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Federalism and Families

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FEDERALISM AND FAMILIES

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INTRODUCTION

Until most recently, the principle of federalism and the law of domestic relations appeared to be following the same well-worn path in the direction of an all-embracing nationalism. In both fields, the traditional virtues of state sovereignty had been displaced, if not banished altogether, by an increasingly powerful ideal of national supremacy. Over the last century, federalism had evolved from being a structural constraint on the powers of the federal government to a pragmatic accommodation of the interdependent relationship between the national and state governments. And as the chains of state sovereignty fell away, family law had emerged in recent years as an important arena of national interest, increasingly governed by national legislation¹ and increasingly

¹ See, e.g., Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1988) (extending full faith and credit standard to child custody determinations); Child Support Enforcement Act, 42 U.S.C. §§ 651-669 (1988 & Supp. V 1993) (establishing national program to aid states in developing and implementing child support enforcement policies and procedures); Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5106h (1988 & Supp. V 1993) (establishing comprehensive federal program directed toward the prevention and treatment of child abuse and neglect); Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10415 (1988 & Supp. V 1993) (providing federal funding to states to address the problem of family violence); Safe Homes for Women Act of 1994, Pub. L. No. 103-322, § 40221, 108 Stat. 1796, 1926-31 (to be codified at 18 U.S.C. §§ 2261-2266) (making domestic abuse a federal crime when the perpetrator crosses state lines); Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553, 108 Stat. 3518, 4056-57 (to be codified at 42 U.S.C. § 5115a) (prohibiting state agencies from denying foster or adoptive placements solely on the basis of race).

presided over by federal courts. Indeed, prior to the current Supreme Court term, one might easily have concluded that we were witnessing the inevitable surrender of perhaps the last remaining substantive legal area within the states' exclusive control.

In its recent decision in *United States v. Lopez*,² however, a majority of the Supreme Court defied conventional wisdom by reestablishing substantive limits on federal lawmaking authority. In an opinion by Chief Justice Rehnquist, the Court struck down the Gun-Free School Zones Act of 1990,³ a federal statute prohibiting the possession of firearms on or near school property.⁴ Displaying a dramatic shift in its approach to constitutional federalism, the Court set limits on congressional authority under the Commerce Clause for the first time in almost sixty years. More importantly, the Court did so on the ground that the sphere of private noncommercial activity falls outside the scope of Congress's enumerated powers. No Supreme Court decision since 1936 has attempted to revive the principle of federalism by staking out a substantive realm of purely local concern belonging to the states. Even the Supreme Court's most notorious (and short-lived) stand in support of federalism—*National League of Cities v. Usery*⁵—was premised on a respect for the institutional autonomy of state processes and structure rather than on a concern for safeguarding a sphere of substantive state authority.

Lopez did not directly concern federal legislation on the family, yet the case provided the opportunity for an otherwise deeply divided Court to unite around the principle that family law constitutes a clearly defined realm of exclusive state regulatory authority. Both the majority and the dissent invoked the regulation of "marriage, divorce, and child custody" as a paradigmatic example of lawmaking power beyond the constitutional competence of the federal government.⁶ Although the majority rested its analysis on an untenable distinction between commercial and noncommercial activities, and the dissent rested on no evident rationale at all, the opinions in *Lopez* laudably draw our attention to the importance of family law within the constitutional ideal of federalism.

² 115 S. Ct. 1624 (1995).

³ 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993).

⁴ See *Lopez*, 115 S. Ct. at 1630-31.

⁵ 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

⁶ *Lopez*, 115 S. Ct. at 1632; *id.* at 1661 (Breyer, J., dissenting).

This Article defends state sovereignty over family law⁷ on grounds very different from those briefly noted in *Lopez*. States enjoy exclusive authority over family law, not because families are in some sense noncommercial, as the *Lopez* majority suggested,⁸ but instead because of the fundamental role of localism in the federal design. The theory of localism presented here rests on the view that the law of domestic relations necessarily promotes a shared moral vision of the good family life. Although in law, as elsewhere, we are accustomed to thinking of the family as a private realm free from governmental influence and control, the domestic sphere is deeply patterned by state laws regulating the formation, maintenance, dissolution, and boundaries of family life. Legal regulation of the family forms domestic roles, directs intimate relationships, and consequently shapes human identity in profoundly normative ways. Legal decision-makers confront fundamental questions concerning the meaning of parenthood, the best custodial placements for children, the rights and obligations of marriage, the financial terms of divorce, and the standards governing foster care and adoption. In answering such questions, state legislatures and courts draw upon community values and norms on the meaning of the good life for families and children.

This Article argues that the normative character of family law is closely tied to a communitarian model of state authority under the federal Constitution. Part I traces the roots of this communitarian ideal in early Supreme Court decisions recognizing exclusive state authority over matters of "local" concern. Although the localist conception all but disappeared from constitutional law by the time of the New Deal—in no small part because of its association with proslavery sentiments—its continuing absence from the contemporary debate over constitutional federalism raises serious concerns regarding the future role of the states in the federal design. As Part I explains, the prevailing procedural model of federalism extends protection to—at most—the institutional processes and structure of state governments; the procedural model establishes no safeguards against the threat of unlimited national regulatory power. Although

⁷ I use the term "sovereignty" advisedly in light of Professor Rapaczynski's persuasive argument that the word should be abandoned in the context of American federalism. See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 346. My choice to retain the traditional terminology reflects my belief that the states retain exclusive regulatory control over a core domain of family law.

⁸ See *Lopez*, 115 S. Ct. at 1630-31.

the recent decision in *United States v. Lopez* attempts to set substantive limits on national authority, the Supreme Court relied on an untenable distinction between commercial and noncommercial activities that missed altogether the vital connection between localism and the substantive domains of education and family law. Part I concludes with an historical review of the localist philosophy underlying the Supreme Court's traditional deference to state sovereignty over family law.

Part II of this Article provides the theoretical foundation for the localist theory of family law by examining the relationship between government and families in liberal society. This Part seeks to dispel the prevailing myth of family privacy and to elaborate the family's essential role in raising good citizens. Traditionally, liberal theorists have assumed the existence of adult citizens possessing the psychological and moral autonomy—what I refer to as “situated autonomy”—necessary for full participation in the political life of the liberal state.⁹ This assumption ignores, however, that families provide the human environment within which the infant acquires a distinct sense of self and the dependent child acquires a sense of mastery over the moral direction of his or her own life. Laws regulating family life have less to do with respecting the moral autonomy of mature individuals than with fostering the growth of responsible, independent citizens. What distinguishes family law as a distinctly communitarian subject matter is its concern for the development of children in liberal society.

Part III explains why national authority over family law raises a serious threat of governmental tyranny over the moral identities of developing citizens. To begin with, a politics of the good family life entails a degree of civic engagement and a sense of shared community identity unattainable at the national level.¹⁰ Although family law does not require the moral homogeneity characteristic of strong communitarian cultures, it does demand a political discourse built upon the normative commitments of a specific historical community. States are far from exemplifying the participatory ideals of classical Greece or colonial New England, yet they are far better situated than the national government to develop and sustain a normative political discourse on family life. Moreover, regulatory

⁹ See SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 9-10 (1989).

¹⁰ For a discussion of the potential advantages and disadvantages of control over family law at levels more localized than the states, see *infra* text accompanying note 276.

diversity among the fifty states preserves some measure of individual and family choice in matters touching upon the formative conditions of human identity. National regulation on the family destroys the opportunity for citizens to exercise choice through exit, that is by moving to a different jurisdiction more accommodating to citizens' particular preferences. Federalism thus utilizes diversity as a crucial structural safeguard against the threat to individual moral freedom posed by uniform national laws on the family.

The localist theory of family law speaks to national tyranny, but what safeguards exist against the threat of local oppression? Part III emphasizes that state sovereignty over the core domain of family law does not diminish the federal government's role in protecting individual rights against the tyranny of local regulation. Communitarian lawmaking in an area so constitutive of human identity and essential to liberal citizenship raises obvious concerns about the oppressive effects that such laws may have on particular dissenting individuals. In addition to enforcing the fundamental rights to equality, individual privacy, and parental authority, the national government bears the responsibility for ensuring the right of citizens to exit state communities, for settling jurisdictional disputes among states over family matters, and for reinforcing state authority through the allocation of national resources.

The localist theory of family law presented in Part III envisions exclusive state authority over a core domain of family law matters. Obviously, the boundaries of this core domain are difficult to draw. For purposes of this Article, however, I assume that at the present time the domain of state authority encompasses marriage, divorce, child custody, child support, alimony, property division, termination of parental rights, adoption, foster care, and child welfare laws. In situations where Congress does not intend to preempt state authority over a core area of family law but nevertheless regulates an aspect of family life, as is the case with certain federal tax laws, a presumption in favor of state authority should arise. In these circumstances, where an otherwise legitimate federal statutory scheme bears directly on family life, the presumption of state authority should be overcome only by the presence of an important federal interest.

By examining the family's critical role in raising good citizens, I hope to provide the foundation for a comprehensive understanding of federal-state relations in the area of family law.¹¹ The

¹¹ The need for a theory of state-federal relations with respect to family law has

localist theory of family law affirms the vital role that families play in preserving the fundamental liberal values underlying the constitutional structure. Far from being an anachronistic exception to the general demise of constitutional federalism, state authority over the substantive domain of family life represents an essential and fundamental communitarian aspect of our liberal democratic order. It is my hope that affirming the importance of state authority over family law may not only serve to refocus the constitutional principle of federalism, but may also contribute to a revitalized conception of liberal theory¹² that acknowledges the familial origins of the civic self.

been identified but not answered by Judith Resnik. See Judith Resnik, "Naturally" *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1750-59 (1991). For a discussion of her views, see *infra* note 113. For the only other extended discussion of the implications of family law for federalism, see William W. Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 782-88. In his article, Professor Van Alstyne uses a hypothetical federal law on the family, "The Commerce Clause Regulation of Marital Standards Act," see *id.* at 783-84, to illustrate his position that the Tenth Amendment sets limits on Congress's Commerce Clause powers. His hypothetical statute sets the employment terms of businesses engaged in interstate commerce by requiring employees to be married and divorced in accordance with uniform federal standards. See *id.* Although Professor Van Alstyne believes the subject of marriage and divorce to be beyond the scope of national power, his theory rests on the enumerated powers doctrine rather than on an affirmative theory of the states' constitutional authority over family law, and thus differs fundamentally from the analysis set forth in this Article. Cf. Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1095-97 (1994) (examining federalism concerns underlying the domestic relations exception to federal court jurisdiction).

¹² Many contemporary liberal theorists have begun the project of reworking traditional liberal principles in response to communitarian and feminist critiques. For recent collections of essays engaged in this effort, see LIBERALISM AND THE GOOD (R. Bruce Douglass et al. eds., 1990); LIBERALISM AND THE MORAL LIFE (Nancy L. Rosenblum ed., 1989); see also BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); AMY GUTMANN, DEMOCRATIC EDUCATION (1987); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1992); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985); 2 CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS (1985). Feminist theorists have a strong presence in this endeavor. See OKIN, *supra* note 9, at 5; IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 226-56 (1990); Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 20-26 (1989). I discuss the relationship between feminist legal theory and the revival of liberalism in Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265 (1993) (reviewing FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katherine T. Bartlett & Rosanne Kennedy eds., 1991)).

I. THE LOCALIST STRAND IN CONSTITUTIONAL FEDERALISM

[T]oday the question faces us whether the constituent States of the System can be saved for any useful purpose, and thereby saved as the vital cells that they have been heretofore of democratic sentiment, impulse, and action.¹³

The decline of federalism as a constitutional principle capable of restraining national power has been the source of great scholarly debate and discomfort over the past fifty years. Despite prevailing references to federalism's demise, few have been willing to surrender the states wholly to the unlimited authority of the national government, and many have been engaged in the effort to resurrect federalism as a constitutional principle of meaningful stature. As a consequence, the "death" of dual federalism,¹⁴ by which is usually meant the end of state sovereignty over the realm of "private" law, has been followed in recent years by the birth of process-based federalism, a theory first shaped in the literature¹⁵

¹³ Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 23 (1950).

¹⁴ Professor Corwin defined "Dual Federalism" as follows:

1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are "sovereign" and hence "equal"; 4. The relation of the two centers with each other is one of tension rather than collaboration.

Id. at 4; see also Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790-1987*, 75 CAL. L. REV. 415, 419-20 (1987) ("The political realities of the nation from 1790 to 1861 made 'dual federalism' (with significant authority remaining in the states) an accurate description of the governmental system, in addition to being an accurate description of the prevailing constitutional doctrine."). Some political historians take the position that dual federalism has never defined the actual practice of our governmental system. See DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 31 (3d ed. 1984) (stating that "[i]n the American federal system, sharing of functions by all planes of government is and always has been the norm," and urging a "noncentralization" model of American federalism); Morton Grodzins, *Centralization and Decentralization in the American Federal System*, in *A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM* 1, 6-7 (Robert A. Goldwin ed., 1963) ("[T]he history of the American governments is a history of shared functions. All nostalgic references to the days of state and local independence are based upon mythical views of the past. There has in fact never been a time when federal, state, and local functions were separate and distinct. Government does more things in 1963 than it did in 1790 or 1861; but in terms of what government did, there was as much sharing of functions then as today."). For an excellent summary of the debates over the history of American federalism, as well as a refutation of the Grodzins-Elazar historical model, see Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & SOC'Y REV. 663 (1980) [hereinafter Scheiber, *Federalism and Legal Process*].

¹⁵ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546

and more recently taken up by the Supreme Court.¹⁶ A less well-developed theory of state sovereignty, which I refer to as "institutional federalism," has also joined the contemporary debate over federalism. Although they differ in important respects, both contemporary theories share an aversion to the substantive line drawing of traditional dual federalism, and I consequently characterize the overall modern approach to state sovereignty as "procedural federalism."

In its recent decision in *United States v. Lopez*,¹⁷ the Supreme Court struck down the Gun-Free School Zones Act of 1990 on the ground that the Commerce Clause limits Congress to the regulation of "commercial" activities having a substantial relation to interstate commerce.¹⁸ The Court's distinction between commercial and noncommercial activities has revived the long dormant principle of state substantive authority. Although the Court recognized that federalism calls for substantive limits on federal authority, both the majority and the dissent in *Lopez* failed to connect these limits to the principle of localism. The localist view, which once contemplated that the states would exercise exclusive authority over matters touching upon the moral life of their citizenry, passed with dual federalism into constitutional obscurity over half a century ago. I hope to show that the disappearance of localism from constitutional discourse has impeded our understanding of the distinctive role that states play in the formulation and enforcement of community norms and values. More specifically, I contend that family law exemplifies why federalism needs to reclaim localism as a constitutional value of fundamental importance.

(1954) (contending that the states can effectively protect their own interests through the national political process); see also Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1560 (1977) ("Numerous structural aspects of the national political system serve to assure that states' rights will not be trampled, and the lesson of practice is that they have not been.").

¹⁶ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."). The Supreme Court recently upheld a federalism-based challenge to national legislation for the first time (with two short-lived exceptions) since 1937. See *New York v. United States*, 112 S. Ct. 2408 (1992) (holding that state sovereignty prevents the federal government from compelling the states to enact or administer a federal radioactive waste program).

¹⁷ 115 S. Ct. 1624 (1995).

¹⁸ See *id.* at 1630-31.

Section A of this Part traces the modern transformation of federalism from a principle oriented toward the protection of substantive areas of private law to one focused upon the national political process and the institutional framework of state activity and decision-making. Sections B and C address how both the prevailing model of procedural federalism and the substantive approach taken more recently in *Lopez* fail to comprehend the importance of localism in the constitutional structure. After a brief historical review of state sovereignty over family law in Section D, the remainder of this Article develops the connection between the role of families in liberal society and the constitutional principle of localism.

