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The Transposal Processes of the EC Directives and the U.S. Uniform Codes: A Comparative Analysis

Mary Jane Dundas,* Barbara Crutchfield George**
and Jane Elizabeth Hallas***

INTRODUCTION

A similarity exists between the European Community (EC)¹ and the United States in their respective methods of transposing proposals into law in order to meet legislative objectives. The process by which the EC Commission and the Council² drafts and issues directives to the Member States closely resembles the way in which the U.S. National Conference of Commissioners on Uniform State Laws (National Conference) drafts and proposes uniform laws to state legislatures. The major similarity between the directives and uniform laws is that both are issued for the purpose of harmonizing the laws among Member

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¹ The European Community (EC) is the supranational entity with the legislative power operating within the European Union (EU).

² The TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, art. 235, [hereinafter EEC TREATY], enables the Council to legislate on the basis of a European Commission proposal after consulting the Parliament in order to achieve a Treaty objective. See RICHARD OWEN, ESSENTIAL EUROPEAN COMMUNITY LAW 70 (1995). See *infra* notes 62-65, and accompanying text. The EEC Treaty was amended in 1992, and changed the EEC to the EC. However, to avoid reader confusion, throughout the paper the authors will refer to the Treaty as the EEC Treaty. The EEC Treaty, commonly referred to as the Treaty of Rome, has been amended several times including various acts of accession admitting new Member States to the EC.

States in the EC and among the states in the United States. The major difference between the EC and the United States is that while it is mandatory for each Member State to implement the directive³ (unless there is a pre-existing State law which satisfies the directive's objectives), adoption of National Conference proposals by the states is purely voluntary.

First, the authors review the sovereignty issues that the EC faces with its Member States and the historic constitutional issues of states' rights in the United States. Second, there is an examination of the process and implementation of directives by the EC and the methods employed by the National Conference to implement uniform legislation among the states. Lastly, there is a comparative analysis of the harmonization processes of the EC and the National Conference which summarizes the relevant issues previously discussed.

I. BACKGROUND

A. *EC: The Treaty Authority Establishing Directives as a Legislative Concept*

The European Union (EU) has a political structure unique in the world because it is composed of fifteen nations⁴ that are bound together by a series of treaties and their amendments. The three main treaties, known collectively as the Founding Treaties, include the European Coal and Steel Community Treaty (ECSC),⁵ the European Atomic Energy Community Treaty (Euratom),⁶ and the European Economic Community Treaty (EEC).⁷ These three treaties were followed by a

³ Each Member State has discretion regarding form and method of implementation within a specific time frame.

⁴ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. The following countries have been invited to begin membership negotiations in 1998: Cyprus, Estonia, The Czech Republic, Hungary, Poland, and Slovenia. On a slower negotiation track are Bulgaria, Latvia, Lithuania, Romania, and Slovakia. See Barry James, *Turkey is Rejected for EU Membership*, INT'L HER. TRIB., Dec. 15, 1997, at 10.

⁵ TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY]. The ECSC Treaty is commonly referred to as the Treaty of Paris. The purpose of the ECSC Treaty is to create a common market for coal and steel products. See OWEN, *supra* note 2, at 2.

⁶ TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 297 U.N.T.S. 259 [hereinafter EURATOM TREATY]. The purpose of the EURATOM TREATY is to create a specialist market for atomic energy, distribute it through the community, develop nuclear energy, and sell surplus. See OWEN, *supra* note 2, at 3.

⁷ See EEC TREATY.

series of revising treaties,⁸ the most recent of which was the Treaty of the European Union (TEU) in 1992.⁹

Widespread confusion exists regarding the terminology used to denote the European structure after the adoption of the TEU. The term "European Union" is the product of the TEU, born of a need to have a separate designation for the political entity arising out of the three main treaties that were modified but not replaced by the TEU.¹⁰ All the citizens of the Member States are now citizens of the EU. The EU, however, does not have sovereign powers.

The EU consists of three pillars. The basis for the first pillar was created in 1967, when the three European Communities (ECSC, Euratom, and the EEC) were compressed into one by the Merger Treaty.¹¹ The TEU in 1994, formalized the first pillar and created two new pillars. Under the TEU, the first pillar became the newly named EC, from the original EEC. The remaining two pillars arose out of areas which the Member States were unwilling to incorporate into the EC: (1) Common Foreign Affairs and Security Policy and (2) Justice and Home Affairs.¹² Thus, a structure was created through which the EU identity could be asserted and economic and social programs promoted.

The EC,¹³ derived from the EEC Treaty of 1957, and unlike the EU, has some sovereign powers and is the established supranational entity,¹⁴

⁸ The Revising Treaties include the TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, Apr. 8, 1965, O.J. (L 152) 1 (1967) (entered into force July 1, 1967), commonly referred to as the Merger Treaty [hereinafter Merger Treaty] and SINGLE EUROPEAN ACT, Feb. 12, 1986, O.J. (L 169) 1 (1987) (entered into force July 1, 1987) [hereinafter SEA]. In addition, there are Budgetary Treaties of 1970 and 1975 and the Treaties of Accession for each subsequent new Member State (other than the original founding States).

⁹ TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (official English text), 31 I.L.M. 247 (entered into force Nov. 1, 1993) [hereinafter TEU]. This has commonly been referred to as the Maastricht Treaty or Maastricht Agreement. See Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L.Q. 213, 213 (1993); Heinrich Kirschner, *The Framework of the European Union Under the Treaty of Maastricht*, 13 J.L. & COM. 233, 233 (1994). The TEU, which includes the EEC Treaty, is a treaty of attribution allowing the EU to act only within the stated powers. No residual powers exist.

¹⁰ The term European Union has political significance, the exact scope of which is not yet fully determined. See P.F.R.F. MATHIJSEN, *A GUIDE TO EUROPEAN UNION LAW* 3-7 (6th ed. 1995).

¹¹ See generally Merger Treaty, *supra* note 8.

¹² The latter two pillars are intergovernmental in character and are not subject to European Community Law. See Bernd Meyering, *Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality*, 22 EUR. L. REV. 221, 221-22 (1997).

¹³ The EEC absorbed the ECSC and EURATOM in the Merger Treaty, *supra* note 8.

¹⁴ A supranational entity has the power to make decisions that are binding on members even if some members disagree. See BRUCE RUSSETT & HARVEY STARR, *WORLD POLITICS: THE MENU FOR CHOICE* 57 (1989).

as contrasted with an international entity, through which the Member States enact community legislation. Thus, it is incorrect to refer to EU law because the EU is the political entity and is separate and distinct from the EC.

The Founding Treaties comprise the primary law while Article 189 of the EEC Treaty¹⁵ briefly sets out the effect of the secondary legislation which is comprised of directives, regulations, and decisions.¹⁶ While regulations are binding in their entirety and directly applicable in all Member States,¹⁷ directives are binding only as to the result to be achieved, upon each Member State to which it is addressed, but leave to the national authorities the choice of form and methods.¹⁸ Decisions are binding upon those Member States to whom they are addressed, principally in anti-competition actions, and recommendations and opinions have no binding force at all.¹⁹

The most common form of EC legislation are directives. Directives only take effect within a Member State by virtue of national implemen-

¹⁵ The legal basis for the issuance of directives was initially established in the EEC Treaty in 1957, in which Article 100 sets forth that:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions of the Member States as directly affect the establishment or functioning of the common market

EEC TREATY, art. 100.

Article 189 of the EEC Treaty provides:

In order to carry out their task and in accordance with the provisions of this Treaty, . . . the Council and the Commission shall make regulations and issue directives, [and] take decisions A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

Id. at art. 189.

¹⁶ It is referred to as secondary legislation because authority is derived from the Founding Treaties. *See supra* notes 5-7.

¹⁷ The primary EC law is the combination of the three treaties and their amendments establishing the original communities, ECSC, Euratom and EEC. Although the authors are concentrating on one area of secondary law, directives, other sources of the secondary law include the regulations and decisions that are viewed as implementing and complementing the Treaties. These are often referred to as Obligatory Acts. *See* DOMINIK LASOK & KAROL P.E. BRIDGE, LAW AND INSTITUTIONS OF THE EU 112-13 (1994). Regulations may also be directly effective if they meet the criteria set forth in Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, [1963] C.M.L.R. 105.

¹⁸ *See* EEC TREATY, art. 189(B). Under the ECSC Treaty, recommendations correspond to directives. *See* ECSC TREATY, art. 14; STEPHEN WEATHERILL, CASES & MATERIALS ON EC LAW 31 (1996).

¹⁹ *See* EEC TREATY, art 189; OWEN, *supra* note 2, at 16.

tation. Implementation is mandatory, however, where no prior legislation exists.²⁰ Article 2 of the amended EEC Treaty first sets out the objectives of the EC, namely the establishment of a common market, economic union, and a range of common policies.²¹ In order to achieve these objectives, Article 5 of the EEC Treaty (otherwise known as the Good Faith Clause) states that “[Member States shall] take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.”²² Because each Member State has the authority to tailor its national legislation to meet the Community promulgated objective, the concept of directives creates freedom within boundaries, and allows for cultural diversity in the establishment of laws within unique nations.

