in law and legislation encounter such difficulties as they do in the United States.

The Constitution of the United States was established as the first of modern federal constitutions at a time when the points of contact between different parts of one State were fewer than they are nowadays between Maine and California, or Florida and North Dakota, when consequently the sense of common nationality was weaker than local jealousy and the conflict of local interests. The mutual dependence of States whose main interest lay in their plantations and States with predominating commercial interests demanded a common jurisdiction in matters of commerce, especially of foreign commerce, and this was fully conceded to the Federal organization. Manufactures were but slightly developed, and labor and other social welfare problems did not exist; as in England, the common law of persons and property was not a conspicuous object of legislative care or activity, and the idea of a national common law of crimes aroused suspicion and apprehension. It is true that the legislation regarding bankruptcy was confined to the Union, but in the first century of the government the power was used only intermittently and for short periods. Patents and copyright were on the other hand treated from the beginning as matters of national concern.

If we compare with the Constitution of the United States those federal constitutions which date of the second half of the nineteenth or the beginning of the present century, we find in all of the latter a wider scope of federal jurisdiction. From the beginning Germany conceded to the national power the legislation concerning trade and insurance; in Germany as well as in Switzerland the constitution was amended in order to bring the entire private law under federal jurisdiction; Canada and Australia conceded to the federal power at least such subjects as marriage and

¹ This is a translation of an article originally published in German in the *Jahrbuch für Öffentliches Recht*, 1911.

commercial paper; Australia moreover permits the common regulation of any matter by the Commonwealth for several states at the request of such states, and in Canada the Dominion Parliament possesses the residuary powers of legislation; in South Africa, the most recent of federal organization, the common legislative power is almost unrestricted. Judged by these later developments, the boundaries of Federal jurisdiction in the United States are clearly too narrow.

Down to the time of the Civil War this limitation was not felt to be a defect; even the powers which the nation possessed were not exercised to their full extent. Hardly any attempt was made to legislate for the territories; except for brief periods the legislation regarding insolvent debtors was left to the States; and from the beginning Congress declared that the Federal Courts should be governed by the laws of the States in which they were sitting. (Act of Sept. 24, 1789, Ch. 20.)

Federal Judicial Power.—The prevailing canons of construction appear to negative the claim that the judiciary article of the constitution implies legislative power, that the United States as the sovereign holder of jurisdiction may determine the law according to which its justice is to be administered.² The United States as a matter of fact claims no common law of its own; in an action brought by a citizen of New York against a citizen of Illinois in a Federal Court sitting in Illinois that court applies the common law of Illinois, unless the nature of the cause of action requires the application of the law of New York. It is true that the Federal courts do not consider themselves bound by the rulings of the Supreme Court of Illinois on questions of general, and particularly of commercial, common law, in which it is not claimed that special local customs have varied general doctrines; but in asserting their own views the Federal courts still profess to apply State common law of which they simply claim to be equally competent judges with the State courts. If therefore the State gives to the interpretation of its own courts the form and force of a statute, the Federal courts yield. That Congress might enact a separate negotiable instruments law for controversies between citizens of different States, has never even been suggested, and for such an act Congress would be much more apt to rely upon the power over

² See an article by Professor R. J. Goodnow in *Political Science Quarterly*, vol. 25, p. 577.

commerce, than upon the judiciary power. Only in the matter of admiralty jurisdiction is there a distinct national law, which has in some points been amended or altered by congressional legislation.

Legislative Powers in Matters of Commerce.—The power to regulate the commerce among the several States and with foreign nations is undoubtedly most conspicuous among Federal legislative powers; but even here Congressional legislation has proceeded only with hesitation and by very gradual steps. The nation provides for registration of vessels, but not for the incorporation of navigation companies, which is left to State laws, and even to-day the great trunk lines of railroads covering many States operate under State, and not under national, charters. While Congress enacted uniform rules of navigation, the pilot service was left to the States; and the States until the latter part of the nineteenth century supervised immigration, being however confined to the protection of the State against the more imminent dangers of disease, crime and pauperism, and being prohibited from interfering with the freedom of commerce by the imposition of head taxes or similar burdens. Where commerce might import disease, it belongs to the States to enact the necessary quarantine measures. It is only since the last decade of the nineteenth century that Congress has taken over immigration legislation entirely, and quarantine legislation in part, and that it has enacted safety measures for the operation of interstate railroads.

