

FEDERALISM AND THE QUESTION OF UNIFORM LAWS: THE CASE OF THIRD PARTY CUSTODY “STANDING” PROVISIONS

*By Lawrence Schlam**

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INTRODUCTION

“[Uniform Law Commissioners research,] draft, and promote enactment of uniform state laws. It turns [out, however,] that the judgment of whether uniformity is desirable can be likened to poker or even shooting craps.”¹

There is quite possibly no place where the poker analogy is more appropriate than with regard to attempts at uniform family laws. The promulgation of the Uniform Marriage and Divorce Act’s “third party

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1. John J. Sampson, *Uniform Family Laws and Model Acts*, 42 *FAM. L.Q.* 673, 674 (2008).

custody” provisions, for example, seems questionable, especially in a field where “local values” are important when determining public policy or resolving disputes over the relative rights of parents and non-parents.² In those states where they were adopted, these third party provisions interfered with the natural evolution of local common law and were problematic for other reasons as well.³ Indeed, most adopting states ultimately returned to prior common law approaches to child custody litigation—but with some refinements accounting for modern thinking in the field.⁴ Hence, the question of how such laws could have been considered by uniform law promulgators to be necessary, appropriate, or consistent with the purposes of uniform laws must be asked.⁵

This article suggests that attempts at national uniformity in this area were inappropriate, if not counterproductive. A more transparent and publically articulated justification for their promulgation—one which specifically *applied* the published, general criteria for projects undertaken by uniform law entities—would have made that clear. Due consideration was not given to the values and implications of a federal system that empowers relatively unique state social values and political sub-cultures.⁶

Third party custody disputes account for substantial litigation. With over half of all marriages in America ending in divorce, children are increasingly raised in non-traditional families.⁷ One of every two children will spend some time living in a step-family.⁸ Often, a non-

2. *Id.* See also *infra* notes 12, 39, 99, 139, 145, and 147, and accompanying text.

3. See *infra* Part II.

4. See *infra* Part II.

5. See *infra* Part III.

6. See *infra* Part IV.

7. See Robert W. Lueck, *The Collaborative Law (R)evolution: An Idea Whose Time Has Come in Nevada*, NEV. LAW., Apr. 2004, at 18–19. The nuclear family is no longer the dominant family model; it is now estimated that only twenty-four percent of American households are traditional nuclear families. *Id.* (citing 2000 Census Report); see also MARGARET M. MAHONEY, *STEPFAMILIES AND THE LAW* 1 (1994); U.S. CENSUS BUREAU, 2007 STATISTICAL ABSTRACT OF THE UNITED STATES, at 55 tbl.64 [hereinafter 2007 STATISTICAL ABSTRACT OF THE UNITED STATES] (reporting 32.6 percent of children living in nontraditional familial arrangements in 2005 compared to 27.5 percent in 1990); Bryce Levine, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315, 316 (1996) (indicating that one in three American children may grow up as part of a stepfamily); Jennifer Klein Mangnall, Comment, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399, 400 (1997).

8. See, e.g., 2007 STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 7, at 55 tbl.64 (reporting 32.6 percent of children living in nontraditional familial arrangements for 2005 compared to 27.5 percent in 1990). Even by 1995, approximately one-

parent is the only “father” or “mother” a child has known—the person who, on a day-to-day basis, fulfils the child’s psychological and physical needs.⁹ The emotional bonds that children form with non-parents can be as strong and meaningful as those between biological or adoptive parents and their children,¹⁰ if not stronger.¹¹ Nevertheless, across states, views regarding parental rights and meaningful relationships with non-parents tend to differ.¹²

quarter of all children born were likely to live in stepfamilies. Larry L. Bumpass et al., *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing*, 32 *DEMOGRAPHY* 425, 426 (1995). Scholars predict that by the year 2010, stepfamilies will be the dominant family type. Emily B. Visher & John S. Visher, *Stepparents: The Forgotten Family Member*, 36 *FAM. & CONCILIATION CTS. REV.* 444, 444 (1998).

9. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (1973); see also Mellisa Holtzman, *Definitions of the Family as an Impetus for Legal Change in Custody Decision Making: Suggestions from an Empirical Case Study*, 31 *LAW & SOC. INQUIRY* 1, 9 (2006) (discussing how “[t]he daily interactions” between children and non-parents create “psychological attachments” that “effectively elevate their relationship to that of a parent and a child, rather than simply that of a child and a caregiver”); Jennifer Gould, Comment, *California’s Move-Away Law: Are Children Being Hurt By Judicial Presumptions that Sweep Too Broadly?*, 28 *GOLDEN GATE U. L. REV.* 527, 548 n.145 (1998); Mangnall, *supra* note 7, at 418–19 (discussing the need for courts to recognize the importance of psychological parenting). A child’s perception of a parent is shaped by his or her day-to-day needs. See, e.g., James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 *U. TOL. L. REV.* 805, 808–09 (1995).

10. See Arlene Browand Huber, *Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nurture*, 32 *U. LOUISVILLE J. FAM. L.* 33, 52–53 (1994). “Terminating custodial relationships between stepparents and stepchildren simply because the marriage ends is unfair to stepparents who assumed a parental role during marriage and can be detrimental to children, especially if they view their stepparents as ‘psychological parents.’” Mangnall, *supra* note 7, at 403; see also Susan H. v. Jack S., 37 *Cal. Rptr. 2d* 120, 124 (Cal. Ct. App. 1994) (holding that the relationship between a child and the man who the child knows as his father does not disappear upon a divorce between the father and the child’s mother).

11. “In recent years . . . the consensus that long supported enforcement of bright-line boundaries [between parents and non-parents] has weakened in the face of non-traditional child rearing arrangements that seem to defy basic assumptions underlying the old rules.” David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 47, 48 (Robin Fretwell Wilson ed., 2006); see also GOLDSTEIN ET AL., *supra* note 9, at 98 (recognizing the importance of psychological, rather than simple biological, aspects of parenting). Goldstein et al., which attempted to integrate legal standards with current psychological theories, articulate a legal standard known as “the least detrimental alternative,” which would replace the “best interests” rule currently utilized by courts. See DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* § 2:8 (rev. 2d ed. 2005).

12. See, e.g., Anne Dailey, *Federalism and Families*, 143 *U. PA. L. REV.* 1787 (1995) (defending state control over family law issues because local courts are more likely to represent shared community norms and values relating to family life).

Historically, third party custody disputes were addressed either through habeas corpus¹³ or neglect petitions¹⁴ brought apart from or after the statutory “marital dissolution” process. These conflicts arose when either parents or non-parents sought to gain or re-gain custody of children. Due to the fundamental nature of parental rights,¹⁵ non-parents seeking custody had the burden of proving at trial that parents were “unfit” or that “extraordinary circumstances” existed (such as voluntary, indefinite relinquishment of parental rights and “de facto” parenting by non-parents).¹⁶ Generally, non-parents could freely petition for custody if they made such allegations. Disputes were resolved at evidentiary hearings through a “balancing” of both parties’ interests and manifested behavior—resulting, quite early in each state’s history, in common law criteria for the adjudication of such matters.¹⁷

13. *See, e.g.*, *Cormack v. Marshall*, 71 N.E. 1077 (Ill. 1904) (habeas corpus sought by father to obtain custody from the child’s grandfather); *Rallihan v. Motschmann*, 200 S.W. 358 (Ky. 1918) (habeas corpus brought to secure delivery of the child from both her current caretakers and, after the child was taken by order of the juvenile court, from the board of children’s guardians); *State ex rel. Nelson v. Whaley*, 75 N.W.2d 786 (Minn. 1956) (habeas corpus proceeding by the mother to regain custody of the child from an unrelated caregiver); *Anderson v. Anderson*, 94 N.W. 681 (Minn. 1903) (habeas corpus brought by the remarried father in order to cease retention of his children by his former wife’s sister and husband); *In re Neff*, 56 P. 383 (Wash. 1899) (writ of habeas corpus on behalf of the father requested after divorce ultimately awarded custody to the mother).

14. *See, e.g.*, *Hohenadel v. Steele*, 86 N.E. 717 (Ill. 1908) (petition brought to modify a previous consent decree in order to give a parent full custody of the child, based on allegations of changed circumstances in the other parent’s home making it unsuitable for the child); *Middleton v. Middleton*, 261 S.W.2d 640 (Ky. 1953) (father who lost custody of his child to the child’s grandmother pursuant to a divorce decree six years earlier petitioned to regain custody of his child based on evidence of unfitness on the part of the grandmother); *see also* Henry H. Foster & Doris Jonas Freed, *Child Custody (Part I)*, 39 N.Y.U. L. REV. 423, 432 (1964) (“It has long been the case that parents who neglect, desert, or abandon their children may forfeit their rights to custody.”); Walker A. Jensen, *The Child Without a Family: Problems in the Custody and Adoption of Children*, 14 U. ILL. L. REV. 633, 633–34 (1962) (noting that family and juvenile courts in several states have long had authority to terminate and fix custody in cases of dependent or neglected children).

15. *See* Lawrence Schlam, *Third Party “Standing” and Custody Disputes in Washington: Non-Parent Rights – Past, Present and . . . Future?* 43 GONZ. L. REV. 391, 400–10 (2007–2008) [hereinafter Schlam, *Washington*] (discussing the evolution of the fundamental constitutional right to parent/child relationships).

16. *See, e.g.*, *In re Brenner’s Guardianship*, 282 P. 486 (Wash. 1929) (finding that a guardian of a minor cannot be appointed without showing that parents are not the proper persons to have custody and that the child’s welfare requires appointment); *State ex rel. Le Brook v. Wheeler*, 86 P. 394, 396 (Wash. 1906) (granting standing to non-parents only to rule against them on the basis that the father did not abandon the child).

17. *See, e.g.*, *Chapsky v. Wood*, 26 Kan. 650, 653 (1881) (“[A parent] has not an absolute and uncontrollable [property] right [to the custody of his children].”). As for UMDA custody states, *see, e.g.*, *Dickason v. Sturdavan*, 72 P.2d 584, 587 (Ariz.

However, from the 1950s through the early 1970s, courts throughout the country were perceived by some family law experts to have become significantly more receptive to non-parent demands and less deferential to parental rights.¹⁸ As a result, from 1970 to 1973, third party custody “standing” provisions were promulgated as part of the Uniform Marriage and Divorce Act (UMDA). These additional jurisdictional requirements were

devised to protect the “parental rights” of custodial parents and to insure that [if the child is in the custody of a parent,] intrusions upon those rights will occur only when the care the parent is providing the child falls short of the minimum standard imposed by the community at large—the standard incorporated in the neglect or delinquency definitions of the state’s Juvenile Court Act.¹⁹

1937) (custody of children awarded to the maternal grandparents over the father where grandparents had cared for the child for seven or eight years and the father had spent very little time with them since infancy); *Devlin v. Huffman*, 339 P.2d 1008 (Colo. 1959) (awarding custody to grandparents based on considerations of the best interests of the child where the mother had left child in the care of maternal grandmother and step-grandfather since 1950); *McAdams v. McAdams*, 197 N.E.2d 93, 96 (Ill. App. Ct. 1964) (“We require that [a parent be] morally and mentally fit to prepare the mind and body of his child to receive the many advantages that our society has to offer.”); *Rallihan v. Motschmann*, 200 S.W. 358, 363 (Ky. 1918) (“[T]he natural family relation should be favored in fixing custody, if the parent is fit for the trust.”); *State ex rel. Platzer v. Beardsly*, 183 N.W. 956 (Minn. 1921) (third party gained custody of the child from the mother based on allegations that the mother had no suitable home or place to keep the child and was without the means to support her); *Viereck v. Sullivan*, 137 P. 456, 457 (Wash. 1914) (custody maintained in the adoptive parents against the biological father in the interests of the “moral, intellectual, and material welfare of the [child]”); *Ex parte Fields*, 105 P. 466, 468 (Wash. 1909) (child’s residence and caring relationship with a third party had to be sanctioned in light of facts construed as voluntary and intentional parental abandonment).

18. See, e.g., Lawrence Schlam, *Children “Not in the Custody of One of [Their] Parents”: The “Superior Rights” Doctrine and Third-Party Standing Under the Uniform Marriage and Dissolution of Marriage Act*, 24 S. ILL. L. J. 405, 419, 424 (2000) [hereinafter Schlam, *Illinois*]; Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: From the Child’s Best Interests to Parental Rights—and Back Again*, 47 ARIZ. L. REV. 719, 741–50 (2005) [hereinafter Schlam, *Arizona*]; Schlam, *Washington*, *supra* note 15, at 425–26; Lawrence Schlam, *Third-Party Standing in Child Custody Disputes: Will Kentucky’s New “De Facto Guardian” Provision Help?*, 27 N. KY. L. REV. 368, 381–82 (2000) [hereinafter Schlam, *Kentucky*].

19. UNIF. MARRIAGE AND DIVORCE ACT § 401, 9A(2) U.L.A. 264 (1998). One of the drafters suggested:

[Given the] intense emotionalism [of custody adjudication], how ‘unfit’ litigating parents often appear or are made to appear to judges, and the invitation the ‘best interests’ standard’s indeterminate qualities offers to judges to award custody to those litigants whose attributes and values most resemble their own. Under such circumstances, an expansion of judicial discretion may well produce a much larger increase in the number of stepparent custody awards than is warranted by the number of [stepparents who truly deserve custody]. Denying ‘standing’ to stepparents can

These “standing” provisions were intended to reinforce the “superior rights” doctrine,²⁰ a long-standing presumption in most states (including those adopting the custody provisions of the UMDA),²¹ that an otherwise fit parent is the best person to raise and nurture a child.²² However, these requirements exceeded the previous standard of proof in third party custody litigation, which generally fell short of requiring a showing of conduct amounting to “neglect or delinquency”

be justified, then, because many of the ‘truly’ meritorious stepparent claims will in any event be honored by decisions ‘outside doctrinal parameters,’ while the ‘formal,’ ‘no standing,’ rule will serve to protect many biological parents from those trial judges tempted to use indeterminate custody standards to prefer stepparents inappropriately.