A. Localism Under Dual Federalism

The principle of dual federalism may lay claim to noble origins within constitutional law. Inspired by the novel political idea of divided sovereignty,¹⁹ the framers conceived of a national government possessing limited, expressly delegated powers. Chief Justice Marshall proclaimed in *McCulloch v. Maryland*²⁰ that the constitutional design recognized distinct spheres of governmental authority and that the Supreme Court would exercise its power of judicial review to restrain the reach of national power.²¹ The principle of dual federalism extended the traditional concept of dual sovereignty premised on a territorial division of authority to embrace the singular idea of a substantive division of authority within a single geographic realm.²²

¹⁹ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198-229 (1967) (describing how the American conception of divided sovereignty departed from popular European political thought).

²⁰ 17 U.S. (4 Wheat.) 316 (1819).

²¹ See *id.* at 423. Marshall wrote:

[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the [national] government[,] it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id. Ironically, Marshall's opinion in *McCulloch* also takes a very broad approach to the scope of Congress's power under the Necessary and Proper Clause, see *id.* at 406-25, thereby laying the foundation for the Supreme Court's virtual elimination of the enumerated powers doctrine after 1937. See *infra* text accompanying notes 40-42.

²² See *McCulloch*, 17 U.S. (4 Wheat.) at 410 ("In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."); see also *The Collector v. Day*,

Despite the Supreme Court's forceful support for the principle of dual federalism throughout the nineteenth and early twentieth centuries,²³ the Court nevertheless remained exceedingly vague about the precise meaning of state sovereignty and certainly never undertook a comprehensive analysis of the line separating state authority from national authority. With some hindsight, however, we can see that the Supreme Court's understanding of the states' sovereign powers during the reign of dual federalism reflected two quite different conceptions of their political role in the federal scheme. The first conception evolved in large part from decisions under the Commerce Clause, a constitutional provision whose

78 U.S. (11 Wall.) 113, 124 (1870) ("The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."). For the intellectual history behind this "revolution" in the idea of sovereignty, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 344-89 (1969) (recounting the American debate over sovereignty).

²³ Even the Supreme Court's most nationalist decisions (and jurists) early in its history expressed loyalty to the concept of dual federalism. See *Cohens v. Virginia*, 19 U.S. 264, 414, 6 Wheat. 120, 185 (1821) (referring to the states as "members of one great empire—for some purposes sovereign, for some purposes subordinate"); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (describing the police power of the states as "a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government"). See generally Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 *TOLEDO L. REV.* 618, 628-31 (1978) (arguing that the Supreme Court adhered to the principles of dual federalism up to the Civil War).

If one were to judge by Supreme Court activity, the high watermark of dual sovereignty in constitutional law was the period between the Civil War and the New Deal. Prior to the Civil War, the Supreme Court struck down only two acts of Congress, neither directly on federalism grounds. See *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (striking down a federal statute prohibiting United States citizens from taking slaves into a federal territory); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding that Congress does not have the power to give original jurisdiction to the Supreme Court beyond those cases enumerated in Article III of the Constitution). As Congress began to exercise more intensively its legislative powers after the Civil War, however, the Supreme Court in turn aggressively exercised its power of judicial review. Between the Civil War and 1937, the Supreme Court invoked the enumerated powers doctrine to strike down laws enacted pursuant to the Commerce Clause, see *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *The Employers' Liability Cases*, 207 U.S. 463 (1908); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); the taxing and spending power, see *United States v. Butler*, 297 U.S. 1 (1936); *Child Labor Tax Case*, 259 U.S. 20 (1922); the bankruptcy power, see *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513 (1936); the treaty power, see *Missouri v. Holland*, 252 U.S. 416 (1920); and the power to admit new states, see *Coyne v. Smith*, 221 U.S. 559 (1911).

express identification of national authority with interstate economic interests implied the correlative preserve of state authority over matters of intrastate concern.²⁴ The intrastate domain of state sovereignty was viewed as a residual category comprised of those substantive powers not constitutionally committed to the national government.²⁵ That the Commerce Clause explicitly designated interstate concerns as part of the national power naturally gave rise to the view that state sovereignty inhered in territorial localism; analogous to the individual's right to private property, it was assumed that states exercised unimpeded control over all affairs occurring exclusively within their geographic borders.²⁶

The intrastate view of state sovereignty clearly reinforced the central role of federalism in the constitutional design by recognizing concrete limits on federal power. The value of federalism has always been understood to lie first and foremost in the prevention of governmental tyranny. Along with the horizontal separation of powers, the Framers relied on the vertical division of authority between the national and state governments to diffuse the potentially oppressive accumulation of power in a single governmental

²⁴ Because the Commerce Clause served as the most important textual source for congressional action in the post-Civil War period, its distinction between interstate and intrastate affairs came to dominate the debate over state sovereignty. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (defining "production" as an inherently local activity distinct from interstate commerce); cf. *United States v. Butler*, 297 U.S. 1, 67 (1936) (noting that "the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare").

²⁵ The intrastate view of state sovereignty was the mirror image of the enumerated powers doctrine. As Madison explained, the national power "extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects." *THE FEDERALIST* No. 39, at 195 (James Madison) (Max Beloff ed., 1948); see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (noting that the federal government "can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication").

²⁶ See *Gibbons*, 22 U.S. (9 Wheat.) at 194 (explaining that the words of the Commerce Clause do not "comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States"). As Professor Rapaczynski points out, the impulse to define intrastate affairs by way of geographic boundaries, while appealing to a traditional notion of sovereignty, is nevertheless exceedingly problematic in the United States. See Rapaczynski, *supra* note 7, at 351-52. "The domain in which national governments are sovereign can be easily delimited by their geographical boundaries. The case of the American states is different because, although state jurisdictions are geographically determined, their sovereignty over their territory is vitiated by the geographically coextensive reach of the federal government." *Id.*

entity.²⁷ Although the promotion of social diversity and political experimentation are also associated with federalism,²⁸ they alone cannot explain dual federalism's long reign among our constitutional first principles. Diversity and experimentation have been "happy incidents"²⁹ of what the early Supreme Court understood to be federalism's central role in the constitutional structure: securing human liberty against abusive governmental power. In the Court's view, the principle of intrastate sovereignty offset the danger of national tyranny by establishing geographically impenetrable spheres of state power.

The intrastate perspective and its emphasis on constraining federal power did not entirely exhaust the meaning of state sovereignty under dual federalism. Present in Supreme Court decisions during this era were references to an alternative conception of sovereignty that appealed to a substantive, rather than a

²⁷ See THE FEDERALIST No. 51, at 319 (James Madison) (Isaac Kramnick ed., 1981). As Madison argued:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

Id. at 321; see also BAILY, *supra* note 19, at 272-301 (recounting the Framers' concerns regarding governmental oppression). Professor Rapaczynski describes "three somewhat different scenarios of governmental oppression that the Framers seemed to have had in mind when they spoke of the danger of 'tyranny':

First, they were clearly concerned that a small minority might be oppressed by a sufficiently homogeneous majority. Second, they were concerned with the danger that a few powerful minority interests might gain ascendancy over the political process and exploit the rest of society. And third, they were afraid that a powerful central government may itself develop its own separate interest and oppress the citizenry.

Rapaczynski, *supra* note 7, at 382.

²⁸ See *Gregory v. Ashcroft*, 501 U.S. 452, 456-70 (1991) (noting that the authority of a state to determine qualifications for governmental officials is implicit in the idea of representative government); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that political experimentation is a feature of federalism); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988) (identifying social diversity and political experimentation among the values of federalism); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 917 (1985) (noting that "[f]ederalism seeks to maintain political decentralization and social diversity").

²⁹ *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting).

purely territorial, vision of the domain of exclusive state authority.³⁰ In many of these cases, the Supreme Court expressed the view that certain subject matters were inherently local in nature. Although the Court never attempted to define in any systematic way this sphere of local concerns, its decisions from this time portrayed the states as the primary institutional guardians of public health and social morality.³¹ Matters of moral concern were not merely local in the intrastate sense of being geographically confined,³² they were local in the sense of implicating the normative values of the relevant state communities.³³ Whereas national interests were

³⁰ See Corwin, *supra* note 13, at 16 (noting that under dual federalism, "certain subject-matters were also segregated to the States and hence could not be reached by any valid exercise of national power" (emphasis omitted)); Rapaczynski, *supra* note 7, at 351 (describing "the history of the American idea of state sovereignty" as "the story of a succession of vain attempts to define some substantive domain over which exclusive and ultimate state authority could be confidently asserted").

³¹ See *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918) ("The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."); *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.").

The sovereign sphere of local concerns was also associated with the states' "police power," a vague concept that continues to be invoked to define the core area of state sovereignty. See *E.C. Knight*, 156 U.S. at 13 ("It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government . . ."); see also *Parker v. Brown*, 317 U.S. 341, 359-60 (1943) (noting that state governments "are sovereign within their territory save only as . . . their action in some measure conflicts with powers delegated to the National Government"); *Lottery Case*, 188 U.S. 321, 365 (1903) (Fuller, C.J., dissenting) ("To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment . . ."); *Munn v. Illinois*, 94 U.S. 113, 124-25 (1876) (upholding an Illinois statute regulating public warehouses as a proper exercise of state authority over its domestic affairs); cf. *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 45 (1869) (striking down federal regulation of the sale of certain oils within state limits); *New Orleans v. United States*, 35 U.S. 662, 736, 10 Pet. 446, 449 (1836) (denying the United States general jurisdiction over land found to be part of Louisiana).

³² To the extent that moral matters could be viewed as intrastate, of course, these two conceptions of state sovereignty were not necessarily incompatible.

³³ See *United States v. Butler*, 297 U.S. 1, 69 (1936) (striking down portions of the Agricultural Adjustment Act of 1933); *Child Labor Tax Case*, 259 U.S. 20, 39 (1922)

focused upon economic and international affairs, the states were identified with the social and moral welfare of their citizenry. This "localist" conception of state sovereignty thus envisioned a more substantive connection between state boundaries and local community life than the mere protection against national overreaching.³⁴

Localism as the defining principle of state sovereignty indicated that the Framers did not view the prevention of tyranny as federalism's only contribution to the securement of political liberty.³⁵ Localism implicitly recognized meaningful civic engagement as an essential condition for the exercise of political authority over matters going to the moral life of the community. In the localist view, the threat posed by a strong centralized government lay not only in the danger of national overreaching per se, but more insidiously in the exercise of national power by representatives politically distant from the particular interests and concerns of local communities.³⁶ This localist view of state sovereignty distinguished

(invalidating a federal law designed to regulate child labor); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (striking down a federal child labor law), *overruled by* *United States v. Darby*, 312 U.S. 100, 115-17 (1941); *E.C. Knight*, 156 U.S. at 11 (1894) (noting that states retain the power to "preserve good order and the public morals" of its citizens). Some earlier cases had upheld congressional power to regulate commerce for social and moral ends. *See, e.g.,* *Hoke v. United States*, 227 U.S. 308, 323 (1913) (upholding the power of Congress, through the White Slave Traffic Act of 1910, to regulate the transportation of women in interstate commerce for immoral purposes); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911) (upholding the Pure Food and Drug Act of 1906 as a proper regulation of interstate commerce); *Lottery Case*, 188 U.S. 321, 363 (1903) (upholding the power of Congress to regulate the transportation of lottery tickets through interstate commerce).

³⁴ In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court offered an analysis under the Commerce Clause similar to the intrastate/localist distinction offered here. The Court in *Parker* drew a distinction between the application of a "mechanical test to determine when interstate commerce begins and ends," *id.* at 360, which focused on the relationship of the regulated commodity to interstate commerce, and an inquiry into the "local character" of the regulated activities. *See id.* at 362. With respect to the latter "localist" inquiry, the Court found that state regulations "are to be upheld [against a negative Commerce Clause challenge when] . . . it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." *Id.* at 362-63. In conclusion, the Court held that "the evils attending the production and marketing of raisins in that state [of California] present a problem local in character . . ." *Id.* at 363.

³⁵ *See* Rapaczynski, *supra* note 7, at 401 ("[The Framers'] ever present concern with what they called public, civic, or 'republican' virtue testifies clearly to their belief that the 'good life,' as Aristotle would have termed it, involves a commitment to a political community and participation in a process by which individuals shape in common the mode of life they are going to share.").

³⁶ *See* Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-*

the political life of the large, heterogeneous national government from that of the smaller, relatively more homogeneous states.³⁷ While accepting that the representative politics of liberal democracy must prevail at the national level, localism presumed that the states' responsibility for the well-being of their citizens required a qualitatively different form of political engagement.³⁸ The point was not simply that citizen participation at the state level offered a more authentic form of self-government, although it may still be true that the quality of representative democracy increases at the local level.³⁹ Rather, localism suggested that only at the state level could meaningful individual engagement in the communal process of shaping shared values and aspirations be realized. From the localist perspective, federalism was understood to foster human liberty by preserving the states' distinctly communitarian political character.

The principle of dual federalism and the value it placed on localism did not endure. As the Supreme Court ratified the growing sphere of national lawmaking powers after 1937, the intrastate theory of state sovereignty was marked for extinction.⁴⁰

Federalism from the Attack on "Monarchism" to Modern Localism, 84 NW. U. L. REV. 74, 84 (1989) (noting that the antifederalists insisted that "a national government would be too large and its representative bodies too far removed from the people to reflect their multiform mores and natures"); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 15-23 (1981) (discussing antifederalist views on the political dangers associated with a large republic).

³⁷ See Rapaczynski, *supra* note 7, at 401 ("It should . . . be by no means surprising if, given the limited possibility of direct participation on the national level, the Framers envisaged the states, and particularly their subdivisions, as the most fertile ground for the development of the alternative political processes, responsive to the need for participatory forms of political life.").

³⁸ By stressing meaningful political participation and communally shared values, the localist view of state sovereignty implicitly appealed to the civic republican roots of antifederalist ideology. For an elaboration of the connection between "the localist tradition" and the political ideology of the antifederalists, see Rose, *supra* note 36, at 94-99; see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 36 (1985) (noting that antifederalism echoed the classical republican belief in "decentralization"). Although Professor Rose acknowledges that the antifederalists "spoke fervently and often for the continuing autonomy of the states," Rose, *supra* note 30, at 94, she believes that the republican values adhered to by the antifederalists are "only possible at a level more localized than the states." *Id.* ("[T]he association of Anti-Federalism with states' rights is relatively sterile ground if we are looking for the lasting contribution of Anti-Federalist ideas.").

³⁹ See Merritt, *supra* note 28, at 7-8 (observing that "[t]he greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decision-making"). But see Rapaczynski, *supra* note 7, at 399 (discussing why "the problem of assuring the representativeness of political institutions is by no means solved by uncritically striving for increased citizen participation").

⁴⁰ See Rapaczynski, *supra* note 7, at 345 (noting that "as long as the actual exercise

The Supreme Court's increasingly expansive interpretation of congressional powers under the Commerce Clause beginning in the New Deal era⁴¹ signalled the end of federalism as a viable constitutional constraint on the substantive lawmaking powers of the federal government.⁴² And as Congress's power over intrastate matters

of the federal commerce power was relatively restricted, the inadequacy of the concept of sovereignty for analyzing the role of the states in the federal system was not immediately apparent"). The fact that, with only one short-lived exception, *see Oregon v. Mitchell*, 400 U.S. 112, 124-31 (1970) (plurality opinion) (striking down national legislation setting state and local minimum voting age requirements), *superseded by* U.S. CONST. amend. XXVI, the Supreme Court did not uphold any federalism-based challenges to the reach of national legislative power from 1937 to 1976 demonstrated that federalism would no longer serve as an independent substantive doctrine in post-New Deal constitutional law.