B. *United States: The Origination of the Concept of Uniform Codes*

In the United States, no equivalent state governmental legislative process, as developed in the EC, exists. Instead, a voluntary procedure was developed in 1892 to achieve harmonization of the state laws.²³ An informal procedure was necessary because of constitutional prohibitions of a federalist form of government. American federalism is a form of political organization in which the exercise of power is divided between two levels of government, each having the use of those powers as a matter of right and each acting on the same citizen body. Under the U.S. Constitution, the powers specifically delegated to the federal government are delineated.²⁴ The residual power of the states to govern is set forth in the Tenth Amendment.²⁵ No Constitution or federal

²⁰ See Josephine Steiner, *Coming to Terms with EEC Directive*, 106 LAW Q. REV. 144, 145 (1990).

²¹ See EEC TREATY, arts. 3, 3a, amended by TEU.

²² EEC TREATY, art. 5.

²³ The passage of the Tenth Amendment of the U.S. Constitution, with its resulting reservation of powers to the States, created the inevitable situation of “diverse legislative enactments by different states upon the same subjects.” WALTER P. ARMSTRONG, J., *A CENTURY OF SERVICE, A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 12-13* (1991) [hereinafter *A CENTURY OF SERVICE*]. Because the problem of lack of uniformity among state laws had to be solved, some states established commissions to deal with the problem. See *id.* at 11, 19. A resolution was passed at the 1889 American Bar Association (ABA) annual meeting that instructed the President of the ABA to appoint a special Committee on Uniformity of State Legislation to examine the “desirability of uniformity in the laws of several states.” *Id.* at 18. Prior to the 1892 annual meeting of the ABA, twelve state Commissioners met to form what is now the National Conference of Commissioners on Uniform State Laws. See *id.* at 11.

²⁴ See U.S. CONST. art. I, § 8.

²⁵ U.S. CONST. amend. X.

statute restrictions exist that prevent the states, within the boundaries of their authority, from passing widely divergent and conflicting legislation, nor does any governmental mechanism exist to assist the states in harmonizing their laws.

It was necessary to solve the sensitive issue of convincing state legislatures to adopt identical or similar laws to achieve harmonization. The National Conference was established to propose uniform laws in areas where interstate interaction frequently occurred.²⁶ State legislatures, at their option, can elect to implement the uniform codes through their own legislative process so that the uniform laws become a part of the statutory law of the state.²⁷ In many cases, state legislatures choose to modify the uniform laws as originally proposed, or may reject the proposed drafts. Each state has discretion regarding form and method of implementation of the prototype legislation if and when it chooses to adopt the proposed legislation.

II. THE EC DIRECTIVE MODEL

A. *Sovereignty Disputes*

It is difficult to explain the rationale behind the institutional structure of the EU or the legal system adopted by the EC without reviewing the historical context from which they evolved.²⁸ The separate kingdoms within Europe struggled for centuries to establish their own unique identities. Ultimately, they evolved from kingdoms into nation

²⁶ See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1997–98 REFERENCE BOOK 6 (1997) [hereinafter REFERENCE BOOK].

²⁷ See A CENTURY OF SERVICE, *supra* note 23, at 3, 13.

²⁸ The EU faces sovereignty issues that can be traced back to the Middle Ages and the Italian style of diplomacy. In the fifteenth century, the Italian peninsula was dominated by five major states, among which were scattered several smaller, very vulnerable ones. For twenty years, the dominant independent states had been involved in intermittent power struggles, tenuous alliances, and destructive wars that inevitably ended in stalemate, while the smaller ones remained "precariously preserved by the mutual jealousies of their bigger neighbor states." GARRETT MATTINGLY, RENAISSANCE DIPLOMACY 67 (1988). Contemporary Italians began to think of Italy "as a system of independent states coexisting by virtue of an unstable equilibrium which it was the function of statesmanship to preserve." *Id.* at 71. It was because of this unstable balance and interstate competition that forced the Italian statesmen to develop a workable style of diplomacy which was essentially a new institution of interstate cooperation to check the overweening aspirations of neighboring states. See *id.* at 52. The Most Holy League was drafted in 1454, an essentially military treaty, but it failed to prevent more wars. What is significant about the development of diplomacy in Italy in the fifteenth century is that it provided the small scale model for "organizing interstate relationships which [all] of Europe later adopted." *Id.* at 60.

states through political, social and economic circumstances. As imperial aspirations, accompanied by an increased chauvinistic attitude, grew among the more dominant European countries, an increase in political tensions and ultimately destructive wars erupted from which a determined sense of nationalism became a pervasive part of the European mentality.²⁹ Thus, it is apparent that those who initially conceived of an idea of basing a unified economic community on a series of treaties, found it difficult to develop a compatible legal system. Given Europe's history, those involved with articulating the terms of the treaty were faced with the problem of developing a legal structure which would not appear to supersede or interfere directly with the sovereignty of these fiercely independent nations.

The sixteenth and seventeenth centuries witnessed escalating conflict between the Catholic and Protestant states of Europe, which resulted in the signing of numerous, tenuous, constantly shifting alliances between them.³⁰ The instability of these alliances, and the fact that each state was ultimately only interested in its own aggrandizement³¹ resulted in a succession of costly wars that ended with the Treaty of Westphalia in 1648.³² After over a century of conflict, "the European state system had reached a stage of heterogeneous organization of precarious equilibrium."³³ With the Peace of Westphalia, "a new European community took shape and a European law of nations was formulated."³⁴ Ultimately, this innovative scheme failed to prevent subsequent wars, because, what contemporaries had not yet come to terms with was that there could be no lasting peace as long as the notion of statehood remained the same: a law unto itself, "acknowledging no superior and no law more potent than that of its own interests."³⁵

During the eighteenth and nineteenth centuries, a militant nationalism began to take root all across Europe in reaction to the aggressive pretensions of rival nations.³⁶ It was strong nationalistic sentiment that ultimately triggered the First World War.³⁷ The destruction that re-

²⁹ See *id.* at 254.

³⁰ See MICHAEL NEWMAN, *DEMOCRACY, SOVEREIGNTY AND THE EUROPEAN UNION* 15 (1996).

³¹ See MATTINGLY, *supra* note 28, at 77.

³² *Id.* at 178.

³³ *Id.*

³⁴ HANS A. SCHMITT, *THE PATH TO EUROPEAN UNION* 8 (1962).

³⁵ See MATTINGLY, *supra* note 28, at 254.

³⁶ See *id.* at 4-5.

³⁷ The first World War was triggered when Archduke Francis Ferdinand, heir to the throne of Austria-Hungary, and his wife, the Duchess of Hohenberg, were assassinated in Sarajevo, Bosnia, in 1914. See *A CENTURY OF SERVICE*, *supra* note 23, at 33.

sulted shocked the world, and plans for uniting the desolate continent once again emerged.³⁸ The man credited with articulating the idea of a "United States of Europe" after World War I, was Count Coudenhove whose aim was "to ensure a modicum of peace and order and to produce among the nations of Europe an expanding opportunity for achieving a more dynamic economy than that afforded by existing systems of nationalistic commercial policy."³⁹ There was a very clear military and financial imperative to Coudenhove's proposal.

The hardship that followed the end of World War I, however, only served to strengthen the prevailing notions of nationalism. The punitive terms of the Treaty of Versailles inflicted humiliation and financial ruin upon Germany.⁴⁰ These harsh terms gave rise in Germany to a fanatical belief in nationalism.⁴¹ The Nazi Party and Adolf Hitler eventually took the reins of the German government.⁴² The actions by the German government led to World War II and the ultimate defeat of Germany. Once again, a war had killed millions of people and inflicted billions of dollars of damage across Europe.

After World War II, Europeans became more amenable to the idea of a united Europe, and the first hesitant steps were taken at The Hague in 1948.⁴³ From the very beginning, however, there was a power struggle between the Consultative Assembly and the Committee of Ministers,⁴⁴ because of the inherent fear of investing power in a European parliament. Parliaments since the seventeenth century had gradually come to be perceived as sovereign bodies with the legislative powers to enact laws.⁴⁵ With this traditional frame of reference, European leaders were wary of vesting control in a representative body whose policies would affect all of the community.⁴⁶ This fear of relinquishing control to a federal body intensified, "as governments replaced resistance organizations in the liberated areas, [and] restoration of national sovereignty supplanted war-torn notions of European

³⁸ See SCHMITT, *supra* note 34, at 9.

³⁹ ARNOLD J. ZURCHER, *THE STRUGGLE TO UNITE EUROPE 1940-1958* 3 (1958).

⁴⁰ See SCHMITT, *supra* note 34, at 19-23.

⁴¹ See ZURCHER, *supra* note 39, at 8.

⁴² See SCHMITT, *supra* note 34, at 8.

⁴³ See *id.* at 39.

⁴⁴ See *id.* at 40.

⁴⁵ See LAWRENCE STONE, *THE CAUSES OF THE ENGLISH REVOLUTION* 52 (1996).