Id.; see also Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 197–98 (1993) (footnote omitted) (speculating on why participants at a conference on “Family Law for the Next Century” seemed to be committed to “protecting the interests of the biological parents” and favored the “traditional doctrine” and discussing the difficulties with attempting to liberalize third party standing requirements in order to use them as “aspirational legal doctrines”).

20. See *supra* note 19 and accompanying text.

21. See, e.g., *Webb v. Charles*, 611 P.2d 562 (Ariz. Ct. App. 1980) (no standing in maternal grandmother where there was insufficient indication that the father had voluntarily relinquished his legal rights to the child); *In re Marriage of Santa Cruz*, 527 N.E.2d 131 (Ill. App. Ct. 1988) (after considering how a third party acquired possession of a child and the duration and nature of the possession, a court should consider whether these factors indicate a parent voluntarily agreed to relinquish physical possession; otherwise, there is a parental preference absent voluntary relinquishment); *Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995) (grandmother not allowed to claim a “best-interest” standard in her custody suit against a parent because custody is not lost to a parent simply because the child is left in the care of a non-parent for a significant length of time); *In re Welfare of May*, 545 P.2d 25, 27 (Wash. Ct. App. 1976) (“A natural parent cannot be deprived of parental rights, including custody and control, unless his or her conduct has been such, or the duty to care for and protect the child has been so violated, that such rights have been abdicated or forfeited.”); *In re Brown*, 105 P.3d 991 (Wash. 2005) (grandmother not given presumption of fitness and right to custody, as would attach to a parent, because although grandmother had physical custody, she did not have a legal right to custody, the combination of which would have created a presumption of fitness; the “legal right” prong of the “physical custody” provision is needed to create a de facto parental preference).

22. See, e.g., *Webb*, 611 P.2d at 562 (examining the nature and duration of non-parent’s actual physical possession is crucial to raising an inference of voluntary and indefinite relinquishment); *In re Custody of Ayala*, 344 Ill.App.3d 574 (1st Dist. 2003) (standing requirement is intended to preserve the presumed superior rights of natural parents, although that right is not absolute and does not require a rigid and unthinking construction of the provision); *Woodrum v. Dunn*, 508 S.W.2d 38 (Ky. 1974) (examining the motivation of natural parents in seeking custody of children whose custody has been relinquished is essential in determining the child’s best interest). It should be noted, however, that “there is . . . little scientific basis for the presumption that a child’s best interests are best served by being in the custody of natural parents.” Richard J. Gelles, *Family Reunification/Family Preservation: Are Children Really Being Protected?*, 8 J. INTERPERSONAL VIOLENCE 557, 560 (1993).

as defined by Juvenile Court Acts.²³ The traditional standard of proof was the “best interests” of the child, a determination that already took into account “extraordinary circumstances” as well as the common law “parental preference” in custody determinations.²⁴

Under the UMDA standing provisions,²⁵ however, third parties seeking to gain or retain custody of children²⁶ now faced obstacles not encountered by competing biological parents.²⁷ Unlike under prior law, someone “other than a [biological or adoptive] parent” could now petition for custody “only if [the child was] *not* in the *physical custody* of one of [the child’s] parents.”²⁸ This language, at least initially as

23. See, e.g., *United States v. Green*, 26 F. Cas. 30 (C.C.D.R.I. 1824); *Hays v. Gama*, 67 P.3d 695, 698 (Ariz. 2003) (“We have repeatedly stressed that the child’s best interests are paramount in custody determinations.”); *In re Smith*, 13 Ill. 138 (1851) (focusing on the best interests of the child); *Chapsky v. Wood*, 26 Kan. 650 (1881); *Shallcross v. Shallcross*, 122 S.W. 223, 225 (Ky. 1909) (suggesting that the paramount duty of the court is to consider the child’s welfare); *Viereck v. Sullivan*, 137 P. 456, 457 (Wash. 1914) (custody retained in the adoptive parents against the biological mother based on a “best interests” analysis).

24. See *supra* note 19.

25. UNIF. MARRIAGE & DIVORCE ACT § 401 (amended 1973), 9A U.L.A. pt. II, at 263–64 (1998). This “third party” provision was adopted in one form or another in Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. *Id.* at 1; see also Carolyn Wilkes Kaas, *Breaking up a Family or Putting it Back Together Again: Refining the Preference in Favor of the Parent in Third Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1069 n.102 (1996).

26. Essentially, these are step-parents or grandparents who have become “psychological” parents. See James G. O’Keefe, Note, *The Need to Consider Children’s Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077, 1081, 1090 (1991) (defining “psychological parent” as that “individual the child perceives, on a psychological and emotional level, to be his or her parent,” and pointing out that under the “parental rights” doctrine, such individuals are not even considered for custody until after the natural parent has been shown to be unfit).

27. See, e.g., Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 82 (2006) (“Both stepfamilies and the broad question of legal recognition for them have a long history.”). Step-parents are not afforded the same rights in child custody suits as parents because, in the eyes of the law, step-parents are seen as legal strangers to their former stepchildren. See David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 809 (1999) (arguing there is no historical recognition by courts of unrelated households as families); Barbara Bennett Woodhouse, “*Out of Children’s Needs, Children’s Rights*”: *The Child’s Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 340–41 (1994) (arguing that courts should pay more attention to children’s perspectives in child custody and visitation cases).

28. Unif. Marriage & Divorce Act § 401(d)(2) (amended 1973), 9A U.L.A. pt. II, at 263–64 (1998) (emphasis added); see, e.g., *In re Guardianship of Alexander O.*, 783 N.E.2d 673, 677 (Ill. App. Ct. 2003) (“[S]tanding’ does not refer to whether a litigant has a justiciable interest in the controversy, but, rather, whether the litigant has satisfied the threshold statutory requirements.”); *Jones v. Minc*, 462 P.2d 927, 932 (Wash. 1969) (Hunter, C.J., dissenting) (“[T]he court has no jurisdiction to grant relief unless authority to do so can be found in Washington statutes.”).

part of the UMDA, was incorporated during the 1970s into the laws of Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.²⁹

In many of these states,³⁰ caring “de facto” or “psychological” parents who failed to meet this “not in the physical custody” jurisdictional requirement could no longer be heard as to the “best interests” of children.³¹ This was true even though “best interests” had been the controlling standard for custody decisions between biological parents and non-parents under pre-existing custody law.³² “Standing” laws essentially ended what was a growing judicial trend in those states of furthering the “best interests” of children by maintaining the continuity of their proven meaningful relationships with “de facto” parents.³³

29. See Kaas, *supra* note 25, at 1069 n.101 (enumerating the adopting states).

30. Some states, at the time of adoption or soon after, quickly decided to insert additional or alternative language which allowed the common law approach to continue. See MINN. STAT. § 518.156 (1979) (stating that “[the] court may, upon a showing of good cause, permit the intervention in custody proceedings of other interested parties”); WASH. REV. CODE ANN. § 26.10.030 (West 2005) (augmenting the third party standing provisions in the UMDA by allowing someone other than a parent to petition for custody not only if a child is not in the physical custody of a parent, but also if the petitioner “alleges that neither parent is a suitable custodian”).

31. See, e.g., *In re V.R.P.F.*, 939 P.2d 512 (Colo. App. 1997) (remanding for further proceedings to determine if grandparents had “physical custody” when, during the time of their custody, the child’s father stayed at the grandparents’ home and the child occasionally stayed overnight elsewhere with her mother); *In re Kirchner*, 649 N.E.2d 324, 335 (Ill. 1995) (holding, *inter alia*, that mere physical possession by the former adoptive parents did not entitle them to standing to seek custody); *In re Guardianship of Alexander O.*, 783 N.E.2d 673, 677 (Ill. App. Ct. 2003) (indicating that “‘standing’ does not refer to whether a litigant has a justiciable interest in the controversy, but, rather, whether the litigant has satisfied the threshold statutory requirements”); *In re Custody of R.R.K.*, 859 P.2d 998 (Mont. 1993) (defining non-parent standing requirement—demonstrating that the child is not in the physical custody of one of the parents—as being based not on who has actual physical possession at the moment of filing, but on whether the parent actually relinquished physical custody and on the length of the separation); *Jones v. Minc*, 462 P.2d 927, 932 (Wash. 1969) (Hunter, C.J., dissenting) (“[T]he court has no jurisdiction to grant relief unless authority to do so can be found in Washington statutes.”).

32. See, e.g., *State v. Bean*, 851 P.2d 843, 845 (Ariz. Ct. App. 1992) (holding that parental rights are not absolute and must yield to the best interests of the child); *Mahon v. People ex rel. Robertson*, 75 N.E. 768, 770 (Ill. 1905); *In re Adoption of R.L.M.*, 156 P.3d 940, 945 n.26 (Wash. Ct. App. 2007).

33. See, e.g., Schlam, *Illinois*, *supra* note 18, at 411–19; Schlam, *Arizona*, *supra* note 18, at 734–42; Lawrence Schlam, *Third-Party Custody Disputes in Minnesota: Overcoming the “Natural Rights” of Parents or Pursuing the “Best Interests” of Children?*, 26 WM. MITCHELL L. REV. 733, 739–40 (2000) [hereinafter Schlam, *Minnesota*]; Schlam, *Washington*, *supra* note 15, at 417–26; Schlam, *Kentucky*, *supra* note 18, at 374–81;

Nevertheless, over the past thirty-five years, these “not in the physical custody” standing requirements have been largely neutered, modified, or circumvented—albeit in somewhat different ways—by different states. There has, in fact, been a re-emergence of approaches to judicial interpretation and decision-making, and a reinvigoration of the legislative amendment process, which is more “child-centered”³⁴ and consistent with pre-1973 trends. The intent has been to more fully recognize the value of third party custodians and protect or expand their rights in custody disputes, like they were recognized prior to the adoption of the UMDA third party custody provisions.³⁵

This article argues that the UMDA custody “standing” provisions were unnecessarily and inappropriately promulgated. They enabled local legislative “social values factions” in adopting states to inhibit both the contemporaneous evolution of pre-existing state common law, which had been trending toward greater recognition of “meaningful” third party-child relationships, and the expression of local approaches toward reinforcing contemporary notions of parenthood and family.³⁶ The “not in the physical custody” provision of the UMDA, therefore, diverted the legislatures and judiciary in adopting states

34. This phrase generally refers to a legal regime in which the importance of children’s relationships with adults, rather than adult “rights,” is stressed and social scientists’ evaluations of those relationships are valued. *See, e.g.*, MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 185 (1994).

35. *See, e.g.*, Clifford v. Woodford, 320 P.2d 452 (Ariz. 1957) (ruling that “best interests” dictated that custody be awarded to the stepfather where the father had shown little interest in the child following his divorce and the stepfather had acted as a full parent); Root v. Allen, 377 P.2d 117 (Colo. 1962) (denying natural father’s petition, following death of mother who had custody and stepfather’s refusal to relinquish custody, despite establishing that he was a fit and proper person, because the best interests of the child would be served by permitting her to remain with the stepfather); People *ex rel.* Edwards v. Livingston, 247 N.E.2d 417, 421 (Ill. App. Ct. 1969) (reasoning that a parent need not first be found “unfit” because the best interests of the child is the controlling standard); Haynes v. Fillner, 75 P.2d 802, 805–06 (Mont. 1938) (“[E]quity has inherent jurisdiction, to be invoked by petition, to award the custody of minor children, and such jurisdiction is not taken away by a statute conferring like power on another court.”); *In re* Guardianship of Palmer, 503 P.2d 464, 465 (Wash. 1972) (holding that a natural parent could be deprived of custody by a grandmother because “the welfare of the child is the only operative standard at this stage of the [custody determination] and all other considerations are secondary.”); Fitzgerald v. Leuthold, 204 P.2d 371 (Wash. 1948) (denying custody to the father in favor of the child’s aunt and uncle, finding the court found that the father’s only interest was in the child’s inheritance and that he had an apparent lack of interest in the child’s life for a significant period of time).

36. MASON, *supra* note 34, at 185.

from their duty to facilitate the “best interests” of children in light of the changing realities of modern family life.³⁷

Moreover, those who promulgated the UMDA knew, or should have known, that “uniform rules” regarding the child custody process and access would be unnecessary and inappropriate. Each state has its own “political culture” and locally predominant “social values” maintained through that culture,³⁸ which presumably includes those values relating to the nature of the parent-child relationship.³⁹ Different political and social points of view among the states lead inevitably to the local common law “experimentation” contemplated in a federal system.⁴⁰ Thus, child custody law would seem a particularly inappropriate target for the “uniform law movement,”⁴¹ given the high probability of diverse local views on how to approach such disputes.⁴²

37. *Id.*; see also *Root v. Allen*, 377 P.2d 117 (Colo. 1962) (where custody was awarded to mother pursuant to divorce decree and stepfather refused to relinquish custody of the child after her death, the best interests of the child dictated that the father not receive custody even though he proved himself “fit”); *Devlin v. Huffman* 339 P.2d 1008 (Colo. 1959) (awarding custody to maternal grandmother and step-grandfather with whom mother had left child since 1950, on considerations of the best interests of the child).