Although the doctrine of constitutional federalism was inactive during this time, the principle of federalism remained an important influence on the shaping of constitutional rights and remedies. *See generally* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) ("Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny."); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 (1987) (noting that "state governments can help federal courts implement truly full remedies" for plaintiffs injured by the federal government); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151-64 (1988) (discussing what he calls the Nationalist and Federalist models of judicial decision-making).

⁴¹ *See Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (interpreting Congress's interstate commerce power to include the regulation of restaurants serving food which has moved in interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (interpreting Congress's interstate commerce power to include the regulation of local wheat farming which in the aggregate has a substantial effect on interstate commerce); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942) (interpreting Congress's interstate commerce power to include the regulation of milk produced and sold intrastate); *United States v. Darby*, 312 U.S. 100, 125-26 (1941) (interpreting Congress's interstate commerce power to include the regulation of wages and hours for employees engaged in the production of goods in interstate commerce).

⁴² *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-20, at 378 (2d ed. 1988) ("For almost four decades after 1937, the conventional wisdom was that federalism in general—and the rights of states in particular—provided no judicially-enforceable limits on congressional power."); *see also* Richard Briffault, "What About the 'Isms'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1311 (1994) ("[G]iven the capacity of the federal government to act under the Commerce Clause, the spending power, or the Fourteenth Amendment to preempt state authority, there may not be any substantive area of policy-making authority reserved to the states exclusively." (footnote omitted)); Corwin, *supra* note 13, at 5 ("[T]he operation of the 'enumerated powers' concept as a canon of constitutional interpretation has been curtailed on all sides."); D. Bruce La Pierre, *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 584 (1985) ("Since 1937, . . . [w]ith the sole exception of . . . [National League of Cities v. Usery], state sovereignty concepts have not been a significant restraint on Congress' power to regulate the states."); Harold

increased, the Court's commitment to localism as a principle of state sovereignty simultaneously diminished.⁴³ Most obviously, the localist ideal of the states as enclaves of communitarian politics was compromised by the nation's experience with slavery.⁴⁴ The rhetoric of community which had shaped the states' claim to define and enforce their own local norms came to be seen as a euphemistic pretext for the support of slavery and racially discriminatory practices. Plagued by its association with the politics of racism, localism made an abrupt and enduring departure from constitutional law.⁴⁵

J. Laski, *The Obsolescence of Federalism*, NEW REPUBLIC, May 3, 1939, at 367 ("I infer, in a word, that the epoch of federalism is over . . ."); Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 81 n.3 (noting that, after 1937, "[t]he basic constitutional 'test' (whether the regulation 'affected' commerce) was immediately understood to provide no limitation on national power"); Rapaczynski, *supra* note 7, at 351 ("The real problem is that even a moderately searching scrutiny of the powers of the federal government shows that the alleged existence of a residual category of exclusive state powers over any private, nongovernmental activity is in fact illusory."); Scheiber, *Federalism and Legal Process*, *supra* note 14, at 666 ("It is no longer true that there are any substantial areas of government that cannot be exercised by the national government or any that can be exercised only by the states' . . . " (quoting PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 156 (1978))); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1711-12 (1985) ("[The] death of federalism . . . [was caused by] the . . . series of endless judicial passive acquiescences that appeared as Congress greatly expanded the FLSA [Fair Labor Standards Act] and moved on to claim a more generalized police power at large."). For a prescient view, see A.N. Holcombe, *The States as Agents of the Nation*, 1 S.W. POL. SCI. Q. 307, 324 (1921) ("The principle of dual sovereignty, long supposed to be the foundation of our political system, has been practically overthrown.").

⁴³ See *United States v. Darby*, 312 U.S. 100, 114 (1941) ("Congress . . . is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use."); see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981) ("The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers.").

⁴⁴ See Merritt, *supra* note 28, at 2-3 ("At worst, state governments perpetuate racism and other oppressive political agendas."); see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1105 n.188 (1980) (noting "the advocacy of states' rights in opposition to Jacksonian programs in the 1820's and 1830's, and in support of slavery in the Nullification controversy").

⁴⁵ Although commentators may differ as to when liberal values came to dominate the constitutional imagination, there is little disagreement that they eventually did. See Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 92 (1984) (describing the "nationalizing project . . . consummated in the New Deal"); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 561 (1986) (describing the Constitution of 1787 as

The following two Sections explore what the collapse of localism has meant for contemporary federalism. After examining the rise of procedural federalism and the Supreme Court's recent return to substance in *United States v. Lopez*,⁴⁶ Sections B and C conclude that the effort to revive constitutional federalism without reviving the principle of localism cannot succeed in any meaningful way. By tracing the doctrinal history of state sovereignty over family law, Section D provides an introduction to my central thesis that the law of family relations serves to illustrate, if not define, the importance of localism in the constitutional design.

B. *The Paradigm of Procedural Federalism: Process and Institutional Models*

After almost four decades of dormancy, constitutional federalism stirred to life again in the early 1970s. Although Justice Blackmun proclaimed the virtues of "Our Federalism" in *Younger v. Harris*,⁴⁷

a "triumph of modern liberalism over classical republicanism"); WOOD, *supra* note 22, at 606 (proposing that ratification of the Constitution marked "the end of the classical conception of politics"). Bruce Ackerman offers a theory of "dualist democracy" under which an ordinary regime of liberal politics is punctuated by extraordinary moments of republican lawmaking. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3-33 (1991).

⁴⁶ 115 S. Ct. 1624 (1995).

⁴⁷ 401 U.S. 37, 44 (1971). By "Our Federalism," Justice Blackmun meant:

[A] system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. Federalism's reawakening was foreshadowed in *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (plurality opinion) (striking down federal legislation setting state and local minimum voting age requirements), and in some dissents prior to 1976. See, e.g., *Fry v. United States*, 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting) (arguing that federal regulation of the wages of state employees is an unconstitutional intrusion on state authority); *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting) (arguing that federal regulation of the wages of state employees constitutes "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism"). Even those Justices most sympathetic to "nationalistic" principles affirmed their loyalty to the values of federalism. See, e.g., *Fry*, 421 U.S. at 547 n.7 ("While the Tenth Amendment has been characterized as a 'truism,' . . . it is not without significance The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." (citations omitted)). Courts also regularly appealed to the value of federalism in fashioning doctrines cutting back on constitutional rights and remedies. See Amar, *supra* note 40, at 1425 (noting that federalism "is now regularly deployed

it was not until the Supreme Court decided *National League of Cities v. Usery*⁴⁸ in 1976 that federalism reclaimed its stature as an enforceable principle of constitutional magnitude. In *Usery*, the Supreme Court upheld a federalism-based challenge to national legislation enacted pursuant to Congress's powers under the Commerce Clause. Striking down the Fair Labor Standards Act as applied to state and local employees, the Court concluded that, although the minimum wage and maximum hour provisions were clearly within Congress's enumerated powers, the law nevertheless interfered with "the States' freedom to structure integral operations in areas of traditional governmental functions."⁴⁹ Doctrinally, *Usery*'s formulation of the Tenth Amendment limitations on congressional power appeared to revive a limited version of dual federalism, with "traditional governmental functions" serving to define the substantive sphere of state authority lying beyond the reach of national power. Viewed in this way, the subsequent overruling of *Usery* was to be expected, for there was no reason to think that the contemporary Court would be any more successful in defining state sovereignty in terms of "traditional governmental functions" than earlier Courts had been at articulating a sovereign realm of intrastate concerns.⁵⁰

Usery's protection for traditional governmental functions, however, should not be understood as a modern effort to arouse dual federalism from its post-New Deal slumber. Neither *Usery* nor the later cases that together map the terrain of contemporary federalism doctrine⁵¹ view the current debate over state sovereignty as concerned with the definitional issue of substantive spheres of regulatory authority. In our post-dual-federalism era, any substan-

to thwart full remedies for violations of constitutional rights"); Fallon, *supra* note 40, at 1145-46 (discussing the effects of judicial federalism on legal rights and remedies).

⁴⁸ 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

⁴⁹ *Usery*, 426 U.S. at 852.

⁵⁰ See *Garcia*, 469 U.S. at 539 (rejecting *Usery*'s "traditional governmental functions" test in part because the Court "find[s] it difficult, if not impossible, to identify an organizing principle" for distinguishing traditional governmental functions from other state activity).

⁵¹ See *New York v. United States*, 112 S. Ct. 2408 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Garcia*, 469 U.S. 528; *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226 (1983); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). The Court in *United States v. Lopez*, 115 S. Ct. 1624 (1995), reopened the question of state substantive authority. See *infra* part I.C.

tive lawmaking powers actually reserved to the states are understood to remain so only at the pleasure of the national government.⁵² Instead, the Court in *Usery* framed the debate over federalism in terms of whether the "States as States"⁵³ may claim a constitutionally recognized status that immunizes them from direct national regulation. The modern issue is no longer what the states exist to do, but simply whether they have a constitutionally-enforceable right to exist as independent governmental bodies in the first place.⁵⁴

Rather than signaling a return to dual federalism, the decision in *Usery* marks the beginning of the Supreme Court's modern effort to construct a viable theory of federalism that avoids the substantive line-drawing characteristic of that earlier period. This modern effort has produced two distinct, although not necessarily inconsistent, procedural models of federalism. The first model, which I term "institutional federalism," understands state sovereignty in terms of the institutional structures and processes that define the "States as States."⁵⁵ Institutional federalism seeks to discern the

⁵² See, e.g., *Federal Energy Regulatory Comm'n*, 456 U.S. at 759 ("[T]he Federal Government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices . . .'" (quoting *Hodel*, 452 U.S. at 290)); *Hodel*, 452 U.S. at 290 ("A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity . . . when these laws conflict with federal law."); *Usery*, 426 U.S. at 840 ("Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 262 (1964) (alteration in original)); see also MICHAEL D. REAGAN, *THE NEW FEDERALISM* 163 (1972) (asserting that the power of the states "rests upon the permission and permissiveness of the national government").

⁵³ *Usery*, 426 U.S. at 845.

⁵⁴ See *id.* ("It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.").

⁵⁵ *Id.*; see also *Gregory*, 501 U.S. at 460 ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Federal Energy Regulatory Comm'n*, 456 U.S. at 761 ("We acknowledge that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty." (quoting *Usery*, 426 U.S. at 851) (omissions in original)); *Hodel*, 452 U.S. at 288 (concluding that the Federal Surface Mining Act does not violate state sovereignty in part because "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (plurality opinion) ("No function is more essential to the separate and

essential features of state identity—those minimum institutional powers that together constitute an autonomous self-governing political body.⁵⁶ As Justice Rehnquist framed the issue in *Usery*, “[t]he question we must resolve here . . . is whether . . . [the regulated activities] are “functions essential to [the States’] separate and independent existence.””⁵⁷ In *Usery*, the Court held that the minimum wage and maximum hour provisions as applied to state employees were invalid because they operated “to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions.”⁵⁸ The employment regulations interfered with powers deemed essential to the structural integrity and procedural autonomy of the states.⁵⁹

independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.”); *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (“The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”); Rapaczynski, *supra* note 7, at 362-63 (“The exception carved out from the federal powers [in *Usery*] pertained exclusively to the immunity of internal state governmental processes, and nothing in the opinion even remotely implied that the federal government could not reach any private activity.”). H. Jefferson Powell describes what he calls Justice O’Connor’s “autonomy of process principle” in similar terms: “[F]ederalism requires that the federal government respect the autonomy of state governments as the possessors of independent institutional processes, even when Congress legislates in an area in which it has the constitutional authority completely to preempt state choices.” H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 641 (1993). Deborah Merritt’s theory of federalism premised on the Guarantee Clause is also a version of institutional federalism. See Merritt, *supra* note 28, at 36.

⁵⁶ See Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 851 (1979). Professor Kaden writes:

To function as a state, the body politic must have at least a minimum of its powers protected against outside interference, including control over the structure of government, the distribution of administrative responsibilities, the process of selecting popular agents, and the capacity to tax and spend. This is but another way to say that the characteristic integral to separate identity in contemporary terms is a power to make choices

Id.

⁵⁷ *Usery*, 426 U.S. at 845 (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911) (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869))).

⁵⁸ *Id.* at 852.

⁵⁹ Although *Usery*’s principle of federalism invokes a procedural paradigm that focuses on the governmental structure necessary to the states’ “separate and independent existence,” *id.* at 845, the procedural analysis as framed in *Usery* does not avoid entirely consideration of the states’ substantive lawmaking authority. Under *Usery*’s “traditional governmental functions” test, the Supreme Court was faced with deciding whether certain substantive powers, such as operating a railroad, see *United*

Although *Usery* remains the fullest modern exposition of this model, strong traces of the principle of institutional federalism may be found in earlier cases decided during the era of dual federalism. In his opinion for the Court in *Usery*, Justice Rehnquist relied upon *Coyle v. Smith*,⁶⁰ a case in which the Supreme Court had held that "[t]he power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers."⁶¹ In addition, the Supreme Court's early decisions upholding state immunity from federal taxation, an immunity grounded in the overall structural design of the Constitution and not in any particular constitutional provision,⁶² were rooted in a form of institutional protection of the "States as States."

A second model of procedural federalism, commonly referred to as "process federalism," emerged nine years after *Usery* to overrule the Supreme Court's "traditional governmental functions" test. In *Garcia v. San Antonio Metropolitan Transit Authority*,⁶³ the Supreme Court took the position that the "States as States" are adequately protected by their participation in the national political process.⁶⁴ Clearly related to the political-representation theory of

Transp. Union v. Long Island R.R., 455 U.S. 678, 686 (1982) ("Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state."), or managing a state park, see *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226, 240 (1983) (concluding that federal retirement policy applied to state game wardens does not pose "the same wide-ranging and profound threat to the structure of state governance" as the regulations held invalid in *Usery*), were activities essential to the states' separate existence.

⁶⁰ 221 U.S. 559 (1911).

⁶¹ *Id.* at 565; see also *Lane County*, 74 U.S. (7 Wall.) at 76 (recognizing the states' "separate and independent existence").

⁶² See *The Collector v. Day*, 78 U.S. (11 Wall.) 113, 125 (1870); *Child Labor Tax Case*, 259 U.S. 20, 41 (1922). The institutional model may also be understood to inform the Supreme Court's deference, in the name of judicial federalism, to state judicial proceedings. See *Younger v. Harris*, 401 U.S. 37 (1971); see also *Day*, 78 U.S. at 126 (noting that the power to maintain a judicial department is "one of the sovereign powers vested in the States by their constitutions"). Professor Powell also suggests that Justice O'Connor's "autonomy of process principle" is similar to the position rejected by Justice Story in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court may exercise jurisdiction over state court rulings on issues of federal law). See Powell, *supra* note 55, at 675-81.

⁶³ 469 U.S. 528 (1985).

⁶⁴ See *id.* at 552 ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."). For earlier expressions of this view, see *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (noting that "effective restraints on [the] exercise [of federal commerce power] must proceed from political rather than

individual rights,⁶⁵ the process model views case-by-case judicial review of national legislation allegedly interfering with state sovereignty as unnecessary; the states are capable of protecting themselves by way of their actual influence within the national government. Although its extreme version abdicates judicial review entirely,⁶⁶ the process model does not abandon the virtues of federalism altogether in favor of a fully nationalized governmental system.⁶⁷ To the contrary, process theory posits that the protection of state interests is best realized through the national political structure established by the Constitution.

