Eric Stein

Uniformity and Diversity in the American Federal System: a Pattern for Analysis

Dieser methodologische Aufsatz ist der erste Schritt einer Untersuchung, warum, von wem und auf welche Weise im amerikanischen Bundessystem einheitliche Regelungen an Stelle unterschiedlicher Regelungen in den 50 Einzelstaaten Geltung erlangen. Rechtseinheitlichkeit wird einerseits durch freiwilliges Vorgehen in den Einzelstaaten, andererseits durch den Gebrauch der Bundesmacht erreicht Fünf »Syndrome« werden identifiziert, die auf Rechtseinheitlichkeit drängen.

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. Georg Christoph Lichtenberg described it in less ponderous terms: »Zwei auf einem Pferd bei einer Prügelei, ein schönes Sinnbild für eine Staatsverfassung.«

Even while constructing a more centralized order to replace a disintegrating confederation, the drafters of the American Constitution worried about preserving regional diversity.' In the new federation - unlike in the Bundesrepublik - 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. Still in contrast to the Bundesrepublik, 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 nineteenth century rhetoric of the European reformers flourished in the new Republic: The »progressive and many-sided development« of Europe, wrote John Stuart Mill, was due to the »remarkable diversity of character and culture«. That was being eroded by political changes (»since they all tend to raise the low and to lower the high«), education, means of communications, commerce, competition, and above all »the ascendancy of public opinion«. Invoking the testimony by Wilhelm von Humboldt and de Tocqueville he warned the Europeans, that they were becoming every day more like the Chinese[2]. 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.

I am interested in the question, why, by whom and through what process a uniform rule is accepted or imposed in place of diverse rules. As a first step, this methodological paper offers a pattern for analysis. In my future work, I propose to apply this pattern and to illustrate the working and the impact of the process in selected fields of private and public law.

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.[3]

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.

1. 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 already mentioned 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 the federal court that would apply federal common law, rather than before the state court that 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.[4] Since 1938, however, by a decision of the United States Supreme Court, »there is no general federal common law,«[5] so that both the federal and state court in a state must apply the same substantive state law: the uniformity 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 a reemergence of federal common law in a new reincarnation, where federal interest in a uniform rule demanded special recognition.'

2. 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 federal agencies implementing federal statutes. The problem here is, for instance, 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.

3. Last but not least, there is the 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 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 superauthority - 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' courts decisions except in matters that they consider to be 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.'

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 company laws, forty nine sets of state securities laws, the fifty sets of state court decisions, not to speak of the extensive federal materials governing corporate securities[8].

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?

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 legislation (Colorado on legalizing abortion)[9] toward similar if not identical solutions. Again, states may enter into interstate agreements or »compacts,« with (but often without) the consent of Congress, which have harmonizing effects on the law of the participating states.[10]

The movement toward uniformity is abetted by the public or private institutions offering uniform or model acts for consideration by state legisla-

tures. 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 on the Continent; 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.

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. Its activities have been particularly helpful to smaller states that are not endowed with expert staff and adequate facilities to engage in studies and to draft legislations.'[12]

The Conference operates in conjunction with the voluntary national association of lawyers, the American Bar Association, which generally supports the work of the Conference but also supplements it with its own model acts and »minimum standards,« with varying success in the legislative halls.

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.

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 set of procedural rules that are largely equivalent. 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 pattern of federal-state co-decision, and the mobility between state and federal bureaucracies.[13]

A myriad of professional organizations, (accountants, brokers, state government officials, etc.) insurance companies and testing laboratories have been an important force in overcoming - outside the prescriptive process - some of the glaring inconveniences of diversity.

Uniformity through federal power (compulsory process)

1. The national rule

Not surprisingly, it is federal power that has provided the most powerful impetus toward uniformity, resulting, in its most radical manifestation, in a uniform national rule. A national rule may take the form of an act of Congress, or by delegation from Congress, of an order of the executive or of a rule by a federal agency; or - last but not least - of a judgment of the United States Supreme Court interpreting federal statutory law or the Constitution. The role of the Supreme Court is dealt with in the following section.

Federal power is circumscribed by the text of the Constitution, by tradition, and above all by important political restraints. Nevertheless, since the late 1930s, 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.

It must be kept in mind that federal law »rests upon a substructure of state law«[14], »[i]t builds upon legal relationships established by states, altering and supplanting them only so far as necessary for [its] special purpose.«[16]

Even where federal power is exclusive, as for instance in federal tax law, in the social security system, or in foreign relations, state law and state authority impinge on its operations. Federal statutes often contain words and embody concepts whose meaning 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, the Congress steps in and provides its own uniform definition.[t6] Where state and federal jurisdictions are concurrent, as in economic regulation (e.g. environmental law, labor law), the two systems interact intimately. Finally, even where state power is »exclusive«, federal power has increasingly intruded as for example in family law.

2. The role of federal judiciary

a. Uniformity and conflicts between the courts

As I have suggested earlier, the overwhelming majority of cases are decided by state courts, and it is the responsibility of the respective state Supreme

Courts to maintain uniformity within each state by resolving conflicts between decisions of the lower courts of the same state.