38. See *infra* Part II.

39. See Dailey, *supra* note 12, at 1871–72 (defending state control over family law issues based on the idea of localism, the notion that local courts are more likely to represent shared community norms and values relating to family life). Dailey explains that the nature of family, and its proper relationship to liberal government, dictates local control of family issues: “[T]he communitarian nature of family law requires a level of political engagement and a sense of community identity that lie beyond the reach of national politics. As the quality of political deliberation falls and as the bonds of community thin out, the danger that shared values will degenerate into governmentally dictated values increases. By situating communitarian politics at the state level, therefore, localism ensures that the civic participation, political dialogue, and shared values essential to family law will develop within the states’ smaller, relatively more accessible political locales.” *Id.*

40. “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (“[T]here 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.”); Dailey, *supra* note 12.

41. Dailey, *supra* note 12, and accompanying text; see also *infra* Part III.

42. See *infra* Part III. Indeed, the vast majority of states had the foresight *not* to adopt the “uniform” UMDA custody provisions in the first place. Further, even some states that adopted the provisions significantly modified provisions. See also *supra* note 28.

The “private legislatures” that promulgate uniform laws and the means by which they do so have long been criticized for the foregoing reasons.⁴³ The uneven results of adoption of the UMDA uniform third party “standing” provisions⁴⁴ substantiate these criticisms and suggest some necessary reforms in the uniform law process. For example, given their articulated duty to “improve the administration of justice,”⁴⁵ uniform law promulgators should do more than simply develop, articulate, and express *general* criteria for the suitability of national uniformity.⁴⁶ They might do well also to publically articulate a transparent *rationale for* uniformity in the discrete area of law contemplated *before* attempting to promote national uniformity in that field.⁴⁷

This approach might better guide legislatures when deciding whether to accept the presumed expertise, views, and approaches of an “alternative legislature.” The motives of national and local “special interests” seeking to revise or supersede state common law in order to advance narrow social policy objectives would likely become more transparent. After all, given the processes through which “uniformity projects” are chosen,⁴⁸ it is unclear whether proposed uniform laws

43. See generally *infra* Part III.

44. See *supra* notes 28–29.

45. See *infra* note 123, and accompanying text.

46. UNIF. MARRIAGE & DIVORCE ACT § 401 (amended 1973), 9A U.L.A. Pt. II, at III (Preface) (1998) says in part: “Proposals for Uniform Acts, received from many sources, are referred to the Standing Committee on Scope and Program which makes an investigation, and reports to the Executive Committee on whether the subject is appropriate for attention by the Conference, *in keeping with specific criteria [which are publically articulated].*” However, these criteria as *applied* to a particular proposal are not expressed or publically articulated. See *infra* note 186.

47. See *supra* notes 28–29.

48. See, e.g., *Projects: Overview*, AM. LAW INST., <http://www.ali.org/index.cfm?fuseaction=projects.main> (describing the process by which ALI decides whether to undertake a project) (last visited Oct. 4, 2011). The process by which the Institute decides whether to undertake a particular project is the province of a select few individuals, without consideration of sources or concerns outside the upper echelons of the membership of ALI:

The nature, content, and scope of each project are initially developed by its Reporter in consultation with the Institute’s Director. The Director’s recommendations that particular projects be undertaken and designations of specific Reporters are subject to the approval of the Council or Executive Committee. A project is developed in a series of drafts prepared by the Reporter and reviewed by the project’s Advisers and Members Consultative Group, the Council, and the ALI membership. Preliminary Drafts and Council Drafts are available only to project participants and to the Council. Tentative Drafts, Discussion Drafts, and Proposed Final Drafts are publicly available.

truly reflect *unbiased* “best thinking” nationally.⁴⁹

Further, in addition to publishing specific criteria allegedly satisfied with regard to a specific uniformity project, there should be greater, articulated emphasis on the extent to which differing predominant local or regional “social values” might detract from the viability or value of national uniformity. At a minimum, uniform law advocates should justify their proposals not just in terms of an “elite” professional consensus over some question of social policy, but also by demonstrating that superseding or disrupting evolved common law will indeed have a positive or necessary impact on “clarity” in law, or improve the “administration of justice.”

Had such specific criteria been articulated and considered, or had an attempt been made to determine whether positive benefits would ensue, it might have been apparent to both the “public” and “private” legislatures that third party standing was not an appropriate area for uniformity. Indeed, as noted above, even though several states were initially convinced to adopt uniform third party standing provisions to promote certain policies,⁵⁰ modern legislatures and the judiciary in these states ultimately amended or circumvented those laws.⁵¹ This low level of acceptance of the UMDA standing provisions, and the relatively rapid subsequent efforts by state governments to reverse the impact of these laws, must be viewed as a failure of foresight, and arguably a misguided and wasteful effort by the uniform law movement.

Part I describes the theoretical and practical problems with the uniform third party custody provisions enacted in several UMDA states, and how those states resolved these problems by reverting to traditional common law approaches but modifying them to accommodate the “modern family.” Part II discusses the impact of American federalism, which encourages local expression of differing local “social values” in the context of diverse state “political cultures.” It explains why local “social values,” and views of the appropriate role of local government in maintaining and reinforcing those values, differ given the unique origins, demographics, and settlement patterns of the American population. Part III describes the origins and influence of the “uniform law movement,” and the scholarly criticism suggesting that, *inter alia*, some areas of law such as those that affect the parent-child relationship are less suited to national uniformity. In other

49. *Id.*

50. See *supra* note 16, and accompanying text.

51. See, e.g., *supra* note 33, and accompanying text.

words, local diversity of “social values” points more toward “non-uniformity” than uniformity in common law.

Part IV argues that the uniform third party custody provisions have unduly detracted, though not permanently, from the ability of common law to evolve to suit the realities of modern family life in a manner consistent with local “social values” and “political culture.” Second, it proposes that the effort to “reform” third party custody law through the UMDA might not have been undertaken if there were more transparent consideration of the specific benefits of national “uniformity” in that area as compared to the problems created for the local “administration of justice.”⁵² Finally, it suggests that it would be helpful to alter the promulgation process in order to increase transparency on the part of the uniform law entities by having them *apply* the general criteria for promulgation in the context of the specific proposed uniform law and publish those presumably reasoned applications for the benefit of state legislatures and voters.

I.

STATE EXPERIENCE WITH THE ADOPTION AND IMPLEMENTATION OF UNIFORM THIRD PARTY CUSTODY PROVISIONS

There are at least five problems that resulted from the enactment by several states of the UMDA third party custody standing requirements. The first reflects one of the expressed rationales for the provision:⁵³ that standing requirements in private custody proceedings unnecessarily duplicate the function of the Juvenile Court Act.⁵⁴ Cus-

52. See *infra* note 125 and accompanying text (stating that this was part of the original justification for uniform laws) and *infra* note 188 and accompanying text (indicating that it is not clear if these original concerns are actually taken into account).

53. See *supra* note 20, and accompanying text.

54. For example, the majority in *In re Marriage of Siegel*, 417 N.E.2d 1312, 1316 (Ill. App. 1981), was criticized by Justice Hutchinson, because its view of the standing requirement as lack of “legal custody” would be superfluous because it would duplicate the Adoption Act and the Juvenile Court Act. See *id.* While the termination of parental rights in Illinois has always required death or unfitness, this has never been true for third party custody, let alone third party standing. See *id.* For example, “abandonment,” which will ordinarily invoke the neglect or dependency jurisdiction of the Juvenile Court Act, is any conduct which evinces a settled purpose to forego all parental duties and to relinquish all parental claims to the child. *Stalder v. Stone*, 107 N.E.2d 696, 700 (Ill. 1952). See, e.g., *In re J.K.F.*, 529 N.E.2d 92 (Ill. App. Ct. 1988) (affirming custody of a 13-year-old boy to stepfather after a finding under the Juvenile Court Act that the mother had abused her children and the boy in question wanted to live with his stepfather); *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. Ct. App. 1993) (defining child abandonment, which will normally allow a non-parent to establish standing

tody litigation in the majority of states, when it is the result of a private intervention, had not historically involved the higher standard of “unfitness” usually required for government intervention.⁵⁵ Yet, this was ostensibly required under the new third party custody provisions.

A second problem was that the UMDA standing language required a lack of “physical custody in a parent” which, although seemingly plain in meaning, has sometimes resulted in ambiguity and confusion in judicial construction.⁵⁶ On at least three occasions, including in the recent Illinois case of *In re Marriage of Archibald*,⁵⁷ the phrase “not in the *physical* custody of [a] parent” has been construed to require a showing that a child is “not in the *legal* custody” of a parent.”⁵⁸ Obviously, this is a higher barrier than just showing mere lack of *physical* possession of a child. Yet, in other opinions, courts have taken the position that non-parent standing does *not* require lack of “legal custody” in parents, but only lack of “possession” sufficient to *imply* an intent to voluntarily and indefinitely relinquish parental

in custody matters, is also a matter properly brought as a matter of neglect or adoption in Juvenile or Family Courts, and may be demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child).

55. See, e.g., *supra* notes 16–20, and accompanying text (describing rigid “standing” requirements replaced traditional “best interests” analysis, which demanded a lesser standard of proof from non-parents and judicial balancing).

56. Colorado provides examples of a lack of decisional clarity. Compare *In re L.F.*, 121 P.3d 267, 272–73 (Colo. App. 2005) (ruling that grandmother’s caregiving over three-month periods of mother’s illnesses and during most days when mother returned home did not constitute necessary “physical custody” because parents did not relinquish care or authorize grandmother to be primary caretaker), with *Matter of V.R.P.F.*, 939 P.2d 512, 513 (Colo. App. 1997) (remanding to determine if grandparents had “physical custody” when, during the time of their custody, the child’s father stayed at the grandparents’ home and the child occasionally stayed overnight with her mother elsewhere, based upon the frequency, duration, and nature of contacts).

57. 363 Ill. App. 3d 725, 736 (2006) (citations omitted) (“[T]he nonparent [seeking custody] must show that the natural parent relinquished the ‘legal’ custody of the child, rather than just physical possession. This requirement places the burden upon the nonparent to show that the parent somehow voluntarily and indefinitely relinquished the custody of the child. Only after finding that the nonparent has standing can the circuit court turn to the issue of [best interests and] custody.”).

58. For decisions revealing differing and more or less strict standards for arriving at this conclusion of law, see, for example, *Webb v. Charles*, 611 P.2d 562 (Ariz. Ct. App. 1980) (refusing to grant standing to a maternal grandmother to petition for custody where there was insufficient indication that the child’s father had voluntarily relinquished his legal rights to the child); *Moore v. Asente*, 110 S.W.3d 336, 360 (Ky. 2003) (“[T]he nonparent must first show by clear and convincing evidence that the parent has engaged in conduct similar to activity that could result in the termination of parental rights by the state.”).

rights.⁵⁹ Parental “abandonment” is not an actual loss of “legal custody,” which would require legal process.⁶⁰

Consequently, there has been confusion and inconsistency in judicial decision-making because *subjective inferences* of intent to “indefinitely” relinquish parental rights—while not the equivalent of a judicial *finding* of neglect—may still be the basis for a transfer of “legal custody” in private custody proceedings.⁶¹ Behavior that may *potentially* cause the loss of legal custody is not the same as *lack* of legal custody. Nevertheless, an initial showing of parental behavior that *might* generate loss of parental legal custody was now required in order for non-parents to even *petition* for custody. By requiring such an initial showing, the standing requirement ultimately amounts to a new “preliminary hearing” requirement that creates an additional impediment to the “fair administration of justice.”

Third, the “not in the physical custody of a parent” standard orients trial courts toward an initial preoccupation with adult “possessory” or legal rights,⁶² rather than an evaluation of the “best interests”

59. See, e.g., *In re R.L.S.*, 218 Ill.2d 428 (2006); *In re Custody of Ayala*, 344 Ill.App.3d 574 (2003) (instructing that, to establish “standing,” a non-parent must demonstrate that the natural parents have voluntarily and indefinitely relinquished physical custody of the child, which is not the same as temporarily relinquishing physical possession, but it is also not necessarily a transfer of “legal custody”). Thus, a natural parent was held unable to defeat a non-parent’s standing merely by executing repeated short-term guardianship appointments to others, since an incarcerated parent, even though he may maintain legal custody, can be found to lack physical custody. See *In re A.W.J.*, 197 Ill.2d 492 (2001); see also *In re Appeal in Pima County Juvenile Severance Action No. S-114487*, 876 P.2d 1121, 1133 (Ariz. 1994) (noting that, although father did not formally give up custody and the child had been placed with potential adoptive parents, those adoptive parents had standing because “[if] the adoptive parents had not acted, the evidence suggest[ed] that the father would have continued to do nothing” to develop a relationship with his child); *In re Custody of C.C.R.S.* 892 P.2d 246, 251–52 (Colo. 1995) (showing that, where mother had placed child with third parties after child’s birth and agreed to relinquish custody once it was a year old, third parties had standing *before* the child was a year old because mother had given them physical custody in contemplation of relinquishment); *Middleton v. Middleton*, 261 S.W.2d 640 (Ky. 1953) (denying custody to father where, after he received custody of the child pursuant to a divorce decree and left the child with a grandparent, over the course of six years he failed to make child support payments and did not play with the child on occasional visits); *In re Marriage of Ferrell*, 835 P.2d 267, 270 (Wash. Ct. App. 1992) (non-parents had standing where child ran away from stepfather and mother and they had subsequently cared for her for a year because “[the child] had been integrated into the [caregiver’s] home with the knowledge of her natural parents and they agreed to the change in custody.”).

