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UNIFORMITY AND DIVERSITY IN A DIVIDED-POWER SYSTEM: THE UNITED STATES' EXPERIENCE

Eric Stein*

Ted Stein and I became friends during his term as visiting professor in Ann Arbor. He was immersed in the United States-Iranian arbitration and I worked on problems of integration of states in divided-power systems. We had long talks. The general idea of this essay goes back to that time. The last time I saw Ted was at a conference in Florence. I still see him deeply moved, contemplating the church of Santa Croce and the sea of Florentine roofs bathed in the scintillating light of the Tuscan morning. It is with a sense of grave personal loss that I submit my contribution to this commemorative issue.

I. THE PROBLEM

Tension between harmony and disharmony, uniformity and diversity, central power and local power, legislature and judiciary, executive and legislature—is endemic to a divided-power system such as the United States federation. Even while constructing a more centralized order to replace a disintegrating confederation, the drafters of the American Constitution worried about preserving regional diversity.¹ In the new federation, private law was to remain in principle within the preserve of the states, subject to specified powers delegated to the federal authorities and general constitutional restrictions. The states were to retain the complete hierarchy of state courts, with the full federal judiciary added. Although common law has provided a vital underpinning for essential uniformity, the process of administering common law has allowed for substantial diversity. The concern for diversity has remained a part of the public discourse in America even though the forces of the industrial, post-industrial, and “post-material” revolutions have worked mightily against diversity and for uniformity and a uniform rule.

*Hessel E. Yntema Professor of Law Emeritus, University of Michigan Law School. I wish to acknowledge the generous advice I have received from my colleagues of the University of Michigan Law Faculty, particularly the detailed comments by Professors Chambers, Conard, Pierce and Dean Sandalow, and by Professors Friedman of the Stanford Law School and Juenger of the University of California at Davis Law School. Dr. Mathias Reimann assisted me ably in the research. I completed this article during my stay as a fellow at the Wissenschaftskolleg zu Berlin—Institute for Advanced Study Berlin. An earlier version served as a basis for a paper delivered at the Max Planck Institute for Foreign and International Private Law in Hamburg, Federal Republic of Germany, and was translated into German for publication in the *Rebels Zeitschrift für ausländisches und internationales Privatrecht*.

1. *See, e.g.*, THE FEDERALIST NO. 10, at 22–23 (J. Madison) (R. Fairfield ed. 1961); THE FEDERALIST NO. 56, at 365–70 (J. Madison or A. Hamilton) (1976).

The modest purpose of this paper is to inquire, in a specific contemporary context, why, by whom, and through what process a uniform rule is accepted or imposed in place of diverse rules. The first, methodological part of the paper offers a pattern for an analysis; the second part applies the pattern and illustrates the working of the process in the field of family law. I have chosen family law because in that field there has traditionally been concern for regional differences and because there has been an instructive interplay between regional and central powers.

It may not come as a surprise that the inquiry will lead us to issues at the heart of the federal process. Moreover, the institutional analysis will bring us to the threshold of societal problems arising out of cultural heterogeneity and caused by value conflicts of private against public good and equality against individual achievement.²

II. TOWARD UNIFORMITY—A PROCESS

A. *The Three Faces of Uniformity*

When I speak of uniformity I have generally in mind not only the situation of identical norms but also a situation in which norms are diverse but lead to essentially identical results. As is the case with many concepts, “legal” uniformity has different meanings in different contexts.

There is, in the first place, the uniformity within each component state of the Union, ultimately promoted by the state’s supreme court—a concept essentially similar to the uniformity in a unitary state. However, this aspect of uniformity is complicated in the American federation by the existence of two complete hierarchies of courts, federal and state. Until 1938, federal courts were free to make their own determination about common law. A party in a controversy with a citizen of another state who considered the federal law more favorable to his side could bring it before a federal court, which would apply federal common law, rather than before a state court, which would apply potentially different and less favorable state common law. Uniformity thus prevailed within the federal system at the price of diversity within the same state, since federal and state courts within the same state could apply different law to the same facts.³ Since 1938, however, by a decision of the United States Supreme Court, “[t]here [has been] no federal general common law,”⁴ so that both the federal and state courts in a state must apply the same substantive state law: the uniformity

2. Smelser & Halpern, *The Historical Triangulation of Family, Economy and Education*, 84 AM. J. Soc. S288, S300–01 (Supp. 1978).

3. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

4. *Erie v. Tompkins*, 304 U.S. 64, 78 (1938).

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within the state is victorious at the price of uniformity in the application of common law by the federal courts. Yet, subsequently a subtle development has led to the reemergence of federal common law in a new reincarnation, where federal interest in a uniform rule demands special recognition.⁵

There is, in the second place, the uniformity within the system of federal law based on federal statutes (Acts of Congress) and rulings of the federal executive and of federal agencies implementing federal statutes. The problem here, for instance, is to ensure that in the application of the federal income tax law, a citizen of Michigan is taxed not more nor less than a citizen of California.

Last but not least, there is uniformity, or—perhaps more accurately—the lack of uniformity between the states (and sometimes even within the states). The bulk of all law in the United States is still the law of the fifty states, which varies often quite egregiously from state to state. The vast majority of judicial cases are decided by state courts under these divergent state laws, and, in the absence of a federal question, there is no judicial super-authority—such as one encounters in unitary states—which would wield the power to review decisions of state supreme courts for uniformity. Although not compelled to do so by the rule of precedent, state courts do look at sister states' court decisions, except in matters of particularly local concern.

The diversity of results in various state courts is aggravated by each state's liberty to apply its own rules even to events that occur in other states. Neither the Supreme Court, nor for that matter Congress, has been prepared to bring order into the confused field of interstate conflict of laws, which by definition would seem to call for uniform rules.⁶

To illustrate the complexity of the system, Professor Conard suggests that if, for instance, an American attorney is to give reliable advice to a national corporation doing business throughout the American "common market," he should have in his library the fifty sets of state corporate laws, the forty-nine sets of state securities laws, the fifty sets of state courts decisions, not to speak of the extensive federal materials governing corporate securities.⁷

5. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). See generally E. SCOLES & P. HAY, *CONFLICT OF LAWS* 133–48 (1982).

6. E. SCOLES & P. HAY, *supra* note 5, *passim*; Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984); Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983).

7. A. CONARD, *CORPORATIONS IN PERSPECTIVE* 49 (1976). The State of Delaware has no securities act. *Id.* at 19.

On first sight—and perhaps on the second as well—the picture is one of unmitigated chaos. Are there any ordering forces and instrumentalities that work to reduce the “chaos” in the interest of uniformity?