Quite as recent are the beginnings of Congressional legislation on the economic side of commerce: the creation of the Interstate Commerce Commission in 1887, with powers over railroad rates which have since been extended; and the enactment of the so-called Sherman Anti-trust Law in 1890. And it has become the practice when legislation is enacted which can bind the States only in the domain of interstate and foreign commerce, to make it applicable to Territories without that restriction, whereas formerly it had been the invariable policy of Congress not to interfere with the internal concerns of a Territory.

It was again a new departure, when in 1907-08 Congress undertook to regulate the liability of interstate railroad companies toward their employees. Subject to the restriction to injuries occurring in connection with interstate commerce, the Supreme Court recognized this as a valid exercise of the commerce power.³

³ *Mondou v. N. Y., N. H. & H. R. R. Co.*, 223 U. S., 1.

On the other hand, it is, to say the least, still very doubtful whether the business done by life or fire insurance companies with citizens of other States or of foreign countries can be treated as commerce and thus be brought under Federal control, and the attempt has thus far not been made. With regard to manufactures, the so-called Beveridge Bill undertook to exclude goods produced by the aid of child labor from interstate and foreign commerce and thus to place child labor at least in part and indirectly under national control, and it is not impossible that such legislation would be sustained by the Supreme Court. The logical result of such a development would be to extend the commerce power over every industry carried on for the sale of its products outside of the State, just as even to-day slaughtering establishments which export meat are placed under Federal inspection. Congress has made Federal funds available for the acquisition of land on the headwaters of navigable streams in order to check deforestation, justifying Federal intervention by the plea, that the preservation of forests on the upper course of navigable waters tends to regulate interstate commerce—surely not a strict construction of national jurisdiction. It remains to be seen how the Supreme Court will receive these new advances of Federal power, which certainly run counter to deep-seated conservative sentiments or prejudices.

State Legislation.—A few years ago Senator Root gave expression to a warning that the tendency toward the expansion of national legislation would prove irresistible, unless the States were able and willing to satisfy the legitimate demand for needed reforms. But it is largely on account of its limited territorial application that State legislation has proved inadequate. How is a successful control of economic interests possible if the moving agencies operate wholly or in part beyond the boundaries of the State and are thus exempt from State jurisdiction? The State legislature recognizes or is met with the objection that measures which are called for encounter obstacles in the freedom of commerce, in the competition of other States, or in physical or social conditions beyond the state boundary line—obstacles which make the success of the measure questionable and which make it seem preferable to do nothing. In view of the mobility of modern industry, the threat that the enactment of a measure will drive the manufacturers into another State, is likely to have at least some effect.

On the other hand, the expansion of Federal jurisdiction is opposed not merely by old prejudices against centralization, but also by the diversity of interests of different sections of the country. Notwithstanding the outward uniformity of life which strikes the foreign observer, conditions are perhaps less favorable to uniformity of legislation than they are in Germany with its great variety of local color and local custom. The enactment of a national trade code for the United States would find as determined resistance as the enactment of a national marriage and divorce law. With regard to many subjects it would be desirable to overcome the divisions of State boundary lines without forcing upon the entire country a legislative unity for which it is not ripe. Outside of the original territory State boundaries are often purely mechanical and artificial, crossing and dividing sections which constitute economic units. New England, the uplands of the Southern Atlantic States, the upper Ohio Valley, the cotton States, the wheat States of the Northwest, the corn belt of the Mississippi Valley, the arid West with its mining industry, the lumber regions of the Pacific Northwest, are distinctly marked territories demanding unity of industrial legislation. If the State of Ohio enacts a child labor law, its enforcement in border counties encounters the difficulty that children may come from West Virginia who may perhaps have the advantage or disadvantage of a looser system of age and school certificates. And so strict marriage laws are frequently rendered entirely inoperative by a brief and easy excursion into a neighboring State. The question thus arises—which has so far been very little discussed—whether it is not possible to secure uniformity of legislation for two or more States without extending it to the entire country.