60. See *supra* note 58 and accompanying text.

61. See *id.*

62. See Noel Semple, *Whose Best Interests? Custody and Access Law and Procedure*, 48 OSGOODE HALL L.J., 287, 288 n.2 (2010). “In comparing the law of custody and access disputes with the procedure used to resolve them there is a fundamental

of children with regard to adults that may have developed meaningful care-giving relationships with them, i.e. those who clearly have a reasonable basis for participating in ultimate custody determinations.⁶³ Thus, a preliminary standing hearing and decision might, in many cases, unfairly bias the ultimate decision on custody toward biological parents.⁶⁴

[contradiction:] the former focuses on the interests of the children involved to the exclusion of all else. *The latter, however, is essentially designed to protect the best interests of the adult parties to the dispute . . .*" *Id.* (emphasis added).

63. See *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 892 N.E.2d 1092, 1096 (2008) (A recent Illinois decision in which, even though the child since birth had been living with the grandmother, a co-care-giver, upon the death of the custodial parent the maternal grandmother simply did not have standing to seek custody because the child remained in the mother's physical custody until her death, after which the father requested physical custody in a timely manner. Neither the mother nor father had voluntarily and permanently relinquished custody, so custody was constructively in the non-custodial parent and "reverted" back to him on the mother's death, even though the father had not been a care-giver.); see also *In re Custody of Peterson*, 491 N.E.2d 1150, 1152-53 (Ill. 1986) (illustrating that, where custodial mother and child lived with grandparents, who provided primary care for the child while the mother was sick and father merely exercised visitation rights, the grandparents did not have standing after the mother's death because mother never "transferred" physical custody to the grandparents); *In re Marriage of Santa Cruz*, 527 N.E.2d 131 (Ill. App. Ct. 1988) (refusing to grant standing to petition for custody to maternal grandmother because there was insufficient indication that child's mother had voluntarily relinquished physical custody of the child). For other examples of this result in other UMDA states, see *Olvera v. Superior Court*, 815 P.2d 925, 926 (Ariz. Ct. App. 1991) (child resided with father and step-mother for nine years, since the child was roughly two years old, yet step-mother did not have standing to petition for custody and argue "best interests" despite the fact that she alleged that she was the primary caretaker during that time because the father had not relinquished "physical custody" and thus his "legal right" to the child); *Webb v. Charles*, 611 P.2d 562, 565 (Ariz. Ct. App. 1980) (although grandmother cared for the child for over three months after the father had given her physical custody, grandmother did not have standing as father did not relinquish his legal "right" to the child; no "best interest" analysis could ever be undertaken by the court); *Henderson v. Henderson*, 568 P.2d 177, 179 (Mont. 1977) (child's paternal aunt obtained physical custody of the child after the custodial father's death, and cared for the child for close to a year, she was found without standing and not entitled to argue the child's best interests required permanent guardianship in her; the court did not even discuss the factors of the child's life but merely focused on the fact that the aunt did not allege neglect, abuse, or dependency, so custody reverted to the non-custodial mother); see also Erin E. Wynne, *Children's Rights and the Biological Bias: A Comparison Between the United States and Canada in Biological Parent Versus Third-Party Custody Disputes*, 11 CONN. J. INT'L. L. 367, 370 (1996).

64. A preliminary jurisdictional hearing with this focus, or any preliminary hearing concerning the elements of the case for modification, for that matter, may unduly bias courts even before "best interests" can be considered. See, e.g., Julia H. McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS. U. L. J. 113, 161 (2009) (by expanding "the parental privacy presumption in an attempt to limit . . . intervention into the realm of the family [through, for example, jurisdictional standing requirements]," children's legal claims become irrelevant under "third-party standing analysis so long as a legal parent is fit"); Semple, *supra* note 62, at 318 (the procedure

Fourth, standing requirements are not necessarily required for the protection of the biological parents' legitimate rights or interests. The presumption of parental rights must still be overcome in subsequent custody hearings.⁶⁵

Finally, the uniform third party custody provisions unnecessarily diverted judges from earlier doctrine which, even in the absence of evident "unfitness," had already accommodated non-parents who due to "extraordinary circumstances" had legitimate claims to custody for a child's "best interests."⁶⁶ At custody hearings prior to the UMDA, courts had explored how non-parental custody was initially obtained, whether meaningful third party "parent-child" relationships of significant duration existed, the potential harm from interference with those relationships, and whether there was at least *plausible* evidence of voluntary and indefinite relinquishment of physical custody to non-parents.⁶⁷

used to resolve custody and access disputes, which presumably include preliminary "standing" determinations, is essentially designed to protect the best interests of the adult parties to the dispute, not children, and this often works to the detriment of children).

65. For example, in *People ex rel. A.M.K.*, 68 P.3d 563, 565 (Colo. App. 2003), a child's caretakers petitioned the court for allocation of parental responsibilities for the child. The biological mother and father had the child in their teenage years out of wedlock and the father of the child had little contact with child beyond the first months of her life. The "caretakers" began taking care of child only in the role of babysitters, but this soon turned into a full-time living arrangement. The trial court, in granting custody to the caretakers, found that they had standing and had become the child's "psychological parents." The decision was remanded because the trial court, in determining custody, failed to take into account a presumption that custody with the father (biological parent) would necessarily be in the best interests of the child. See also McLaughlin, *supra* note 64, at 113 n.133 (citing with approval, Schlam, *Washington*, *supra* note 15, at 447-48); Schlam, *Arizona*, *supra* note 18, at 723-24, 770-71 nn.19, 21, 22; Schlam, *Kentucky*, *supra* note 18, at 372-73 nn.23-25.

66. See, e.g., *Root v. Allen*, 377 P.2d 117, 121 (Colo. 1962) (even though father established that he was a fit and proper person to have custody of his child, he was not entitled to custody because it was determined that the best interests of the child would be served by permitting her custody to remain with the stepfather); *Devlin v. Huffman*, 339 P.2d 1008, 1010 (Colo. 1959) (where mother had left child in the care of maternal grandmother and step-grandfather since 1950, custody was awarded to grandparents based on considerations of the best interests of the child); *In re N.M.O.*, 399 N.W.2d 700, 702 (Minn. Ct. App. 1987) (reversing trial court for failing to make findings about best interests of child); *Haynes v. Fillner*, 75 P.2d 802, 805 (Mont. 1938) (equity has inherent jurisdiction, to be invoked by petition, to award the custody of minor children, and such jurisdiction is not taken away by a statute conferring like power on another court).

67. See *supra* note 65; see also *In re Custody of Groff*, 332 Ill.App.3d 1108 (2002) (standing based on lack of parental physical custody depends on who was responsible for care and welfare prior to initiation of custody proceedings, how physical possession of child was acquired, and nature and duration of possession of child); *In re Marriage of Santa Cruz*, 527 N.E.2d 131, 138 (Ill. App. Ct. 1988) (maternal grand-

Thus, notwithstanding adoption of the UMDA custody provisions, courts—or in most cases, legislatures—eventually came to appreciate the wisdom of their traditional approaches to standing. Some courts contrived justifications for granting standing to third party caregivers who might not clearly comply with the UMDA’s “not in the physical custody” provision, but who would nevertheless have been parties to a hearing prior to the UMDA.⁶⁸ This also occurred in other states where, in a court’s view, an optimal evaluation of “best interests” seemed to require standing for certain “de facto” parents.⁶⁹ In these situations, courts selectively choose facts that would sustain a finding that non-parents should be involved in custody disputes,⁷⁰ pointing out circumstances that *might* indicate the voluntarily and “indefinite” relinquishment of parental rights.⁷¹

One example of convoluted reasoning employed in an effort to grant standing under the rigid “not in the physical custody of a parent” standard is evident in *In re Marriage of Roberts*.⁷² Roberts was married when the child was born. He signed the birth certificate because the mother led him to believe he was the father.⁷³ Only when blood tests were performed during dissolution proceedings several years later was it conclusively determined that Roberts was not the biological father.⁷⁴ However, prior to the tests, he had already petitioned for custody of the child in the dissolution proceedings.⁷⁵ The trial court

mother was not granted standing to petition for custody where there was insufficient indication that child’s mother had voluntarily relinquished physical custody of the child); Jeff Atkinson, *Modern Child Custody Practice*, § 8.06 (“In most cases in which stepparents have obtained custody, the stepparent has been very active in raising the child and has treated the child as if it was the stepparent’s natural child.”); Schlam, *Illinois*, *supra* note 18, at 425 (abstracting these commonly used parameters from Illinois law).

68. See *In re Marriage of Ferrell*, 835 P.2d 267, 268 (Wash. Ct. App. 1992) (non-parents had standing where child ran away from stepfather and mother and they had subsequently cared for her for a year because “[the child] had been integrated into the [caregiver’s] home with the knowledge of her natural parents and they agreed to the change in custody).

69. See, e.g., Schlam, *Illinois*, *supra* note 18, at 424–41; Schlam, *Arizona*, *supra* note 18, at 751–60; Schlam, *Washington*, *supra* note 15, at 425–34.

70. Steven R. Hellman, *Stepparent Custody Upon the Death of the Custodial Parent*, 14 J. SUFFOLK ACAD. L. 23, 28 (2000) (courts have awarded step-parents custody using a variety of convoluted justifications) (citing Levy, *supra* note 20, at 194); see also Schlam, *Illinois*, *supra* note 18, at 443; Schlam, *Arizona*, *supra* note 18, at 719, 761; Schlam, *Minnesota*, *supra* note 33, at 773; Schlam, *Kentucky*, *supra* note 18, at 389.

71. See, e.g., Schlam, *Washington*, *supra* note 15, at 446–47.

72. 649 N.E.2d 1344 (Ill. App. Ct. 1995).

73. See *In re Marriage of Roberts*, 649 N.E.2d, at 1346.

74. See *id.* at 1345.

75. See *id.*

found that, by allowing Roberts to sign the birth certificate and believe he was the father, the mother impliedly agreed to share parenting rights with him.⁷⁶ Thus, Roberts was held to be an “equitable parent” with the same rights as the biological mother,⁷⁷ and was given standing to petition for custody.

On appeal, however, the court concluded that the “equitable parent” doctrine improperly derogates the more deeply rooted doctrine granting superior rights to “natural” parents.⁷⁸ Despite Roberts’ signature on the birth certificate, the court argued that there was at least some evidence that Roberts knew he was not the biological father.⁷⁹ Thus, it would be inequitable to imply that the mother intended to share parenting rights with him.⁸⁰ Roberts, now viewed as a non-parent, therefore lacked standing to request custody of his “son” because he only had sole possession of him (“physical custody *not* in a parent”) briefly while the mother was away on an excursion.⁸¹

Nevertheless, recognizing the “strong bonds” between Roberts and his child, the court chose to circumvent the need to show intentional and indefinite parental relinquishment on the mother’s part. As a result, Roberts was ultimately granted standing—but only under a parallel statutory provision purportedly applying only to *biological* parents disputing custody.⁸² Because Roberts petitioned for custody before it was conclusively determined that he was *not* the biological father, and because standing generally is based upon the status of the party at the time relief is sought, the court held that Roberts status as a *presumed* biological father at the time of petitioning for divorce was enough to grant him standing to seek custody.⁸³

This decision, which essentially ignores the plain meaning of the UMDA third party custody provision, represents an appropriate but unnecessarily convoluted approach to achieving the ultimate best in-

76. *See id.* at 1349.

77. *Id.*

78. *Id.* at 1349–50. Avoiding this sort of “inequity” against parental rights was, after all, the legislative intent behind the UMDA provision. *See supra* notes 18–21 and accompanying text.

79. *See In re Marriage of Roberts*, 649 N.E.2d, at 1346.

80. *See id.*

81. *See id.* at 1350–51.

82. *See id.*

83. *See id.* at 1351; *cf. In re D.T.*, 248 S.W.3d 74, 77 (Mo. App. 2008) (where a paternity test revealed that putative father was not the biological father of twin babies who had been taken into protective custody because he was aggrieved by the Circuit Court disposition denying his request to remain a party and be considered for kinship placement, father was held to have standing).

terests of a child.⁸⁴ Therefore, to avoid strained or subjective judicial reasoning, legislatures in UMDA custody states might very well have incentive to amend their “not in the physical custody of a parent” statutes to allow for easier judicial recognition of the diverse structures of modern families. For instance, legislatures might broaden the definition of “parent,” or loosen the requirements for standing⁸⁵ rather than have courts continue to strain to act in the “best interests” of children while focusing on adult “property rights.”⁸⁶

As it turns out, some states have enacted such statutory modifications, either upon the original adoption of the UMDA⁸⁷ or subsequently.⁸⁸ In Arizona, Minnesota, and Washington, legislatures reintroduced traditional common law approaches to standing decisions and more clearly defined and protected modern “de facto” parent-child relationships.⁸⁹ Though there has been only modest statutory revision in Illinois,⁹⁰ “creative” judicial statutory construction continues to be the vehicle for maintaining traditional analytical approaches in light of modern family life in that and, to some extent, other states.⁹¹ There has been more significant legislative reform in Colorado that also fa-

84. Hellman, *supra* note 70, at 28 (noting that courts have awarded step-parents custody using a variety of convoluted justifications).

85. Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 47 (2008) (due to the wide range of situations in which a third party custody order may be necessary, states should permit a broad set of individuals to seek custody; concerns that broad standing provisions would lead to a flood of meritless lawsuits are not borne out by actual data in states that have had nearly unlimited standing).

86. See, e.g., Schlam, *Illinois*, *supra* note 18, at 410, n.30; Schlam, *Arizona*, *supra* note 18, at 770–71; Schlam, *Washington*, *supra* note 15, at 451–52; Schlam, *Kentucky*, *supra* note 18, at 410, n.30; Schlam, *Minnesota*, *supra* note 33, at 770–71, nn.214–15.