⁴⁶ See NEWMAN, *supra* note 30, at 24.

unity."⁴⁷ In effect, Europeans were again seeking security through their own unique national identities.⁴⁸

The EU has been perceived as an "embryonic federation."⁴⁹ Federalists in the EU face ingrained perceptions of sovereignty that are difficult to overcome; federalism "constitutes a direct attack upon the community's Member States."⁵⁰ It is essential that the EU be considered as distinctive in its own right, and not "as a new unitary state in the making."⁵¹ It should be seen as a supranational, rather than as an international, entity in order to preserve each Member State's secure knowledge in its own sovereignty.⁵² A long history of mutual distrust, as well as a notion of sovereignty which was "rooted in the experience of traditional state-building and national integration,"⁵³ is largely responsible for contributing to the complex manner in which secondary legislation is implemented.

B. *Institutional Structure of the European Community*

Article 4 of the EEC Treaty created a quadripartite institutional system consisting of the European Commission,⁵⁴ the Council of Ministers⁵⁵ (the Council of the European Union), the European Parlia-

⁴⁷ See SCHMITT, *supra* note 34, at 33.

⁴⁸ See Reginald Dale, *Stereotypes: A European's Road Map*, INT'L HER. TRIB., Nov. 18, 1997, at 13.

⁴⁹ NEWMAN, *supra* note 30, at 15.

⁵⁰ MICHAEL BURGESS, *FEDERALISM AND EUROPEAN UNION: POLITICAL IDEAS, INFLUENCES AND STRATEGIES IN THE EUROPEAN COMMUNITY, 1972-1987* 14 (1989).

⁵¹ *Id.* at 18.

⁵² See *id.* at 14.

⁵³ *Id.*

⁵⁴ See EEC TREATY, art. 4. The European Commission is the executive body and has historically had the right of legislative initiative. The TEU granted the European Parliament the authority to request that the Commission submit proposals under certain circumstances. The Commission consists of unelected commissioners from each Member State, with larger nations, such as Germany and United Kingdom, each having two Commissioners and the smaller states each having one. See *id.* at art. 157(1). It must act within the powers conferred upon it in Article 4(1) of the EEC Treaty. General powers, however, are granted in Article 235 of the EEC Treaty to initiate legislation if it is necessary for the proper functioning of the Common Market. See J.S. Davidson, *The Treaty on European Union or A Guided Tour of Maastricht*, 5 CANTERBURY L. REV. 102, 106 (1992).

⁵⁵ The Council of Ministers is the main policy-setting body. It consists of representatives from the government of each Member State. The presidency of the Council rotates among the Member States every six months. See Merger Treaty, *supra* note 8, art. 2; EEC TREATY, art. 146. The Council acts on proposals of the Commission and its main function is legislative. The Council may not act without a proposal for legislation having been first presented to it by the Commission. The

ment⁵⁶ and the European Court of Justice (ECJ).⁵⁷ The ECJ plays a crucial role in enforcing Community law, being the final arbiter of the meaning of Community provisions under Article 177 (the preliminary reference procedure).⁵⁸ The TEU added the Court of Auditors.⁵⁹ This system is different from other national and international models because it embodies the idea of a true Community of Nations both in letter and in spirit. Unlike the United States, the EU is not founded on a constitution, but on international treaties among sovereign states.⁶⁰ The Member States have relinquished only part of their national sovereignty to these institutions.⁶¹

C. *Scope of Authority*

In legislative matters, the EC employs a federal approach through the principle of subsidiarity,⁶² in which the EC is granted jurisdiction

Council of Ministers is to be distinguished from the European Council. The European Council was formally recognized in Article 2, SEA, but has no formal powers. The function of this political body is to set the agenda for progress in the EC and deal with any other broadly political issues which might arise. See Davidson, *supra* note 54, at 105.

⁵⁶ The European Parliament does not exercise the role that traditionally would belong to a body designated as a "parliament." Initially it was involved in the legislative process only through advising and consulting on matters under consideration. Only with the TEU in 1992, did it acquire some power. See TEU, art. J(7). Article J(7) allows for Parliament's views concerning many policy areas to be taken into consideration. See *id.* It does not grant additional powers as such. See *id.* It is comprised of elected representatives. See EEC TREATY, art. 137. Seats are allocated to reflect the size of Member States' populations. It is the only democratically elected institution within the EC.

⁵⁷ See EEC TREATY, arts. 164, 169, 170. The Court functions as the primary judicial unit of the EC. It exercises jurisdiction over such disputes as actions brought either by the commission or a Member State against another Member State for failure to fulfill Community obligations. See *id.*

⁵⁸ See IAN WARD, A CRITICAL INTRODUCTION TO EUROPEAN LAW, ch. 2 (1996).

⁵⁹ See LASOK & BRIDGE, *supra* note 17, at 231.

⁶⁰ See WARD, *supra* note 58, at ch. 2.

⁶¹ Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, [1964] C.M.L.R. 425.

⁶² See Conclusions of the Presidency at the Edinburgh European Council Meeting 12-13 December 1992 (Bull. EC 12-1992). The principle of subsidiarity is an attempt to straddle the lines of authority between the Community and Member States. Within the Paragraph 10 of the Preamble to the TEU the principle of subsidiarity is first mentioned: "RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity." Subsidiarity was defined by Title II Article G(B)(5) "Article 3b" of the TEU as:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the proposed action, be better achieved by the Community.

for those policies that cannot be effectively handled at the domestic level of government. Article 3b of the EEC Treaty states that the Community shall act only within its powers which are conferred by the Treaty.⁶³ Where the Community does not possess exclusive power, it will take action only where the proposed action cannot be achieved by the Member States and where the proposed action can be better achieved by the Community.⁶⁴ However, this action shall not go beyond what is necessary to achieve the objectives of the Treaty.⁶⁵ Thus, the concept of directives arises to grant the supranational entity the right to supply Member States with the templates for laws which must be transposed from directives.

D. *Harmonization Procedures*

Part of the process of western European nations working together for free trade movement and uniting economic resources into a single unit was to work toward the elimination of the disparities among the laws of the Member States.

Unifying nations through treaties makes it necessary that there be a formal process for harmonizing the laws of the Member States.⁶⁶ Difficulties arise in handling sensitivities related to respecting the integrity of the individual nations.⁶⁷ Even the terminology is carefully crafted so as not to antagonize the leaders and citizens of the independent nations firmly rooted in centuries of history and tradition.

Under Article 189 of the EEC Treaty, the European Parliament acts jointly with the Council, and the Council and the Commission shall issue directives.⁶⁸ Once a directive has been issued to the relevant

Id. If a matter falls within the area of the EC's competence defined by the Treaty, then the Community has complete jurisdiction. If the matter is within an area of overlapping competencies, subsidiarity requires that it be dealt with internally within the Member States unless the States are unable to achieve the objectives or unless the inherent nature of the objectives require Community action. Because of the formal nature of the directives, the EC has encountered the requirements of the principle of subsidiarity in determining the areas in which the directives can be issued. See Davidson, *supra* note 54, at 112.

⁶³ See EEC TREATY, art. 3b, amended by TEU, art. G(3), tit. II.

⁶⁴ See *id.*

⁶⁵ See George B. Hefferan, II & Joanne Katsantonis, *Movement Towards an Internal Market in 1993: An Overview of Current Legal Developments in the European Community*, 3 DUKE J. COMP. & INT'L L. 1, 4-5 (1992).

⁶⁶ See MATHIJSEN, *supra* note 10, at 7-8.

⁶⁷ See *id.*

⁶⁸ See EEC TREATY, art. 189; see also LASOK & BRIDGE, *supra* note 16, at 130.

Member State, the Member State is obligated⁶⁹ to transpose it into its own national legislation within a set time limit.⁷⁰ The actual detail and method of implementation is left to the Member State, so that its own domestic legislation can be amended as appropriate to achieve the goal of harmonization described in the directive.⁷¹ One directive, therefore, may result in a range of differently worded national legislation, but all sharing a common objective and some common features. Only when a directive precisely specifies a particular course of action will the Member State be left with no discretion on the wording of its own legislation.⁷² Because of the compromising nature of these directives, derogations are usually permitted within the terms of the directive.⁷³ For example, in the Working Times Directive,⁷⁴ there are a substantial number of derogations available for Member States to utilize.⁷⁵

1. Problems of Noncompliance

Although the EC has supremacy over the national law of Member States in the relevant areas,⁷⁶ Member States do not always comply with the provisions of Article 5 in relation to directives. Failures to comply include missing the implementation period laid down by the Community,⁷⁷ inadequate implementation of the scope of the directive,⁷⁸ and an outright failure to implement the directive at all.⁷⁹

The consequence of failing to adhere to the terms of the directive results in a breach of its Treaty obligations by the Member State.⁸⁰ No

⁶⁹ See EEC TREATY, art. 191(2).

⁷⁰ A recent example is the Working Time Directive which stipulated compliance by Member States by November 23, 1996 (Council Directive 93/104/EC, art. 18, O.J. (L307) 18 (1993) (concerning aspects of the organization of working time)) [hereinafter Working Time Directive].

⁷¹ See LASOK & BRIDGE, *supra* note 17, at 122.

⁷² See Case 38/77, *Enka BV v. Inspecteur der Invoerrechten*, 1977 E.C.R. 2203.