Process theory shares with institutional federalism the conviction that the Constitution as a whole does assume the continued existence of the states themselves, even if the document does not carve out protected zones of state authority.⁶⁸ In the process view, as long as the states participate in the lawmaking process, the substantive ends of government may be freely pursued by the

from judicial processes"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from abuse. They are the restraints on which . . . people must often rely solely, in all representative governments.").

⁶⁵ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938); JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-77 (1980). For a criticism of the process-based theory in the context of individual rights, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072-77 (1980).

⁶⁶ See, e.g., Choper, *supra* note 15, at 1557 (arguing that "the constitutional issue whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be treated as nonjusticiable, with final resolution left to the political branches").

⁶⁷ See, e.g., Wechsler, *supra* note 15, at 543 ("In a far flung, free society, the federalist values are enduring. They call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise.").

⁶⁸ See TRIBE, *supra* note 42, § 5-20, at 379 ("It is clear . . . that the Constitution does presuppose the existence of the states as entities independent of the national government."). Constitutional provisions recognizing the formal existence of the states include the Guarantee Clause, U.S. CONST. art. IV, § 4; the prohibition on alteration of state boundaries and reduction of state representation in the Senate without consent of state legislatures, see U.S. CONST. art. IV, § 3, cl. 1; the provision for constitutional amendment, see U.S. CONST. art. V; and other miscellaneous provisions, see, e.g., U.S. CONST. art. I, § 2, cl. 1 (describing voter qualifications for the House of Representatives); U.S. CONST. art. I, § 8, cl. 16 (reserving to the states certain powers over the militia); U.S. CONST. art. I, § 9, cl. 6 (prohibiting the federal government from giving preference to the ports of any state or from imposing interstate duties on ships); U.S. CONST. amend. XVII (providing for the direct election of Senators by the people of each state).

national legislature working alone or in cooperative relation with the fifty state governments. The continued existence of the states as independent political bodies remains a constitutional given.⁶⁹ Process theory's withdrawal of judicial review over federalism-based challenges to national laws is therefore not a repudiation of state sovereignty so much as an affirmation of the states' power of political self-preservation.⁷⁰

Even on its own terms, however, the process model does not offer a vision of the states' constitutional role that entirely avoids the need to elaborate some external limitations on national power

⁶⁹ See *Garcia*, 469 U.S. at 549 (noting that the states "unquestionably" retain significant sovereign authority); Choper, *supra* note 15, at 1567 (reaffirming Hamilton's and Madison's view that "[t]he State Governments may be regarded as constituent and essential parts of the federal Government" (quoting THE FEDERALIST No. 45 (James Madison))). As Justice Rehnquist did in *Usery*, the Supreme Court has consistently reaffirmed the constitutional status of the states by referring to Chief Justice Chase's assertion in *Texas v. White* that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." National League of Cities v. Usery, 426 U.S. 833, 844 (1976) (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868) (alteration in original)), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) (recognizing the Supreme Court's "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity'"); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) ("[I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized."); *TRIBE*, *supra* note 42, § 5-20, at 379 (noting that "the structural assumptions and the tacit postulates of the Constitution as a whole" do "presuppose the existence of the states as entities independent of the national government"); Rapaczynski, *supra* note 7, at 345 (noting that the Framers' "assumption of the continued existence and vitality of state governments is visible throughout the Constitution"); Wechsler, *supra* note 15, at 544 ("The continuous existence of the states as governmental entities and their strategic rôle in the selection of the Congress and the President are so immutable a feature of the system that their importance tends to be ignored."). Whether the states possess a constitutionally protected right to exist in the first place is not a new issue in constitutional law. See, e.g., *Child Labor Tax Case*, 259 U.S. 20, 41 (1922) ("It would undoubtedly be an abuse of the [taxing] power if so exercised as to impair the separate existence and independent self-government of the States . . .") (quoting *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 541 (1869)); *The Collector v. Day*, 78 U.S. (11 Wall.) 113, 127 (1870) (recognizing the states' right of "self-preservation").

⁷⁰ Herbert Wechsler offers a related argument based on national self-restraint: "Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states." Wechsler, *supra* note 15, at 558; see also Choper, *supra* note 15, at 1560 ("Numerous structural aspects of the national political system serve to assure that states' rights will not be trampled, and the lesson of practice is that they have not been."); *id.* at 1568 ("Congress has generally paid fastidious attention to the reserved power of the states.").

vis-à-vis the states. The theory fails to address the possibility that national laws might in fact imperil the "separate and independent existence" of the "States as States,"⁷¹ and specifically their status as relatively autonomous participants in the national lawmaking process. Although process theory might defend the states' power of self-preservation by appeal to the metaphor of the "body politic,"⁷² it remains unclear why we should assume that the states are immune from self-destructive forces.⁷³ Unless we concede that the states are free to acquiesce in their own dissolution, a concession seemingly at odds with process theory's professed commitment to the value of federalism, then we are forced to acknowledge some minimal extrapolitical constraints on national power.

Significantly, even Justice Blackmun's opinion for the Court in *Garcia* pulls back from a wholesale embrace of the theory of state self-preservation. Although he recognized political restraints as "the principal and basic limit on the federal commerce power," he nevertheless alluded to the "affirmative limits [that] the constitutional structure might impose on federal action affecting the States under the Commerce Clause."⁷⁴ The significance of Justice Blackmun's concession to the existence of affirmative limits on congressional power cannot be overlooked. By leaving the door open to judicially enforced limits, he acknowledged that participation in the political process alone may not guarantee that the states will retain "their ability to function effectively in a federal system."⁷⁵ To retain a meaningful role in the constitutional structure,

⁷¹ See *supra* note 57 and accompanying text.

⁷² See *Day*, 78 U.S. (11 Wall.) at 128 (Bradley, J., dissenting) ("[N]or can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the State governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded.").

⁷³ See Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1661 n.24 (1987) (noting that federal legislators face a conflict of interest whenever their laws threaten to infringe on state sovereignty); Rapaczynski, *supra* note 7, at 393 (noting that "in normal times, in which most of the pressure to erode the independence of the states is exerted, the primary constituencies of the national representatives may . . . be precisely those that advocate an extension of the federal power to the disadvantage of the states").

⁷⁴ *Garcia*, 469 U.S. at 556; see also Wechsler, *supra* note 15, at 559 ("Federal intervention as against the states is thus *primarily* a matter for congressional determination" (emphasis added)); Rapaczynski, *supra* note 7, at 343 n.15 ("While stressing the 'political safeguards of federalism,' the Court's opinion in the *Garcia* case stops short of declaring outright that federalism-related limits on the national commerce power present a nonjustifiable political question").

⁷⁵ *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

federalism must rely on something more than a theory of state self-preservation that itself depends on the grace of congressional self-restraint.

The need to articulate some affirmative limits on the federal lawmaking power led the Supreme Court back in the direction of institutional federalism. In *Gregory v. Ashcroft*,⁷⁶ Justice O'Connor conceded that *Garcia* "left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers."⁷⁷ Yet in evaluating the validity of the Age Discrimination in Employment Act as applied to state court judges, she also reaffirmed *Usery's* institutional view of "the constitutional scheme of dual sovereigns": "This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."⁷⁸ Although Justice O'Connor artfully avoided enforcing these affirmative institutional limits on national power,⁷⁹ the decision one year later in *New York v. United States*⁸⁰ confirmed the Court's power of judicial review. Again invoking the institutional principle of federalism, the Supreme Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that "offer[ed] state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress."⁸¹ The Court held that such a federally-mandated choice "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."⁸²

⁷⁶ 501 U.S. 452 (1991).

⁷⁷ *Id.* at 464.

⁷⁸ *Id.* at 460.

⁷⁹ At one point, Justice O'Connor suggests that "the authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment." *Id.* at 463. However, she later suggests that Congress has the power to override state sovereignty under *Garcia* as long as Congress makes its intent to do so absolutely clear. See *id.* at 464 ("We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause." (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985))).

⁸⁰ 112 S. Ct. 2408 (1992).

⁸¹ *Id.* at 2428.

⁸² *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

Although at close range the decisions in *Garcia* and *Usery* might seem to be in tension, from a more removed historical perspective the institutional and process models of federalism are not so clearly incompatible. In doctrinal terms, institutional federalism may be understood to supplement process federalism by providing those minimal affirmative limits on the exercise of federal power that Justice Blackmun alluded to in *Garcia*.⁸³ In terms of operating principles, both models adhere to the two basic tenets that together define the procedural paradigm: a categorical rejection of dual federalism's substantive spheres of authority, and a complementary concern for the preservation of the "States as States" in the constitutional structure. Despite some irreconcilable differences at the extremes,⁸⁴ both models assume that the values of constitutional federalism are adequately served by the mere existence of the states as independent political entities and nothing more. In both views, whatever "affirmative limits" the Constitution might impose on national power are directed to preserving not the substance of state authority, but the integrity of state processes and decision-making.

Even on its own terms, however, the procedural model cannot provide a meaningful conceptual framework for federalism. While the prevention of governmental tyranny was once accomplished by delimiting substantive realms of legislative power, the procedural model has replaced this constraint with, at most, the much more limited goal of prohibiting Congress from "commandeer[ing]" or destroying state institutional processes.⁸⁵ Within the procedural paradigm, all that stands against the full centralization of governmental power are the "States as States," sovereign only in the most limited sense of possessing the capacity for decision-making. Yet the mere existence of the states, without some substantive vision of their role in the constitutional scheme, does not suffice to set boundaries on the scope of national power. Put somewhat

⁸³ Professor Rapaczynski reconciles the two models by construing national legislation that impairs the institutional autonomy of the states as a form of process failure. See Rapaczynski, *supra* note 7, at 394 ("[I]n undermining the states, the federal government at the same time undercuts those very features of the national political process as a whole . . . on which its *own* health crucially depends.").

⁸⁴ Professor Choper, for example, would not recognize any affirmative limits on congressional power as long as the national political process has not malfunctioned. See Choper, *supra* note 15, at 1556-57. His argument that federalism claims are nonjusticiable, *see id.* at 1557, suggests that Congress has the power, although perhaps not the will, to obliterate the states altogether.

⁸⁵ See *Hodel*, 452 U.S. at 288.

differently, the states' institutional autonomy—their power to make decisions without interference from the national government—must include the power to make decisions in specific areas.⁸⁶ If not, the institutional autonomy at stake becomes a mere formalism. Despite its stated commitment to the prevention of governmental tyranny, therefore, the procedural model's only actual safeguard against the complete loss of state autonomy is congressional self-restraint.⁸⁷ And self-restraint, while perhaps a sufficient check on governmental overreaching in ordinary times,⁸⁸ is by definition inadequate as a safeguard against the extraordinary aggrandizement of centralized power that the Framers so feared.

The procedural model's commitment to the existence of the "States as States" does arguably preserve some residual role for federalism within the constitutional structure. In its most robust institutional form, procedural federalism might be understood to protect an "organizational framework" at the state level that serves to break "the national monopoly on the power to coerce."⁸⁹ Yet

⁸⁶ Professor Rapaczynski acknowledges this fundamental problem with the procedural model:

[T]he vitality of the participatory state institutions depends in part on the types of substantive decisions that are left for the states. Should the federal government preempt them from most fields that touch directly on the life of local communities, the states would become but empty shells within which no meaningful political activity could take place.

Rapaczynski, *supra* note 7, at 404.

⁸⁷ In elaborating her procedural theory of federalism, Professor Merritt concedes that, at bottom, the procedural model of federalism (which she derives from the Guarantee Clause) rests on a theory of congressional self-restraint:

One might argue, of course, that a republican government must have the power to regulate some aspects of private conduct and that the guarantee clause requires Congress to allow the states to engage in some minimum level of regulatory activity. As a practical matter, however, this question is unlikely to arise. Although Congress' constitutional powers are broad, it remains a government of delegated authority. Some purely local matters may remain outside of Congress' regulatory competence. Moreover, even if Congress could theoretically render the states obsolete by preempting state regulation on every conceivable subject, practical limits on congressional time and federal funds would prevent Congress from exercising its powers that broadly.

Merritt, *supra* note 28, at 59 n.329.

⁸⁸ Cf. *TRIBE*, *supra* note 42, § 5-20, at 381 ("If there is any danger [of Congress obliterating the states], it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.").

⁸⁹ Professor Rapaczynski makes the most compelling procedural argument for the states' effectiveness in preventing governmental tyranny:

with no substantive agenda, the procedural paradigm ultimately threatens to "obliterate the distinction between what is national and what is local and create a completely centralized government."⁹⁰ It was with this concern in mind that the Supreme Court departed from the procedural approach in *United States v. Lopez*⁹¹ by reviving a substantive model of federalism.

C. *The Reemergence of Substantive Federalism:*

United States v. Lopez

The Supreme Court in *United States v. Lopez*⁹² has taken an important step toward a fundamental reordering of the law governing federal-state relations. Striking down the Gun-Free School Zones Act of 1990,⁹³ Chief Justice Rehnquist, speaking for the majority, reestablished substantive limits on Congress's Commerce Clause power for the first time since the New Deal. Despite a misguided effort to define these limits in terms of "commercial" activity, the Chief Justice correctly assessed the need for substantive restraints as the only effective constitutional check against the threat of "a general federal police power."⁹⁴ Equally significant, both the majority and the dissent in *Lopez* invoked family law as a paradigmatic example of state authority.⁹⁵ The Justices' shared concern for preserving state authority over family law highlights the need for a theory of federalism that explains the connection between localism and the role that families and education play in the national liberal state.

[T]he independence of the very process of state government, without seriously hampering the national authorities in regulating most private activities, assures the existence of an organizational framework, more efficient than any private institution could provide, that may always be used as an effective tool for bringing together otherwise defenseless individuals with some stakes in resisting the overreaching of the national government. The value of this organizational apparatus thus lies not so much in any of its concrete regulatory activities that the national government could not do as well (or better), as in the very fact that it eliminates the national monopoly on the power to coerce.

Rapaczynski, *supra* note 7, at 390.

⁹⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

⁹¹ 115 S. Ct. 1624 (1995).

⁹² *Id.*

⁹³ 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993).

⁹⁴ *Lopez*, 115 S. Ct. at 1632.

⁹⁵ See *id.* at 1630-31; *id.* at 1661 (Breyer, J., dissenting).

The majority in *Lopez* began its analysis by asserting that "the proper test [of congressional authority] requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."⁹⁶ On its face, the majority's Commerce Clause analysis does not depart significantly from the standard articulated in many cases since the New Deal.⁹⁷ But while prior cases exhibited a general deference to congressional decision-making, the Chief Justice detected a "pattern" of sustaining congressional authority only where the local activity in question was itself of a commercial or economic nature.⁹⁸ Concluding that the possession of a firearm in a school zone "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms,"⁹⁹ the majority held the Act to be outside Congress's authority. In so holding, the Court removed noneconomic local activity—whatever its effect on interstate commerce—from the scope of federal regulatory power.

The majority in *Lopez* thus established a commercial-noncommercial distinction based on a legitimate concern that Congress

⁹⁶ *Id.* at 1630. The majority identified "three broad categories of activity that Congress may regulate under its commerce power." *Id.* at 1629. Because the Act did not involve either the regulation of the use of the channels of interstate commerce, or the protection of the instrumentalities of, or persons or things in, interstate commerce, the majority focused its analysis on the third category: the regulation of "those activities having a substantial relation to interstate commerce." *Id.* at 1629-30.