87. See WASH. REV. CODE ANN. § 26.10.030(1) (West 2005).

88. See ARIZ. REV. STAT. ANN. § 24-415(B) (2001); MINN. STAT. § 518.156 (1998).

89. See, e.g., Schlam, *Arizona*, *supra* note 18, at 750–51; Schlam, *Washington*, *supra* note 15, at 425–26; Schlam, *Minnesota*, *supra* note 33, at 761.

90. Illinois has statutorily deviated from the original UMDA “physical custody” language only to the extent that it now specifically permits step-parents who have taken care of children for a certain amount of time to seek custody under some circumstances. 750 ILL. COMP. STAT. ANN. 5/601(3) (2006).

91. Schlam, *Illinois*, *supra* note 18, at 431–36; Schlam, *Kentucky*, *supra* note 18, at 387–91, 394–95; see also *In re E.L.M.C.* 100 P.3d 546, 553 (Colo. App. 2004) (interpreting § 1(c) of Colorado’s third party standing provision, the court held that the requirement that a non-parent be responsible for “the physical care” of a child for six months did not equate with *sole* custody being vested in the non-parent; this according to the court, was in harmony with the Colorado legislature’s implied acceptance of the “psychological parent doctrine” by adopting the provision).

cilitated increased judicial “child-centered” responsiveness to third party interests in that state.⁹²

Legislative and judicial responses to problems with the UMDA “standing” language have been varied. Returning to “tradition” may involve rejecting, accepting, or expanding the policy biases in the originally adopted UMDA language.⁹³ Such efforts, and whether or how they are made, just as with the question of whether to adopt the UMDA in the first place, largely result from the process of relatively distinct local or regional “social values” being maintained through the means dictated by individual “political cultures” within the states.⁹⁴ These disparate values and cultures, in turn, flow from the settlement and migration patterns of numerous waves of American immigrants and, *inter alia*, the cultural, political, and moral attitudes of their places of origin. Such local differences in political process or policy preferences have special importance where states are assumed to have plenary power to engage in experimentation with both legal process and substantive law in furtherance of local public policy.

92. In Colorado, there is now an option that allows custody proceedings to be commenced “[by] a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical custody.” COLO. REV. STAT. § 14-10-123(1)(c) (2007). *See, e.g., In re Custody of C.C.R.S.*, 892 P.2d 246, 253 (Colo. 1995) (finding that non-parents had “physical custody” because the natural mother “voluntarily relinquished physical custody of [her child] to [them] the day after he was born,” the mother and child “were separated from one another during the crucial bond-forming time at infancy,” and the child had been in the home of the non-parents and under their control for six months).

93. *See supra* notes 18–21 and accompanying text (noting bias in that third party custody provisions were intended to reinforce parental rights as against third parties). By comparison, in non-UMDA jurisdictions, and with regard to step-parents in particular, the trend has been contrary to the restrictive third party custody “standing” provisions in the UMDA: “While in some jurisdictions statutory language is a barrier to redefining parenthood, other jurisdictions have acknowledged that the definition of parent includes stepparents in custody determinations. [Only] three states [specifically] refer to stepparents as potential [custodians, but eleven other non-UMDA] states provide for general authority for a court to consider awarding custody or visitation to individuals other than natural parents. [Moreover, all] fifty states have adopted statutes analogous to the Uniform Child Custody Jurisdiction Act, by which third parties . . . were provided standing to claim custody of a non-biological child.” Hellman, *supra* note 70, at 28.

94. *See generally infra* Part II.

II.

FEDERALISM: GIVING VOICE TO VARYING LOCAL "SOCIAL
VALUES" THROUGH LOCAL STATE
"POLITICAL CULTURES"

One of the frequently noted attributes of our federal system is that the citizens of individual states have the freedom to experiment with their law and process to better maintain and reinforce local moral and social values.⁹⁵ This is important because dominant views on many social issues will be different across states,⁹⁶ including views regarding the appropriate balance between "fundamental" parental rights and the children's independent interests in meaningful non-parent relationships.⁹⁷ Arguably, with greater local protection for traditional parental rights characterized as a relatively conservative legal regime, and broader statutory definitions of "parent" and third party standing characterized as more liberal or progressive, most state populations' views about the importance of third party care-givers and the sanctity or integrity of biological families will fall all along the political spectrum.⁹⁸ As a corollary matter, there will be a local "political

95. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation [on social issues] is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social [experiments] without risk to the rest of the country.").

96. "The citizens of a [state] cooperate with each other because they share a core set of moral values and concerns." DANIEL J. ELAZAR, *CITIES OF THE PRAIRIE: THE METROPOLITAN FRONTIER AND AMERICAN POLITICS* 258 (1973) [hereinafter ELAZAR, *CITIES OF THE PRAIRIE*]; *see also* DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 112 (1966) [hereinafter ELAZAR, *AMERICAN FEDERALISM*] (noting that the sectional pattern in the nationwide distribution of the political cultures is one of the ways in which "sectionalism—the expression of social and economic, and political differences along geographic lines—are part and parcel of American political life"). "State policy within a larger federal system is valued by some because [of its] relatively greater responsiveness to diverse local needs, values, and culture . . ." Jonathan D. Varat, *Economic Integration and Interregional Migration in the United States Federal System*, in *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* 23 (Mark Tushnet, ed.) (1990) (citing Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94, 1509 (1987)).

97. *Id.*; *see also* Dailey, *supra* note 12 (observing that family law will inevitably differ among the states); ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 112 ("The sectional pattern in the nationwide distribution of the political cultures is one of the ways in which "sectionalism—the expression of social and economic, and political differences along geographic lines—are part and parcel of American political life.").

98. These views are usually expressed in state legislation. There appears to be a spectrum from narrowness to broadness in state definitions of those with standing to petition for child custody. *See, e.g.*, 750 ILL. COMP. STAT. 5/601(b)(2) ("A child custody proceeding is commenced in the court . . . by a person other than a parent, [but]

consensus,” or lack thereof, as to the role of state government in maintaining, regulating, and adjudicating these local “social values.”⁹⁹ This later “consensus” is described by political scientists as a state’s unique “political culture.”¹⁰⁰

In other words, the furtherance of local social values is the primary goal of a state’s political order,¹⁰¹ and how that political order accomplishes this is a matter of a given state’s political culture.¹⁰² Political culture will be derived in large part from the geographic origins of a state’s population,¹⁰³ that population’s view of the role of government in those places of origin, the extent of cohesion or conflict within a given state on particular social issues and policies, and the local population’s view of the government’s role in promoting or maintaining these policies.¹⁰⁴

only if he is not in the physical custody of one of his parents.”); N.C. GEN. STAT. § 50-13.1 (“Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child.”) (emphasis added); WASH. REV. CODE ANN. § 26.10.030(1) (“[A] child custody proceeding is commenced . . . by a person other than a parent . . . only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.”). This arguably reflects a variation in the views within each state as to how strongly the biological parent-child relationship should be protected.

99. “Political culture is particularly important as the historical source of such differences in habits, concerns, and attitudes that exist to influence political life in the various states.” ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 80, 85–86; ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 258. Comprehending the “political culture” of a particular state allows for a better grasp of why that state currently functions as it does politically. ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 80. Political culture “[influences] the definite manner of political and governmental practice in all members of a culture, in view of the culture’s existing notions on those matters.” ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 258.

100. ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 112, 258.

101. *See id.* at 258–59.

102. ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 86; ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 259.

103. ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, 94–104 (describing the geographic origins of American immigrants, their views on government, and the flow and settlement of these ethnic groups and their views throughout the country); *see also* ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 11. “[T]here exists a wide range of issues in which the dominant interests in any state can act as if they had statewide consensus behind them. These include some substantive issues in which the welfare or interests of the bulk of a state’s citizenry are clearly involved. . . . [The] highest degree of internal unity in relation to a specific . . . issue is invariably connected with some issue that would be of central importance to any society. Maintenance of cultural norms is one such issue.” *Id.* at 19.

104. These subcultures are the product of each state’s geography, history, demographics, culture, and reaction to national political developments. *See* ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 258.

The notion of political culture incorporates two basic concepts¹⁰⁵ that shape the perceptions and expectations of citizens and public officials regarding the political process.¹⁰⁶ First is the notion of the political order as a “marketplace” in which both individuals and groups negotiate and bargain to peacefully balance various interests.¹⁰⁷ On the other hand, the political order may be thought of as a “commonwealth”¹⁰⁸ where the citizens, as a whole, have unified, overarching interests and values.¹⁰⁹ Indeed, most state citizens successfully cooperate with each other politically because they share a core set of moral values and concerns.¹¹⁰ In a federal system, therefore, state efforts to maintain and further “core moral values and concerns” will involve independent experimentation within a local political context, and will result in varying approaches among states as to the regulation of any particular matter. “Uniformity” in state treatment of particularly important social or moral issues, it would follow, is *not* to be expected. The late Professor Daniel J. Elazar proposed that there are three main forms of political culture¹¹¹ in the United States, and that each state’s population may include influential traces of more than one of these cultures. First, there are “traditional” political cultures, in which most citizens assume that legislatures and courts will reinforce long-held views or traditions of family and social hierarchy or interaction.¹¹² Second, those living within “moralistic” cultures expect government to take a more active, affirmative role in promoting public welfare by adopting modern approaches to legal problems that benefit the popula-

105. *See id.*

106. *See id.*

107. *Id.*

108. ELAZAR, AMERICAN FEDERALISM, *supra* note 96, at 85; ELAZAR, CITIES OF THE PRAIRIE, *supra* note 96, at 258–59.

109. ELAZAR, AMERICAN FEDERALISM, *supra* note 96, at 85; ELAZAR, CITIES OF THE PRAIRIE, *supra* note 96, at 258–59.

110. ELAZAR, CITIES OF THE PRAIRIE, *supra* note 96, at 258.

111. ELAZAR, AMERICAN FEDERALISM, *supra* note 96, at 86; ELAZAR, CITIES OF THE PRAIRIE, *supra*, note 96, at 259.

112. “In a traditionalistic society, those at the top social levels are expected to lead.” ELAZAR, AMERICAN FEDERALISM, *supra* note 96, at 86. “The traditionalistic leader . . . acts mainly to preserve the existing societal structure.” *Id.* at 97. Leadership and political power is often sought to be transferred through familial and social connections. ELAZAR, CITIES OF THE PRAIRIE, *supra* note 96, at 264. Individuals without any social or familial connections to politics are not expected to participate. *See id.* at 264–65. Thus, the preservation of traditional views of family structure and nature is important in a traditionalistic political culture, which acts as a preserver of existing order rather than a promoter of change, where “the favored role of government is custodial as opposed to active.” *See id.* at 265.

tion as a whole.¹¹³ Finally, “individualistic” cultures (which tend to include states with diverse demographic origins and a *lack* of internal consensus on political or social issues) are most comfortable with a government acting more as a neutral “referee” on questions of social policy.¹¹⁴

These generalized traits of state political cultures do not necessarily correlate, of course, with what might be considered liberal or conservative views on social issues in states with these cultures.¹¹⁵ In other words, one may not be able to predict which state will or will not

113. “The overriding goal of the ‘moralistic’ state subculture is the promotion of a ‘good society,’ generally involving some form of altruism.” ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 262. “The viewpoint taken by members of the [moralistic] society, both the politically active and the everyday citizenry, is that government exists to promote the greater public good.” ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 90; ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 262. The private goals of the individual are secondary to community well-being. ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 262. Governmental resources are often used to accomplish this. *See id.* “Moralistic societies do not have any strong preference for maintaining the status quo or promoting change.” *Id.* at 264. “Whichever of these seems most likely to accomplish the agreed-upon [social] goals of the culture is acceptable.” *Id.*; *see also* ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 92.

114. In the individualistic political subculture, the importance of the political order as a vehicle for negotiating and bargaining among disparate organized interests of citizens is stressed. ELAZAR, *CITIES OF THE PRAIRIE*, *supra* note 96, at 259. “The only point at which the individualistic culture will express a concern for society as a whole is when expressing that concern serves a marketplace function.” *Id.* at 260. “As long as the consumer’s most pressing demands are met, the political actors within the system will be reluctant to enact any significant change; keeping their own individual relationships satisfied is more vital than actualizing anything but the strongest of mandates from the members of the society.” *Id.*

115. One cannot necessarily assume any correlation or relationship between traits of various political cultures and conservative or liberal social values. *See* ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 109; *see, e.g.*, N.C. GEN. STAT. § 50-13.1 (West 2000) (representing the current provision regarding third party custody in North Carolina, a state which did not adopt the UMDA third party provisions but is ordinarily considered by political scientists to be a traditional political culture, stating, “Any parent, relative, or other *person*, agency, organization or institution *claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child.*”) (emphasis added). Resolving this question is beyond the scope of this article. However, one scholar has attempted to characterize the forms of third party access or standing provided by individual states as (1) those providing unlimited standing, (2) those providing much more restrictive access, (3) states that permit only certain relatives to seek custody, (4) states that limit standing to existing long-term caretakers, (5) states that grant standing to any third party when the child is not living with a parent of children, and (6) states that limit third party custody actions only to divorce or a parent’s death. *See* Gupta-Kagan, *supra* note 85, at 74–84. Nevertheless, these categories of provisions do not allow for conclusions about the significance or character of these policy positions (expression of “social values”) or the relationship between social values and the traits of political cultures as described by Elazar. *See* ELAZAR, *AMERICAN FEDERALISM*, *supra* note 96, at 97 (providing a map indicating the forms of political culture within and among the states).

have a bias toward granting third party custody rights at any given point in time based solely on its assigned political culture. All states, however, will still tend to express public policies regarding similar issues in a variety of ways. This experimentation generates an important national conversation about best practices in public policy.