Legislative Agreements.—The Federal Constitution forbids the States to enter into agreements with each other without the consent of Congress; it follows from this that such agreements are possible provided the consent of Congress be obtained. It may be asked why States should not avail themselves of this power to follow the example of the Berne Conventions and agree upon identical legislation regarding certain matters. In the past this course has not been adopted and it is to be feared that it would prove impracticable. For the Constitutions of the several States do not recognize such agreements as having statutory force; the agreement in order to have such force would have to be authorized by the State as well as by the Federal Constitution.

Suppose an agreement were concluded between two States whereby each would agree to adopt the same law: would such law when adopted be of greater force than any other? The Federal Constitution permits States to bring their controversies before the Supreme Court; in the past, however, it has always been made a condition for the exercise of such jurisdiction that the controversy should concern some "justiciable" matter, and the complaint that in violation of an agreement a law had not been enacted or not been enforced or altered or repealed would raise an issue of a political or at least of an entirely novel character, which might lead the Supreme Court to decline jurisdiction. In view of these difficulties and uncertainties regarding enforcement the suggestion of such an agreement would most likely meet with a very cold reception on the part of any State legislature. It is true that there are similar legal difficulties in the case of the Berne Conventions; but the governments of the signatory powers are not only accustomed to diplomatic arrangements of this character, but they recognize the duty and have the influence to carry them into effect through the enactment of the requisite legislation, while our State, owing to the lack of representative organs, would be without an adequate sense of responsibility with regard to such agreements.

Where an object can be accomplished by joint or concurrent control of proprietary interests, the method of agreement is of course available, and by act of March 1, 1911, Congress gave its consent to any compact States might enter into for the purpose of conserving forests and water supply.

Reciprocity Legislation.—This method of coöperation has been somewhat discussed and is perhaps less unfamiliar than that of legislative agreements (Lindsay, *Reciprocal Legislation*, *Political Science Quarterly*, vol. 25, p. 435). The procedure would be for two or more States to enact statutes in such a manner that the beginning and continuance of their operation would be conditioned upon the operation of an identical statute in the other State or States. In a very few cases (fishing regulations in boundary waters) this method has been adopted. The power of the legislature to make the operation of an act dependent upon the existence of conditions beyond its control, is supported by established analogies and would probably not constitute an unconstitutional surrender of legislative power. It is not impossible that sooner

or later this will become a recognized method of coöperation, but it would be premature to speak of it as an established method.

Common Preliminary Measures.—The enactment of uniform laws would be strongly aided by several States with common interests uniting in the creation of common offices or commissions, charged with the task of establishing technical or scientific standards to be incorporated by reference in subsequent State legislation. Such a practice would be supported by existing precedents; laws enacted against the adulteration of drugs refer to the national Pharmacopeia, the Federal railway safety appliance act refers to the rules of the National Railway Association. To a constantly growing extent modern legislation is concerned with matters in which effectual rules must be based upon conclusions reached after expert inquiry. A common bureau for the prosecution of such inquiries would have the advantage of a wider range of selection of competent men; its finding would be more reliable; there would be a saving of time and money; and uniformity of provisions would be brought about without special agreement. Within the last three or four years more than half a dozen separate legislative commissions have studied the question of workmen's compensation. They sometimes met in conference; but to a considerable extent the same inquiries were prosecuted without collaboration, and large sums of money expended without adequate results.