B. Uniformity Through Voluntary Process

In what I would call a “voluntary” process, a “lead” state, responding to pressures for a change, may initiate a trend in state legislatures toward similar if not identical solutions.⁸ Again, states may enter into interstate agreements or “compacts,” with (but often without) the consent of Congress. Such agreements have harmonizing effects on the laws of the participating states.⁹

The movement toward uniformity is abetted by the public or private institutions offering uniform or model acts for consideration by state legislatures. Foremost among the public institutions is the venerable Conference of Commissioners on Uniform State Laws established in 1892 by the legislatures of all the states of the Union. Its triumph (shared with the American Law Institute) has been the acceptance by every state of the Uniform Commercial Code, thus bringing about a substantial uniformity in commercial law in the United States; but the majority of the currently recommended acts in other fields have been adopted by less than ten states, and quite a few by none.¹⁰

The uniform laws are often substantially modified in the process of adoption and, after adoption, divergent interpretations by state courts may further dilute the uniformity. However, the influence of the Commissioners’ work cannot be measured solely in terms of formal adoptions. Their activities have been particularly helpful to smaller states that lack expert staff and adequate facilities to engage in studies and to draft legislation.¹¹

8. G. STEINER, *THE FUTILITY OF FAMILY POLICY* 56 (1981) (Colorado on legalizing abortion). On the process generally, see Friedman & Teubner in *1 INTEGRATION THROUGH LAW—EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (M. Cappelletti, M. Seccombe, J. Weiler eds., forthcoming).

9. L. DI MARZO, *COMPONENT UNITS OF FEDERAL STATES AND INTERNATIONAL AGREEMENTS* (1980).

10. 1983 *HANDBOOK NAT’L CONF. COMM’RS ON UNIF. ST. LAWS & PROC. ANN. CONF. MEETING* 470–75 [hereinafter (year) *HANDBOOK UNIF. ST. LAWS*].

11. The beneficial effects of the “voluntary process” at its best are illustrated by the unification, for all practical purposes, of the law of commercial transactions in goods (as distinguished from services), resulting from the universal adoption of the Uniform Commercial Code. There have been systemic benefits incidental to the primary business purpose: in interpreting the Uniform Code, state courts are more inclined to consider decisions of other states, and they frequently give greater weight to the original text of the Code than to deviations in their own state enactment; courses on commercial law in law schools, which form the attitudes of the bar, emphasize uniformity of interpretation; the attraction of the Code is illustrated by the fact that although federal common law governs contracts with the United States, the Supreme Court has “incorporated” the relevant Code provisions into federal law (*see* United

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Various private organizations have furthered the trend towards uniformity. The voluntary national association of lawyers, the American Bar Association (ABA), often operates in conjunction with the Conference of Commissioners. While the ABA generally supports the work of the Conference, it also supplements the uniform laws with its own model acts and “minimum standards,” with varying success in the legislative halls. In addition, the model codes and “restatements” of the law prepared by the American Law Institute, another voluntary institution, have exerted considerable impact, particularly on the judiciary, in a number of fields. A myriad of professional organizations (for example, accountants, brokers, state government officials), insurance companies, and testing laboratories have been an important force in overcoming—outside the prescriptive process—some of the glaring inconveniences of diversity.

Finally, the codes of federal rules of civil and criminal procedure and evidence, promulgated by the United States Supreme Court under a congressional mandate for use in federal courts, have also served as models for state legislation. About one half of the states have adopted part or all of the Federal Rules of Civil Procedure, so that lawyers in many states work, in effect, with a largely equivalent set of procedural rules. At times, states have built their own regulatory system in the image of national legislation such as the National Labor Relations Act. A somewhat analogous radiation effect upon state administrative rules and procedures can be traced to the lively intercourse between state and federal officials, particularly as a result of state administration of federal programs, the new patterns of federal-state co-decisionmaking, and the mobility between state and federal bureaucracies.¹²

C. Uniformity Through Federal Power (Compulsory Process)

1. The National Rule

Not surprisingly, federal power has provided the most powerful impetus toward uniformity, resulting in a uniform national rule, uniformity’s most radical manifestation. A national rule may take any one of several forms: an

States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)); last but not least, Congress, which enacted the Code for the Virgin Islands, the District of Columbia, and Guam, has found it unnecessary to enter the commercial arena with broad legislation as contrasted with its role in consumer protection. Divergent state courts’ interpretations appear to be limited to a few areas where litigation abounds; when substantial consensus emerges the Commissioners draft appropriate amendments to the Code for adoption by the Code states. Many of the above ideas were suggested to me by my colleague Professor J.J. White.

12. The interaction between federal and state authorities has contributed to the improvement of state governments.

act of Congress; an executive order or a federal agency rule, both of which result from a delegation by Congress; or—last but not least—of a judgment of the United States Supreme Court interpreting federal statutory law or the Constitution.¹³

Federal power is circumscribed by the text of the Constitution, by tradition, and above all by important political restraints. Nevertheless, since the late 1930's, owing to the broad construction of federal power by the "New Deal" Supreme Court, the Congress has been able, for all practical purposes, to exercise plenary legislative power in the economic field at any rate, not unlike the legislature in a unitary state. This has meant a dramatic proliferation of uniform national rules. In areas where Congress may feel barred by the Constitution or by politics from legislating uniform rules, it has employed extensively the device of making federal funds available to states on condition that they accept a more or less stringently defined policy.

Keep in mind that federal law "rests upon a substructure of state law,"¹⁴ in that "[i]t builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for [its] special purpose."¹⁵ Even where federal power is exclusive, as for instance in federal tax laws, in the social security system, or in foreign relations, state law and state authority often impinge on its operations. Federal statutes often contain words and embody concepts, the meaning of which is defined by state law. Where divergence among state law definitions impairs the uniform application of the federal rule, as in federal income tax law, Congress steps in and provides its own uniform definition.¹⁶ Where state and federal jurisdictions are concurrent, as in economic regulation (for example, in environmental law or labor law), the two systems interact intimately. Finally, even where state power is "exclusive," federal power has increasingly intruded, as will be demonstrated in the example of family law.¹⁷

2. *The Role of Federal Judiciary*

a. *Uniformity and Conflicts Between the Courts*

As I have suggested earlier, state courts decide the overwhelming majority of cases, and it is the responsibility of the respective state supreme

13. For a discussion of the Supreme Court's role, *see infra* notes 18–34 and accompanying text.

14. Sandalow, *Federalism and Social Change*, 43 *LAW & CONTEMP. PROBS.* 29, 29 (1980).

15. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 471 (2d ed. 1973) [hereinafter P. BATOR].