Thus, without a more apparent need for nationally uniform legal process and doctrine, as there was in interstate commercial law or the law of conflicts of law, uniform child custody laws such as the UMDA standing provisions would seem counter-productive with regard to the important value of federalism in the United States. If this is true, then, why would uniform law entities have sought to encourage national uniformity in this area of law, especially if this would be inconsistent with both the pre-existing, functional common law in the field and the desirable goal of local experimentation with public policy? If it was not clear that national uniformity in third party standing law was necessary to clarify the law or enhance the "fair administration of justice," why promulgate national law in this field of traditionally local concern?¹¹⁶

III.

THE NATURE AND CRITICISM OF THE UNIFORM LAW MOVEMENT AND ITS MEANS OF PROMULGATING UNIFORM LAWS

There are certain ideas of uniformity that sometimes seize Great spirits, [but] that Infallibly strike small ones. They find in it a kind of perfection they recognize because it is impossible not to discover [it. But] is this always and without exception appropriate? . . . And does not the greatness of genius consist rather in knowing in which cases there must be uniformity and in which differences? [When] the citizens observe the law, what does it matter if they observe the same ones?¹¹⁷

The "Uniform Law Movement" began in the latter part of the nineteenth century when prominent leaders of the legal profession argued that there was confusion or "uncertainty and complexity" in the common law among the states.¹¹⁸ Many academics took the view that

116. "Family law is essentially the province of the states." David R. Fine & Mark A. Fine, *Learning From Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 49 (1992).

117. CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 617 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

118. See John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 617 (1998) (At the first meeting of the Institute in 1923, it was agreed that the law was in a "deplorable state." The Institute determined that "badly drawn statu-

there was a need for a national common law.¹¹⁹ This growing sense, at least in some quarters, that significant problems resulted from interstate doctrinal inconsistencies resulted in the formation of the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1892,¹²⁰ and the American Law Institute (ALI) in 1923.¹²¹ The existing literature, however, fails to indicate the precise nature of the hindrance to the administration of justice that diverse common law approaches in areas such as family law, or other fields unrelated to interstate commerce or conflicts of law, produces.

The NCCUSL has drafted uniform codes on a variety of matters, the most well-known being the Uniform Commercial Code (“UCC”).¹²² Over the years, the NCCUSL has expanded its scope of activity but has remained dedicated to the formation and promulgation of model codes within non-regulatory areas.¹²³ Among the founders and early leaders of the ALI were some of the country’s most prominent legal minds.¹²⁴ William Draper Lewis, the first director of the ALI, characterized its goal at its founding in 1923 as follows:

There existed then a growing feeling among the members of the legal profession [that they owed] a duty to the public to im-

tory provisions and the unnecessary multiplication of administrative provisions caused great uncertainty and complexity,” along with the voluminous influx of case law, created a lack of agreement among lawyers as to fundamental principles of the common law.). Between 1914 and 1921, many academic leaders in the legal profession from schools such as Harvard, Yale, and the University of Wisconsin, were in agreement that an organization devoted to the study of the *broad variances* of the law be established. See William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law*, in AMERICAN LAW INSTITUTE, *RESTATEMENT IN THE COURTS* 1 (perm. ed. 1932–1944) (“My plan was the creation of an organization . . . which could produce an orderly Restatement of the Law tending to clarify and . . . simplify what [may be termed] the general Common Law of the United States.”); see also *About the American Law Institute*, AM. LAW INST., <http://www.ali.org/doc/thisIsALI.pdf> (last visited Mar. 23, 2009); *Frequently Asked Questions*, UNIFORM LAW COMM’N, NAT’L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited Oct. 21, 2011).

119. See *supra* note 118 and accompanying text.

120. *About Us*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Oct. 21, 2011).

121. See Lewis, *supra* note 118, at 1 (recounting how, at the time the American Law Institute was created in 1923, many lawyers felt that the common law in the U.S. had become an “indigestible mass of decisions” which would benefit from an orderly restatement).

122. *Frequently Asked Questions*, *supra* note 118 (noting that the drafting of the UCC remains the “signature product” of the NCCUSL).

123. See *id.* (noting that the NCCUSL rarely drafts laws that are regulatory in nature).

124. See Frank, *supra* note 118, at 615–17 (Elihu Root, William Howard Taft, Benjamin Cardozo, and Learned Hand were all early leaders within the organization).

prove the administration of justice. Many lawyers felt that the growing indigestible mass of decisions threatened the continuance of our common law system.¹²⁵

The ALI, therefore, generally sought only to clarify and summarize existing law. The NCCUSL, on the other hand, drafted codes for states to either adopt directly or with minimal changes.¹²⁶ The first set of ALI restatements, drafted between 1923 and 1944, spoke to subjects such as agency, contracts, and torts.¹²⁷ These areas were chosen because the founding committee concluded that uncertainty in the law should first be addressed through subjects with apparent interstate consequences.¹²⁸ In 1952, however, the ALI expanded its function to more closely resemble that of the NCCUSL. It drafted model and uniform codes, such as the joint effort between both entities that resulted in the UCC.¹²⁹

The UMDA third party custody provisions, on the other hand, were promulgated much later because a group of presumably knowledgeable experts in family law concluded that, at least by the 1970s, there was too much judicial discretion being exercised in favor of non-parents.¹³⁰ Of course, it is equally plausible that state courts during this time were not “prejudiced” against parents but were simply re-

125. Lewis, *supra* note 118, at 1. This work does not, however, identify what was meant by the term “indigestible” or reflect on the problem of the importance of local variation in the common law.

126. “By 1935, the Restatement was committed . . . to restating the common law ‘with such care and accuracy that courts and lawyers may rely upon the Restatement as a current statement of the law as it now stands’; and to expressing those principles ‘with clarity and precision.’” Frank, *supra* note 118, at 619.

127. See Frank, *supra* note 118, at 619.

128. See *id.*

129. See *supra* notes 18–19 and accompanying text.

130. See *supra* note 18 and accompanying text. This antipathy to judicial discretion in custody adjudication was not uncommon in state legislatures either. See, e.g., John J. Sampson, *Choking on Statutes Revisited: A History of Legislative Preemption of Common Law Regarding Child Custody*, 45 FAM. L.Q. 95, 97 (2011) (describing the massive expansion and extensive legislative specification of family law policies in Texas throughout the last four decades). Sampson argues that:

Most of the changes, large and small, in the allocation of “parental custody and visitation in the *Texas Family Code* [between] 1973 through 1995 [was] the product of interest group lobbying, especially volunteer fathers’ rights groups and the Family Law Section of the State Bar of Texas,” and that the consequence has been intermittent tension between legislators and the judiciary, on the one hand, as well as continuing pressure on legislators from constituents, lawyers, sometimes judges, and divorcing or divorced parents determined ‘to improve’ the Code, and often to revisit old battle grounds and to re-litigate the political and policy issues.

sponding to the changing, modern circumstances of family life in the United States.¹³¹ But even if it can be argued that third party custody disputes now required an additional preliminary jurisdictional requirement to reinforce parental rights, what accounts for the apparent assumption that individual state courts and legislatures, already long predisposed to raise reasonable “parental rights” barriers to third party custody claims,¹³² would not continue to do so, or that state courts should not be allowed to determine the appropriate balance between

131. During the long historical period preceding adoption of the UMDA, in most states there would seem to have been a traditional, functional balancing of the abilities of parties with meaningful relationships with children to further their “best interests.” This was accomplished with due regard always given to the parental preference as valued in each state. *See, e.g., In re Guardianship of Palmer*, 503 P.2d 464, 465 (Wash. 1972) (stating that “the welfare of the child is the only operative standard at this stage of the [custody determination] and all other considerations are secondary”); *see also Clifford v. Woodward*, 320 P.2d 452, 458 (Ariz. 1957) (ruling in favor of a stepfather over the natural father because, although “[nothing in the record] in any way reflects adversely upon the character, the morals or the fine home and family of [the father and his new wife],” the stepfather had acted as a full parent to the child.) (quoting trial judge’s order); *People ex rel. Edwards v. Livingston*, 247 N.E.2d 417, 421 (Ill. 1969) (indicating that it is not true “that in [a third party custody] proceeding [the father’s] parental right to custody cannot be superseded unless he is shown to be unfit or to have forfeited his rights . . . [T]he best interest of the child is the standard and . . . if it is in the best interest of the child that he be placed in the custody of someone other than the natural parent,” this is appropriate); *Reynardus v. Garcia*, 437 S.W.2d 740, 742 (Ky. 1969) (considering, in holding in favor of the child’s maternal grandparents against the natural father, “[the father’s] moral fitness and habits, surroundings, age, financial ability, interest and affection for the child, and any circumstances, which would be prejudicial to the best interests of the child”); *Wallin v. Wallin*, 187 N.W.2d 627, 630 (Minn. 1971) (“[A]ll things being equal, as against a third person, a natural [parent is] entitled as a matter of law to custody of [his or] her minor child unless there has been . . . [parental] neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care . . . , or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child . . .”). Thus, at this point in the evolution of principles of third party adjudication in UMDA states, attitudes in many parts of the country became accepting of “blended” and “extended” families and local common law adjusted accordingly.

132. *See, e.g., Harper v. Tipple*, 184 P. 1005, 1007 (Ariz. 1919) (child’s maternal grandparents cared for the child while the mother was ill and the father agreed that the grandparents could raise the child after the mother’s death, but when the father subsequently petitioned for custody, the court reasoned that based on the father’s superior parental rights his original acquiescence did not bar him from receiving custody, as such a result would be “against public policy.”); *Wohlford v. Burkhardt*, 141 Ill. App. 321, 325 (1908) (“Unless the evidence is clear that the parent of the child is unfit to care for it, the father should have [custody].”); *Lehman v. Martin*, 103 N.W. 888, 888 (Minn. 1905) (“The only question . . . is whether . . . respondent is a fit and suitable person to have the custody and care of his child. [The father’s right] is paramount and superior to that of any other person, and prima facie entitles him to [custody], unless the evidence shows that the child’s welfare demands and requires that [the child] remain with [the grandmother].”).

parental and non-parental interests themselves? After all, local courts knowledgeable in local values¹³³ would appear to be more than competent to make these decisions.

Perhaps the problem was that custody standing rules were promulgated through a uniform law rather than as part of a restatement, which serves as a cohesive, treatise-like organization and explication of an area of law developed by national experts.¹³⁴ Restatements are not drafted to be adopted; however, it is anticipated that legislatures could at least reflect upon them when re-evaluating local practice or substantive law.¹³⁵ Uniform laws, on the other hand, are promulgated to be adopted by as many states as possible,¹³⁶ even though adoption may hinder the ongoing development of local common law consistent with currently predominant local social views.

This problematic aspect of uniform laws has long been recognized in the scholarship evaluating the uniform law movement. Uniform laws or codes, and the means of their production¹³⁷ have been much discussed in recent years. Indeed, criticism has been leveled against both restatements¹³⁸ and uniform codes,¹³⁹ and against the

133. See, e.g., Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 56 (1988) ("State courts are generally closer to the public, to the legal institutions and environments within the state, and to the public policy process.").

134. See *supra* note 117 and accompanying text; Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596 (1995) ("The ALI is a self-perpetuating organization of lawyers, judges, and academics. Its primary function is to promulgate restatements of law. These restatements are sets of rules, organized by subject matter, the content of which is partly a function of the case law but also is a function of the ALI's collective view respecting which legal rules are normatively desirable for courts to apply. Restatement rules do not have binding force but are advisory to courts. Inclusion of a rule in a restatement, however, is widely thought to increase the likelihood that courts will follow it.").

135. See *supra* note 17 and accompanying text.

136. See *id.*

137. See, e.g., Steven L. Schwarcz, *A Fundamental Inquiry Into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 915–16 (1995) (The statutory rulemaking process for uniform laws such as the U.C.C., for example, is a relatively discretionary process based on whether the Permanent Editorial Board for the Uniform Commercial Code deems an addition or revision to the U.C.C. desirable. Under the current process for revising the U.C.C., two 'respected' lawyers or academics are appointed as reporters for a study committee. These reporters garner comments and suggestions by others in the field and submit their own ideas, based upon which the study committee issues a report containing its recommendations.).

138. See generally Kristen David Adams, *The Folly Of Uniformity? Lessons From The Restatement Movement*, 33 HOFSTRA L. REV. 423, 424–25 (2004) (due to the application of restatements in areas with a rich common law history, tailored for the specific community in which it originates, the natural development of the common law becomes restricted or restrained, replaced by the restatement view of legal doctrine). This effect is even more undesirable because restatements have become in-

promulgating entities themselves.¹⁴⁰ Some criticize the use of uniform laws for certain geographic areas,¹⁴¹ or within certain legal fields.¹⁴²

creasingly normative even though they are the result of interest group politics. *See id.* at 424.

139. *See, e.g.,* Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 572 (1998). The weaknesses of the uniform law drafting process are apparent in the attempts to revise the U.C.C. because, in an effort to maintain simplicity and uniformity, employment safety concerns, usually important matters of local public policy, still remain:

Secured credit may create an incentive for debtors to make unreasonably small investments in product and workplace safety while imposing the costs of this risky strategy on involuntary creditors and other creditors who do not have a meaningful ability to protect against or adjust to this risk. The Article 9 revision process has not explored or responded to this concern in any meaningful way.

Id.