⁹⁷ See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (requiring a "close and substantial relation" between a regulated activity and interstate commerce). The dissent questions the use of the word "substantial," but otherwise agrees with the majority's formulation. See *Lopez*, 115 S. Ct. at 1659 (Breyer, J., dissenting).

⁹⁸ See *Lopez*, 115 S. Ct. at 1630 ("[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

⁹⁹ *Id.* at 1630-31. The majority also found that the Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1631. It is unclear whether this jurisdictional basis for congressional authority is an exception that swallows the majority's general rule regarding state authority over local noneconomic activity. If all Congress had to do was provide that the specific firearm in question in any prosecution under the Gun-Free School Zones Act of 1990 had a connection to interstate commerce, then given the likelihood that either the gun or some of its component parts had moved in interstate commerce, the jurisdictional exception would appear to provide Congress with unlimited regulatory authority.

would otherwise enjoy "a plenary police power that would authorize enactment of every type of legislation."¹⁰⁰ The dissent's claims notwithstanding, the majority is clearly right that the procedural model of federalism threatens to "obliterate the distinction between what is national and what is local and create a completely centralized government."¹⁰¹ As discussed earlier, without some substantive limitation on congressional power, federalism becomes nothing more than an unenforceable promise of congressional self-restraint.¹⁰²

While the majority rightly identifies the need to limit federal regulatory power, its distinction between commercial and noncommercial activity ultimately creates more problems than it solves. The Chief Justice seems unconcerned with the striking resemblance between his commercial-noncommercial line and the failed categories of "direct-indirect" and "production-commerce" that characterized the era of dual federalism.¹⁰³ As was true fifty years ago and, as the dissent convincingly argued, is still true today, the complex workings of our national economy make drawing the line between commercial and noncommercial activities "almost impossible."¹⁰⁴ With respect to education, the dissent provides powerful evidence that, "in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being."¹⁰⁵ The majority concedes that its commercial-noncommercial distinction "may in some cases result in legal uncertainty,"¹⁰⁶ but this fleeting moment of judicial candor vastly understates the impossibility of identifying any area of modern social life left untouched by commercial concerns.

The example of family law surfaces as the majority's principal response to the dissent's empirical claim concerning the important

¹⁰⁰ *Id.* at 1633.

¹⁰¹ *Id.* at 1629 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

¹⁰² See *supra* notes 87-88 and accompanying text; see also *TRIBE*, *supra* note 42, § 5-20, at 380-81 (insisting that, as a constitutional matter, "Congress cannot deny the states *some* symbolic corollaries of independent status, *some* revenue with which to operate, *some* sphere of autonomous lawmaking competence, and *some* measure of choice in selecting a political structure").

¹⁰³ See *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting) ("The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects interstate commerce and what touches it only indirectly.").

¹⁰⁴ *Id.* at 1664 (Breyer, J., dissenting).

¹⁰⁵ *Id.* at 1662 (Breyer, J., dissenting).

¹⁰⁶ *Id.* at 1633.

connection between education and national economic well-being. No less than four times the majority stresses the point that, "[u]nder the dissent's rationale, Congress could just as easily look at child rearing as falling on the commercial side of the line because it provides 'a valuable service—namely, to equip children with the skills they need to survive in life and, more specifically, in the workplace.'"¹⁰⁷ There can be no question that the majority correctly insists that the example of family law explodes the dissent's position. The effects of divorce, nonpayment of child support, foster-care, restrictions on marriage, and numerous other aspects of family life on the national economy are widely documented.¹⁰⁸ Indeed, it is arguable that no institution has more direct links to the economic, social and political well-being of this country than the family.

Yet despite a compelling analysis of the connection between education and commerce, the dissent openly retreats from drawing the same conclusions with respect to family law.¹⁰⁹ Struggling vainly to salvage federalism from the ruins of its own analysis, the dissent weakly asserts that "the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institu-

¹⁰⁷ *Id.* at 1633 (quoting *id.* at 1664 (Breyer, J., dissenting)); see also *id.* at 1632 ("[U]nder the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."); *id.* (describing as "devoid of substance" Justice Breyer's suggestion "that there might be some limitations on Congress' commerce power such as family law"); *id.* at 1633 (noting that the dissent's analysis "would be equally applicable, if not more so, to subjects such as family law and direct regulation of education").

¹⁰⁸ See, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985) ("On a societal level, divorce increases female and child poverty and creates an ever-widening gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other."); CHILDREN OF POVERTY: RESEARCH, HEALTH, AND POLICY ISSUES (Hiram E. Fitzgerald et al. eds., 1995) (exploring issues surrounding the connection between poverty and family life in the United States); NORA S. GUSTAVSSON & ELIZABETH A. SEGAL, *CRITICAL ISSUES IN CHILD WELFARE* 181 (Nora S. Gustavsson & Elizabeth A. Segal eds., 1994) (noting that "[t]he overall benefit to society of caring for our children today is a healthy and productive workforce for tomorrow"); ARLOC SHERMAN, *WASTING AMERICA'S FUTURE: THE CHILDREN'S DEFENSE FUND REPORT ON THE COSTS OF CHILD POVERTY* 59-119 (1994) (documenting the national economic costs of child poverty).

¹⁰⁹ See *Lopez*, 115 S. Ct. at 1661 (Breyer, J., dissenting) (denying in conclusory fashion that its approach would permit the federal government "to regulate 'marriage, divorce, and child custody'").

tions."¹¹⁰ Abandoning the implications of its critique at the domestic threshold, the dissent remains unwilling to cede authority over family law to the federal government, asserting without support that its approach would not permit Congress "to regulate 'marriage, divorce, and child custody.'"¹¹¹

The discussion of family law in *Lopez* crystallizes the central problem for contemporary federalism: how to identify meaningful substantive limits on federal regulatory power. Both the majority and the dissent invoke family law as a paradigmatic arena of state authority, yet neither provides a basis upon which to distinguish family law from other regulatory matters within Congress's power. Missing from the discussion in *Lopez* is any inquiry into the substantive connection between education and family law on the one hand, and state authority on the other. The majority and the dissent in *Lopez* both proceed on the widespread but mistaken assumption that the presence of a strong national interest always militates in favor of national regulatory authority. The Justices neglect to consider, however, that the principle of federalism might come into play precisely because local control over families and education is vital to the survival of our national liberal democracy.¹¹² They fail to recognize that state sovereignty over family law preserves the constitutional ideal of citizenship by promoting the development of civic virtue—and in particular the virtue of situated autonomy—in maturing children. Federalism in this context destroys the federal government's power to mold the moral character of future citizens in its own uniform image.

Despite its obvious shortcomings, the decision in *Lopez* makes a vital contribution to the contemporary debate over federalism by reopening the general question of substantive spheres of governmental authority. Equally important, the decision highlights the importance of family law to the constitutional ideal of federalism. The following Section begins the task of elaborating a localist theory of federal-state relations by examining the doctrinal history of state authority over family law.

¹¹⁰ *Id.* at 1662.

¹¹¹ *Id.* at 1661.

¹¹² Although I do not discuss state authority over education in this Article, the theory of localism developed here with respect to families is also obviously relevant to a discussion of primary education in a liberal society. For discussions of the place of education in liberal society, see GUTMANN, *supra* note 12; Nomi M. Stolzenberg, "He Drew a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

D. *Localism and Family Law*

From the earliest days of the Republic until the recent past, family law has unquestionably belonged to the states.¹¹³ The era of dual federalism witnessed universal agreement that government regulation of the family fell within the constitutionally protected sphere of state sovereignty.¹¹⁴ Although the Supreme Court during this time did not have occasion to hold directly that family matters were beyond the scope of congressional power, it did carve out a domestic relations exception to federal court jurisdiction that underscored its often expressed view that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs

¹¹³ Judith Resnik notes that "[w]hile federal law thus far has not regulated directly either the marriage, divorce, or custodial relations of divorcing parents, federal law does govern a host of legal and economic relations that do affect and sometimes define family life." Resnik, *supra* note 11, at 1721. After surveying federal law on the family, Professor Resnik then concludes, however, that "the idea that family law belongs to the states becomes problematic." *Id.* at 1746-47. Although it is my view that the core domain of family law, which includes marriage, divorce, child custody and support, alimony, property division, adoption, foster care, child welfare, and termination of parental rights, may properly be characterized as still "belonging" to the states, Professor Resnik is right to point out that many areas of federal law (such as taxation, immigration, and bankruptcy law) do address family life. Moreover, much recent federal legislation has pressed up against, if not crossed over, the boundary of traditional state authority. For examples, see *supra* note 1.

¹¹⁴ See *Carter v. Carter Coal Co.*, 298 U.S. 238, 292-93 (1936) (noting that national legislation on marriage and divorce, however vigorously demanded, is constitutionally beyond Congress's power); *Northern Sec. Co. v. United States*, 193 U.S. 197, 402 (1904) (Holmes, J., dissenting) ("Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce."); see also Van Alstyne, *supra* note 11, at 773 ("Many subjects (e.g., the divorce or descent laws of the several states) were not in dispute at the time [of ratification], . . . and no proposals were made or adopted to confide any general power to Congress.").

Sarah Barringer Gordon details the rise of a national antipolygamy campaign during the second half of the nineteenth century. See Sarah Barringer Gordon, "The Twin Relics of Barbarism": A Legal History of Anti-Polygamy in Nineteenth Century America (1995) (unpublished Ph.D. dissertation, Princeton University) (manuscript on file with author); see also Resnik, *supra* note 11, at 1743-44 (discussing nineteenth-century federal efforts to control polygamy and sexual relations). During this time, Congress passed several measures designed to eliminate the Mormon practice of polygamy in the federal territories, a geographic area in which the federal government possessed the traditional regulatory powers of the states. See *id.* at 1743 (noting that the antipolygamy legislation "was directed at federal governance of the territories and was implemented by the federal courts in their capacity as 'territorial courts' (thus acting as 'state courts' for these purposes)" (footnote omitted)). Although Professor Gordon provides compelling evidence of the importance of the national antipolygamy movement to the national political life of the time, I see little evidence in the law of federalism or domestic relations that the antipolygamy movement fundamentally altered the traditional presumption of state authority over family law.

to the laws of the States and not to the laws of the United States."¹¹⁵

The domestic relations exception concerned the extent of federal judicial power rather than congressional power, yet the principle of localism underlying the doctrine was the same.¹¹⁶ Justice Daniel's dissenting opinion in *Barber v. Barber*¹¹⁷ articulated the important connection between family law and state sovereignty.¹¹⁸ Justice Daniel concluded that "[the] power [to regulate the domestic relations of society] belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities."¹¹⁹ The domestic relations exception reflected the view that family law constituted a distinctly communitarian endeavor, a subject reflecting locally shared values and norms.¹²⁰ The moral dimension of family law gave rise to the localist view that family law belonged to the particular states within which those moral norms and values were conceived and followed. Perhaps more than any other legal domain, family law epitomized dual federalism's association of state sovereignty with the localist views of the antifederalists.¹²¹

¹¹⁵ *In re Burrus*, 136 U.S. 586, 593-94 (1890); see also *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony . . ."). But cf. *De la Rama v. De la Rama*, 201 U.S. 303, 307-08 (1906) (stating that the domestic relations exception does not apply to suits within the territories); *Simms v. Simms*, 175 U.S. 162, 167 (1899) (same).

¹¹⁶ See *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930) ("If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly . . ."). At least one decision from the era of dual federalism proposed a statutory basis for the exemption. See *De la Rama*, 201 U.S. at 307 (noting that diversity jurisdiction was unavailable in divorce cases because a husband and wife by law share the same domicile and no monetary amount is involved).

¹¹⁷ 62 U.S. (21 How.) 582 (1858).

¹¹⁸ Drawing out the historical connection between localist ideology and pro-slavery sentiments, Naomi R. Cahn describes Chief Justice Taney's approach in *Barber* as an effort "to preserve state control over the family and to protect another form of 'property,'" Cahn, *supra* note 11, at 1078, much as he had preserved state control over slaves two years earlier in *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

¹¹⁹ *Barber*, 62 U.S. (21 How.) at 602.

¹²⁰ See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.").

¹²¹ Cf. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN

The doctrinal implications of dual federalism's eventual demise for family law were clear. If limits on Congress's substantive lawmaking powers no longer existed, then the federal government would be free to legislate pursuant to its Article I powers in the domain of family life.¹²² Until recently, however, Congress evidently chose to pursue a course of self-restraint with respect to domestic relations.¹²³ The prevailing view of federalism would suggest that this exercise of self-restraint derived from a pragmatic deference to the states' historical expertise in the domain of the family, an example of cooperative intergovernmental relations under which the federal government delegates exclusive authority to the states over particular subject matters. In the post-dual-federalism world, it is left to Congress to decide whether the national government will exercise its plenary substantive authority over matters of familial concern.

The Supreme Court's most recent decision on the domestic relations exception, *Ankenbrandt v. Richards*,¹²⁴ reinforces this pragmatic understanding of family law's place in the federal system. Whereas the domestic relations exception might once have been understood as constitutionally compelled, the Supreme Court held in *Ankenbrandt* that the exception exists as a matter of statutory

NINETEENTH-CENTURY AMERICA 295 (1985). Professor Grossberg notes:

[J]udicial dominance of domestic relations grew out of an abiding commitment to local control that lay at the heart of nineteenth-century American family law. An expression of the nation's persistent localism, opposition to national jurisdiction over the family stemmed from the deep-seated republican aversion to centralized government in general, and more particularly its lingering localist corollary that state policy makers and community officials best understood the dynamics of family life.

Id.

¹²² Any limitations on the federal government's power to legislate in the domain of family law would flow, not from federalism concerns, but from the constitutional protection for "family privacy." Although Supreme Court cases invoking the right of family privacy have involved legislation at the state level only, *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down a state law forbidding the use of contraceptives), the right of privacy also constrains the power of the federal government.

¹²³ Until recently, Congress had not attempted to pass legislation directly regulating such core family matters as marriage, alimony, property division, child custody, child support, adoption, or termination of parental rights. For recent legislation, *see supra* note 1.

¹²⁴ 112 S. Ct. 2206, 2215 (1992) (interpreting a statutory grant of diversity jurisdiction as incorporating a domestic relations exception). For a discussion of this case that takes an affirmative view of federal jurisdiction in matters of family law, *see Cahn, supra* note 11, at 1081-87.

construction.¹²⁵ The Court concluded that Congress has the authority to grant jurisdiction over domestic relations cases to the federal courts, although the Court nevertheless affirmed the "sound policy considerations" supporting the statutory exception.¹²⁶ Yet it is possible that Congress's posture of jurisdictional self-restraint toward domestic relations reflects something more than mere policy considerations: a lingering suspicion that "some sphere of autonomous lawmaking competence" must remain with the states.¹²⁷ Behind this congressional restraint may lie the persistent view that our federal system in its very design contemplates that the states shall possess primary regulatory authority over the realm of family relations.

Congress's historical self-restraint has obscured the implications of the demise of dual federalism for family law. Congressional inaction has made it possible for courts and commentators to overlook the value of localism in our constitutional structure. As a consequence, we are unequipped to respond to the situation we now face: the federal government's increasing involvement in issues of family law. The contemporary approach to federalism provides no conceptual framework for examining the substantive relation between family law and the constitutional design. It is for that reason that an understanding of the importance of family law in the federal system is not merely of theoretical interest but is also of significant practical importance.

The troubled history of dual federalism has led contemporary proponents of federalism to overlook the important ways in which our constitutional structure demands a richer, more comprehensive account of the states' substantive role in the federal scheme than

¹²⁵ See *Ankenbrandt*, 112 S. Ct. at 2212 (holding that "Article III, § 2, does not mandate the exclusion of domestic relations cases from federal-court jurisdiction").