16. *E.g.*, I.R.C. § 2518 (CCH 1985) (disclaimers).

17. *See infra* notes 52–75 and accompanying text.

courts to maintain uniformity within each state by resolving conflicts between decisions of the lower courts of the same state. State courts have to share judicial power with federal courts in only an “infinitesimally small” fraction of cases that raise federal questions.¹⁸

In the federal system, ninety-four federal district courts are supervised by thirteen circuit courts of appeal with the United States Supreme Court at the apex of the pyramid. The problem of maintaining uniformity has been greatly magnified by the enormous growth in the appellate dockets. The rapid increase in the number of judges required to cope with the overload has made it more difficult within each appellate court to avoid internal conflicts between the panels.¹⁹ More importantly, since no federal court of appeal is bound to respect the decisions of another, conflicts among these courts occur. Although the Supreme Court takes into consideration the existence of such conflicts in accepting cases for review²⁰ it does not review a sufficient number of cases to resolve all such conflicts “or indeed even a small fraction of [them].”²¹ As a result, the “non-constitutional” areas of federal law, such as the important cases that come out of federal administrative agencies, are generally left by the Supreme Court to the courts of appeal.²² These courts talk about the need of uniformity and they stress a policy of avoiding conflicts,²³ but one experienced critic has charged them with a lack of “institutional responsibility” about avoiding conflicts because they know that their decisions will not be reviewed.²⁴ This leads to

18. R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 262 (5th ed. 1978) (quoting from Brennan, *State Court Decisions and the Supreme Court*, 31 PENN. BAR ASS'N Q. 393, 395-96 (1960)).

19. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 689 (1984).

20. At present there are only a few classes of cases that can be appealed to the Supreme Court as matter of right, rather than by application for the discretionary “writ of certiorari.” See R. STERN & E. GRESSMAN, *supra* note 18, at 317 & *passim*; *id.* at 262-73; SUP. CT. R.P. 19(b) (listing inter-circuit conflicts as one of the possible reasons for granting a review); see also *Bailey v. Weinberger*, 419 U.S. 953 (1974) (White, Douglas, and Stewart, JJ., dissenting); Harlan, *Manning the Dikes*, 13 REC. A.B. CITY N.Y. 541, 550 (1958); generally P. BATOR, *supra* note 15, at 631. Some doubts have been raised as to how much weight the Court gives in practice to the existence of conflicts among lower courts. A 1963 analysis of 3500 Supreme Court cases from the 1947 through 1958 terms named three “cues” as exerting major influence in the selection of cases for review: first, the favoring of the grant by the federal government; second, a conflict among lower courts; and third, the presence of a civil liberty issue. Tanenhaus, Schick, Muraskin & Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111 (G. Schubert ed. 1963). However, a 1972 study based only on cases from the 1958 term, rejected the second and third cues and found that only the fact that the federal government favored the review could be shown to have significant impact. Ulmer, Hintze & Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 L. & SOC'Y REV. 637 (1972).

21. Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 87 YALE L.J. 1219, 1223 (1978).

22. *Id.*

23. Marcus, *supra* note 19, at 687.

24. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not*

“forum shopping” among federal courts and uneven enforcement of federal law in different parts of the country.

There is currently a wide-ranging national debate on whether or not the Supreme Court has the time and will to resolve the divergence in interpretation. There are controversial proposals to establish a new National Court of Appeals with the jurisdiction to resolve inter-circuit conflicts.²⁵ Opponents of these proposals contend that the persistence of the divergent interpretations over a period of time will enable the Supreme Court to deal with issues “more wisely at a later date,”²⁶ and that elimination of regional influence in divergent interpretations would be undesirable.²⁷

Whatever may be the merits of the National Court of Appeals proposal, it is not likely to be accepted by the Congress in the foreseeable future. In the meantime, much depends on the willingness of the courts of appeals to pay attention to the courts in other circuits. As Judge Lay expressed it:

Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless our 11 courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system.²⁸

b. *Preserving Uniformity of National Rules*

The United States Supreme Court performs another influential function by protecting the integrity of the uniform rules in the Constitution against the other federal branches of government, and, more importantly, by

Do. 60 CORNELL L. REV. 335, 341-42 (1975).

25. Chief Justice Burger and Justices Blackmun and White favored the idea. See *Brown Transport Corp. v. Atcon*, 439 U.S. 1014 (1978). The recently established United States Courts of Appeals for the Federal Circuit (replacing the United States Court of Customs and Appeals) was given exclusive jurisdiction to receive appeals in patent infringement matters and this eliminated inter-circuit conflicts in that field. 28 U.S.C. § 1294 (1982). A similar solution in the federal tax field was blocked by the opposition of the tax bar.

26. See Justice Stevens' opinion on denial of certiorari in *McCray v. New York*, 461 U.S. 961, 962 (1983). However, *McCray* did not concern a conflict of decisions within the federal system. In Justice Stevens' judgment, “it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.” *Id.* at 963.

27. Marcus, *supra* note 19, at 690 (citing the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 235 (1975) (Hruska Commission)).

28. *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (1979). As stated above, there are now 13 courts of appeals.

defending the Constitution and federal law against state intrusions. Although the Court often exalts national uniformity, this goal appears to be more an inspiration to silver-tongued rhetoric than a decisive variable. For instance, in wielding the power of constitutional review under the clause that gives Congress the authority to regulate interstate commerce, the Court is concerned more with economic unity of the nation, rather than with normative uniformity. At this stage of its history, at any rate, the Court is tolerant of diverse state legislation unless the legislation is motivated by a more or less explicit protectionist purpose to discriminate against goods or services from other states. Where, however, national transportation systems are hampered by state regulation of train lengths, truck sizes, mudguard requirements, etc., the Court imposes strictest uniformity and strikes down deviant state laws.²⁹

The Court also imposes rigorous restrictions on state power when it comes to applying a uniform rule for the protection of individual rights derived from the Bill of Rights of the Constitution. This is the process of “constitutionalization” of traditional areas of state law, as manifested, for example, in criminal procedure and family law. The scope of this “constitutionalizing” process is unprecedented in other systems.