⁷³ See LASOK & BRIDGE, *supra* note 17, at 123-24.

⁷⁴ See Working Time Directive, *supra* note 70, at art. 17.

⁷⁵ See *id.*

⁷⁶ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, [1963] C.M.L.R. 105.

⁷⁷ See LASOK & BRIDGE, *supra* note 17, at 125.

⁷⁸ See P.P. Craig, *Francovich, Remedies and the Scope of Damages Liability*, 109 LAW Q. REV. 604, 604-15 (1993) [hereinafter Craig, *Francovich*]; Case C-392/93, *The Queen v. H.M. Treasury, ex parte British Telecomm*, 1996 E.C.R. I-1631, ¶ 43; [1996] All E.R. (E.C.) 411, [1996] I.R.L.R. 300. Note that in this case the European Court of Justice held there was no serious breach of EC law by the British government because the relevant wording contained in the directive article was imprecise.

⁷⁹ See LASOK & BRIDGE, *supra* note 17, at 125.

⁸⁰ See TEU, art. 5.

defense is available to the Member State once the time limit for implementation has passed.⁸¹ The only challenge available is a declaration by the ECJ that the directive itself was invalid.⁸² The method of bringing the breach to the Community's attention depends upon whether it is another Member State or the Commission bringing enforcement proceedings,⁸³ or an individual citizen of the EU who seeks to claim his or her rights deriving from the directive in question.

2. Individual Rights Under the Parent Directive

Of critical importance in determining whether an individual can claim rights under a directive which has not been transposed into national law by the Member State is whether the directive has direct effect (i.e., the directive confers legally enforceable rights on an individual).⁸⁴ In *Van Gend en Loos*, the ECJ held that a measure (in this case, a regulation) will be directly effective if the content is sufficiently clear, precise, and unconditional, leaving no room for discretion in its implementation.⁸⁵

This decision was followed in *Van Duyn v. The Home Office*, where the ECJ confirmed its adherence to the direct effect doctrine and its relevance to directives.⁸⁶ The ECJ stated that it would be necessary to examine in every case "whether the nature, general scheme and wording of the provision in question are capable of having direct effects"⁸⁷ In extending the possibility of direct effect to directives, the ECJ demonstrated its commitment to protecting the rights of individuals. Note that in deciding on the wording of the directive in question,⁸⁸ the ECJ in *Van Duyn* used the words "clearly defined."⁸⁹

⁸¹ See LASOK & BRIDGE, *supra* note 17, at 125.

⁸² See *id.*

⁸³ See EEC TREATY, arts. 169, 170. It is important to note that the European Court of Justice has no power to impose sanctions against Member States under these procedures; they are of limited effect in ensuring compliance. See JOSEPHINE STEINER, ENFORCING EC LAW 12 (1995).

⁸⁴ Vertical direct effect occurs where an individual brings an action within the terms of a directive against the state or an emanation of the state. See STEINER, *supra* note 83, 14-19.

⁸⁵ See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, [1963] C.M.L.R. 105.

⁸⁶ See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, ¶ 12, [1975] 1 C.M.L.R. 1.

⁸⁷ *Id.*

⁸⁸ Directive 64/22/EEC on the Co-ordination of Special Measures concerning the Movement and Residence of Foreign Nationals which are Justified on Grounds of Public Policy, Public Security or Public Health, 1963-64 O.J. SPEC. ED. (L56) 117.

⁸⁹ See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, ¶ 19, [1975] 1 C.M.L.R. 1.

Furthermore, once the time limit for implementation of the directive has passed, the directive will no longer be conditional on the Member State implementing it into domestic legislation.⁹⁰ It appears, therefore, that an individual wishing to pursue his or her rights under a directive will not be able to do so until the implementation period has expired.⁹¹

3. Horizontal and Vertical Direct Effect

The rights of individuals to pursue an action against the Member State appear to depend on whether the directive in question has vertical or horizontal direct effect.⁹² Without the ability to enforce implementation of directives, Member States would be free to ignore directives unless another Member State or the Commission brought proceedings.⁹³ Vertical direct effect occurs where an individual brings an action, within the terms of a directive, against the state or an emanation of the state.⁹⁴ Horizontal direct effect is where the action is brought by an individual against another individual or other private body, e.g., a company.⁹⁵

Not all national or community law courts have approved the principle of direct effect in relation to directives. For example, the French Conseil d'Etat in *Minister of the Interior v. Cohn Bendit* refused to follow the principle, stating that only regulations under Article 189 were capable of having direct effect.⁹⁶ The Conseil d'Etat stated that the authorities to whom the directives were addressed retained the power to decide on the form to be given to the implementation of the directives and to fix themselves, under the control of the national courts, the means appropriate to cause them to produce effect in national law.⁹⁷

⁹⁰ See Case 148/78, *Pubblico Ministero v. Ratti*, 1979 E.C.R. 1629, at ¶ 22, [1980] 1 C.M.L.R. 96. A Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails. See *id.*

⁹¹ Note that it is at least arguable that where a Member State has implemented a directive, an individual can still commence an action under the parent directive even though the time limit has not expired. See JOSEPHINE STEINER & LORNA WOODS, *TEXTBOOK ON EC LAW* 44 (5th ed. 1996).

⁹² See STEINER, *supra* note 83, at 14–19.

⁹³ See STEINER & WOODS, *supra* note 91, at 44.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *Minister of the Interior v. Cohn Bendit* (Conseil d'Etat), [1980] 1 C.M.L.R. 543, at ¶ 2.

⁹⁷ See *id.*

Many directives have been issued which directly confer individual rights,⁹⁸ not the least of which is the area of employment.⁹⁹ It is understandable that individuals may wish to assert these rights which are derived from directives. However, it is surely iniquitous that individuals may only do so if they are in the fortuitous position of being employed by the state¹⁰⁰ or an emanation of the state.¹⁰¹

As a result of a multiplicity of actions throughout the 1980s and continuing in the 1990s, the ECJ appeared to recognize vertical effect, but not horizontal direct effect.¹⁰² The main argument is that because directives are addressed to Member States, it leads to uncertainty if private bodies can be sued for what, in fact, is the government's failure to legislate to meet the directives aims.¹⁰³ It is important to note that prior to the TEU in 1992, there was no obligation on the EC to publish directives, although in practice they were published.¹⁰⁴

In *Marshall v. Southampton Area Health Authority*, the ECJ clarified its position stating, "a directive may not of itself impose obligations on an individual" and "a provision of a directive may not be relied upon as such against such a person."¹⁰⁵ This decision was subsequently confirmed in the *Dori* case, where the ECJ refused to follow the Advocate General's advice to extend direct effect to encompass private parties.¹⁰⁶

⁹⁸ See G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, ¶ 3 (1989).

⁹⁹ See Council Directive 75/117/EEC on the Approximation of the Laws of Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45/19) [hereinafter Equal Pay Directive]; Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39/40) [hereinafter Equal Treatment Directive].

¹⁰⁰ See *Duke v. GEC Reliance Ltd.*, [1988] App. Cas. 618, 630-40, [1988] 1 All E.R. 626 (House of Lords).

¹⁰¹ Case C-188/89, *In re Foster and others v. British Gas plc*, 1990 E.C.R. I-3313, ¶¶ 14-22, [1991] 2 W.L.R. 258. In *Foster*, the ECJ laid down the requirements for an organization to come within the definition of an emanation of the state. The organization had to be made responsible by the State for providing a public service, which was under the control of the state and had special powers to carry out this service. Thus in *Doughty v. Rolls Royce plc*, [1992] 1 C.M.L.R. 1045, ¶¶ 25-27, *Rolls Royce*, which had been owned by the United Kingdom government before privatization, did not come within the definition even though elements of the organization provided a service.

¹⁰² See LASOK & BRIDGE, *supra* note 17, at 130.

¹⁰³ See STEINER & WOODS, *supra* note 91, at 44.

¹⁰⁴ See *id.*

¹⁰⁵ See Case 152/84, *Marshall v. Southampton Area Health Authority*, 1986 E.C.R. 723, ¶ 48.

¹⁰⁶ See Case C-91/92, *Paola Faccini Dori v. Recreb Srl*, 1994 E.C.R. I-3325, ¶¶ 20-25, [1995] 1 C.M.L.R. 665.

Instead, it reiterated the basis of its stance, namely that to give directives horizontal effect would be akin to making them indistinguishable from regulations, thus extending the meaning of Article 189.¹⁰⁷

This adherence to the policy of not allowing horizontal effect appears to have been challenged recently by the ECJ in *CIA Security International v. Signalson*.¹⁰⁸ This case concerned three private security organizations.¹⁰⁹ The ECJ held that technical regulations (in this case, technical standards for burglar alarms), which are not notified to the Commission as required under the relevant directive, cannot be enforced against an individual.¹¹⁰ The logical consequence of this reasoning therefore appears to be that a directive can have direct effect and be relied upon in national courts by an individual facing an action by another individual.¹¹¹

If the door to horizontal direct effect wedged open by *CIA Security* is not widened by subsequent ECJ decisions, some areas still exist where individuals may assert their rights under directives which are either not yet implemented or inaccurately applied into domestic legislation. The principle of indirect effect was formulated in *Von Colson*¹¹² where the ECJ stated, "[i]t is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirement of community law, insofar as is given discretion to do so under national law."¹¹³ In other words, domestic laws must be construed in accordance with the terms of the relevant directive.¹¹⁴ The extent to which national courts have to comply with this principle has been challenged.¹¹⁵ In *Marleasing*,¹¹⁶ the ECJ confirmed that even legislation adopted before the directive in question must be interpreted as far as possible in the light of the wording and the purpose of the directive in order to achieve its purpose.¹¹⁷

¹⁰⁷ See EEC TREATY, art. 189.