¹²⁶ *Id.* at 2215. The Court lists these policy considerations as follows:

Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees.

Id.

¹²⁷ *TRIBE*, *supra* note 42, § 5-20, at 380-81.

the procedural model can ever provide. Although the Supreme Court in *Lopez* revived a substantive framework for federalism, the Court failed to provide a meaningful defense of state sovereignty over family law. The remainder of this Article undertakes to explain why national regulation of the family raises a serious threat of government tyranny over an area constitutive of individual identity and essential to the moral autonomy of developing citizens in liberal society.

II. FAMILIES AND THE DEVELOPMENT OF CIVIC CHARACTER

A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.¹²⁸

This Article argues that state authority over family law is an essential feature of our liberal constitutional order. Implicit in the design of the Constitution is the understanding that the states have responsibility for developing a shared moral vision of the good family life. Prohibited from assuming responsibility for this moral domain, the federal government plays a limited but vital role in protecting individual rights in the domestic sphere against state encroachment. The localist theory of family law presented in Part III of this Article explores the relationship between the federal and the state governments and the distinct role that each plays in the overall regulation of the family in the liberal state.

In order to understand the relationship between federal and state authority over the family, however, we first need to understand the more general relationship between government and families in a liberal democracy. What justifies governmental involvement at all in the so-called private sphere of family life? How should we understand the status of the family in a liberal polity committed to the protection of individual rights and liberties? And what exactly is at stake when the government undertakes, as it must, regulation of family values? After clarifying the contours of the general relationship between liberal government and families in Part II, I then turn in Part III to the question of federalism and the importance of state authority over the moral terms of family life.

Section A of this Part explores the concept of parental authority within liberal theory and the role that parents play in fostering the development of civic virtue in children. Section B then examines

¹²⁸ *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

the concept of citizenship that underlies the constitutional recognition of parental authority and explores what I call the civic virtue of situated autonomy. Section C looks more closely at the relationship between parental authority and the development of situated autonomy in children. Section C analyzes the notion of "situatedness" by drawing out, first, the relational claim that parents provide the necessary environmental conditions for the psychological development of autonomy and, second, the communal claim that parents instill particular values and beliefs in their developing children. Exploration of the parental role in fostering psychological autonomy and cultural embeddedness will help to illuminate what is at stake when the liberal state exercises its regulatory authority over family life. This discussion of liberal citizenship and the civic virtue of situated autonomy lays the conceptual foundation for Part III's discussion of the need for local authority over the moral domain of family law.

A. *Families in Liberal Theory*

The relationship between the liberal state and the family has traditionally been understood in terms of the classic liberal distinction between public and private spheres of life.¹²⁹ In

¹²⁹ See Judith N. Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE, *supra* note 12, at 21, 24 ("Because of the primacy of toleration as the irreducible limit on public agents, liberals must always draw . . . a line [between the spheres of the personal and the public]."). For an exploration of the concepts of public and private within liberal theory, see Stanley I. Benn & Gerald F. Gaus, *The Liberal Conception of the Public and the Private*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 31 (S.I. Benn & G.F. Gaus eds., 1983). For a critique of the public/private distinction from a feminist perspective, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 43 (1992) ("[F]ighting the verbal distinction between public and private, rather than fighting invalid arguments which invoke them, or the power structures which manipulate them in unjustifiable ways, is as futile as seeking individual therapy for problems of social structure.") Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE, *supra*, at 281, 283 (arguing that "the separation and opposition of the public and private spheres is an unequal opposition between men and women"); and from a critical perspective, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 286-89, 355-68 (1979). Liberalism may be understood, in part at least, as a reaction against the prevailing seventeenth century political theory that conflated familial and political authority. For the best known example of this preliberal theory, see ROBERT FILMER, *PATRIARCHA AND OTHER POLITICAL WORKS* (Peter Laslett ed., 1949). Benn and Gaus suggest that the organizing antithesis prior to the Reformation was not public/private, but temporal/spiritual. See Stanley I. Benn & Gerald F. Gaus, *The Public and the Private: Concepts and Action*, in PUBLIC AND PRIVATE IN SOCIAL LIFE, *supra*, at 3, 19.

addition to marking the fundamental boundary between collective authority and individual freedom—the boundary that in large part defines the liberal project—the division between public and private has also expressed a qualitative distinction within liberal society. Under liberalism, the public sphere of politics is understood to operate according to the principles of governmental neutrality, social toleration, and individual autonomy. The private domestic sphere, in contrast, is governed by a quite different constellation of values oriented around the affective virtues of love, trust, and human dependence. More pointedly, the organic transmission of shared values and beliefs that characterizes family life has been considered antithetical to the studied neutrality and tolerant respect of liberal politics.¹³⁰

The realms of public and private life, although antithetical, have not been seen as incompatible. The private domestic sphere has traditionally been thought to offer a necessary refuge from the relentlessly amoral, individualistic concerns of public life.¹³¹ The domestic sphere has also been viewed as the place where human beings cultivate their individual values and beliefs free from government control. Because the domestic sphere is understood to be a central arena for the formation of individual values and beliefs, liberalism has traditionally sought to set strict limits on the power of the state to intervene in family matters. The constitutional doctrine of family privacy stands as the most forceful embodiment within contemporary legal doctrine of liberalism's concern for preserving this "private realm of family life which the state cannot enter."¹³²

A fundamental flaw in the traditional liberal distinction between the public realm of politics and the private realm of family life lies in the fact that government has always exerted a powerful, and often

¹³⁰ See LINDA J. NICHOLSON, *GENDER AND HISTORY: THE LIMITS OF SOCIAL THEORY IN THE AGE OF THE FAMILY* 43-44 (1986) (noting that, according to traditional doctrine, the home represents a refuge from the sphere of business and politics, a "domain where morality, concern for others, sensibility, and feelings [are] allowed to exist"); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505 (1983) (noting that within the family "[t]he good of all is . . . achieved not by each family member's pursuit of individual goals, but rather by sharing and sacrifice among family members"). I discuss this subject in greater detail in Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 964-72 (1993).

¹³¹ See CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* at xiii (1977).

¹³² *Prince*, 321 U.S. at 166.

primary, influence within the domestic sphere.¹³³ In addition to the infinite ways in which the law indirectly affects family life,¹³⁴ state laws directly govern who may marry, when they may marry, the consequences of divorce, and, perhaps most important, the terms and obligations of parenthood.¹³⁵ While the state cannot prevent fertile couples from bearing a child, the law monitors parental fitness by way of abuse and neglect statutes, and the states all claim the ultimate power to terminate parental rights altogether. Most dramatically, at moments of family transition, whether upon divorce, death, or the intervention of child welfare agencies, the state assumes authority for determining key issues of family life. In addition to financial matters, the state determines what is in the best interests of the child, an open-ended legal standard that requires the decision-maker to draw upon substantive values and ideals surrounding the welfare of children.¹³⁶ State legislatures and courts are deeply engaged in an ongoing process of shaping, articulating, and enforcing community norms concerning the good life for families and their children.

The states' strong presence in the realm of family life is not merely an unfortunate departure from the ideal liberal state. Family privacy in the sense of freedom from governmental influence or control is an incoherent idea. It is impossible to imagine how an ordered society would evolve or survive with a domestic sphere entirely free of governmental regulation. The pervasive presence of law within the sphere of family life is not an historical accident, but a defining attribute of kinship relations within human society.¹³⁷

¹³³ I discuss this point in greater detail in Dailey, *supra* note 130, at 997-1008. Susan Okin also describes how "the liberal state has regulated and controlled the family, in innumerable ways, and in such ways as to reinforce patriarchy." Susan M. Okin, *Humanist Liberalism*, in *LIBERALISM AND THE MORAL LIFE*, *supra* note 12, at 39, 42 (emphasis omitted); see also Pateman, *supra* note 129, at 295 ("Feminists have emphasized how personal circumstances are structured by public factors, by laws about rape and abortion, by the status of 'wife', by policies on childcare and the allocation of welfare benefits and the sexual division of labour in the home and workplace.").

¹³⁴ Examples of law's indirect effects on family life may be found in the areas of criminal law, taxation, estate planning, insurance law, labor law, contract law, tort law, and property law. See, e.g., Dailey, *supra* note 130, at 1001-02 (describing statutes that extinguish rape claims within the marital context as "[o]ne example of the law's historical role in setting the terms of family relationships").

¹³⁵ For examples of state laws and cases governing these areas of the family, see *infra* notes 236-60 and accompanying text.

¹³⁶ See *infra* part II.C.2.

¹³⁷ See, e.g., CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 3 (1980) (noting that "anthropological studies

Even in primitive cultures, the public regulation of intimate relations imposes a necessary organizing structure on human instincts, desires, and emotions, a structure that serves to stabilize the social foundation for the development of more advanced economic and political systems.¹³⁸ It is inconceivable that any society could operate in the absence of laws defining, organizing, and regulating the social and economic aspects of primary kinship relations.

Impractical under any circumstances, the concept of family privacy is also vulnerable to critique from within the traditional liberal paradigm. To the extent that the legal doctrine of family privacy seeks to prevent the state from intervening in the governance of family life, it actually reinforces the authority of the domestic community over its individual members. Family privacy thus transgresses the fundamental liberal commitment to individual autonomy, understood as the capacity of each individual to determine for herself in what manner she will lead her life.¹³⁹ The expansive development of the constitutional right of individual privacy in matters of family life beginning in the early 1970s¹⁴⁰

of cultures far removed in character from so-called civilized societies have turned up virtually none which lacked a family life," and defining family life to include "socially recognized and defined" rights and duties).

¹³⁸ Claude Lévi-Strauss writes:

[I]t will never be sufficiently emphasized that, if social organization had a beginning, this could only have consisted in the incest prohibition since . . . the incest prohibition is, in fact, a kind of remodeling of the biological conditions of mating and procreation (which know no rule, as can be seen from observing animal life) compelling them to become perpetuated only in an artificial framework of taboos and obligations. It is there, and only there, that we find a passage from nature to culture, from animal to human life

Claude Lévi-Strauss, *The Family, in* MAN, CULTURE AND SOCIETY 261, 278 (Harry L. Shapiro ed., 1956); see also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 228 (1983) (noting that "[t]he rules of kinship are an anthropological feast"). Although Walzer recognizes that formal and informal regulations "constitute an elaborate system of rules" governing kinship, *id.*, he nevertheless overemphasizes, in my view, the "opposition of kinship and politics," which to him is "very old, perhaps primordial." *Id.* at 229. Obviously, I do not agree with Walzer that "legislators ordinarily deal with [the rules of kinship] only at the margins or after the fact." *Id.* at 228.

¹³⁹ The modern women's movement, with its early emphasis on "the personal is political," Dailey, *supra* note 130, at 1018, fortified this individualistic critique of family privacy. Women's claim to equality and autonomy within the marital relationship dramatically undercut the ideological power of family privacy. See *id.* at 1018-21.

¹⁴⁰ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976) (striking down a

underscores the radically individualistic impulses of traditional liberal theory. Taken to their extreme, such impulses eventually threaten to extinguish the legal authority of all communal enterprises that stand between the individual and the liberal state.¹⁴¹

Our understanding of the relationship between the liberal state and the family has thus evolved in the last few decades. No longer shielded from public view, the relations among spouses and children have been opened to evaluation against liberal principles. In general, the courts have moved in the direction of reconceiving marriage in liberal terms as an equal, contractual relationship designed to fulfill individual interests.¹⁴² Viewing the spousal relationship as a domestic partnership rather than as an organic entity allows courts to promote the liberal values of individual autonomy and governmental neutrality. Under this contractual view of marriage, individuals may design the terms of their own relationships without governmental interference. Although the state may still impose certain limited duties on spouses,¹⁴³ in many important ways individuals are now free to negotiate the terms of their own marital relationships.

The expansion of individual rights within the domestic sphere, however, has not entirely eradicated the rhetoric of family privacy from legal discourse.¹⁴⁴ The doctrine of family privacy may no

state abortion law requiring a married woman to obtain the prior consent of her spouse); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (recognizing a woman's right to decide whether to terminate her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 452-53 (1972) (recognizing the right of unmarried individuals to obtain contraceptives).

¹⁴¹ See Frug, *supra* note 44, at 1088 (arguing that "[t]he evolution of liberalism . . . can be understood as an undermining of the vitality of all groups that . . . held an intermediate position between what we now think of as the sphere of the individual and that of the state").

¹⁴² See Dailey, *supra* note 130, at 972-79 (discussing the liberalization of the family).

¹⁴³ See, e.g., CONN. GEN. STAT. ANN. § 46b-37 (West Supp. 1995) (imposing a duty on each spouse to support his or her family).

¹⁴⁴ See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (describing "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family"); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (limiting the right of privacy to activity connected to "family, marriage [and] procreation"); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (arguing that the Constitution "must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children."); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 845 (1977) (stating that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights"); *Moore v. City of E. Cleveland*, 431

longer shield the marital relationship from public scrutiny, but it continues to control the state's ability to intervene in the parent-child relationship on behalf of the child. Although courts and commentators still conceive of family privacy in terms of negative liberty—keeping the government out of family affairs—upon closer examination the doctrine of family privacy in fact reveals itself to be a means for the enforcement of parental rights over children. The core meaning of family privacy has come to revolve around “the liberty of parents and guardians to direct the upbringing and education of children under their control.”¹⁴⁵ Far from keeping government out of the domestic realm, the doctrine of family privacy puts the power of the state behind the exercise of parental authority over the lives of their children.¹⁴⁶

The right of parental authority presents a problem for liberalism, since the recognition and enforcement of parental rights entails a corresponding denial of the right of children to direct their own lives. Obviously, no one would suggest that infants have the capacity to be self-governing. Nevertheless, the reality of childhood dependence need not inescapably translate into parental rights. Moreover, to say that the law must recognize parental rights because to do so is in the best interests of children, while possibly true as a general matter, would seem to contravene the basic liberal commitment to governmental neutrality on questions of the good life.¹⁴⁷ All disputes that raise the issue of parental authority to some degree pose a challenge to the parents' substantive values and beliefs. In some cases, a third party might claim to offer a superior home environment for the child, a closer psychological bond, or a healthier life; in others, an older child herself might assert the right to make educational, medical, or life-style decisions against her parents' wishes. In all such cases, absent serious abuse or neglect, the trump card of parental authority will control the legal outcome.

U.S. 494, 498 (1977) (plurality opinion) (striking down a municipal zoning ordinance on the ground that the law “slic[ed] deeply into the family itself” (footnote omitted)).

¹⁴⁵ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

¹⁴⁶ I develop this point in greater detail in Dailey, *supra* note 130, at 983-89.

¹⁴⁷ When I refer to the liberal principle of neutrality here, I do not mean to suggest that liberalism is wholly impartial with respect to all theories of the good, since liberalism itself must certainly be counted as one such theory. I do mean to suggest that, as among differing ways of life compatible with the liberal political order, the liberal state does endeavor to remain, to the extent possible, impartial. See Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 *ETHICS* 883, 883-86 (1989) (defining liberal neutrality). For a discussion of the liberal ideal of governmental neutrality, see *infra* part III.A.