When faced with an allegation of a conflict between a federal statute and state law, the Court manipulates the doctrine of “preemption”—a finely-tuned instrument for determining whether Congress “intended” to preclude the exercise of state power on a given subject or in an entire field. After attempting without success to construct a generally applicable preemption standard, the Court now openly resorts to balancing the respective state and federal interests. In areas where in the Court’s judgment uniform national policy is needed—as for instance in labor relations, in the interest of preserving industrial peace—the Court generally holds that the federal statute “preempts” the state law.³⁰

In the process of deciding whether to lay down a constitutional rule or whether a federal statute has preempted the field, the Court sometimes considers trends in state legislation.³¹ Occasionally, the Court even subordinates uniformity as a value to the utility of social or economic experimentation, with one or more states serving as laboratories.³²

29. See articles by Stein & Sandalow, Linde, Blasi, Rosberg, and Conard in *COURTS AND FREE MARKETS—PERSPECTIVES FROM THE UNITED STATES AND EUROPE* 26–27, 140–221, 276–384 (T. Sandalow & E. Stein ed. 1982).

30. See, e.g., *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). *But cf.* *Brown v. Hotel & Restaurant Employees & Bartenders*, 468 U.S. 491 (1984).

31. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (considering the law in “a majority of the States”).

32. *Johnson v. Louisiana*, 406 U.S. 356, 377 (1972) (Powell, J., concurring). *But see* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting) (a “pre-New Deal” decision

After the Second World War and through the earlier years of the Burger Court, the controlling emphasis was on preserving and expanding national rules as against the diverse state rules. Recent developments in fields as varied as criminal procedure and corporate securities may signal a slowing down of this trend.³³ It would be interesting to observe whether such a trend from uniformity toward greater diversity, if it indeed materializes, could be correlated with the cyclical oscillation between liberalism and conservatism which Schlesinger discerns in American history.³⁴

D. *Forces for Legal Uniformity: The Five Syndromes*

It would exceed the scope of this study to attempt an economic and social analysis of the advantages and disadvantages of diversity and uniformity, important as such an effort would be in providing an appropriately broad

describing the Court's holding to mean that a state business regulation cannot be saved from condemnation by calling it "experimental"; see also *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). In *Truax*, Justice Holmes observed that:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

Id.

33. In criminal procedure, see, e.g., *United States v. Leon*, 468 U.S. 897 (1984); *New York v. Quarles*, 467 U.S. 649 (1984). Responding to voices for a stricter enforcement of "law and order," the Court has been grafting substantial exceptions on its earlier constitutional rulings that imposed strict restraints upon law enforcement authorities. Constitutional Law Conference in 53 U.S.L.W. 2187, 2189-91 (Oct. 16, 1984) (comments of Professor Yale Kamisar); 54 U.S.L.W. 2196, 2202 (Oct. 15, 1985) (comments of Professor Lawrence Tribe). Professor Tribe observed that compared with the United States Supreme Court's "sharp and visible turn to the right" in the 1983-84 term, the Court "this past term" appeared to be moving back toward the "constitutional mainstream." *Id.* at 2202. Professor Conard also sees a "sharp rightward turn taken [by the Supreme Court] during the 1970's in the Court's approaches to [corporate] securities law." Conard, *Tender Offer Fraud: The Secret Meaning of Subsection 14(e)*, 40 BUS. LAW. 87, 96, 97-99, 101 (1984). In the area of corporate securities law, the Court's tendency to restrict the reach of a uniform national rule (and even to disregard the interpretations by the competent administrative agency) reflects "the widespread suspicion that regulation has reached the point of diminishing returns, where further expansion is unlikely to confer economic benefits that exceed its costs." *Id.* at 98. The Court's tendency in this area also reflects the possible negative effects of the volume of litigation, and the reluctance to interfere with commercial expectation in a "traditional area of state law." *Id.* at 101. See, e.g., *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); see also Hazen, *Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability*, 1978 WIS. L. REV. 391, 415 & *passim*. At the same time, according to Professor Buxbaum, federal courts currently do not hesitate to strike down state securities regulations as contrary to the Federal Constitution or congressional legislation—thus upholding a uniform rule. He sees the "pre-emptive slaughter of state securities regulation law spreading to state corporation law." Buxbaum, *Federalism and Company Law in Festschrift in Honor of Eric Stein*, 82 MICH. L. REV. 1163, 1165-66 (1984).

34. Schlesinger, *Tides of American Politics*, 29 YALE REV. 217-30 (1939).

context for a normative inquiry. I trust, however, that some, if not most of the relevant variables can be found, at least implicitly, in the text that follows. It must suffice here to enumerate, in neutral terms and on the basis of little more than intuition, the principal syndromes that unleash forces which pull towards legal uniformity:

1. *The freedom and equality syndrome*: Social and economic change that has created a demand for national guarantees of freedom and equality, and for uniform policy in many areas of life.³⁵

2. *The “dollars-and-cents” syndrome*:

(a) Profit-maximization of *private* interest groups through improved standards, increased efficiency, simplification and systematization, etc.

(b) Budgetary concerns of *public* institutions.

3. *The bureaucratic centralization syndrome*: The expanding role of the central government in the life of the nation.

4. *The effective law enforcement syndrome*: The need for effective enforcement in inter-state situations, and the need for preventing subversion of local policies and “forum shopping,” which creates a drive to “patch up the holes” in the federal system.

5. *The Cartesian syndrome*: Theoretical concern for comprehensiveness and structural harmony.

The forces for social and economic change of the first syndrome may initially cause the prevailing uniformity to be undermined, only to be replaced, after a period of fragmentation and diversity, by a new uniformity. In contrast with continental Europe, the Cartesian syndrome is the weakest of the five in the United States, where common law mentality and innate pragmatism place little value on systematization as such. It may be present, however, along with the other syndromes, in the minds of the reporters on uniform state laws, drawn predominately from among law professors.

The five syndromes do not operate in isolation but interact actively in most instances when a uniform rule emerges. For example, the first four syndromes are discernible in the growth of uniform national rules intruding into the state-law-governed relationship between corporate management, shareholders, and investors: the 1930's scandal of massive fraud causing widespread financial disasters and nationwide indignation; the failure of the states to act, with the consequent radical intervention by Congress; and the persistent reach for more power by the supervising bureaucracy imposed by the Congress.