Deliberate Conferences.—If American statute law presents in form and content a considerable uniformity, this is due not to systematic coöperation on the part of State legislatures, but to the common basis of older English law and legislation, to the practice, observed in drafting statutes, of adhering as closely as possible to laws already enacted, and to the fact that the ideas, tendencies and movements which are impelling forces of all new legislation, are entirely national and not peculiar to any particular State. As regards these unofficial factors, the unity of the United States is not inferior to that of any other nation. In addition to the numerous national associations which represent the interests of social or economic groups or voice public welfare aspirations, we find in more recent years the associations of State officials, such as factory inspectors and attorneys-general. Unfortunately their deliberations often remain without permanent record, and information regarding them can be gathered only from fugitive and imperfect accounts in the daily press.

Governors' Conferences.—The most conspicuous among these conferences of officials is at present the so-called House of Governors. The idea of such conferences appears to have arisen in the New England States: a meeting of the governors of these States called toward the end of 1908 discussed schools, highways, and fisheries. Even before that time (beginning of 1907) the idea of a general conference of governors had been privately suggested,⁴ and President Roosevelt, in May, 1908, had invited the Governors of all the States to Washington to participate in a discussion on the conservation of natural resources: on this occasion the Governors, like other participants, were merely guests of the President. They improved the opportunity however by appointing a committee to consider the creation of a distinctive and possibly permanent organization. This committee called the first independent conference which, at the suggestion of President Taft, again met in Washington, in January, 1910, simultaneously with a large and representative conference called by the National Civic Federation for the discussion of uniform legislation. A second conference met in November and December of the same year in Kentucky, a third one in New Jersey in September, 1911.

The organization of the governors is a very loose one: a committee makes the necessary preparations for meetings and selects the subjects for discussion; the chairman changes with each meeting and there is no permanent president. The governors hold no official mandates from their several States, and no public moneys are appropriated for the meetings.

Under these circumstances little more can be expected than an informal exchange of ideas. The main topic of discussion at the first conference was the conservation of national resources, a subject in which the conflict between local and national desires is particularly marked. President Roosevelt advocated a far-seeing policy with the object of checking as far as possible the private exploitation of forests and mineral wealth and of water power. This implied a stricter method of public land grants and the non-surrender of Federal control of water power sites. The western States desire liberal principles in the opening up of public resources in order to attract private capital, and are averse to sacrificing the present to the future; they maintain that they know

⁴ By Mr. W. G. Jordan of New York, who subsequently acted as Secretary of the Governors' Conference.

how to take care of their own interests. This was the dominant note in the Kentucky conference, and it is unlikely that the deliberations upon the subject will proceed beyond academic discussions. The conference of 1911 discussed divorce, and the referendum and initiative—questions on which combined action is not looked for at the present time.

As compared with other officials meeting in national conference, the governors are at a disadvantage in not having a definitely circumscribed sphere of official activity, and their discussions are therefore without professional character. The specific administrative functions of the governor's office are few. He is, however, naturally the chief medium of intercourse between the different States and as such is the organ of mutual aid in the administration of justice. In this matter State legislation is necessarily inadequate, and Federal legislation covers only a portion of the required coöperation; thus it is impossible for one State to compel the attendance of witnesses from another State. If the governors were to direct their attention to matters like this, their conferences would find a useful though modest field of action. It is more tempting to discuss great issues of the day; with regard to these, however, there is little prospect of reaching practical conclusions, especially in view of the short duration and the informality of the meetings, and if conclusions were reached, governors would frequently not possess the political influence necessary to induce the legislatures of their States to adopt them. Legislative bodies are jealous of their prerogatives; and while they must submit to the exercise of the constitutional veto power, they are inclined to resist, at least passively, the governor's initiative in matter of legislation, unless it is supported by a strong public opinion or unless it relates to technical details of administration. In course of time this relation of powers may change in favor of the governor; as things are at present, it is hardly possible to speak of the "House of Governors" as a new organ in American constitutional organization.