140. Alex Elson, *From the Trenches and Towers: The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 625–26 (1998) (In recent years, critics increasingly argue that the Institute has veered away from its original purpose of clarifying the law and instead of investing quasi-judicial and legislative power into an elite few, that the lawyers comprising it do not necessarily have all of the right policy and administrative answers, that “the need for interdisciplinary scholarship has been ignored,” and that the main groups that work on Institute projects lack intellectual and generational diversity.); Schwartz & Scott, *supra* note 134, at 598 (noting that, although the NCCUSL is thought to be politically neutral, it is in fact influenced by politics just as is any other rule-making body, and so, as between a uniform law promulgated by the NCCUSL and other traditional modes of lawmaking, “[t]his showing should influence the choice of which legal vehicle is best for regulating particular subjects”).

The ALI is a self-perpetuating organization of lawyers, judges, and academics. Its primary function is to promulgate restatements of law. These restatements are sets of rules, organized by subject matter, the content of which is partly a function of the case law but also is a function of the ALI’s collective view respecting which legal rules are normatively desirable for courts to apply. Restatement rules do not have binding force but are advisory to courts. Inclusion of a rule in a restatement, however, is widely thought to increase the likelihood that courts will follow it.

Id. at 596.

141. *See, e.g.,* Adams, *supra* note 138, at 424 (criticizing the use of restatements in the Virgin Islands, Adams notes that the islands’ geographical isolation, in the absence of restatements, make it a “common-law backwater [and thus] a valuable creative engine and resource”).

142. *See* Janger, *supra* note 139, at 580–82 (suggesting that uniform laws should *not* be promulgated either when interest group theory predicts “capture” of either the uniform law process or state legislatures, that is, when there is disproportionate power among interest groups, or where interest group theory predicts a “race to the bottom”). A “race to the bottom” refers to the undesirable or inefficient outcome of competition among the various state legislatures. *See id.* at 579. In the context of the U.C.C., for example, the “race to the bottom” is exemplified by a lack of restriction on corporations by state legislatures, as opposed to the “race to the top” that would result in efficient regulatory rules imposed on corporations consistent with local public policy. *See id.* “[T]he effect [of capture and a race to the bottom] will be to cause the promul-

Others are concerned less with the appropriateness of uniform laws than the fact that the process by which these laws are created is tainted.¹⁴³

Uniform laws, as noted earlier, can have the undesirable effect of disrupting the desirable, natural evolution of an area of substantive law.¹⁴⁴ Even restatements can do this where they are adopted or treated as highly persuasive.¹⁴⁵ This is especially problematic with regard to family law, which, by its nature, relates to the social and moral views of the local people to whom it applies¹⁴⁶—populations whose

gation and uniform adoption of an inefficient or otherwise inappropriate rule.” *Id.* at 580.

143. See Elson, *supra* note 140, at 626 (noting that the ALI has become politicized, subject to special interest lobbying, and that members respond to these lobbying efforts, in some cases as partisans); Schwarcz, *supra* note 137, at 598 (noting that choices in the promulgation of uniform laws which require value judgments, as opposed to questions of technology or efficiency, attract the attention of interest groups, which have an effect on the uniform law drafting process). “NCCUSL furnishes useful technical expertise to state legislatures in areas where there is a consensus on the underlying values and where the resulting statutes cannot create large winners and losers. The set of such ‘technical subjects’ is, however, considerably smaller than the set of subjects that NCCUSL and the ALI attempt to regulate.” *Id.* at 599–600 (emphasis added). See also Charles W. Wolfram, *Bismarck’s Sausages and the ALI’s Restatements*, 26 HOFSTRA L. REV. 817, 820–21 (1998) (suggesting that parties, in an attempt to influence the decisions of courts in their favor, “attempt to influence the shape of a Restatement-in-the-making.”). An interested party, for example, may retain a lawyer to exert pressure on the process by which restatements are promulgated. See *id.*

144. See Adams, *supra* note 138, at 445–50 (suggesting that “fit is more important than uniformity” in that the common law naturally develops to accommodate local values and views). This dynamic nature allows the common law flexibility, which in turn allows it to develop in such a way so as to “learn from experience” in relation to the effect a particular locality’s common law has on the locality, and the extent to which it reflects local mores and views. See *id.*; see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic; it has been experience [The] law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”).

145. Adams, *supra* note 138, at 425 (noting that, in the Virgin Islands, the authoritative connotation which attaches to a restatement, once adopted, shifted the focus of the common law away from its flexible nature and toward a rigid application of the principles promulgated in a restatement).

146. See *infra* note 177. Also, speaking of the appropriateness of uniform laws within the European Union, one scholar has opined:

In contrast to other legal subject areas, such as the law of carriage and the law on securities, which by their very nature are global and thereby render a substantive unification within reach, family law is a more intrinsically local matter. A variety of factors facilitate the impression of domestic sources being unique and incompatible with a unification, including national customs, the incorporation of different views into laws, religious and emotional bonds. . . . [“Cultural” constraints” vary strong [sic] in different fields of family law.

views will differ partly due to the migration and settlement patterns of waves of immigrants with different backgrounds and origins. Thus, it seems reasonable that individual states or regions tend to have different social and policy orientations regarding the fundamental right of parents to raise their children as compared to children's interests in non-parent relationships.¹⁴⁷ Applying uniform code provisions to otherwise culturally unique jurisdictions, especially regarding family law, could serve as an unnecessary intrusion into state judicial autonomy with regard to enforcement of local public policy and values.¹⁴⁸

Other potential difficulties caused by the promulgation of uniform standing laws may be found in the criticism of the general process through which uniform laws are created,¹⁴⁹ particularly the claim that the drafting and adoption process may be captured by special interest groups¹⁵⁰ that ordinarily attempt to exert influence on state legislatures.¹⁵¹ The argument is that, as the uniform law process became more prominent and influential, it became more efficient to directly lobby members of the national uniform law entities.¹⁵²

Supporters of these entities have, however, defended them from the accusations of a potential lack of impartiality.¹⁵³ They acknowl-

Dieter Martiny, *Is Unification of Family Law Feasible or Even Desirable?* 9 (May 20, 2010) (unpublished manuscript), available at <http://ssrn.com/Abstract=1612157>.

147. See *id.*

148. See, e.g., Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713, 1722–23 (1988) (emphasizing the diversity of American subcultures and the risks of attempts at homogenization); see also *infra* note 177 (discussion of Dailey's argument for state control of family law issues so as to reinforce local mores and values).

149. See Wolfram, *supra* note 143, at 820–21 (noting that the effect of those who lobby the uniform law drafters would undoubtedly be, at the least, to assert disproportionately represented interests and, at the worst, the promulgation of uniform laws which are not reflective of a particular state's political culture or social mores).

150. See Elson, *supra* note 140; see also Janger, *supra* note 139, at 583 (noting both that the greatest strength and the greatest weakness of the uniform law drafting process is that it engages the most talented drafters and informed professionals, and fosters a careful, deliberative process, but this has the unintended effect of heavily restricting the number of people and groups that participate in the process); Schwarcz, *supra* note 137, at 598 (noting that interest groups have a disproportionate effect on the uniform law drafting process).

151. It was thought that "capture" would result either in non-adoption of certain uniform laws or adoption of laws to circumvent those uniform laws. See Janger, *supra* note 139, at 578 (based on the political factors in individual state legislatures, the result will be either that state legislatures refuse to adopt the law or enact subsequent laws to change the uniform law proposed).

152. See *id.* (suggesting that the uniform law process is captured by interest groups at the uniform law level who likely carry and use influence since the drive for adoption by the states requires an attempt to neutralize the effects of *local* capture at the individual state level).

153. See Henry Gabriel, *The Revision of the Uniform Commercial Code—How Successful Has It Been?*, 52 *HASTINGS L.J.* 653, 660 n.20 (2001) ("It should be noted that

edge that “it is wholly inappropriate for members of these entities to assume partisan views in their work,”¹⁵⁴ but they argue that any outside influence is minimized by the alleged “insulation” of the process.¹⁵⁵ This defense nonetheless relies on the presumed integrity of the members of these organizations, an assumption that the ethics of their members are somehow stronger or greater than those of state legislators.¹⁵⁶ Yet even those who promote the work of these entities acknowledge the potential for normally disinterested scholars and experts to be captured by special interest politics.¹⁵⁷ Thus, some have argued that closer scrutiny must be applied to the uniform law process of “private legislatures” like the ALI.¹⁵⁸

There are other capture-related difficulties that contribute to the promulgation of arguably inappropriate uniform laws as well.¹⁵⁹ One of the goals of the uniform law movement is to encourage state legislatures to enact uniform laws with few or no changes.¹⁶⁰ The success of uniform law efforts is often judged by the number of jurisdictions that adopt them.¹⁶¹ Thus, the desire of uniform law entities to see their

it is wholly inappropriate for members of NCCUSL or the ALI to assume partisan views in their work,” as the regulations of impartiality imposed upon them requires them to be “disinterested.”).

154. Supporters of uniform law entities assume that the seriousness with which the members take their duties will counter any potential bias. See Henry D. Gabriel, *The Revisions of the Uniform Commercial Code-Process and Politics*, 19 J.L. & COM. 125, 131–32 (1999).

155. *Id.* This insulation is accomplished through the membership process whereby members do not owe their membership to any political entity or constituency, but to the existing membership. See Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 91–92 (1993).

156. See *supra* notes 151–53 and accompanying text.

157. ALI and NCCUSL members are still individuals susceptible to the same influences and temptations as any other “legislator.” See Schwartz & Scott, *supra* note 134, at 650–51.

158. *Id.* at 597 (noting that the substance of a particular law is inherently informed by the process by which that law was drafted, yet analyses of the institutional processes which occur in drafting uniform laws is surprisingly scarce). See also Elson, *supra* note 140.

159. See Janger, *supra* note 139, at 578–79 (pointing out that the “interest in enactability” and competition among the states to enact the laws that are most attractive to commercial enterprises also lead drafters to promulgate uniform laws that are not necessarily in the best interest of all of the parties affected).

160. See *id.* at 587–88 (making the point that because drafters necessarily seek universal adoption of a uniform set of rules, consensus is required, and any threat by a single state to disrupt the adoption of the uniform rules may allow that state to unduly influence the promulgation of the rules).

161. See *id.* at 576 (“Since the inception of the uniform law project, its sponsor organizations, the [ALI] and [NCCUSL], have measured the success of each uniform drafting effort by counting the number of uniform adoptions.”).

model schemes uniformly enacted is likely to allow the concerns and biases of state legislators who are being asked to adopt a given uniform law to reach the uniform law drafters.¹⁶² That is, the uniform law drafters must take into account the potential influences to which various state legislatures will be subjected when they decide whether and how to adopt a uniform law.¹⁶³ This phenomenon is referred to as “anticipated capture.”¹⁶⁴

These concerns about propriety and legitimacy of process exist within any area of law contemplated for uniformity. Even uniform codes that are generally acknowledged to be widely successful, such as the UCC, have been subjected to criticism on these grounds.¹⁶⁵ Questions of propriety are compounded in areas like family law that tend to evolve from unique local social values and regional attitudes.¹⁶⁶

Thus, it would seem that child custody law should at least be presumed to be inappropriate for nationally uniform statutory treatment.¹⁶⁷ Indeed, the UMDA third party standing provisions would appear to be the result of both capture and anticipated capture on a national level.¹⁶⁸ The disapproval of a doctrinal development in many states perceived as inappropriate by experts, even a large group of *national* experts,¹⁶⁹ should not justify efforts to change the course of local state common law.

162. See Gabriel, *supra* note 153, at 664 (noting that capture by state legislature’s presents a problem because it leads the drafters to take a position that is not necessarily based on the “ideal policy, but on the subsidiary goal of getting the act enacted.”).

163. See *id.*

164. See Janger, *supra* note 139, at 578–79, 587.

165. See Gail Hillebrand, *The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191,193 (1994) (noting that the original U.C.C. was drafted contemplating negotiations and equality of bargaining between two or more commercial entities but, in reality, many modern business transactions take place between consumers and commercial entities who are not on an equal footing, a fact that must be considered in revising the code).

166. See *supra* note 37 and accompanying text. Speaking of the appropriateness of uniform laws within the European Union, for example, one scholar has opined that:

In contrast to other legal subject areas, such as the law of carriage and the law on securities, which by their very nature are global and thereby render a substantive unification within reach, family law is a more intrinsically local matter. A variety of factors facilitate the impression of domestic sources being unique and incompatible with a unification, including national customs, the incorporation of different views into laws, religious and emotional bonds. . . . [“Cultural” constraints] vary strong [sic] in different fields of family law.

See Martiny, *supra* note 146.

167. See *supra* note 165.

168. See *supra* note 17 and accompanying text.

169. See *id.*

IV.

ANALYSIS: WHAT THE UMDA THIRD PARTY CUSTODY EXPERIENCE SUGGESTS ABOUT THE GOAL OF “NATIONAL COMMON LAW” AND SOME MODEST PROPOSALS FOR IMPROVING UNIFORM LAW PROMULGATION

Third parties with meaningful relationships with children were initially at a disadvantage after the unprecedented third party custody jurisdictional standing requirements promulgated as part of the UMDA.¹⁷⁰ The biological-parent preference reinforced by these provisions was beyond that necessary to preserve the constitutional and natural rights of parents.¹⁷¹ Indeed, available scholarship suggests that the parental bias introduced into the custody dispute process by these provisions was the result of capture by socially conservative interests.¹⁷²

As a result, many states that adopted the UMDA custody standing provisions, focused as the provisions are on ascertaining relative adult “quasi-property” or “possessory” legal rights as a jurisdictional question,¹⁷³ engaged in creative judicial decision-making or legislative reform to advance the “best interests” of children in the modern era. These creative efforts reestablished earlier common law approaches to third party custody disputes—which had successfully balanced parental prerogatives with third party interests for decades and which, with some modifications, would better accommodate disputes over family structure in the future.¹⁷⁴

Thus, a question naturally arises as to why uniform law entities would promulgate such a radical change in third party custody disputes through the UMDA. Why not simply allow state common law in this area to develop naturally,¹⁷⁵ taking into account both the circumstances of the modern family and the unique social values within each jurisdiction? Each state, after all, has a relatively unique political culture through which predominant local social values¹⁷⁶ are maintained, especially with regard to matters such as the nature of families and the

170. See *supra* notes 25–31 and accompanying text.

171. See *supra* note 53 and accompanying text.

172. See *supra* note 17 and accompanying text.

173. See, e.g., Kevin Noble Maillard, *Rethinking Children as Property: The Complex Family*, 32 CARDOZO L. REV. 225 (2010) (noting that the law persists in treating children as property, rooted in static, rigid, and exclusive claims).