¹⁰⁸ See Case C-194/94, *CIA Security Internation v. Signalson*, 1996 E.C.R. I-2201, ¶ 37, [1996] All E.R. (E.C.) 557.

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See Jason Coppel, *The Horizontal Effect of Directives*, 26 *INDUS. L. J.* 69, 70 (1997).

¹¹² See Case 14/83, *Von Colson and Kaamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, ¶ 3, [1984] 2 C.M.L.R. 430.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See Case C-106/89, *Marleasing SA v. La Commercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, ¶ 17, [1992] 1 C.M.L.R. 305.

¹¹⁶ See *id.*

¹¹⁷ See *id.* ¶ 13.

What the ECJ meant by "interpretation" has also been open to scrutiny. In *Webb v. EMO Cargo*, the House of Lords in the United Kingdom held that national courts were only obliged to construe domestic legislation in light of directives "if at all possible."¹¹⁸ In other words, if the domestic legislation can be construed in accordance with the relevant directive, it must be; if not, presumably the national court can effectively ignore the directive.¹¹⁹

Aside from direct effect and the hotly debated principle of indirect effect, a system of penalizing recalcitrant Member States has been devised, thereby stepping into the breach between two private parties caused by the State's failure to implement directives. If an individual is able to prove that he or she has suffered loss as a result of the State's failure to implement a directive, he or she may be able to claim damages from the Member State under the *Francovich* principle,¹²⁰ even if the directive does not have direct effect.

The ECJ laid down three conditions to be fulfilled for a right to bring such an action.¹²¹ First, the result prescribed by the relevant directive would entail the grant of rights to an individual.¹²² Second, it should be possible to identify the content of those rights within the directive.¹²³ Third, there must be a causal link between the breach of the State's obligations and the loss and damage suffered by the injured party.¹²⁴ The ECJ stated that, "it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible."¹²⁵ Therefore, Member States have the duty to rectify the "unlawful consequences of a breach of community law."¹²⁶ The Member State may also be liable for incorrect implementation of a directive.¹²⁷

¹¹⁸ *Webb v. EMO Air Cargo (UK) Ltd.*, (No.2), [1995] 4 All E.R. 577, 582. (House of Lords).

¹¹⁹ *See Duke v. GEC Reliance Ltd.*, [1988] App. Cas. 618, 630-40; [1988] 1 All E.R. 626 (House of Lords).

¹²⁰ *See* Joined Cases C-6 & 9/90, *Francovich and Others v. Italian Republic*, 1991 E.C.R. I-5357, ¶ 40, [1992] 1 C.M.L.R. 305. It is worth noting that the Italian government had already received a judgment from the ECJ under Article 169 for the government's failure to implement the directive in question.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See* Joined Cases C-6 & 9/90, *Francovich and Others v. Italian Republic*, 1991 E.C.R. I-5357, ¶ 37.

¹²⁶ *Id.*

¹²⁷ *See id.* ¶ 76.

In *Brasserie du Pecheur*,¹²⁸ the ECJ considered the nature of the breach of EC law which resulted in Member State liability. As is common, the Court formulated a threefold test: 1) the rule of law impinged must have been intended to confer rights on individuals; 2) the breach must have been sufficiently serious;¹²⁹ and 3) a direct causal link between the breach and the damage must have been established.¹³⁰

In *Dillenkofer*, the ECJ confirmed that for liability to attach to the Member State, the breach must be sufficiently serious and that, although not expressly stated in the *Francovich* formula, it was self-evident from the facts of that case.¹³¹ If there were a breach by a Member State of Article 189 once the conditions formulated in *Francovich*¹³² are satisfied, the state will be liable in damages to the individual.¹³³

Thus, an individual denied rights under direct effect (for example, because he or she works for a private company rather than the State) could mount a claim for damages due to the State's failure to implement those rights.¹³⁴ Therefore, it would appear that whenever a directive gives rights to an individual, such as in employment directives, individuals will be able to sue¹³⁵ provided the conditions in *Francovich* are met.¹³⁶ Furthermore, a breach by a Member State will impact upon all emanations of that Member State.¹³⁷

¹²⁸ See Joined Cases C-46 & 48/93, *Brasserie du Pecheur SA v. Germany and R v. Secretary of State for Transport ex parte Factortame and others*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889, ¶ 65.

¹²⁹ See P.P. Craig, *Once More Unto The Breach: The Community, The State and Damages Liability*, 113 LAW. Q. REV. 72, 72-74 (1997).

¹³⁰ See Cases C-46 & 48/93, *Brasserie du Pecheur SA v. Germany and R. v. Secretary of State for Transport ex parte Factortame and others*, 1996 E.C.R. I-1029, [1996] C.M.L.R. 889, ¶¶ 50-51. This reasoning was followed in Case C-392/93, *The Queen v. H.M. Treasury, ex parte British Telecomm*, [1996] All E.R. (E.C.) 411, ¶¶ 39-40, [1996] I.R.L.R. 300, and Case 5/94, *R. v. Ministry of Agriculture, Fisheries & Food, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, [1996] All E.R. (E.C.) 493, ¶¶ 25-26.

¹³¹ See Joined Cases C-179, 188 & 190/94, *Dillenkofer et al. v. Federal Republic of Germany*, 1996 E.C.R. I-4845, [1996] All E.R. (E.C.) 917, ¶¶ 23-30.

¹³² See Cases C-6/90, C-9/90, *Francovich and Others v. Italian Republic*, 1991 E.C.R. I-5357, ¶ 40, [1992] 1 C.M.L.R. 305.

¹³³ See Noel Travers, *The Liability of Local Authorities for Breaches of Community Directives by Member States*, 22 EUR. L. REV. 77, 173 (1997).

¹³⁴ See Josephine Steiner, *From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law*, 18 EUR. L. REV. 3, 3-5 (1993).

¹³⁵ See T.K. Hervey, *Francovich Liability Simplified*, 26 INT'L L. J. 74, 75 (1997).

¹³⁶ See Equal Pay Directive, *supra* note 99, at art. 2; Equal Treatment Directive, *supra* note 99, at art. 3.

¹³⁷ See Coppel, *supra* note 111, at 70, 71.

III. THE U.S. UNIFORM CODE MODEL

In the United States, there is a two-tier system in which fifty states are governed by federal law and state law, with no requirement that there be any uniformity of laws among the states for areas which rest within their jurisdiction.¹³⁸ This lack of harmonization among the states makes it very difficult for businesses and others who engage in interstate transactions.¹³⁹ Although the need for harmonization of the laws of the states may be important, the uniform code process rests on voluntary compliance by the state legislatures.¹⁴⁰ Occasionally, external pressures are placed on state legislatures to follow the same pattern of law found in other states.¹⁴¹

A. *Sovereignty Disputes*

The United States resorted to the voluntary system of the uniform codes for reasons similar to those of the EC for handling its secondary legislative process through the issuance of directives. Arguments have abounded since the Revolutionary War in the United States about the scope of powers of the federal government relative to the states.¹⁴²

Even before the colonies united to declare their independence from Britain in 1775, the question of sovereignty had already been raised in earlier attempts at collaboration.¹⁴³ The first attempt to unite the colonies occurred in 1643, when a union was created under the title "The United Colonies of New England."¹⁴⁴ This union provided a means for the independent colonies to show collective support against outside aggressors and to facilitate trade between them.¹⁴⁵ The union remained in force for thirty years as a confederation rather than as a consolida-

¹³⁸ See U.S. CONST. amend. X.

¹³⁹ See REFERENCE BOOK, *supra* note 26, at 6-7.

¹⁴⁰ Legislatures of the fifty states, the District of Columbia, and the territories of Puerto Rico, Guam, and the Virgin Islands must each determine whether a uniform code will be considered for adoption. See *id.* at Record of Passage of Uniform and Model Acts as of September, 30, 1997, appended on an unnumbered page.

¹⁴¹ See *id.* at 6. An example is the adoption of the Uniform Commercial Code by each of the fifty states' legislatures resulting from business community pressures. See *id.* at Record of Passage of Uniform and Model Acts as of September 30, 1997, appended on an unnumbered page.

¹⁴² See LAURENCE J. O'TOOLE, JR., AMERICAN INTERGOVERNMENTAL RELATIONS 5 (1993).

¹⁴³ See ALPHEUS THOMAS MASON, THE STATES' RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION 8 (1964).

¹⁴⁴ ROBERT J. TURNBULL, OBSERVATIONS ON STATE SOVEREIGNTY, FEDERAL USURPATIONS, AND STATE INTERPOSITION 9 (New York, Cornish Lamport & Co., 1850).