Commissioners on Uniform State Laws.—These are undoubtedly at present the most important organs of the movement toward uniformity of legislation. They bear an official mandate; the annual conferences are of a practical character, and have produced important bills, some of which have become law in a considerable number of States. The commissioners of each State and Territory (as a rule three or five) are appointed by the governor, usually in

pursuance of a statute, and several States make appropriations in aid of the conferences. The office is unpaid, and the resolutions of the conference have no binding character; on the other hand the commissioners are uninstructed. Each State has one vote, determined by the majority of its commissioners.

The first commissioners were appointed by the State of New York in 1890, after the American Bar Association had, in the preceding year, created a committee for uniform legislation. At present all States and Territories and possessions with the exception of Nevada are represented in the conference. The conferences are held in connection with the annual meetings of the American Bar Association, and the latter makes an annual appropriation for the work of the conference and publishes an account of the conference proceedings in its Annual Report.

The conference annually elects a President from its midst, and the President appoints the committees. Expert draftsmen are from time to time employed in the preparation of important measures.

The subjects named in the beginning for unification were: marriage and divorce, inheritance and administration, execution and probate of wills, acknowledgment of deeds, and insolvency. The latter subject disappeared from the program when Congress again enacted a bankruptcy law. A number of new subjects have however been recognized by the creation of standing committees, among them commercial law, conveyances, insurance, pure food legislation, incorporation, banking, etc. And in recent years the conference has also taken up some matters of social legislation, notably child labor and workmen's compensation.

The greatest results have been accomplished in the field of commercial law. A codification of the law of negotiable instruments was completed in 1896, based on the English Bills of Exchange Act of 1882. The Negotiable Instruments Act has become law in not less than forty States and jurisdictions,⁵ in a few cases with minor amendments, so that here the work of the conference has resulted in practical uniformity. It may be mentioned that the unification and codification of the law of negotiable instruments for Germany was likewise first accomplished by the enactment of identical laws on the part of the several States.

⁵ The States which have not yet enacted the Negotiable Instruments Law are Arkansas, California, Georgia, Maryland, Maine, Minnesota, Mississippi, South Carolina, South Dakota, Texas and Vermont.

The other commercial law bills so far approved by the conference relate to warehouse receipts (1906), sales (1906), transfer of stock certificates (1909), and bills of lading (1909). These acts represent at the same time a work of law reform, since the documents of title which are current in the transfer of stock and the transportation of merchandise, and on the faith of which bankers' advances are customarily made, have been invested with the character of negotiability, in the case of stock certificates and of bills of lading absolutely, in the case of other documents of title with reservations in favor of the party who has not parted with the document voluntarily. The policy of this reform is the enlargement of credit facilities by giving banks which are compelled to rely upon the possession of documents, the greatest possible security. When it is considered that practically all merchandise on the way from the producer to the consumer is at some time or other represented by these documents, and that the marketing of goods would be impossible without bankers' advances, the importance of the reform is obvious. The extension of the principle of negotiability, while in accordance with commercial usage, was vigorously opposed in the conference. The railroad companies also objected to being bound by bills of lading issued by their officials in contravention of their rules.

The acts referred to being of much more recent date than the Negotiable Instruments Act, naturally have become law in fewer States: the Warehouse Receipts Act in twenty-four,⁶ the Sales Act in nine,⁷ the Stock Transfer Act in five,⁸ the Bills of Lading Act in nine States or Territories or possessions.⁹

Two other subjects of commercial law which have engaged the attention to the conference are the law of incorporation and the law of partnership.

The chief object of a uniform incorporation law is to counteract the mischievous practice of organizing migratory corporations in one State in order to do business in another, compliance with the

⁶ California, Colorado, Connecticut, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Wisconsin, District of Columbia, and Philippine Islands.

⁷ Arizona, Connecticut, Maryland, Massachusetts, New Jersey, New York, Ohio, Rhode Island, and Wisconsin.