35. Professor Allen speaks of the “pervasive unease [after World War II] about threats to individual liberty” and of the “danger of systems of criminal justice being employed as instrumentalities of tyranny.” Allen, *American Criminal Procedure: Why the Dominance of Judge-Made Law?*, in *POLICE PRACTICES AND THE LAW, ESSAYS FROM THE MICHIGAN LAW REVIEW* 1, 2 (F. Allen ed. 1982).

The revolution in transport and communication (first syndrome) and the consequent dramatic growth of nationwide commerce demanding uniformity (second syndrome) are reflected in the important “voluntary” uniformization of commercial law. However, a threat of federal imposition had loomed in the background and it may have contributed to the success of the voluntary process.³⁶ The interplay of the fourth, “gap filling” syndrome with the first two, is illustrated by the two acts of Congress described in the next section, which were designed to deal with “child-snatching” and with absent fathers owing family support in inter-state situations beyond the reach of enforcement by individual states.³⁷

The syndromes also operate transnationally—with greater or lesser intensity—on the global and regional levels and lead to uniform rules or principles in treaties and resolutions or declarations by international groups and organizations. Their influence upon the United States, while increasing in the last decades, is substantially less pervasive than it is upon smaller countries with less power and more dependent economies. Thus, for instance, the United States has not accepted the bulk of the widely ratified conventions of the International Labor Organization that have been motivated by both social concerns over working conditions (first syndrome) and considerations of international economic competition (second syndrome). Nor has the United States adhered to the principal United Nations covenants purporting to provide uniform world rules on fundamental human rights (first syndrome). Needless to say, the process toward uniformity at the international level, although propelled largely by identical syndromes, is much more onerous than in the domestic arena.

III. THE WORKING OF THE PROCESS: TOWARD UNIFORMITY IN FAMILY LAW?

Ever since Montesquieu, and surely since Max Weber, there has been little doubt about the interaction between law and society. If there is any field in which one would expect a particularly intimate link between legal norms and local culture, it is family law. In the United States, that law has been left within the preserve of the states. As late as 1956 the Supreme Court declaimed: “[T]here is no federal law of domestic relations, which is primarily a matter of state concern. . . .”³⁸ State legislation has varied greatly, though reflecting, on the whole, traditional family values.

36. Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 241 (1965).

37. See *infra* notes 52, 53, 57 and accompanying text.

38. *De Sylva v. Ballantine*, 351 U.S. 570, 580 (1956).

A dramatic change in the society over the last thirty years has brought about a radical turn from diversity to a degree of uniformity. World War II, new technology, massive movements to cities, changes in the composition of the urban population, increased mobility—all of these factors contributed to the breakdown in the consensus over the traditional concepts of marriage, family, and sexual morality. There has been a new emphasis on a pluralistic society and varied styles of life. Personal relations are seen less in moralistic traditional terms, and more in terms of personal growth and satisfaction; and psychiatric expertise has been given a major role. Minority and women's groups have entered the political process and there has been a change in the perception of the role of the government. "[I]t seems no exaggeration," wrote Dean Sandalow, "to say that the United States has, during the past decade, experienced a revolution, a momentous alteration in the aggregation of attitudes and practices that defined a traditional societal stance toward the family."³⁹

A. *Uniformity by State Action: Marriages and Divorce*

In 1963, 66.31% of all terminated marriages ended by death and 33.69% by divorce. By 1979 only 42.79% terminated by death, while 57.23% ended by divorce. In 1930 there were six marriages to every divorce; in 1981 the ratio was two to one.⁴⁰

Most Americans in the twentieth century no longer believed that divorce should be available only when one of the parties had committed some marital sin, such as adultery or "cruel treatment," yet nearly all state laws still required proof of fault. Unhappy couples regularly engaged in collusion to obtain divorces both partners wanted; and the courts winked at the practices. The underpinnings of the traditional concept of divorce for fault had been eroded. The time for reform was ripe and the reform objective clear. Desire for simplification and greater coherence provided additional impulses for change in the law. At the end of the 1960's California started the trend toward no-fault divorce.⁴¹

In 1965 the Ford Foundation and the federal government provided funds for a study, sponsored by the State Commissioners on Uniform Laws with the advice of the American Bar Association. In 1970, the Uniform Marriage and Divorce Act,⁴² incorporating no-fault divorce and a greatly

39. Sandalow, *supra* note 14, at 29–30. For a critical view, see Riga, *The Supreme Court, Marriage and the Family: Tradition or Transition?*, 1979 JURIST 325 (1979).

40. UNIF. MARITAL PROPERTY ACT, in 1983 HANDBOOK UNIF. ST. LAWS, *supra* note 10, at 135 (prefatory note).

41. *Id.*

42. 1970 HANDBOOK UNIF. ST. LAWS, *supra* note 10, at 180–222.

reduced list of prohibited marriages, saw the light of day, and by 1983 it had been adopted in full or as amended in seven states. By 1984, however, all the other states had already removed the fault features except for South Dakota which continued to adhere to fault-based divorce.⁴³ The introduction of no-fault also advanced uniformity in the granting of divorces by eliminating judicial discretion inherent in the determination of fault of one side against the other. Thus substantial uniformity on a vital issue was achieved in two decades without federal intervention. Uniformity or similarity in substantive divorce law has reduced the problem of “migratory” or “tourist” divorces, which had subverted state autonomy in local affairs—the object of federalism—and which had caused unacceptable discrimination and legal uncertainty.⁴⁴

The Uniform Marriage and Divorce Act extended the no-fault notion to the treatment of property upon dissolution of the marriage and most states incorporated in their legislation modifying the divorce law, a provision for “equitable distribution” between the divorced spouses. This approach was further articulated in the innovative 1983 Uniform Marital Property Act (“Property Act”), which takes into account the rapidly growing number of two-worker households, and responds to the new militancy of women’s groups.⁴⁵ Under the Property Act, married couples own jointly all property acquired by the effort of either or both of them during the course of the marriage. This regime parallels the marital sharing under the community property systems that have been historically the law in eight states. The Property Act, which is also supposed to stem the migration of well-to-do couples to the southwestern community property states, has already been adopted (with some changes) in Wisconsin and is under consideration in

43. 1970 UNIF. MARRIAGE AND DIVORCE ACT, in HANDBOOK UNIF. ST. LAWS, *supra* note 10, at 176–79 (Commissioner’s prefatory note); *see also* Letter from Professor William J. Pierce, Executive Director of the National Conference on Uniform State Laws, to Professor Eric Stein (Dec. 7, 1984) (on file with Washington Law Review) [hereinafter the Pierce letter]. Interestingly, when the National Conference of Commissioners was formed in 1892, marriage and divorce were named as one of the two major subjects appropriate for uniform laws. Yet it was not until 1970 that agreement was reached on a measure combining marriage and divorce. In the intervening years some dozen statutes were approved dealing with the various aspects of one or the other; but none of them received substantial acceptance by the states. *Id.* at 176.

