SYMPOSIUM ON FEDERALISM, PREEMPTION AND STATE LAW

Friday, October 29, 2010
George Washington University Law School
2000 H Street, N.W., Washington, DC

9:00 – 9:15 am  Welcome and Introductions:

Robert A. Stein, ULC President; Everett Fraser Professor, University of Minnesota School of Law, Minneapolis, MN
Raymond P. Pepe, Chair, ULC Federalism and State Law Committee; K & L Gates, Harrisburg, PA
Alan B. Morrison, Associate Dean, George Washington University Law School, Washington, DC


Daniel A. Farber, Sato Sho Professor, University of California, Berkeley, School of Law, Berkeley, CA

Among the topics that Professor Farber will discuss are:
1. Factors that have led to expansion or contraction of federal power and scope of federal legislation and regulation
2. The courts and pre-emption, summarizing the basic doctrines that have developed and the limitations of and problems with those approaches. When considering the preemptive effect of conduct by regulatory agencies, have the courts handled those inquiries reasonably?
3. Dissection of the reasons for Reagan, Clinton, and Obama executive orders on preemption
4. Brief review of the theory of federalism
5. Barriers to effective delineation of responsibilities and power

Moderator: Robert Stein

10:15 – 10:30 Break
Legislating Areas of Shared Federal and State Interest

Discussion of examples of preemption that were necessary and done reasonably well, and preemption that either was ill advised or not well done. There should be focus on some specific examples (e.g., medical devices and drugs; tobacco labeling and advertising), so that the discussion is not at an overly general level.

Professor Catherine M. Sharkey, New York University School of Law, New York, NY

What should Congress do differently when it considers preempting state law, particularly when it considers doing so in areas that have traditionally been the subject of state law or regulation?

Panelists:

Professor Brian Wolfman, Georgetown University Law Center, Washington, DC ; former Director of the Public Citizen Litigation Group

Daniel Jarcho, McKenna, Long & Aldridge, Washington, DC

Professor Sharkey

Moderator:  Alan Morrison, George Washington University Law School

Regulating Areas of Shared Federal and State Responsibility:  A Case Study of the Financial Reform Legislation

This panel will look in some detail at the preemption and other effects on the federal/state relationships as a result of the new financial reform legislation, both because of the current interest in that legislation and as a general example of federal legislation in an area of shared responsibility.

Speaker:

Professor Arthur E. Wilmarth, Jr., George Washington University Law School, Washington, DC
Panelists:

Raymond Natter, Barnett Sivon Natter, Washington, DC

Lauren Saunders, National Consumer Law Center, Washington, DC

Moderator: Alan Morrison, George Washington University Law School

12:45 – 2:00 pm  Luncheon with Speaker

Senator and former Governor Thomas Carper of Delaware

Introduction of Speaker: Michael Houghton, Chair of the ULC Executive Committee; Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE

2:15 – 3:15 pm  Perspectives on the Obama Administration’s State and Federal Cooperation Initiatives

Preeta Bonsal, General Counsel, Office of Management and Budget (invited)

Professor David J. Barron, Harvard Law School, Cambridge, MA; formerly Acting Assistant Attorney General, Office of Legal Counsel;

Gerald Coyne, Chief Deputy Attorney General, Rhode Island

Speakers will discuss President Obama’s decision to issue the May 2009 memorandum that reaffirmed the Clinton Executive Order on Preemption and how the administration has used the principles espoused in the Executive Order to deal with some of the issues that have arisen since the issuance of the memorandum.

Have the Executive Orders (including an earlier one issued by President Reagan) been effective and useful? What should federal executive and regulatory agencies do differently when they consider preempting state law, particularly when they consider doing so in area that have traditionally been the subject of state law or regulation?
3:15 – 3:30 pm Break

3:30 – 4:45 pm Redefining the State and Federal Relationship

Part A:

Overview and Discussion of the ULC Draft Statement of Federalism Principles and the Report and Recommendations of the ABA Task Force on Agency Preemption of State Tort Law

Raymond P. Pepe, K & L Gates, LLP, Harrisburg, PA
Edward F. Sherman, Chair of the ABA Task Force; W.R. Irby Chair & Moise S. Steeg, Jr., Professor, Tulane University School of Law, New Orleans, LA

Moderator: John A. Sebert, Executive Director, ULC, Chicago, IL

Part B: Open Questions and Discussion

Panelists from the 2:15 p.m. Panel and from Part A of this Panel

Other Panelists

Joni Cutler, Attorney, SD Network Against Family Violence and Sexual Assault; Member, South Dakota House of Representatives, Sioux Falls, SD

Daniel Troy, Senior Vice President and General Counsel, Glaxo Smith Kline, Philadelphia, PA; former Chief Counsel, Food & Drug Administration

David L. Williams, President of the Kentucky Senate and Chair of the Council of State Governments, Frankfort, KY

Moderator: Professor Daniel Farber

Among the topics for discussion during Parts A and B are:

How best to integrate the roles and responsibilities of federal and state governments in recognition of our complex national economy;
Discuss and evaluate the different general models for shared federal/state responsibility (which are summarized in the ULC Federalism Principles);

Should Congress be more explicit as to when a federal regulatory agency has the power to preempt, or should agencies be given more discretion to decide those issues?

What should be the nature of the prescribed rulemaking process before an agency can preempt?

Would it be useful to re-establish an entity such as the former National Advisory Committee on Intergovernmental Relations to facilitate dialogue among federal, state and local government officials about the allocation of responsibilities among the governmental levels in specific areas, and do discuss specific issues and problems that are on the horizon.

Comments and Questions from the audience

4:45 – 5:00 pm Concluding Session

Moderator: Robert Stein