⁸ Louisiana, Ohio, Maryland, Pennsylvania, and Massachusetts.

⁹ Connecticut, Illinois, Iowa, Louisiana, New York, Maryland, Ohio, Massachusetts, and Pennsylvania.

laws of which would involve greater expense or be attended by other inconveniences or disadvantages. The difficulties of unification are considerable. For many objects of incorporation, notably railroads, banking and insurance, special laws exist, in which provisions regarding organization are inextricably intermingled with provisions regulating business, with reference to which different policies are pursued. These special classes of incorporation are therefore left out of the scope of the uniform law. States also differ with regard to the classes of business that may be pursued under corporate organization, so particularly as to whether a corporation may be formed for the purpose of dealing in real estate: and there is little hope of securing uniformity in this respect. At best therefore a uniform incorporation act would be a fragmentary piece of legislation.

The generally prevailing law of partnership differs from that of incorporation in the almost complete absence of statutory provisions. The characteristic feature of this branch of the law is the separation of the individual partners' rights and liabilities from those of the firm and their subordination to the latter; the development of this principle has been the work of the courts. It is the object of the proposed uniform law to carry this separation and subordination to all practical consequences. It recognizes the firm as formal holder of rights to an extent hitherto unknown in our law, especially in litigation and in connection with the title to real estate. The recognition of corporate capacity is on the other hand carefully avoided, on account of the manifold incidents of such a status which are entirely beyond the range of commercial law.

Among the subjects of commercial law which have been suggested for uniform legislation is the law of carriers. It is clearly an anomaly that a railroad company in carrying merchandise from one point to another should from one moment to another and frequently without the possibility of ascertaining at what moment the change occurs, be subject to different liabilities. However, Congress has ample jurisdiction to deal with the interstate carriage of goods and passengers, and local uniformity could be best secured by a model national act.

Family Law.—Next to commercial law the law of domestic relations presents the most serious inconveniences resulting from absence of uniformity. The conference of commissioners on

uniform State laws has concerned itself with three subjects: family desertion, divorce, and the form of the marriage contract.

The Family Desertion Act was the first measure of social legislation approved by the conference. It was not so much the diversity of regulation that called for remedy as the absence of efficient coöperation in meeting a new and rapidly increasing evil which is fostered by the limitations of territorial jurisdiction. The object was the formulaton of a model type of penal provisions for adoption by the States. The act was approved in 1910 and has become law in four States (Kansas, Massachusetts, North Dakota, Wisconsin).

Divorce.—The Uniform Divorce Act which the conference has approved, has not proceeded from its own deliberations, but was the result of a national congress called at the suggestion of the Governor of Pennsylvania, which met in 1906, and which many commissioners attended as delegates. In the matter of divorce the evil of divided jurisdictions is particularly striking. It is true that the great majority of States recognize the same grounds of divorce, and also agree in not recognizing such causes as incompatibility of temper and incurable insanity. Some States, however, are known for laxity in the interpretation and application of their divorce laws. Two States, moreover, have an extremely strict divorce legislation: South Carolina, the Constitution of which State prohibits the granting of any divorce, and New York, where absolute divorce is known only in case of adultery. It is not unnatural that parties seek to evade these laws by resorting to more liberal States. Thus arises the question of divorce jurisdiction. Most States recognize such jurisdiction, not on the basis of the domicil of the defendant, but on the basis of the matrimonial domicil or of the domicil of the plaintiff. In the latter case it is assumed that the taking up of another than the matrimonial domicil by the plaintiff is justifiable, and not due to a wrongful act, such as desertion. If a divorce is obtained on the basis of a wrongfully obtained domicil which is not the matrimonial domicil, the decree, according to a well known decision of the Supreme Court (*Haddock v. Haddock*, 201 U. S., 562) is not such a judgment as, by the Federal Constitution, is entitled to full faith and credit in any other State. New York refuses to recognize the validity of divorces thus obtained, and it is with regard to this State, by reason of the strictness of its divorce laws, that the question is practically of the greatest importance. Such non-recog-