44. *See* UNIF. DIVORCE RECOGNITION ACT, in 1947 HANDBOOK UNIF. ST. LAWS, at 174–76 (Commissioner’s prefatory note). For the text, *see* 9 U.L.A. 644 (master ed. 1947). It can be argued, on the other hand, that the migratory divorce used to provide an escape valve from state rules that hampered divorce unreasonably.

45. 1983 HANDBOOK UNIF. ST. LAWS, *supra* note 10, at 135. The drafters report that the Act was “a response to the twenty-year-long challenge of the President’s Commission on the Status of Women issued in 1963. . . .” *Id.* at 9. Also relevant are provisions in the Uniform Probate Code of 1969 adopted in 15 states. *Id.* at 6.

several other states.⁴⁶ A recent empirical study suggests, however, that—contrary to universal expectations—the “equitable distribution” rule in a no-fault divorce leaves the woman in a worse position than under the old law.⁴⁷ Under the old law “the levers of fault and consent gave them some power to bargain for a better financial settlement. . . . It is now obvious that equality cannot be achieved by legislative fiat in a society in which men and women are differently situated.”⁴⁸

B. Uniformity by State and Federal Action: Enter the Congress

Two problems have risen to the level of national concern: custody of children, and support of mother and children. Both problems have been aggravated by the mercurial mobility of the population, by the ease of disappearing and assuming a new identity elsewhere, and by the discontinuity of federalism. In both cases the perceived crisis elicited responses at both the state and federal levels.

1. “Child Snatching” Across State Lines

Thousands of children are shifted from state to state every year while their parents battle over their custody in the courts of several states. Child snatching is rampant, and it was abetted by the absence of statutory law, competing jurisdiction of the state courts, and the cavalier treatment of custody awards received in sister states.⁴⁹ Each state saw itself free to provide for the custody of a child physically within its borders and did not consider itself bound by the custody decrees of another state. Children have been the innocent victims of the “family law chaos.”

46. The drafters point out that:

[f]orty-one traditional common law jurisdictions now use some form of property division as a principal means of resolving economic dilemmas on dissolution of marriage. Adding the eight community property jurisdictions in which such a division is an inherent aspect of spousal property rights yields a total of 49. The one state missing . . . is Mississippi.

Id. at 5. See generally Cheadle, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269 (1981); Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45 (1981).

47. L. WEITZMAN, *THE DIVORCE REVOLUTION—THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 362, 365 (1985).

48. *Id.*

49. R. LEFLAR, *AMERICAN CONFLICTS LAW* 93–94 (3d ed. 1977). In this section I rely substantially on Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297 (1981). See the extensive sources cited therein, particularly Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203 (1981). The author was reporter for the Act and also played an important role in drafting the Hague Convention on the Civil Aspects of International Child Abduction Act. See Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99 (1980).

The public debate over the legal remedy resulted in the 1968 Uniform Child Custody Jurisdiction Act, which proved to be the first true success of the State Commissioners on Uniform Laws in the family law field. After a slow start, this Act has become the law in all states.⁵⁰ The Act's jurisdictional provisions, although favoring strongly the child's "home state,"⁵¹ maintain some flexibility—at a certain price of stability and certainty—in order to ensure the best interests of children. A noteworthy feature is the law's reliance on the direct cooperation between the courts of the different states.

Despite the progress of state legislation and practice, the pressure of aroused public opinion led Congress to step in with the Parental Kidnapping Prevention Act of 1980.⁵² This statute provides a nationwide rule that seeks to eliminate the jurisdictional uncertainty left under the Uniform Act by awarding exclusive jurisdiction to the "home state," and it compels each state to recognize as binding custody decrees previously entered by the court of another state. There is now some possibility of a conflict between the greater flexibility of the widely adopted Uniform Act and the federal statute; however, the latter must prevail by virtue of the supremacy clause of the Federal Constitution.⁵³

2. *The Child Non-Support Scandal*

In 1981, twenty-eight percent of the mothers who were owed child support payments from absent fathers received nothing, while half did not get the full amounts ordered by the court. Some two million children were entitled under court orders to support that they were not receiving. In 1983, federal and state governments spent more than \$690 million to collect over \$2 billion worth of child support.⁵⁴

50. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 116 (master ed. 1979); Table of Jurisdictions Listing Uniform Acts Adopted, U.L.A. DIRECTORY OF UNIFORM ACTS AND CODES 8 (master ed. pamphlet 1986). See also the Pierce Letter, *supra* note 43.

51. "Home state" means the state in which the child immediately before the time involved lived with both or one of the parents for at least six months. A similar definition was adopted in the federal legislation referred to in the text immediately below. See Foster, *supra* note 49, at 301 (giving the legislative texts).

52. Pub. L. No. 96-611, 94 Stat. 3566 (1980), (codified at 28 U.S.C. § 1738A).

53. The Parental Kidnapping Prevention Act "needlessly disturbs [the Uniform Act's] cooperative system by mandating exclusive continuing jurisdiction of the original home state, unless a technical home state chooses to defer to a state having closer connection with the pertinent facts and the child's welfare." Foster, *supra* note 49, at 342. However, Professor William J. Pierce, Executive Director of the National Conference of the Commissioners on Uniform State Laws, rates the possibility of a conflict between the federal and state legislation as minimal. The Pierce letter, *supra* note 43.

54. *House Adopts Bill to Enforce Child Support*, N.Y. Times, Aug. 9, 1984, at A12, col. 1; *Reagan Signs Bill Forcing Payments for Child Support*, N.Y. Times, Aug. 17, 1984, at 1, col. 1; S. REP. NO. 387, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2397, 2408, 2416

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Clearly, love was not enough to motivate absent parents to pay child support; and the states faced special problems when the parents moved from state to state. The states were able to arrest men within their own territory who persistently refused to pay, but had no power to arrest a person in another state. Similarly, states had begun passing laws that permitted courts to direct local employers to deduct child support from a nonpayer's wages, but when the parent had moved to another state, the original state had no power to order an out-of-state employer to make deductions.