And, if the child runs away or a third party resorts to self-help, the coercive power of the state will intercede on the parents' behalf.¹⁴⁸ In these situations, liberalism must be able to justify on its own terms why, when a dispute arises between parents and children, or between parents and third parties with respect to children, the state automatically enforces parental authority as a fundamental right. The liberal view of children, which traditionally rests on a model of incompetency or impaired choice, does not itself speak to the question of parental rights.¹⁴⁹

Unlike contemporary liberal theorists, who for the most part have overlooked the issue of parental authority,¹⁵⁰ the Supreme Court has worked to justify the presence of parental rights within a constitutional philosophy oriented around the

¹⁴⁸ See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 837 (1985) (noting that even "the staunchest opponents of state intervention in the family will insist that the state reinforce parents' authority over their children").

¹⁴⁹ See Dailey, *supra* note 130, at 987-88.

¹⁵⁰ For exceptions, see WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 254-55 (1991) (discussing how liberal democracies draw the line between parental and public authority over children's education); GUTMANN, *supra* note 12, at 28-33 (describing the "state of families" in which educational authority rests with parents). Although modern scholars have been notably silent on this issue, one can assume that justifications for parental authority would track the traditional strands of utilitarian and rights-based liberalism. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 886-93 (1984) (discussing the legal and theoretical foundation for exclusive parenthood). Either strand proves unsatisfactory. A rights-based justification for parental authority, constitutionally rooted in an understanding of "this Nation's history and tradition," *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); see also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977), cannot reconcile the inherent conflict between parental authority and the competing needs and desires of the individual child. Similarly, a utilitarian justification cannot explain why parental authority and not the authority of intimate caregivers, close relatives, religious authorities, or educational leaders should prevail.

Unlike their modern counterparts, classical liberal thinkers did address the question of parental authority. In describing "Dominion Paternal," for example, Hobbes argues that, in the state of nature, the right of parental authority would lie with the mother who chooses to "nourish" her infant, for the infant "owe[s] its life to the mother and is therefore obliged to obey her rather than any other, and by consequence the dominion over it is hers." THOMAS HOBBS, *LEVIATHAN* 164 (Liberal Arts Press, 1958) (1651). However, Hobbes qualifies this rather radical proposal for matriarchal rights with the important caveat that "[i]f the mother be the father's subject, the child is in the father's power." *Id.* at 165. Locke grounded his theory of paternal rule, as well as the rule of the husband over the wife, in nature. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 146-59 (Thomas I. Cook ed., Hafner Publishing Co. 1947) (1690).

liberal ideal of individual autonomy. Forsaking traditional rights-based and utilitarian arguments, the Court has offered what I construe as a civic justification for parental rights.¹⁵¹ In the Court's view, state enforcement of parental authority legitimately serves the liberal ideal by reinforcing the parents' unique role in preparing children to assume the responsibilities of citizenship.¹⁵² In *Bellotti v. Baird*,¹⁵³ Justice Powell elaborated on the connection between the exercise of parental authority in the home and the preservation of individual liberty in the political sphere:

[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors. . . . "[T]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." . . . This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.

We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹⁵⁴

As Justice Powell explains, parents help to instill the virtues of mature reflection and public spiritedness required of citizens if our liberal democracy is to succeed.¹⁵⁵

¹⁵¹ Developing a similar argument, to which I am indebted, Nomi Stolzenberg explores what she calls the "civic" interest in public education. See Stolzenberg, *supra* note 112, at 644-60.

¹⁵² See Bartlett, *supra* note 150, at 892 ("The family provides the setting within which children are raised to become stable, responsible citizens."). Like Bartlett, I also conclude that the nuclear family and exclusive parenthood are not essential to, and in many situations may be counter to, the developmental needs of children in the liberal state.

¹⁵³ 443 U.S. 622 (1979) (plurality opinion).

¹⁵⁴ *Id.* at 637-38 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis omitted) (citations omitted) (second alteration in original)).

¹⁵⁵ For Supreme Court decisions affirming the importance of parental authority,

The Supreme Court's defense of the importance of the parental role is intuitively satisfying, for most of us share an unyielding sense that parents do provide something for their children that is beyond the reach of governmental expertise. The view that what parents provide is instruction in the art of political citizenship, however, resonates with a vision of parental authority more commonly associated with the civic republican tradition than with liberalism. Family historians have recently begun to explore the antifederalists' emphasis on the family's essential role in inculcating the civic virtue required of citizenship in a republican state. "Though other institutions such as the common school and the church shared its duties, molding the nation's young into virtuous republicans and competent burghers became more clearly the primary responsibility of the family."¹⁵⁶ Linda Kerber points out that the primary political responsibility for raising virtuous citizens during the revolutionary era was assigned to mothers.¹⁵⁷ Perhaps surprisingly, therefore, the liberal defense of parental authority implicitly invokes an ideal

see *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Parham v. J.R.*, 442 U.S. 584 (1979); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁵⁶ GROSSBERG, *supra* note 121, at 8.

¹⁵⁷ See LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 22-30 (1980). Professor Kerber elaborates on the role of the Republican Mother during the revolutionary era:

The Republican Mother's life was dedicated to the service of civic virtue: she educated her sons for it, she condemned and corrected her husband's lapses from it. If, according to . . . [one] commonly accepted claim, the stability of the nation rested on the persistence of virtue among its citizens, then the creation of virtuous citizens was dependent on the presence of wives and mothers who were well informed, "properly methodical," and free of "invidious and rancorous passions." It was perhaps more than mere coincidence that *virtù* was derived from the Latin word for *man*, with its connotations of virility. Political action seemed somehow inherently masculine. Virtue in a woman seemed to require another theater for its display. To that end the theorists created a mother who had a political purpose and argued that her domestic behavior had a direct political function in the Republic.

Id. at 229; see also GROSSBERG, *supra* note 121, at 7-8 ("By charging homes with the vital responsibility of molding the private virtue necessary for republicanism to flourish, the new nation greatly enhanced the importance of women's family duties."); BERNARD WISBY, *THE CHILD AND THE REPUBLIC: THE DAWN OF MODERN AMERICAN CHILD NURTURE* 24-33 (1968) (discussing the republican view of the American mother's role in the molding of future generations).

of the Republican Mother¹⁵⁸ historically rooted in the political thought of civic republicanism.

Long overlooked, the concept of parental rights turns out to be central to the liberal project. The importance of parental authority would seem to lie in the fact that the essential virtues of liberal citizenship can only be acquired in the context of intimate human relationships. As the Supreme Court has repeatedly emphasized, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹⁵⁹ Yet the Court's explanation of parental rights leaves some questions unanswered. What exactly are the virtues of liberal citizenship? And why is the state itself incapable of instilling these virtues in its future citizens? By exploring these questions in the following two Sections, I hope to give some insight into the need for parental authority in the liberal state, as well as an understanding of what is at stake politically when the government assumes responsibility, as it must, for regulating family life.

B. *Liberal Citizenship and Civic Character*

The obligations of citizenship in the liberal state are generally understood to implicate the form of political participation rather than the substance of political beliefs. Under liberalism, no one is required to adhere to any particular values or ideas;¹⁶⁰ even in its most robust form, what liberalism requires of its citizens is a tolerant disposition, rational habits of thought, and a willingness to engage in political discourse, what we may refer to as "civic character."¹⁶¹ Although not tied to any particular value system,

¹⁵⁸ I borrow the term "Republican Mother" from KERBER, *supra* note 157, at 228. Will Kymlicka and Wayne Norman identify a modern version of the Republican Mother in the theory of "maternal citizenship." As they explain, maternal citizenship theorists "focus on the family, and mothering in particular, as the school of responsibility and virtue." Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 364-65 (1994).

¹⁵⁹ Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

¹⁶⁰ For one of the more well-known statements of this view, see West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

¹⁶¹ As critics of traditional liberalism have shown, it is certainly possible to promote a minimalist theory of liberalism that requires very little of citizens, perhaps only the effort it takes to cast a vote. See BARBER, *supra* note 12, at 6-11 (describing

civic character does entail commitment to a political way of life. It implies a measure of critical distance from all beliefs and values, a somewhat dispassionate and intellectual perspective from which

the "anarchist" disposition in liberalism). My understanding of liberalism assumes a meaningful degree of democratic participation on the part of citizens, although I do not mean to exclude the usefulness and necessity of representative politics for the American system. See GALSTON, *supra* note 150, at 247 (observing that "in liberal democracies, representative institutions replace direct self-government for many purposes"). But see BARBER, *supra* note 12, at xiv (contending that "[r]epresentation destroys participation and citizenship"); cf. *id.* (defining strong democracy "as a form of government in which all of the people govern themselves in at least some public matters at least some of the time").

Amy Gutmann employs the term "democratic character" in the same sense as my use of the term "civic character." See GUTMANN, *supra* note 12, at 50-52. Gutmann's term highlights the ambiguous and uneasy relationship between liberalism and democracy within the American political tradition. Contemporary theorists seeking to correct for what they see as traditional liberalism's overvaluation of individual liberty have begun to emphasize the importance of the community-affirming aspects of participatory democracy. In addition to Amy Gutmann, see BARBER, *supra* note 12, at xi (arguing that "what little democracy we have had in the West has been repeatedly compromised by the liberal institutions with which it has been undergirded and the liberal philosophy from which its theory and practice have been derived"); cf. GALSTON, *supra* note 150, at 246-48 (correcting for what he views as the recent overemphasis on democracy at the expense of liberty, as exemplified in Gutmann's work). Theorists such as Gutmann and Barber who promote the ideal of participatory democracy are not too far off from those communitarian theorists who, while purporting to reject liberalism altogether, nevertheless (and necessarily) retain a commitment to the concept of individual autonomy. See, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 139 (1982) (noting that "unless some principle of individuation other than a merely empirical one can be found, the danger . . . is the drift into a radically situated subject"); see also *infra* notes 213-18 and accompanying text (discussing the importance of autonomy in prevailing communitarian thought).

As theorists have begun to explore the interconnections between individual autonomy and community life, the boundaries marking off the categories of liberalism and communitarianism have blurred, and participatory democracy has seemed to emerge as a central feature of both traditions. See Kymlicka & Norman, *supra* note 158, at 361 ("The modern civic republican tradition is an extreme form of participatory democracy largely inspired by Machiavelli and Rousseau (who were in turn enamored with the Greeks and Romans)."). The question upon which liberal and communitarian theorists seem to be converging is whether a reinvigorated form of participatory democracy, sustained by responsible citizens engaged in political dialogue, can generate enough of a shared identity to constitute community in the "thick" sense without sacrificing the central liberal value of individual autonomy. See GALSTON, *supra* note 150, at 44 (promoting "a nonneutral, substantive liberalism committed to its own distinctive conception of the good"); Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY* 163 (John W. Chapman & Ian Shapiro eds., 1993) (promoting the concept of "democratic community"); Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *LIBERALISM AND THE MORAL LIFE*, *supra* note 12, at 159-60 (describing the possibility of "holist[ic]" social theory).

citizens may together deliberate "competing conceptions of the good life and the good society."¹⁶² Liberalism assumes that individuals so equipped with the habits of rational thought and critical deliberation share the intellectual tools necessary for communal engagement in the art of political dialogue.¹⁶³ At their best, liberal citizens exhibit more than tolerance; they make a patient and empathetic effort to understand and appreciate the differences of others.¹⁶⁴ The ideal liberal can thus be defined by personality type: tolerant, reasonable, empathetic, persuasive, honest, and clear-thinking.¹⁶⁵

¹⁶² GUTMANN, *supra* note 12, at 44. William Galston takes issue with the idea, as presented by Gutmann, that liberalism requires citizens capable of rational deliberation among competing ways of life. See GALSTON, *supra* note 150, at 252-53. In his view, "[c]ivic tolerance of deep differences is perfectly compatible with unswerving belief in the correctness of one's own way of life." *Id.* at 253. Galston assumes, however, that the "examined life" necessarily fosters skepticism and is therefore "incompatible with ways of life guided by unquestioned authority or unswerving faith." *Id.* at 253-54. In my view, Galston errs in assuming that the element of rationality almost universally cited as among the essential attributes of the liberal citizen necessarily entails a skeptical or relativistic outlook; it may only require that the individual be capable of reflecting upon and publicly defending her deeply held beliefs. Moreover, to the extent that the capacity for self-reflection does entail some degree of skeptical distance from one's beliefs, Galston himself should have no reason to object since he already concedes that "[s]ome measure of reflection, or at least critical distance, is likely to result" from the mere knowledge of the existence of competing ways of life in the liberal state. *Id.* at 255. I discuss the capacity for self-reflection as the defining aspect of liberal autonomy below. See *infra* notes 182-93 and accompanying text.

¹⁶³ See Kymlicka & Norman, *supra* note 158, at 352 (observing that "the health and stability of a modern democracy depends, not only on the justice of its 'basic structure' but also on the qualities and attitudes of its citizens").

¹⁶⁴ I discuss the feminist contribution of empathy to the liberal character in *Feminism's Return to Liberalism*. See Dailey, *supra* note 12, at 1278-85; see also BARBER, *supra* note 12, at 174-75 (positing empathy as an essential attribute of citizenship for his theory of strong democracy).

¹⁶⁵ Cf. GALSTON, *supra* note 150, at 221-27 (describing the liberal virtues as including courage, law-abidingness, loyalty, independence, toleration, capacity to discern and respect the rights of others, and a willingness to engage in public discourse); GUTMANN, *supra* note 12, at 44 (describing "those character traits, such as honesty, religious toleration, and mutual respect for persons, that serve as foundations for rational deliberation of differing ways of life"); MACEDO, *supra* note 12, at 251 (describing the "ideal liberal personality" as characterized by "reflective self-awareness, active self-control, a willingness to engage in self-criticism, an openness to change, and critical support for the public morality of liberal justice"); Kymlicka & Norman, *supra* note 158, at 353 (including a sense of identity, toleration for differences, political participation, and economic self-reliance as among the qualities necessary for democratic citizenship); Shklar, *supra* note 129, at 33 (describing liberalism as requiring "habits of patience, self-restraint, respect for the claims of others, and caution").

Although the qualities that define citizenship in the liberal state, the so-called civic virtues,¹⁶⁶ may seem to go more to style than substance, they nevertheless clearly raise questions concerning liberalism's professed commitment to the value of governmental neutrality. The obligations of civic virtue in the liberal state quite obviously limit and, to some extent, mandate the content and range of the individual's substantive beliefs.¹⁶⁷ In appreciation of this inconsistency, liberal theorists have moved quite willingly in the direction of recognizing the inherent tension between liberalism's stated neutrality with respect to competing ways of life and its

¹⁶⁶ See Kymlicka & Norman, *supra* note 158, at 365 (describing the importance of civic virtue "to liberal virtue theorists" such as Gutmann, Macedo, and Galston). The use of the phrase "civic virtue" in this context is somewhat confusing, as civic virtue has traditionally been associated with the civic republican demand that individuals subordinate their personal interests to the politics of the common good. See, e.g., J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 74 (1975); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 18-19 (1986). William Galston notes that liberalism as traditionally conceived was understood as an effort to sever political life from a reliance on individual virtue. See GALSTON, *supra* note 150, at 213-14. Following Galston, Kymlicka, and others, I understand liberal virtue to mean the individual character or qualities necessary for liberalism to "sustain" or "reproduce" itself. See *id.* at 214 ("For Charles Taylor and his fellow communitarians, liberalism undercut the very possibility of community and thus the significance of the virtues, understood as the habits needed to sustain a common life."); GUTMANN, *supra* note 12, at 40 ("The justification for teaching [democratic] virtues is that they constitute the kind of character necessary to create a society committed to conscious social reproduction."). The liberal appeal to civic virtue is part of recent efforts to refocus attention on the communal dimensions of liberal politics.