ition naturally leads to most undesirable confusion in the status of parties who are rightfully married in one State, and guilty of bigamy in another. Hence the demand for uniformity of legislation. The evil would be remedied both by agreement regarding causes of divorce and by agreement in the matter of jurisdiction. The Uniform Divorce Act deals with both points. In the matter of causes of divorce, it follows the great majority of States, but allows a limited divorce from bed and board as well as absolute divorce. Since the practice of granting limited divorces has disappeared from many States, and since New York does not appear to be inclined to liberalize its divorce legislation, there is little prospect of an adoption of this part of the uniform divorce act. The jurisdictional provisions would have a better chance, if presented by themselves. They are to the following effect: Except in the case of adultery and bigamy, there must have been a domicile of two years' duration in the State to allow the Court to assume jurisdiction. If the domicile has been changed since the happening of the cause of divorce, not only must a domicile of this duration be proved in every case, even in the case of adultery or bigamy, but the cause of divorce in the State in which it happened. If process is personally served, it is sufficient if either of the parties satisfies the domicile requirement; if process is served by publication, the plaintiff must show the two years' domicile on his part. The requirements thus proposed involve no radical departure from common law principles of jurisdiction, and they would be efficient in checking present abuses.

The proposed act further provides that if a spouse leaves the State of the matrimonial domicile in order to secure in another State a divorce upon a ground which has happened in the first State, or which the first State does not recognize, a divorce thus obtained shall be void in the first State.

No State has as yet adopted the proposed Uniform Divorce Act in its entirety, but a few States have enacted the jurisdictional and some other provisions (Delaware, New Jersey, and Wisconsin).

The practice of resorting to other States with more lenient laws obtains not merely for the purpose of obtaining divorce, but also for the purpose of evading prohibitions upon the right to marry, whether attached by way of penalty to a divorce decree, or whether resting upon relationship or other personal disability. This practice is sought to be met by an act approved by the Conference of 1912, which makes parties residing and who intend to

continue to reside in another State subject with regard to their right to marry to the prohibitions and disabilities of the law of the State of residence, the act operating both on marriages which residents of the State contract in another State, and in marriages contracted within the State by residents of other States.

The Marriage Contract.—It has been deemed impracticable to seek to unify the law regarding disabilities to marry. Miscegenation is a distinctively Southern problem upon which many Northern States are disinclined to take action; in the matter of consanguinity, the tendency to prohibit marriages between first cousins, while growing, is confined to relatively few States, and agreement on this subject is for the present improbable. There are also considerable differences of opinion regarding the requirements of age which it would not be easy to reconcile. On the whole, therefore, conditions are unfavorable to uniform marriage law on the substantive side, and the act approved by the Conference of 1911 therefore confines itself to the form of the marriage contract.

According to what may be called the American common law informal consent is sufficient to constitute marriage. The statutes found in all States which designate certain persons (officials and ministers of any denomination) as authorized to solemnize marriages, and which very generally also prohibit such solemnization unless an official license be previously obtained, have commonly been interpreted as directory and not as mandatory, so that notwithstanding the statute, the common law marriage entered into without license or solemnization is recognized as valid. It is only within a relatively recent period that statutes have been enacted which by their explicit provisions render such interpretation impossible, and make informal marriages null and void.

The main purpose of the proposed uniform act is to carry out this modern tendency and to abrogate common law marriage. There is of course no attempt to introduce obligatory civil marriage in the European sense, which requires solemnization by some secular official, and which probably could not be carried in a single State. Every State is to be left free to designate the persons who may solemnize marriages as well as the officials who are authorized to issue licenses.