174. See *supra* notes 33, 66–69 and accompanying text.

175. Cf. Janger, *supra* note 139, at 627 (“[W]ith regard to consumer protection, [for example,] nonuniform law may work somewhat better.”).

176. See *supra* Part II.

parent-child relationship.¹⁷⁷ These cultural and social differences demand the unique evolution of local common law contemplated in a federal system.¹⁷⁸ Child custody law, therefore, would seem an inappropriate target for the uniform law movement,¹⁷⁹ especially given the high probability of nationally diverse views on matters of family relations.¹⁸⁰

The reasons why uniform law entities might have promulgated uniform child custody laws rather than simply drafted a potentially persuasive restatement would appear to relate to common criticisms of the uniform law process. First, that the process was captured by special interest groups—the conservative “pro-parental rights” lobby, or entities responsible for the third party custody provisions, including divorce lawyers (who regularly sided with biological parents), some religious groups, and “family sanctity” organizations that had a narrow social policy agenda.¹⁸¹ These are groups that ordinarily attempt to exert influence on state legislatures as well.¹⁸² As the uniform law

177. See generally, Dailey, *supra* note 12 (defending state control over family law issues based on the idea of localism and the notion that local courts are more likely to represent shared community norms and values relating to family life). Dailey explains that the nature of family, and its proper relationship to liberal government, dictates local control of family issues:

The communitarian nature of family law requires a level of political engagement and a sense of community identity that lie beyond the reach of national politics. As the quality of political deliberation falls and as the bonds of community thin out, the danger that shared values will degenerate into governmentally dictated values increases. By situating communitarian politics at the state level, therefore, localism ensures that the civic participation, political dialogue, and shared values essential to family law will develop within the states’ smaller, relatively more accessible political locales.

Id. at 1871–72; see also Martiny, *supra* note 146.

178. See *supra* Part II.

179. See *id.*

180. See *id.*; see also Fine & Fine, *supra* note 116, at 49 (“Family law is essentially the province of the states.”); Martiny, *supra* note 146.

181. See Elson, *supra* note 140; see also Janger, *supra* note 139, at 583 (both the greatest strength and the greatest weakness of the uniform law drafting process is that it engages the most talented drafters and informed professionals, and fosters a careful, deliberative process, but this has the unintended effect of heavily restricting the number of people and groups that participate in the process); Schwarcz, *supra* note 137, at 598 (interest groups have a disproportionate effect on the uniform law drafting process). This may be the case in state legislation concerning custody law as well. See, e.g., Sampson, *supra* note 130 (discussing the nature and impact of special interest groups on the Texas Family Code).

182. It was thought that “capture” would result either in non-adoption of certain uniform laws or adoption of laws to circumvent those uniform laws. See Janger, *supra* note 139, at 578 (observing that, depending on the political factors in individual state legislatures, the result will be either that state legislatures refuse to adopt the law or enact subsequent laws to change the uniform law proposed).

process becomes more prominent and influential, it becomes more efficient for these groups to directly lobby members of the national uniform law entities.¹⁸³ Second, there may have been anticipatory capture.

The uneven and counter-productive results of the experiment with uniform third party standing provisions,¹⁸⁴ and the fact that the probable cause of these results may relate to problems with the uniform law process, suggest a few modest reforms. First, uniform law promulgators might do well not just to develop and publish general criteria for promulgation,¹⁸⁵ but instead to publically address the *application* of those criteria to a proposed uniform law so as to allow for individual legislative evaluation of the *suitability* of their state contrib-

183. *See id.* (indicating that the uniform law process itself is “captured” in that interest groups at the uniform law level most likely carry and use influence since the drive for uniform adoption requires an attempt to neutralize the effects of *local* capture at the individual state level).

184. These “uneven results” following from the creation of “uniform family law” are not restricted to the UMDA. The Uniform Child Custody Jurisdiction Act, § 2(9) U.L.A. (Supp. 2000), as well as its replacement, the Uniform Child Custody Jurisdiction and Enforcement Act § 2(9) U.L.A. (Supp. 2000), was ultimately adopted by all fifty states, the District of Columbia and the Virgin Islands. However, a number of states have significantly departed from the original text as promulgated by the National Conference of Commissioners on Uniform State Laws. *See* UNIF. LAWS ANN., Vol. 9 (2000). Under the UCCJA § 2(9):

“[P]erson acting as parent” means a person, other than a parent, who has physical custody of a child and who either has been awarded custody by a court *or claims a right to custody*. [In] the United States, where each of the individual state legislatures possesses the competence for family law matters, a series of model laws have been drafted. Some of these uniform laws, which are often very detailed, focus on interstate matters, such as the enforcement of maintenance obligations or the jurisdiction for custody procedures. Others attempt comprehensive unification of the law with respect to an entire subject area. The latter, at any rate, are seldom adopted by the individual states, with the result that *[they] have not resulted [in] a significant sense of comprehension and transparency to the process of legal reform and its implementation.*

Martiny, *supra* note 146, at 16 (emphasis added).

185. *See* COMM. ON SCOPE AND PROGRAM, UNIF. LAW COMM’N (ULC), STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF UNIFORM AND MODEL ACTS, § I(a)–(c) (2010) (“The subject matter must . . . be such that approval of the act [would] promote uniformity in the law among the several States on subjects where uniformity is desirable and practicable,” [and] that uniformity of law among states will produce significant benefits to the public through improvements in the law [such as] facilitating interstate economic, social, or political relations; [responding] to a need common to many states as to which uniform legislation may be more effective, more efficient, and more widely and easily understood; and [avoiding] significant disadvantages likely to arise from diversity of state law, for example, the tendency of diverse laws to mislead, prejudice, inconvenience, or otherwise adversely affect the citizens of the states in their activities or dealings in other states or with citizens of other states or in moving from state to [state].”).

uting to national uniformity.¹⁸⁶ That is, uniformity advocates might openly advance their reasoned *rationale* for uniformity in a specific field *before* attempting to promote national uniformity.¹⁸⁷

This approach might better guide legislatures otherwise inclined to simply accept the presumed expertise and views of an “alternative legislature.” It might also make more transparent the motives of national and local special interests seeking to revise or supersede state common law in order to advance narrow social policy objectives. After all, given the relatively isolated and uncertain conditions under which “uniformity projects” are chosen,¹⁸⁸ it is unclear whether any

186. This need for prior analysis of the justification for attempting to make uniform family law in other “confederated” entities, such as the European Union, has been noted by other scholars:

When one ponders more closely the possibility of a unification of family law [in Europe], a variety of questions arise. [If] and with respect to which subject matters is there a need for unification? [Which] institutions possess the corresponding competencies? Within what framework could a unification or even an approximation occur? Any attempt to try to provide answers to these questions must consider the diversity of approaches to family law

Martiny, *supra* note 146, at 2.

187. This is not currently the practice with the NCCUSL:

The criteria are certainly used when [the Scope and Program Committee] evaluates proposals, but there’s nothing beyond the minutes from any particular Scope and Program meeting that would reveal how those criteria are applied. And the minutes would likely not be helpful, since the minutes just reflect the final outcome of any discussion about a particular proposal.

E-mail from Katie Robinson, Communications Officer, Unif. Law Comm’n (Sept. 10, 2010). Objections arguing the non-existence of a relationship between the criteria and the law offered for promulgation are not uncommon. *See, e.g.*, Letter from Stephen P. Kranz, Partner, Sutherland, Asbill & Brennan LLP, to Charles A. Trost, Chair, NC-CUSL Study Comm. of the Unif. Law Comm’n, *Re: Opposition to NCCUSL Review of UDITPA* (May 14, 2008), available at http://www.uniformlaws.org/shared/docs/uditpa/UDITPA_Sutherland%20Kranz_Opposition_051408.pdf (suggesting that the Commissioner’s criteria were not met with regard to a proposed amendment to the Uniform Division of Income for Tax Purposes Act).

188. *See, e.g., Projects Overview*, AM. LAW INST., <http://www.ali.org/index.cfm?fuseaction=projects.main> (last visited Aug. 23, 2009) (describing the process by which ALI decides whether to undertake a project). The process by which the Institute decides whether to undertake a particular project is the province of a select few individuals, without consideration of sources or concerns outside the upper echelons of the membership of ALI:

The nature, content, and scope of each project are initially developed by its Reporter in consultation with the Institute’s Director. The Director’s recommendations that particular projects be undertaken and designations of specific Reporters are subject to the approval of the Council or Executive Committee. A project is developed in a series of drafts prepared by the Reporter and reviewed by the project’s Advisers and Members Consultative Group, the Council, and the ALI membership. Preliminary

given proposed uniform law truly reflects unbiased “best thinking” nationally or is appropriate in any given state.¹⁸⁹

There should be a public articulation, for example, of the extent to which variations in state social values expressed in local common law might indicate the inadvisability of policy change through statutory reform, and the extent to which differing predominant local values might detract from the viability or value of a nationally uniform law. At a minimum, uniform law advocates should explicitly justify their proposals in terms of a national consensus that superseding or disrupting evolved local common law will have some specific salutary or positive impact. Also, a process that requests and allows for reasonable feedback from interested constituencies would seem crucial to the success of uniformity efforts.

A more transparent accounting of the reasoning surrounding a uniformity project would more efficiently focus the resources of uniform entities and provide state legislatures with greater insight into why nationally uniform doctrine is desirable. Thus, justifications for uniformity projects should not simply amount to arguments that, for example, a narrow group of national experts feels that judges are “bi-ased,”¹⁹⁰ but should instead articulate why national uniformity will specifically advance the commonly understood goals of greater clarity of local common law in the national interest or more fairness in the administration of justice.¹⁹¹

Criteria for promulgation actually applied to individual initiatives should include the extent of existing diversity in state political and social cultures, and the impact or influence uniform law would have on existing local common law. The effect that uniformly redirecting existing local common law or modifying the process for its implementation would have on local values should be clear. This is especially true in areas like family law, where it would not be uncommon for national uniform law to act contrary to locally desired approaches toward maintaining commonly shared social values.

Drafts and Council Drafts are available only to project participants and to the Council. Tentative Drafts, Discussion Drafts, and Proposed Final Drafts are publicly available.

Id.

189. *Id.*

190. *See supra* Part II (discussing the influence of interest groups on the uniform law drafting process, and the susceptibility of the drafters to political capture).

191. Other than the original justification of “clarity,” there is little commentary on exactly why there was “confusion” or why clarity required “uniform” common law throughout the nation. *See supra* note 117 and accompanying text.

Such an approach—where uniform law advocates choose the focus of their efforts more carefully, rationally, and with reasonable transparency¹⁹²—would avoid the concerns of many with the uniform law process, especially those related to a lack of justification for a chosen focus in a certain area.¹⁹³ The politics of “alternative legislatures” should not be substituted for evolving local legislative and judicial experience and wisdom.¹⁹⁴ Doing so, as with third party custody law, has been inconsistent with the local legal experimentation encouraged in a federal system.

CONCLUSION

It is no longer clear, after almost a century of experimentation, that the process of promulgation and the results of adoption of uniform law is, at least in several contexts like child custody law, so significant a force for clarity and better justice that the benefits of uniformity outweigh the costs of disrupting the evolution of local common law simply in the service of the biased local agendas of elite members of the legal profession.

Transparent *application* of existing criteria for initiating national uniform law projects should be published, and feedback from interested constituencies should be allowed. Had such application, reasoning, and justifications been explicit, it might have been apparent that third party child custody law, like other areas that have been or might be the object of efforts toward uniformity, was not appropriate for uniform law.¹⁹⁵

192. See John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 674 (2008) (“[T]here are . . . reasons why the NCCUSL should take responsibility for transparency given the notion of ‘capture.’”).

193. See *supra* note 141 and accompanying text (discussing this criticism leveled against the uniform law drafting process).

194. See Adams, *supra* note 138.

195. “Family law is essentially the province of the states.” Fine & Fine, *supra* note 116, at 49.

In the United States, where each of the individual state legislatures possesses the competence for family law matters, a series of model laws have been drafted. Some of these uniform laws, which are often very detailed, focus on interstate matters, such as the enforcement of maintenance obligations or the jurisdiction for custody procedures. Others attempt a comprehensive unification of the law with respect to an entire subject area. The latter, at any rate, are seldom adopted by the individual states, with the result that [they] have not resulted [in] a significant sense of comprehension and transparency to the process of legal reform and its implementation.

Martiny, *supra* note 146, at 16.

As a result, the uniform law promulgators would be more focused and productive, would give important guidance to state legislatures considering adoption, and would be less likely to interfere with the evolution of common law in areas of traditional local concern to further the social agendas of special interests. It is one thing to say, generally, that there is a need to increase protection for parental rights in the states; it is another to provide a useful, illuminating rationale for doing so through nationally uniform law.