¹⁴⁵ See *id.* at 9.

tion, since each colony retained absolute jurisdiction over its separate territories.¹⁴⁶ At the termination of the union, the colonies remained independent until the notorious incident of the Stamp Act in 1765, at which point each colony agreed to send a delegate to Philadelphia annually to confer in the interests of the colonies as a whole.¹⁴⁷ Again, the structure was confederate in nature, and the colonies retained absolute sovereignty.¹⁴⁸

The Declaration of Independence in 1776, altered the nature of the union because the colonies became states; however, each state still jealousy guarded its independent status.¹⁴⁹ "The strongest evidence of its confederate character was the inability of the General Government to act upon the people of the states otherwise than through the authority of the state legislature."¹⁵⁰ The Articles of Confederation were subsequently abandoned in 1787, and a new Constitution was framed, but the ideological debate over the states' versus the federal government's rights continued.¹⁵¹

In the early years of the nineteenth century, United States Supreme Court Chief Justice John Marshall defined the Constitution in terms favorable to the federal government, arguing that the states abrogated their sovereignty by uniting together.¹⁵² His successor, Roger Brooke Taney, however, interpreted the Constitution along the lines of dual federalism, in which "two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions,"¹⁵³ and he ruled most often in favor of state power.¹⁵⁴ John C. Calhoun, moved by the conflict between the North and the South, spoke vehemently in defense of state rights, arguing that had the states intended to abrogate their sovereignty, they would have explicitly said so when the Constitution was originally drafted.¹⁵⁵ "I consider the

¹⁴⁶ *See id.* at 10.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See* TURNBULL, *supra* note 144, at 11.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 12.

¹⁵² *See* MASON, *supra* note 143, at 187.

¹⁵³ *Id.* at 188. Chief Justice Roger Brooke Taney, 1777–1864; Fifth Chief Justice of the United States 1836–1864.

¹⁵⁴ *Id.*

¹⁵⁵ AUGUST O. SPAIN, *THE POLITICAL THEORY OF JOHN C. CALHOUN* 178 (1951). John C. Calhoun, 1782–1850, Vice-President, 1825–1832, U.S. Secretary of State, Secretary of War, Senator, and Congressman.

preservation of the rights of the states, *as secured by the Constitution*, as essential to liberty," Calhoun wrote.¹⁵⁶

Like earlier attempts by European leaders to construct a workable confederation,¹⁵⁷ the Framers of the U.S. Constitution sought for a way to minimize "instability, injustice and confusion," and to prevent "internal tyranny."¹⁵⁸ Although the language of the Constitution was ambiguous, the intention was to allow for the constantly evolving impact of political, economic and social forces to shape its interpretation without violating the basic framework. For example, in order to overcome the restrictions placed on national government regarding direct participation in state affairs, joint stock companies were organized by private and public sectors to finance railways and road construction.¹⁵⁹ In this way, the states could collaborate with the federal government in strengthening the infrastructure without compromising the Constitution.¹⁶⁰

In the early decades of the twentieth century, however, federal intervention in state affairs steadily increased.¹⁶¹ The federal income tax was imposed in 1913, and grants-in-aid to the states were introduced in the 1920s to pay for improvements to the infrastructure, which caused growing concern that the federal government was becoming overly intrusive.¹⁶² A cooperative federalism replaced the dual federalism of the nineteenth century.¹⁶³ The economic, social, and political imperatives of the twentieth century began to shape how the states and federal government negotiated their separate spheres.¹⁶⁴

The United States experienced several distinctive phases that have shaped the role of the federal government in determining the degree of state rights.¹⁶⁵ The first stage lasted from 1789 through 1861, and incorporated the notion of dual federalism dominated by a "rivalistic state mercantilism."¹⁶⁶ The second stage dated from 1861 through

¹⁵⁶ *Id.*

¹⁵⁷ See TURNBULL, *supra* note 144, at 7.

¹⁵⁸ O'TOOLE, *supra* note 142, at 3.

¹⁵⁹ See *id.* at 5.

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 6.

¹⁶² See *id.* at 7.

¹⁶³ See Harry N. Scheiber, *The Condition of American Federalism: A Historian's View*, in AMERICAN INTERGOVERNMENTAL RELATIONS, FOUNDATIONS, PERSPECTIVES, AND ISSUES 67, 67 (Laurence O'Toole, Jr. ed., 1930).

¹⁶⁴ See *id.* at 72.

¹⁶⁵ See *id.* at 67-73.

¹⁶⁶ *Id.* at 71.

1890, a transitional period of increased centralization through the jurisdiction of the courts.¹⁶⁷ It was during this period that the Sherman Act was passed to regulate interstate business.¹⁶⁸ The third stage covered the years from 1890 to 1933, in which centralization increased: the Supreme Court "censored" state legislation; grants-in-aid became even more prevalent; and World War II made national security a priority.¹⁶⁹ The New Deal in 1934, increased both the extent and the intensity of federal regulation.¹⁷⁰ And by 1941, Justice Stone redefined the Tenth Amendment by inserting the word "expressly" before the word "delegated," arguing that the Framers of the Constitution had indeed intended to create a strong central government.¹⁷¹ The debate over the extent of states' rights continues to be a highly-charged one, as evidenced by anti-federalist sentiments expressed through the proliferation of militia-type organizations that continue to object to the authority of central government.

B. *Constitutional Structure*

The United States has two official legislative systems and one unofficial system. The federal government is the first official system. Congress is authorized under Article I of the U.S. Constitution to pass legislation that 1) pertains strictly to federal matters and 2) legislation which affects interstate commerce.¹⁷² The second official system is at the state level. Each of the several states has a separate legislative body authorized under its respective Constitution to adopt legislation concerning strictly intrastate matters. The unofficial voluntary system for effecting harmonization of disparate state laws operates through the National Conference.¹⁷³

As far back as 1786, immediately prior to the adoption of the U.S. Constitution, the drafters of the Constitution considered "how far a uniform system in the commercial requirements would be necessary to their common interest and their permanent harmony."¹⁷⁴ In 1789, the Constitution was approved, and by 1791, the first ten amendments

¹⁶⁷ See *id.*

¹⁶⁸ See SCHEIBER, *supra* note 163, at 71.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See MASON, *supra* note 143, at 190.

¹⁷² U.S. CONST. art. I.

¹⁷³ Constitution of the National Conference, § 1.2, *in* REFERENCE BOOK, *supra* note 26, at 79.

¹⁷⁴ Quoted in A CENTURY OF SERVICE, *supra* note 23, at 12

had been adopted. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁷⁵

One of the difficulties inherent in the reservation of powers by the states is the emergence of divergent legislation concerning the same subject matter.¹⁷⁶ Over the years, such diverse statutes became a problem.¹⁷⁷ In the nineteenth century, as the nation grew, the disparate legislation among the states presented a challenge to a mobile population that had moved from local to multi-state activities.¹⁷⁸ Political pressure mounted to have particular areas of the law harmonized among the several states.¹⁷⁹ Given the competitive positions of the states and their respective histories, it was unreasonable to rely on state legislatures to adopt identical statutory approaches. Voluntary state action appeared to be the only solution. In this way, state sovereignty was preserved because state legislatures have the discretion to adopt, reject, or adopt in part any proposed legislation.

C. *The Harmonization Procedures*

The American Bar Association (ABA),¹⁸⁰ formed in 1878, is one of the precipitating bodies concerned with creating a solution for filling the gap where harmonization of laws among the states is necessary but cannot be formally accomplished.¹⁸¹ The ABA establishes in its constitution as one of its objectives the promotion of the uniformity of legislation among the states.¹⁸² The National Conference was created to develop and propose uniform laws to state legislatures where har-

¹⁷⁵ U.S. CONST. art X.

¹⁷⁶ See A CENTURY OF SERVICE, *supra* note 23, at 3, 12, 13.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ The American Bar Association (ABA) is an influential private organization. See generally, ALBERT P. MELONE, LAWYERS, PUBLIC POLICY AND INTEREST GROUP POLITICS 6-8 (1977); THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES, THE ABA IN LAW AND SOCIAL POLICY: WHAT ROLE? (1994). The membership is composed of "any person of good moral character in good standing at the bar of a state, territory, or possession of the United States is eligible to be a member of the Association in accordance with the Bylaws." AMERICAN BAR ASSOCIATION CONSTITUTION AND BYLAWS, § 3.1 Members, (1996-1997). The ABA has no governmental authority. *Id.* at § 11.1 Autonomy of State and Local Bar Associations.

¹⁸¹ See A CENTURY OF SERVICE, *supra* note 23, at 11-22.