The Commissioners on Uniform State Laws have been concerned with this problem since early in this century. The Uniform Reciprocal Enforcement of Support Act, adopted after several revisions in 1968, leaves it to the state legislatures to define family support duties and is concerned solely with enforcement of these duties where the "obligor" is in a state different from the "obligee." All states have accepted the Act with various amendments,⁵⁵ another resounding success of the "voluntary process." In reality, however, the state measures "only slightly improved the chances for collection."⁵⁶

Because of the explosive rise in welfare cost for aid to dependent children, Congress has been concerned with the problems of support enforcement since 1967. Finally, in the 1984 election year, when women voters loomed particularly important, the President, although dedicated to the "new federalism," signed, with enthusiasm, the "radical" Child Support Enforcement Amendments of 1984, after they were adopted unanimously by both houses of Congress.⁵⁷ According to this Act, states are required at the risk of losing vital federal funds, to enact far-reaching enforcement legislation, including mandatory withholding from the delinquent parent's wages if support payments are in arrears, holding the employer liable for the arrears he failed to withhold, imposing liens for such arrears, expediting judicial proceedings, facilitating establishing paternity, etc. Only the State of Wisconsin is exempted in order to allow it to continue experimenting with its own system. This unprecedented federal intervention, no longer confined to federally aided welfare cases, was motivated by commitment to women and compassion for children as well as by a concern about growing expenditures of public welfare funds.

[hereinafter cited as S. REP. NO. 387].

55. UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT (REVISED), in 1968 HANDBOOK UNIF. ST. LAWS, *supra* note 10, at 225-37. The older Uniform Civil Liability Support Act shows five adoptions.

56. G. STEINER, *supra* note 8, at 115.

57. The Child Support Enforcement Amendments, Pub. L. No. 98-378, 98 Stat. 1305 (1984). The legislation was designed to strengthen radically the program instituted by the 1967 amendments to the Social Security Act. The Senate Committee on Finance concluded as far back as in 1972 that the program needed to be strengthened. S. REP. No. 387, *supra* note 54, at 2402.

C. *A Federal Constitution for the Family? The Supreme Court Speaks*

By the mid-1960's, "[the] Supreme Court Justices could no longer suppress conscious awareness of familial or social conflict with the easy aplomb of their predecessors."⁵⁸ Social changes brought the allocations of competence between the state and federal power (and between the legislature and the judiciary) into conflict, leaving "the Court with a substantial degree of freedom to decide whether they should be resolved by the adoption of a constitutional—and, therefore, [uniform] national—rule or whether they should be left for resolution by the states."⁵⁹

In today's climate, it is difficult for example to conceive that in 1966, sixteen states still maintained on their books statutes outlawing and punishing interracial marriage.⁶⁰ When a couple, sentenced in Virginia under such a statute to one year's imprisonment, appealed to the Supreme Court, the unanimous Court reversed, striking down the statute on the ground that it violated the equal protection and due process clauses of the fourteenth amendment to the federal Constitution. Clearly, the Court could not allow for this type of "diversity;" here was an example of the imposition of a uniform national standard of civil liberties.

An even more striking example is provided by a case that originated in the State of Connecticut. A physician was convicted in the state court for prescribing a contraceptive device to married persons. Under a statute imposed by a Catholic majority in the Connecticut legislature this was illegal. The United States Supreme Court invalidated the statute as violating the right of marital privacy which—although not mentioned in the Constitution—is within the "penumbras, formed by emanations" from the "specific guarantees in the Bill of Rights . . . that help give them life and substance."⁶¹

The greatly expanded right of privacy subsequently became an important component of the "new constitutional doctrine to adjudicate relations both within the family and between the family unit and outsiders."⁶² In reviewing state (as well as federal) legislation, the Court has manipulated its formulas of standards for judicial review to balance, on a case by case basis, the interests of the state, of legitimate and illegitimate children, parents and teachers, husbands and wives, women and men. And, the Court has invoked the Due Process (both procedural and substantive) and

58. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 347.

59. Sandalow, *supra* note 14, at 31.

60. *Loving v. Virginia*, 388 U.S. 1, 6 (1966).

61. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (opinion for the Court by Douglas, J.). Two Justices dissented.

62. Burt, *supra* note 58, at 329. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978).

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Equal Protection Clauses to invalidate legislation that did not conform to its vision of contemporary society. It is, as Dean Sandalow points out, a striking testimony of the Court's inattention to the issues of federalism, that no reasons are given in the opinions why, in an area traditionally within the policy power of the states, they should now be foreclosed by a national rule.⁶³

In 1971, the Court, for the first time in its history, held a classification on the basis of sex unconstitutional.⁶⁴ In subsequent cases striking down both federal and state statutes, the Court has established the "presumptive invalidity of governmental discrimination on the basis of sex,"⁶⁵ though with some exceptions, to be sure. In the words of the Court, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas."⁶⁶

In the 1968–1977 decade, fourteen cases "have rather suddenly focused legal concern upon a group which had previously received no attention"⁶⁷—illegitimate children. The Court caused "a turn-about in the status" of these children by invalidating during that period ten of the fourteen statutes involved in these cases.⁶⁸

Of all the Supreme Court's excursions into family matters once regulated solely by the states, "perhaps the most egregious instance with the most far-reaching social consequences"⁶⁹ is the decision in *Roe v. Wade*, where the Burger Court (with two dissents) laid down in detailed, statute-like

63. Sandalow, *supra* note 14, at 30, 33.

64. *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating an Idaho statute imposing a preference of a male over a female applicant for an appointment as an administrator of an estate).

65. Sandalow, *supra* note 14, at 32. For the cases in which the Court rejected or sustained the gender classification, see *id.* at 32–38. The proposed Equal Rights Amendment to the Federal Constitution, pressed with great vigor by women's groups, has failed to receive the required number of ratifications by state legislatures.

66. *Orr v. Orr*, 440 U.S. 268, 280 (1978) (citing *Stanton v. Stanton*, 421 U.S. 7, 10, 14–15 (1975)). In *Orr*, the Court struck down an Alabama statute imposing alimony obligation on husbands but not on wives, on the ground that such a law violated the Equal Protection Clause of the fourteenth amendment.

67. Stenger, *The Supreme Court and Illegitimacy: 1968–1977*, 11 *FAM. L.Q.* 365, 400 (1978).

68. *Id.* The majority of the Court was not prepared to hold that a classification based on illegitimacy or gender was "inherently suspect" (as in race or alienage) for the purpose of the equal protection clause; such classification would call for the strictest standard of judicial review. The Court has thus kept its hands free for case-by-case adjudication. On gender discrimination, see, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981). See generally H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971).