In only an »infinitely small« fraction of cases may the state courts have to share judicial power with federal courts because they raise federal questions." In the federal system, 94 federal district courts are supervised by 13 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.[18]

More importantly, since no 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 review[19] it does not review a sufficient number of cases to resolve all such conflicts »or indeed even a small fraction of it««.[20] 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.[21] These courts talk about the need of uniformity and they stress a policy of avoiding conflicts[22] 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.[23] This leads to »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 divergencies in interpretation that must be resolved. There are controversial proposals to establish a new National Court of Appeals with the jurisdiction to resolve inter-circuit conflicts.[24] The opponents of the 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««[25] and the elimination of regional influence in divergent interpretations would be undesirable.[26]

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 burden 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.«[27]

b. Preserving uniformity of national rules

The federal 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 defending the Constitution and federal law against state intrusions.

Although the Court often exalts national uniformity, this goal appears to be more of an inspiration to silvertongued rhetoric than a decisive variable. In wielding the power of constitutional review, for instance, under the clause that gives Congress the authority to regulate inter-state commerce, the Court is concerned more with economic unity of the Continent rather than with normative uniformity. At this state of its history, at any rate, the Court is tolerant of diverse state legislation unless the legislation is motivated by 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, mudguards requirements, etc., the Court imposes strictest uniformity and strikes down deviant state laws.[28] The Court has been imposing 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»constitutionali7ation« - unprecedented in its scope in other systems - of traditional areas of state law, as manifested for example in criminal procedure and family law.

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.[29]

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,[30] and occasionally even subordinates uniformity as a value to the utility of social or economic experimentation, with one or more states serving as laboratories.31

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.[32] 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[33]

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 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 forces working for legal uniformity.

1. Social and economic change which has created a demand for national guarantees offreedom and equality, and for uniform policy in many areas of life.[34]

2. *The »dollars-and-cents« (or »marks-andpfennigs«) syndrome:*

a. Profit-maximization of *private* interest groups including improved standards, increased efficiency through 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, 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 fifth 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, however, be present, along with the other syndromes, in the minds of the reporters on uniform state laws, drawn predominantly from among law professors.

The five syndromes do not operate in isolation but interact actively in most instances when a uniform rule emerges. The first four syndromes are discernible, for instance, in the growth of uniform national rules intruding into the state-law-governed relationship between corporate management, the shareholders and the investors: the 1930s scandal of massive fraud causing wide-spread financial disasters and nation-wide 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.

The interplay of the fourth, »gap-filling« syndrome with the first two, is illustrated by the two Acts of Congress, which were designed to deal with »child-snatching« and with absent fathers owing family support in interstate situations beyond the reach of enforcement by individual states.[35]

The important »voluntary« uniformization of commercial law reflects the revolution in transport and communication (first syndrome) and the consequent dramatic growth of nationwide commerce demanding uniformity (second syndrome). 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 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 workers 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).

Footnotes

1 See *e.g.* The Federalist or the New Constitution, Papers by Alexander Hamilton, James Madison, John Jay, Paper Number 10 at 61, Paper Number 56 at 378-379 (New York, The Heritage Press, 1945).

2 John Stuart Mill, Essays on Politics and Society (J.M. Robson, ed. of the text) (Toronto 1977) 274-275.

3 Smelser and Halpern, »The Historical Triangulation of Family, Economy and Education,« 84 American Journal of Sociology - Supplement S288, S300-301 (1978).

4 Swift v. Tyson, 47 U.S. (16 Pet.) 1(1842).

5 Erie von Tomkins, 304 U.S. 64, 78 (1938).

6 Friendly, »In Praise of Erie - and the New Federal Common Law,« 39 NY.U.L.R 383 (1964). See generally E. Scoles and P Hay, Conflict of Laws 133-148 (1982).

7 Juenger, »Conflict of Laws: A Critique of Interest Analysis,« 32 Am. J'l Comp. L. 1 (1984); Kay, »Theory into Practice: Choice of Law in the Courts,« 34 Mercer L. Rev. 521 (1983); E. Scoles and P. Hay, *supra* n. 6, *passim* .

8 A.F. Conard, Corporations in Perspective 49 (1976). The state of Delaware has no securities act. *Ibid.* at 19.

9 G.Y. Steiner, The Futility of Family Policy 56 (1981). On the process generally, see L. Friedman and G. Teubner in M. Cappelletti, M. Seccombe, J. Weiler (eds.), Integration through Law - Europe and the American Federal Experience, Vol.1, forthcoming.

10 L. Di Marzo, Component Units of Federal States and International Agreements (1980).

11 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its Ninetieth Year 470-475 (1983).

12 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. Thus, in interpreting the Uniform Code, the 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 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; United States v. Kimbell Foods, Inc., et al., 440 U.S. 715 (1972); 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. Finally, 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. •

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

14 Sandalow, »Federalism and Social Change,« 43 Law and Contemporary Problems 31 (Summer 1980).

15 P.M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 471 (2nd ed. 1973).

16 *E.g.* Internal Revenue Code § 2518 Disclaimers

17 R. Stern and E. Gressmann, Supreme Court Practice, 262 (5th ed. 1978).

18 Marcus, »Conflicts Among Circuits and Transfers within the Federal Judicial System«, 93 Yale L.Rev. 677 at 689 (1984).