The act, however, establishes two essential requirements of a valid marriage: the express declaration of the affianced parties before a person authorized by the laws of the State to solemnize

marriages, or such a declaration in accordance with the rules of any religious sect or denomination (the latter alternative being a concession in favor of Quaker marriages, in which the parties marry each other by their own act in the presence of a meeting of friends without the formal concurrence of a minister), and the license issued by a State or local official designated by law for that purpose. The license is required in order to emphasize the civil nature of the contract and to facilitate State supervision and control. It does not constitute an innovation, being provided for by the laws of all states except one; according to the new existing laws, however, the license is not essential to the validity of the marriage, while the uniform act makes the marriage contract preceded by no license whatever null and void. There are, however, ample saving clauses against any prejudice from defects or irregularities in the issuance or form of the license, and also the further proviso that where the solemnization of a marriage is followed by the habit and repute of marriage for one year or until the death of either party, it shall not be lawful to prove that no license has been issued.

The act does not deal with disabilities to marry, and an absolute impediment is not cured by the issuing of a license; care is however taken as far as possible to satisfy and require the licensing official to satisfy himself that no impediment exists. The act contains no rules of evidence, nor does it determine by which law the validity of a marriage is to be judged; as pointed out before the matter of the evasion of the marriage laws of the domicile is to be dealt with separately, and in other respects the rules of the common law will prevail. Considerable attention is however given to the establishment of marriage registers and records, and the local registries are required to report to a central State office.

The Uniform Marriage Act has not yet become law in any State.

In the law of wills the conference has approved a brief act with regard to foreign wills. A will executed in a jurisdiction other than that in which it is offered for probate, is to be valid, if executed in accordance with the requirements of the laws of either the State in which it has been executed, or of the State in which the testator had his domicile, provided that it is in writing and signed by the testator. This act has become law in five States: Kansas, Michigan, Rhode Island, Washington, Wisconsin.

Labor Legislation.—The extension of the activity of the conference to this field is significant of the rapidly growing interest in social legislation. Two acts have been approved, one for the regulation of child labor, the other for workmen's compensation. The object in the case of child labor was to standardize a policy, which is now in principle accepted by most States, and to facilitate the carrying out of the laws by removing the competition of the lower standards. Workmen's compensation is still in its pioneer stages, and the act approved by the conference will be valuable as a model law. The act approved is of the compulsory as distinguished from the elective type, and applies to a long list of hazardous occupations. The general scheme of the act is that of the British Act of 1906.

The National Civic Federation.—This influential organization takes an active part in the movement toward uniformity of legislation. Its program is more extensive than that of the commissioners for uniform State laws. In addition to the subjects considered by the latter, the resolutions adopted by the Civic Federation in 1910 recommend the following for uniform legislation: legislative reference bureaus; vital statistics; public accounting; practice of medicine; control of narcotics; the white slave traffic; mining and forestry; and the operation of automobiles. The list is characteristic as showing that with nearly every legislative movement of importance there is connected a demand for uniformity.

The strength of the opposing agencies must not, of course, be underestimated, though they do not make themselves heard to the same extent. Uniformity generally means a movement away from the old laxity or inactivity of State legislation, under which some interests thrive and prosper. And where as in the matter of double taxation, the State itself has a selfish interest in the continuance of existing abuse or injustice the outlook for reform is slight indeed.¹⁰

The movement for uniform legislation on the whole represents the conviction that the Federal powers are no longer adequate for the demands of national life. Uniform State laws are at best a poor substitute for national laws. It may be expected that a liberal interpretation and application of the commerce, judiciary,

¹⁰ The subject of double taxation is likewise being considered by the Conference of Commissioners on Uniform State Laws.

and taxing powers of the Federal Constitution will substitute national for State control in some matters; and that others may be deemed of sufficient importance to call for specific amendments. But there does not as yet appear to be an effective popular demand for an enlargement of Federal powers which would give us the possibility of a national legislation such as other great federations possess; nor would such enlargement be desirable without new guaranties of State autonomy in the administration of national laws. For some time to come progress toward uniformity will have to be made along the more devious paths here outlined.

Ernst Freund.

University of Chicago.