To help the states to adjust their law to the new constitutional situation, the National Conference of Commissioners on Uniform State Laws approved the Uniform Parentage Act of 1973. The Act was adopted in seven states (including California). 1973 *HANDBOOK UNIF. ST. LAWS*, *supra* note 10, at 335.

69. Burt, *supra* note 58, at 388.

fashion the parameters of legality of abortion, and in the process invalidated legislation in some forty-odd states.⁷⁰

Only a year before, the House of Delegates of the American Bar Association had approved, over some opposition, the Uniform Abortion Act, which was adopted earlier by the Conference of Commissioners on Uniform State Laws.⁷¹ This Act reflected a more liberal trend in state laws and court decisions, but it was so drafted as to allow the states considerable discretion to prohibit or regulate abortion as local attitudes might dictate. Actually, some one-third of the states had, since the late 1950's, significantly liberalized their abortion laws,⁷² and during 1970 four states practically abolished restrictions.⁷³ Individual freedom to decide for abortion thus became an accident of residence.

Yet the Court, motivated perhaps by the concern for "back room" abortions of the poor in the more restrictive states, decided to end the nationwide debate by imposing a detailed uniform rule. Unlike the situation in the Connecticut contraceptive case, even a semblance of a national consensus had not evolved at the time. However, there was some prospect that the political process could work out a tolerable accommodation of strongly held competing views. The Court's intervention did not terminate the debate, but on the contrary it sharply exacerbated the emotionally charged controversy. In addition to the usual criticisms of the Justices—that they were "legislating" on issues of policy, and that they were operating on the basis of limited data—the Court was also blamed in this case for failing to see the significance of the ongoing debate in other institutions. As an "implicit accommodation" to the anti-abortionists, Congress proceeded to limit severely the use of federal funds for abortions and the deeply divided Court upheld the measure.⁷⁴ After *Roe*, the Court has nonetheless consistently continued to uphold the basic principle that a woman has a fundamental right to make the "highly personal choice" whether or not to terminate pregnancy, and it has tightened still further the restrictions on the states, thus reducing the states' opportunities for dealing with local discontent. By 1983, however, the Court's liberal-conservative alliance over the abortion issue showed some signs of wear; three Justices rejected the basic premises of *Roe* and were perhaps even willing to overrule it.⁷⁵

70. *Roe v. Wade*, 410 U.S. 113 (1973). The decision decreed a total decriminalization of abortion during the first trimester of pregnancy and limited decriminalization thereafter. G. STEINER, *supra* note 8, at 52. See also Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

71. For the text, which was based largely on New York legislation, see *Roe v. Wade*, 410 U.S. 113, 146 (1973).

72. *Id.* at 140.

73. *Id.* at 140 n.37.

74. *Harris v. McRae*, 448 U.S. 297 (1980). See also G. STEINER, *supra* note 8, at 54.

75. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 n.7 (1983).

IV. SOME SUMMARY THOUGHTS

If one projects the developments in family law against the grid of the forces for uniformity outlined earlier, it becomes readily apparent that all five syndromes are involved, albeit in varying degree. The first syndrome (social and economic change) is a pervasive force and it is propelled by influential women's groups and other special interests. The financial concerns (second syndrome) of private individuals (single parent families, women and children left without support), private welfare agencies and public authorities (state welfare departments and the federal treasury) motivate, at least in part, most of the state and federal legislation. Both acts of Congress mentioned above reflect also the third and fourth syndromes; they illustrate the expansion of the central government and at the same time they seek to mitigate specific glaring flaws of federalism. As for the fifth syndrome, academics and some members of the bar who provide the principal brain power in drafting uniform laws are at times concerned with the need for systematization of a particularly fragmented field of law.

There is no national "family policy," but the trend is toward national, more or less uniform solutions. Ideas move quickly across the country, reform groups operate nationally, and national academic circles and national law schools exert considerable influence.

In the last two decades the Conference on Uniform State Laws has scored some significant successes by having its uniform laws widely adopted in state legislatures. The Conference has been encouraged by Congress.⁷⁶ However, when an issue emerges as a national problem and political forces are effectively mobilized, the federal government does not hesitate to act. The Congress has shied away from direct substantive legislation except to fill the gaps arising in the federal system and where federal competence was clear. However, under successive administrations, including the current one, the Congress has been employing freely the "carrot" technique by offering states federal funds in return for their acceptance of federal policies on a variety of subjects that have impinged directly or indirectly on family law and relations.⁷⁷

76. In addition to the Uniform Acts mentioned in the text, see also the currently recommended acts. UNIFORM PARENTAGE ACT, 9A U.L.A. 579 (1973); UNIFORM ADOPTION ACT, 9 U.L.A. 11 (1971); CIVIL LIABILITY FOR SUPPORT ACT, 9 U.L.A. 171 (1953).

77. Sandalow, *The Expansion of Federal Legislative Authority*, in T. SANDALOW & E. STEIN, *supra* note 29, at 83-84. On the many federal activities with an impact on the family, see, e.g., welfare laws, family planning legislation, housing authority laws, etc.; Federal Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 8 (1978) (codified as amended at 18 U.S.C. §§ 2251-2253 (1982); U.S. COMM'N ON CIVIL RIGHTS, *Federal Response to Domestic Violence* (1982).

Although the vast majority of court cases are decided in state courts under still more or less divergent state laws, the process of “constitutionalization” has gone some considerable distance toward imposing uniformity. The process also offers an insight into the interaction between law and society. Thus, when it came to removing criminality from interracial marriages or discrimination against illegitimate children, statutory law lagged behind a widely held, changed attitude in the society, but it proved difficult to activate change through legislation because of strongly entrenched forces. The Supreme Court’s ruling imposed uniformity more in keeping with general attitudes despite striking local variations. In the use-of-contraceptive situation, the Court’s ruling helped to crystallize a clear trend toward a new consensus. On the issue of abortion, however, the Court imposed a uniform norm in the face of persistent, strongly-held differences; political and legal difficulties persist.

In family law, as in some other fields of law, constitutional law as declared by the United States Supreme Court serves as “the means by which effect is given to ideas that from time to time are held to be fundamental in defining the limits and distribution of governmental power in our society.”⁷⁸ A uniform rule imposed upon the states and reducing their role in response to social change often has had as its consequence an advancement of individual freedom.

78. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184 (1977).