19 At present there are only a few classes of cases allowing appeals to the Supreme Court as of right rather than by application for the discretionary »writ of certiorari«. Stern and Gressmann, *supra* n. 17 at 317 and *passim.* See generally Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 631 ff. (2nd ed., 1973). See particularly Rule 19 (b) of the Supreme Court Rules of the Procedure listing inter-circuit conflicts as one of the possible reasons for granting a review. Stern and Gressmann, *supra* n. 17 at 262 ff. See also Bailey v. Weinberger, 419 U.S. 953 (1974), dissent by Justices White, Douglas and Stewart; Harlan, »Manning the Dikes«, 13 Ass'n of the Bar of the City ofNY Record 541 at 550 (1958). 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 et al., »The Supreme Court's Certiorari Jurisdiction: Cue Theory« in G. Schubert (ed.), Judicial Decisionmaking 111-132 (1963). But 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 et al., »Decision to Grant Certiorari: Further Consideration of Cue Theory«, 6 Law and Society Rev. 637 (1972).

20 Note, »Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Court of Appeals«, 87 Yale L.R. 1219 at 1223 (1978).

21 *Ibid.*

22 Marcus, *supra* n. 18 at 687.

23 Griswold, »Rationing Justice - The Supreme Court's Caseload and What the Court Does Not Do«, 60 Cornell L.Rev. 335, 341-342 (1975).

24 Justices Blackmun, White and Chief Justice Burger favored the idea, Brown Transport Corp. v. Atcon, 439 U.S. 1014 (1978). The recently established United States Court 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 intercircuit conflicts

in that field. Pub.L. 97-164, Apr. 2, 1982, Title 1, § 126, 96 Stat. 37. A similar solution in the federal tax field was blocked by the opposition of the tax bar.

25 Justice Stevens' opinion on denial of certiorari in McCray v. New York,103 S. Ct. 2438 (1983). There was however, no conflict of decisions within the federal system in this case. In Justice Stevens' judgment »it is 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« (at 2439).

26 Marcus, *supra* n. 18 at 690, citing the Hruska Commission.

27 Aldens, Inc. v. Thomas J. Miller, as Attorney General of the State of Iowa, etc. 610 F. 2d 538 at 541 (1979). As stated above, there are now 13 Courts of Appeals.

28 See Stein and Sandalow, Linde, Blasi, Rosberg, Conard in T. Sandalow and E. Stein, Courts and Free Markets - Perspectives from the United States and Europe 26-27, 140-221, 276-384 (1982).

29 See *e.g.* Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969). But cf. most recently G. Michael Brown v. Hotel and Restaurant Employees and Bartenders, 104 S.Ct. 3179 (1984), - - U.S. - -.

30 Santosky v. Kramer, 455 U.S. 745 (1951) considering the law in »a majority of states«.

31 Justice Powell concurring in Johnson v. Louisiana, 406 U.S. 377 (1972). But see a »pre-New Deal« decision in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), holding (Justice Brandeis dissenting) that a state business regulation cannot be saved from condemnation by calling it experimental (at 278-280). See also Justice Holmes dissenting in Truax et al. v. Corrigan et al., 275 U.S. 312 at 344 (1921): »There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its word 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 judgement I most respect.«

32 In criminal procedure U.S. v Leon, 52 LW 5155 (1984); Oliver v. U.S., 52 LW 4425 (1984); New York v. Quarles, 52 LW 4790; 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. Professor Conard sees a »sharp rightward turn taken [by the Supreme Court] during the 1970's in the Court's approaches to [corporate] securities law«. Here the Court's tendency to restrict the reach of the uniform national rule (and even to disregard the interpretation 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,« possible effects on the volume of litigation, and the reluctance to interfere with commercial expectation in a »traditional area of state law.« Conard, »Tender Offer Fraud: The Secret Meaning of Subsection 14 (e),« 40 Bus. Lawyer 87 at 96, 97-99,101(1984). *E.g.* Blue Chips Stamps v. Manor Drug Co., 421 U.S. 723 (1975); Santa Fe Industries v. Green, 430 U.S. 462 (1977). Also Hazen, »Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability,« 1978 Wis.

L.R. 391 at 414 and *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 »preemptive 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 at 1165-1166 (1984).

33 Schlesinger, »Tides of American Politics,« 29 Yale Review 217-230 (1940).

34 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 F.A. Allen (ed.), Police Practices and the Law, Essay from the Michigan Law Review 1 at 2 (1982).

35 Parental Kidnapping Prevention Act of 1980, Pub. Law No. 96-611, 94 Stat. 3568 (1980), 28 U.S.C. 1738A; Child Support Enforcement Amendments, Pub. Law No. 98-378 [H.R. 4325], Aug. 16, 1984, 98 Stat. 1305.

36 Dunham, »A History of the National Conference of Commissioners on Uniform State Laws«, 30 Law and Contemporary Problems 233 at 241 (Spring 1965).