¹⁸² See *id.*

monization of the law in a particular area the Conference thought to be important.¹⁸³

1. Role of the National Conference

In order to promote this goal, the ABA created a Committee on Uniform Laws in 1889.¹⁸⁴ The Committee convened a study of interstate laws that would achieve uniformity.¹⁸⁵ The study group submitted a report at the next annual ABA meeting which showed almost unanimous agreement that "desired uniformity could be secured best by concurrent legislative action in the various states."¹⁸⁶ The National Conference of Commissioners on Uniform State Laws was established in 1892.¹⁸⁷

Since its inception, the National Conference has drafted over two hundred laws on numerous subjects and various fields of law, many of which have been widely enacted.¹⁸⁸ The National Conference recommends both uniform acts and model acts.¹⁸⁹ In the 1940s, there was a recommendation that the appropriate subject matter for uniform acts include matters which are appropriate for state legislation and have substantial interstate implication.¹⁹⁰ On the other hand, model acts cover subjects which "do not directly affect relationships among the states, but which involve problems common to many, if not all, the states."¹⁹¹ It is specifically stated by the National Conference that "it drafts model legislation on subjects where state legislation could help implement international treaties of the United States or where uniformity would be desirable."¹⁹²

The members of the National Conference are composed of Commissioners on Uniform State Laws from each state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Each state usually has at

¹⁸³ See REFERENCE BOOK, *supra* note 26, at 6.

¹⁸⁴ See A CENTURY OF SERVICE, *supra* note 23, at 20.

¹⁸⁵ See *id.*

¹⁸⁶ *Id.* at 21.

¹⁸⁷ See A CENTURY OF SERVICE, *supra* note 23, at 11.

¹⁸⁸ See REFERENCE BOOK, *supra* note 26, at 6. Note that although there have been two hundred laws drafted, there are only ninety-nine in existence at this time because many have been superseded such as the Sales Act and Negotiable Instruments Law which were superseded by the Uniform Commercial Code. See *id.*

¹⁸⁹ See *id.* at 6-7.

¹⁹⁰ See A CENTURY OF SERVICE, *supra* note 23, at 67.

¹⁹¹ REFERENCE BOOK, *supra* note 26, at 6.

¹⁹² *Id.* at 7.

least three commissioners,¹⁹³ but each state delegation has only one vote. The associate members of the Conference are usually the principal officers of the state agency charged with the responsibility of drafting legislation for the state.¹⁹⁴

As is evidenced by the National Conference's organizational plan, it is non-partisan association.¹⁹⁵ The state Commissioners actively seek consideration of uniform acts, but they do not represent any special interest.¹⁹⁶

The Conference is a state organization.¹⁹⁷ The three sources of support are the state legislatures, the ABA, and foundations.¹⁹⁸ The appropriations from state legislatures make up the major portion of its financial support.¹⁹⁹ The states apportion the expenses based upon their population and financial abilities.²⁰⁰ Individual commissioners receive neither salary nor compensation.²⁰¹

The President is the chief executive officer of the National Conference and presides at all meetings.²⁰² Proposals that uniform acts be drafted, received from many sources, are referred to a Committee on Scope and Program.²⁰³ This committee conducts an investigation, solicits input from interested parties, and reports to the National Conference concerning the desirability and feasibility of drafting a uniform law on a given subject.²⁰⁴ A special committee of state Commissioners is appointed to prepare a draft of an act after the National Conference determines that it is an acceptable subject.²⁰⁵ Draft acts are submitted to the National Conference after extensive consideration from as many constituencies as possible, including groups within the ABA.²⁰⁶

The National Conference meets annually to consider drafts of proposed uniform legislation.²⁰⁷ The National Conference must consider

¹⁹³No state has less than three. However, there are some states, like California, that have thirteen. *See id.* at 32-53.

¹⁹⁴Constitution of the National Conference, § 2.3, *in* REFERENCE BOOK, *supra* note 26, at 79.

¹⁹⁵*See* REFERENCE BOOK, *supra* note 26, at 6.

¹⁹⁶*See id.*

¹⁹⁷*See id.* at 7.

¹⁹⁸*See id.*

¹⁹⁹*See id.*

²⁰⁰*See* REFERENCE BOOK, *supra* note 26, at 7.

²⁰¹*See id.*

²⁰²*See id.* at 87, 93.

²⁰³*See id.* at 7.

²⁰⁴*See id.*

²⁰⁵*See* REFERENCE BOOK, *supra* note 26, at 8.

²⁰⁶*See id.*

²⁰⁷*See id.* at 7.

all draft acts section by section at no less than two annual meetings before it decides by a vote of states to promulgate the draft as a uniform act.²⁰⁸ Each state is entitled to one vote, and an act is not recommended unless 1) a majority of the states are represented at an annual meeting and 2) at least twenty jurisdictions have approved the draft.²⁰⁹

The purpose of the Conference is to promote uniformity in state laws on subjects where uniformity is desirable and practicable.²¹⁰ In order to meet this purpose, the Commissioners participate in drafting acts on various topics; they then submit the drafts to the states to be considered for adoption.²¹¹ The most successful uniform law is the Uniform Commercial Code which has been adopted by all fifty states.²¹²

Every act proposed by the National Conference must conform to the following requirements:

1. There shall be an obvious reason for an act on the subject such that its separation will be a practical step toward uniformity of state law or at least toward minimizing diversity;
2. There shall be a reasonable probability that the act, when approved, either will be accepted and enacted into law by a substantial number of jurisdictions or, if not, will promote uniformity indirectly;
3. The subject of the act shall be such that uniformity of law among states will produce significant benefits to the public through improvements in the law or will avoid significant disadvantages likely to arise from diversity of state law;
4. The potential contribution of the proposed act to the objectives of the Conference shall be substantial in comparison with other pending proposals for addition to the agenda of the National Conference;
5. If consideration of the proposal requires other resources in addition to the work of members and staff of the National Conference, there must be a reasonable prospect that additional resources can be found.²¹³

²⁰⁸ See *id.* at 8.

²⁰⁹ See *id.*

²¹⁰ See REFERENCE BOOK, *supra* note 26, at 6.

²¹¹ See *id.*

²¹² See *id.* at Record of Passage of Uniform and Model Acts as of September 30, 1997, appended on an unnumbered page.

²¹³ See *id.* at 100, 101.

2. Voluntary Compliance

Through the evolutionary process, one hundred one uniform acts now exist.²¹⁴ Forty of the uniform acts have been adopted by a majority of the states.²¹⁵ Unlike the uniform acts, none of the twenty-eight model acts has been adopted by such a majority.²¹⁶ In fact, no more than eleven states have adopted any of the model acts.²¹⁷ However, the success rate cannot be measured by the number of adoptions, because with both the uniform acts and the model codes, legislatures have studied the proposed acts and codes and used parts of them as a prototype for statutes that have later been passed.²¹⁸

It should be noted that states have the discretion to adopt legislation which is in the form of an "amended version," "substantially similar" or "identical" to that proposed by the National Commissioners.²¹⁹ For example, the Uniform Durable Power of Attorney Act has been enacted verbatim by thirty-one states, substantially similar in ten states, and an amended version enacted in eight states.²²⁰

The record of passage of uniform acts as of September 30, 1997, published by the National Conference, charts one hundred one uniform acts and the states that have either enacted them, adopted an amended version, or implemented a substantially similar law in place.²²¹ Of the one hundred one acts listed, those that have been enacted most often concern child and family issues and business regulation.²²² For example, the Uniform Commercial Code, which has undergone nine revisions since its inception in 1951, has had as many as fifty-two of the fifty-three regions enact it at one time or another.²²³ All states and territories except Massachusetts and Puerto Rico enacted verbatim the 1968 version of the *Uniform Child Custody Jurisdiction Act*.²²⁴

²¹⁴ A full record of passage of uniform acts can be found at Record of Passage of Uniform and Model Acts as of September 30, 1997, appended to an unnumbered page at the end of REFERENCE BOOK, *supra* note 26.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See A CENTURY OF SERVICE, *supra* note 23, at 109-10.

²¹⁹ See REFERENCE BOOK, *supra* note 26, at Record of Passage of Uniform and Model Acts as of September 30, 1997, appended on an unnumbered page.

²²⁰ See *id.*

²²¹ See *id.*

²²² See *id.*

²²³ See *id.*

²²⁴ See REFERENCE BOOK, *supra* note 26, at Record of Passage of Uniform and Model Acts as of September 30, 1997, appended on an unnumbered page. Massachusetts enacted what the Con-

The uniform acts adopted in the amended form still reflect an emphasis on child and family issues.²²⁵ For example, the *Uniform Reciprocal Enforcement of Support Act* was unanimously adopted in the amended version.²²⁶ The only other uniform act that was unanimously adopted was the *Attendance of Out of State Witnesses Act*.²²⁷

The uniform acts that have been least adopted, that is by less than three and usually by none at all, do not fall into any particular category.²²⁸ The *Land Security Interest Act* is an example of an act that has not been adopted in any jurisdiction.²²⁹ The only child-welfare act that was not unanimously adopted is the *Putative and Unknown Fathers Uniform Act*.²³⁰ What is evident in reviewing the passage pattern of the uniform acts is that the states still undeniably observe their right to reject or adopt as they see fit, thus emphasizing their continued independence.

3. Effects of Harmonization

The U.S. system is established in such a way that the concept of voluntary adoption of laws by states, as recommended by a completely non-political organization, is the preferred way to accomplish some degree of harmonization.²³¹ Because of the disparity in adoptions of the uniform codes among the states, there is no guarantee that if a uniform code is adopted in a state that it is exactly the same in other states.²³² This reality demonstrates the negative aspects of a voluntary process.²³³ A quote from former Commissioner James W. Day speaks to this point:

Certainly everyone connected with the conference is aware that its work is not perfect. Particularly it is impossible in

ference refers to as "substantially similar" legislation. *See id.* It should be noted that a 1997 version of the *Uniform Child Custody Jurisdiction and Custody Act* exists, but which has not been adopted in any form to date. *See id.*

²²⁵ *See id.*

²²⁶ *See id.*

²²⁷ *See* REFERENCE BOOK, *supra* note 26, at Record of Passage of Uniform and Model Acts as of September 30, 1997, appended at an unnumbered page.

²²⁸ *See id.*

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *See* A CENTURY OF SERVICE, *supra* note 23, at 13.

²³² *See* REFERENCE BOOK, *supra* note 26, at Record of Passage of Uniform and Model Acts as of September 30, 1997, appended on an unnumbered page.

²³³ *See id.*

drafting an act to foresee subsequent changes of conditions that may affect its desirability at a future period. Many of the instances in which a uniform or model act has later been amended, superseded by a new act or declared obsolete are attributable to this factors.²³⁴

Benefits occur as a result of the work of the Commissioners in recommending a uniform code for adoption.²³⁵ In discussing these benefits, W. Brooke Graves remarked:

[i]t may be . . . that even though the act may not have been widely adopted by the states as proposed by the Conference, it may still exert considerable influence upon legislation in many jurisdictions. It may serve to stimulate needed legislation in neglected fields, and to discourage unwise legislative polices which might otherwise be widely adopted.²³⁶

IV. COMPARATIVE ANALYSIS

The primary thrust for both the EC and the ABA National Conference is the necessity for having comparable laws in a geographic region in which there is constant interaction among people and businesses. The historic issues of sovereignty caused the EC²³⁷ and the United States²³⁸ to develop different methods of dealing with the problem of institutional and constitutional structures which prevent them from passing laws which apply to all Member States or to all the states.

Although a historic similarity exists between the United States and the EC regarding sovereignty issues, the methods of solving the problems that arise from these issues differ greatly. The significant difference is that the EC was created by a series of governing treaties, while the United States has a constitutional structure serving as its foundation for a federal form of government.²³⁹ The U.S. Constitution de-

²³⁴ A CENTURY OF SERVICE, *supra* note 23, at 106. Note that reference is made to a University of Florida article written by Commissioner Day in which this comment was made.

²³⁵ *Id.* at 109-10.

²³⁶ *Id.*

²³⁷ The EC was created from nations with a long history of war. See DEREK W. URWIN, THE COMMUNITY OF EUROPE: A HISTORY OF EUROPEAN INTEGRATION SINCE 1945 7 (1991). In the last half of the twentieth century, these nations resolved to move from war towards cooperation that transcends trade agreements. *Id.*

²³⁸ The original thirteen states in the last half of the eighteenth century entered into a compact and came to a treaty-like agreement to join as one political and legal unit under a single federal constitution. See generally U.S. CONST.

²³⁹ As evidenced by the debate over the euro as the single European currency, the debate

clares that the Constitution, statutes, and treaties of the United States are the supreme law of the land and are binding on all judges in every state.²⁴⁰ The Constitution created the Office of the President, Congress, and the federal court system.²⁴¹ The EC, on the other hand, is not part of a federal system and has developed an institutional structure which places the three communities under a single Council, Commission, Court and Parliament.²⁴² The EC is only one of the three so-called pillars of the EU created by the TEU in 1992, and thus, is forced to operate within many restraints on its powers.²⁴³

While Congress has full powers to pass primary laws²⁴⁴ under a federalist system, the founding treaties²⁴⁵ constitute the only primary law of the EC. The EC institutions can only issue directives²⁴⁶ as a secondary means of legislation, while each of the sovereign European nations in the EU has its own independent form of domestic government and legislative bodies.²⁴⁷ In the United States, state legislatures are vested with the power to pass all laws pertaining to the citizens of their states.²⁴⁸ The drafters of the Constitution appear to have made a concession to those who advocated states' rights by not addressing matters that are strictly intrastate.²⁴⁹ The failure to create a system for harmonizing laws among the states caused a gap that the National Conference attempts to fill.²⁵⁰

Both the EC and the United States were left with no alternative except to devise ways in which to solve the problem indirectly. As its main method of harmonization, the EC uses the institutional mecha-

continues in the EU between the integrationists, who argue for a federal form of government, and the nationalists, who seek to protect the independence and sovereignty of their independent countries. See Dale, *supra* note 48, at 13.

²⁴⁰ See U.S. CONST. art. VI.

²⁴¹ See U.S. CONST. arts. I, II, III.

²⁴² See Davidson, *supra* note 54, at 105-08.

²⁴³ See OWEN, *supra* note 2, at 7.

²⁴⁴ Under the Tenth Amendment to the U.S. Constitution, if powers are not delegated to the federal government, and if the powers are not prohibited to the states by the Constitution, the states are vested with the power to pass laws pertaining to residents within their boundaries. See U.S. CONST. amend. X.

²⁴⁵ See generally EEC TREATY; ECSC TREATY; EURATOM TREATY.

²⁴⁶ Directives, along with regulations and decisions, are the means of secondary legislation by the EC. OWEN, *supra* note 2, at 15-16.

²⁴⁷ See MATHIJSEN, *supra* note 10, 7-8.

²⁴⁸ All states, under the Full Faith and Credit Clause, are required to follow the public acts, records, and judicial decisions of all other states. See U.S. CONST. art. IV, § 1.

²⁴⁹ See U.S. CONST. amend. X.

²⁵⁰ See REFERENCE BOOK, *supra* note 26, at 100.

nism of the Commission, Council, and Parliament to propose, approve and issue directives.²⁵¹ Member States can devise their own way of implementing the directives as long as the legislative bodies of the Member States meet a common objective.²⁵² In the United States, of course, the state legislatures retain the discretion to accept, amend, or reject the uniform laws that the National Conference proposes.²⁵³

Some issues are unique to the EC. Noncompliance is a problem in the mandatory system of the EC, while in the voluntary system of the United States, it is simply an issue of convenience for a large number of state legislatures to adopt the proposed uniform code.²⁵⁴ Also of concern in the EC is the issue of standing, which involves an examination of the direct and indirect effect, as well as the horizontal and vertical effect, of directives.²⁵⁵ The principle of subsidiarity is similarly a unique concept in that the EC can take action only insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States; consequently, by reason of the scale of the proposed action, the Community can better achieve its objectives.²⁵⁶

While the EC has encountered numerous problems in the transposal of community legislation into national law, the inherent voluntary nature of the uniform codes, as previously discussed, prevents similar problems from arising in the United States.²⁵⁷ The proposed uniform codes are a recommendation from the National Conference to the state legislatures which are free to adopt the codes, in whatever form they choose, in order to harmonize the widely divergent laws of the various states.²⁵⁸ In contrast, because EU directives are mandatory, Member States are required to enact new legislation unless they (1) can amend existing legislation or (2) prove that their existing legislation achieves the results to be accomplished by the directives.²⁵⁹

The lack of harmonization of state laws within the United States was partially solved by the system of uniform acts created by the National

²⁵¹ See Davidson, *supra* note 54, at 105–06, 107–08.

²⁵² See EEC TREATY, art. 189.

²⁵³ See A CENTURY OF SERVICE, *supra* note 23, at 30–31.

²⁵⁴ See *id.*

²⁵⁵ See OWEN, *supra* note 2, at 32.

²⁵⁶ See TEU, art 3b.

²⁵⁷ See A CENTURY OF SERVICE, *supra* note 23, at 3; see also REFERENCE BOOK, *supra* note 26, at Record of Passage of Uniform and Model Acts as of September 30, 1997, appended on an unnumbered page.

²⁵⁸ See *id.*

²⁵⁹ See P.E. MORRIS, *The Direct Effect of Directives—Some Recent Developments in the European Court*, J. Bus. L. 233, 238, 244 (1989).

Conference, a private organization. Although many aspects of the system are cumbersome, the voluntary nature of the process does achieve a measure of uniformity. The EC has developed a secondary system of directives which allows it to achieve uniformity among the laws of its sovereign Member States. Although one system operates under a supranational institutional structure and issues mandatory directives, while the other is based on a federal constitutional system and has voluntary codes issued by a private organization, both meet the overall objective of harmonization.

V. SUMMARY

Businesses and private citizens alike encounter unnecessary difficulties in their attempts to conduct their affairs across politically-drawn borders when they operate under conflicting laws governing similar transactions. Property rights, tort liability issues, commercial transactions, marital status, and employment matters are a few examples illustrating how important it is for businesses and persons interacting within a geographic region to enjoy the predictability of similar laws. The EC operates under a series of treaties and uses directives with requirements to harmonize the laws among its independent nations. The United States adopted a constitutional system which has no provisions to harmonize laws on matters that affect people doing business in several states. Originally structured by the American Bar Association, the National Conference provided a solution to harmonize laws among the states. Both the EC and the United States have adopted systems unique to their historical backgrounds to harmonize the laws of the region and to transpose proposals into legislation. Neither has achieved a perfect system, but both have achieved a relative degree of success.