¹⁶⁷ See GUTMANN, *supra* note 12, at 42 ("A democratic state of education constrains choice among good lives not only out of necessity but out of a concern for civic virtue."); MACEDO, *supra* note 12, at 258-59 ("Liberalism . . . rules out certain conceptions of the good life altogether: any that entail the violation of liberal rights."); WISHY, *supra* note 157, at 136-58 (discussing the role of families and public schools in a child's moral and civic upbringing); Stolzenberg, *supra* note 112, at 659 ("[T]he liberal individualist commitment to the 'free mind' . . . requires a certain kind of education—namely, education in the value of diversity, reason, and individual choice."). As Professor Stolzenberg explores, the inculcation of liberal virtues, or the liberal "way of life," has recently come under attack by fundamentalist religious groups claiming that their way of life is incompatible with the development of critical faculties in their children. See *id.* These parents claim that the public education in civic virtue, with its emphasis on toleration rather than belief, threatens those religious communities founded upon faith rather than upon reason. See *id.* at 596-97. The fundamentalist debate over public education suggests that liberalism may simply be unable to accommodate some forms of illiberal community, a necessary concession to intolerance at the margins of social life in the name of political self-preservation. See GALSTON, *supra* note 150, at 253; GUTMANN, *supra* note 12, at 30; Kymlicka & Norman, *supra* note 158, at 367.

insistence on the liberal way of life itself. Although liberalism does endorse the civic virtues of rational reflection, civil dialogue and toleration over unreflective sermonizing and moral dogmatism, liberal theorists generally construe these virtues as first-order norms that serve to establish a political framework within which competing values and ways of life may flourish.¹⁶⁸ In this way, the values promoted by liberalism are viewed as facilitative rather than restrictive of human freedom; the framework that they establish is understood to nurture rather than oppress the diverse and creative strivings of the human spirit.

While the importance of civic character to liberal politics may be self-evident, the assumption that only parents can instill civic virtue is not. Indeed, public education has traditionally been viewed as an important, if not the primary, means by which individuals acquire the intellectual skills of rational thought and critical deliberation demanded by liberal citizenship.¹⁶⁹ Furthermore, to the extent

¹⁶⁸ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 203 (1985) (noting that liberalism is not a "way of life," but rather a principle of political organization); JOHN RAWLS, *POLITICAL LIBERALISM* 190-94 (1993) (arguing that all citizens share a sense of justice that is not dependent on "any particular . . . doctrine"). Although critical of liberalism, Michael Sandel affirms this point:

What is neutral about the principles of right is not that they admit all possible values and ends but rather that they are derived in a way that does not depend on any particular values or ends. To be sure, once the principles of justice, thus derived, are on hand, they rule out certain ends—they would hardly be *regulative* if they were incompatible with *nothing*—but only those that are unjust, that is, only those inconsistent with principles which do not themselves depend for their validity on the validity of any particular way of life. Their neutrality describes their foundation, not their effect.

SANDEL, *supra* note 161, at 12. Other theorists simply abandon the claim to neutrality. For example, Gutmann states:

Democratic education is not neutral among conceptions of the good life, nor does its defense depend on a claim to neutrality. Democratic education is bound to restrict pursuit, although not conscious consideration, of ways of life dependent on the suppression of politically relevant knowledge. Democratic education supports choice among those ways of life that are compatible with conscious social reproduction.

GUTMANN, *supra* note 12, at 46; see also GALSTON, *supra* note 150, at 96 ("[To reject neutrality] is certainly not to say that the bias of liberalism is as systematically constraining, as hostile to full human diversity, as are other forms of political life."); RAZ, *supra* note 12, at 110-33 (discussing political neutrality and its relation to liberal theory).

¹⁶⁹ See *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684, 692 (11th Cir. 1987). The Court of Appeals upheld the use of certain school texts against the challenge that they promoted secular humanism in violation of the First Amendment. In its opinion, the Court noted:

that families may have strongly held religious, ethnic, or other communal affiliations, it is not at all clear that parents can be relied upon to instill the virtues of rational thought, toleration, and public spiritedness in their children. It may be that, with regard to habits of thinking and respect for differences, the liberal state is in a better position than parents to prepare children for the responsibilities of public life.¹⁷⁰

If in fact parents are not any better situated than the state to instill the qualities of citizenship in maturing children, then what, if anything, is left of the liberal defense of parental rights? Certainly something underlies our instinct that parents serve an essential and unique role in raising their children to become responsible citizens. If the cultivation of rational thought, toleration, and public spiritedness may be carried out by public institutions, then we need to ask whether we have overlooked some critical aspect of civic character that is not amenable to state instruction or control, an attribute that must be nurtured into being within close affective relations. Quite clearly, the individual quality most important to the liberal world view, yet so far missing from the account of parental authority, is autonomy.¹⁷¹

[T]he message conveyed [in the school texts] is one of a governmental attempt to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making. This is an entirely appropriate secular effect. Indeed, one of the major objectives of public education is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

Id. (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979) (alteration in original))); see also GALSTON, *supra* note 150, at 241 (noting that the "necessity . . . of civic education ha[s] been accepted without question"); GUTMANN, *supra* note 12, at 49 ("Education . . . forms the moral character of citizens . . ."); WALZER, *supra* note 138, at 197 (arguing that education is a "program for social survival"); Shklar, *supra* note 129, at 33 (arguing that the aims of liberal education should be to foster "well-informed and self-directed" citizens). Benjamin Barber concludes that formal education is least useful for instilling civic virtue in a true participatory democracy, although he defines formal education in terms of imparting substantive knowledge, appearing to overlook the educational goal of cultivating critical habits of thinking. See BARBER, *supra* note 12, at 234.

¹⁷⁰ See GUTMANN, *supra* note 12, at 29-30; Kymlicka & Norman, *supra* note 158, at 364-65; Mary G. Dietz, *Citizenship with a Feminist Face: The Problem with Maternal Thinking*, 13 POL. THEORY 19, 20-21 (1985).

¹⁷¹ For a classic expression of the centrality of autonomy to liberal thought, see JOHN S. MILL, ON LIBERTY AND OTHER ESSAYS 13 (Emery E. Neff ed., 1926) ("The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of

It may come as no surprise that autonomy does not figure prominently in a discussion of parental rights, since at first glance the concept of individual autonomy and the exercise of parental authority appear directly at odds. Indeed, it is because the exercise of parental authority seems to override the autonomy of children that a problem arises for liberalism in the first place. In common terms, autonomy is generally understood to involve the capacity for self-government, the ability to direct one's life in deliberate ways, and the assumption of responsibility for one's beliefs and actions.¹⁷² The exercise of autonomy implies independence, separateness, and self-control; thus, it would seem to lie at the opposite extreme from the childhood condition of dependence and subordination.¹⁷³ Indeed, with some important exceptions, the law does not consider individuals to be fully autonomous until they reach the age of majority;¹⁷⁴ until then, their beliefs and intentions are not entitled to legal recognition. Upon turning of age, the child emerges from the protective womb of parental authority as a self-governing citizen of the liberal state.

This concept of autonomy, which plays such a central part in liberal theory, has come under prolonged and serious attack in

right, absolute. Over himself, over his own body and mind, the individual is sovereign." In the discussion of autonomy that follows, I do not intend to enter into the more ambitious philosophical debate concerning its precise meaning within liberalism. For a recent overview and reconceptualization of the concept of autonomy in legal and political thought, see Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994).

¹⁷² Richard Fallon rightly notes that autonomy "is a protean concept, which means different things to different people." Fallon, *supra* note 171, at 876. For purposes of this Article, I nevertheless assume that all conceptions of autonomy presuppose some idea of an acting, self-conscious, responsible self. See, e.g., RAZ, *supra* note 12, at 369 ("The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."); see also Michelman, *supra* note 166, at 26 (noting that Kant believed freedom was a mixture of will and self-knowledge); Fallon, *supra* note 171, at 877 ("To be autonomous, one must be able to form a conception of the good, deliberate rationally, and act consistently with one's goals."); Nedelsky, *supra* note 12, at 8 ("The image of humans as self-determining creatures . . . remains one of the most powerful dimensions of liberal thought.").

¹⁷³ Some writers also stress that the concept of autonomy necessarily incorporates the capacity for rational thought. See, e.g., Fallon, *supra* note 171, at 887. I am somewhat hesitant to define autonomy in terms of rationality, unless we view the concept of rationality itself as capacious enough to embrace intuitive, emotional, instinctual, and religious thinking.

¹⁷⁴ The major exception in most states is an older child's right to seek legal emancipation under certain circumstances. See, e.g., CONN. GEN. STAT. ANN. § 46b-150b (West 1986).

recent years, most prominently on the ground that autonomy as traditionally understood rests upon a misguided theory of the individual self. Originally associated with communitarian theorists, this now widespread critique focuses upon the "atomistic" view of human nature thought to underlie liberal theory.¹⁷⁵ "The liberal psychology of human nature is founded on a radical premise no less startling for its familiarity: man is alone. We are born into the world solitary strangers, live our lives as wary aliens, and die in fearful isolation."¹⁷⁶ In the atomistic world, individuality precedes the world of social relations, and community consists in the coming together of these solitary, independent, bounded selves. As Michael Sandel describes, the "unencumbered" self of traditional liberal theory exists "beyond the reach of its experience,"¹⁷⁷ an organic subject who steps, fully formed, into the social relationships and communal affiliations that comprise its world. Critics of atomism

¹⁷⁵ For strong-communitarian critics of atomism, see ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed., Univ. of Notre Dame Press 1984) (1981); SANDEL, *supra* note 161, at 150. For liberal-communitarian critics of atomism, see 2 TAYLOR, *supra* note 12; Benjamin R. Barber, *Liberal Democracy and the Costs of Consent*, in *LIBERALISM AND THE MORAL LIFE*, *supra* note 12, at 54, 62. For feminist critics, see ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983); Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, 99 *ETHICS* 275 (1989); Nedelsky, *supra* note 12; Okin, *supra* note 133, at 41; Iris M. Young, *The Ideal of Community and the Politics of Difference*, in *FEMINISM/POSTMODERNISM* 300, 307 (Linda J. Nicholson ed., 1990). For critical-theory views of atomism, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781, 783-85 (1983). See generally Will Kymlicka, *Liberalism and Communitarianism*, 18 *CANADIAN J. PHIL.* 181 (1988) (defending liberalism against these critiques).

¹⁷⁶ BARBER, *supra* note 12, at 68. As Barber describes, the "genius" of liberalism once lay in its ability to transform what it saw as the unavoidable solitude and isolation of the human condition into the redemptive promise of political freedom and self-realization. See *id.* at 69-70. He elaborates:

It was only with the Renaissance that man's essential aloneness came to be construed as a liberation rather than a purgatory. It has been liberalism's genius to transform the unavoidable into the desirable, the fate worse than death into the ideal life, and the invisible walls keeping us out of the Garden into bulwarks protecting us from its seductive communal intimacies. There is no redemption, only the paradise of solitude. In the new worldly nirvana, the struggle to overcome and to transcend isolation is supplanted by the struggle to fortify it with rights and to undergird it with liberty and power. Communion comes to mean interference, exile becomes privacy. The kinship of tribalism and feudal relations and the citizenship of the classical polis are alike identified as bonds, and community itself comes to be understood as slavery.

Id.

¹⁷⁷ Sandel, *supra* note 45, at 86.

rightly contend that individual identity does not emerge in isolated, transcendent singularity, but develops over time from within a complex set of human relations and communal affiliations.¹⁷⁸ Not only within political theory, but across diverse disciplines,¹⁷⁹ we have come to understand human identity as situated rather than abstract, permeable rather than bounded, relational rather than independent.

From the discussion so far, it might appear that the critique of "atomistic" man also casts strong doubt on our conventional understanding of autonomy. If the situated self is essentially reactive, then how can we conceive of an individual's self-determining conduct? Is autonomy incompatible with a view of the self as constituted by communal forces? It may be true that a conception of the radically (or wholly) situated self would be difficult to reconcile with any familiar conception of autonomy, and would thus prove to be a thoroughly illiberal idea. But such a conception would also be difficult to reconcile with any reasonable conception of individual liberty. Certainly the theorists who endorse the concept of the situated self do not propose that human identity is

¹⁷⁸ See BARBER, *supra* note 12, at 90 ("It is from common rather than individual consciousness—from generations of communal labor and not the passing whimsies of individuals—that the enduring features of human identity are born.").

¹⁷⁹ See, e.g., TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* (1983) (literary theory); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (1978) (history); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983) (anthropology); SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986) (science); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989) (philosophy). Freud, of course, may be viewed as the first to have posited a situated conception of the self to the extent he believed that primary family relations (in addition to innate drives) define who we are. His Oedipal theory, however, also has strong elements of biological determinism, relegating individuals to predictable psychic outcomes depending upon their gender; the classical Freudian understanding of the Oedipus complex may also be seen as unduly deterministic by locating the origin of adult neuroses exclusively in childhood conflict. Yet, one must concede, the transformative promise of psychoanalytic insight itself would seem to undercut the theory's deterministic slant.

Contemporary psychoanalysis now grapples with the implications of the situated self for its own theories. For an overview, see STEPHEN A. MITCHELL, *HOPE AND DREAD IN PSYCHOANALYSIS* 95-122 (1993) (discussing the contribution of object-relations theory to the psychoanalytic understanding of the self); see also MALCOLM BOWIE, *LACAN* 76 (1991) (noting that the Freudian subject "is no longer a substance endowed with qualities, or a fixed shape possessing dimensions . . . : it is a series of events within language, a procession of turns, tropes and inflections"). For a discussion of object-relations theory in psychoanalysis, see *infra* note 201 and accompanying text. For a discussion of the psychoanalytic process as metaphor for (and clinical manifestation of) the "self-in-process," see *infra* note 184.

entirely constituted by outside forces, for to do so would collapse the theory of the situated self into a theory of cultural and biological determinism entirely at odds with the tenets of both liberalism and democracy.¹⁸⁰ And so it seems that the situated self is not wholly reactive to exogenous forces. We are only partly constituted by social relations.¹⁸¹ Something of us exists along with our culturally-inscribed values and beliefs, and that something looks suspiciously like a capacity to act in a morally responsible—or “autonomous”—way.

Autonomy is not exclusively an attribute of the atomistic conception of selfhood. The theory of the situated self views autonomy in terms of the innate human capacity to act upon culturally-inscribed beliefs and values, to embrace or to reject them, in a process of self-reflection and self-understanding that ideally produces a coherent, if unstable, personal identity.¹⁸² What lies at the heart of situated (as opposed to atomistic) autonomy is self-

¹⁸⁰ Such a proposal would also certainly be at odds with emancipatory political theories such as feminism. See Dailey, *supra* note 12, at 1272-73; see also BARBER, *supra* note 12, at 134 n.23 (noting that “every democratic theory requires a commitment to the reality of human agency”); Toril Moi, *Introduction to THE KRISTEVA READER* 1, 15 (Toril Moi ed., 1986) (“[S]ome concept of agency (of a *subject of action*) is essential to any political theory worthy of the name.”). It sometimes appears that feminist scholars in the relational domain come dangerously close to advocating a deterministic theory of the female self. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982) (examining the ways in which women’s moral development differs from men); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 21 (1988) (arguing that “[w]omen are more empathic to the lives of others because women are physically tied to the lives of others in a way which men are not”).

¹⁸¹ See Michael J. Sandel, *Introduction to LIBERALISM AND ITS CRITICS* 5 (Michael J. Sandel ed., 1984). As Sandel argues in his introduction:

Communitarian critics of rights-based liberalism say we cannot conceive ourselves as independent in this way, as bearers of selves wholly detached from our aims and attachments. They say that certain of our roles are *partly constitutive* of the persons we are—as citizens of a country, or members of a movement, or partisans of a cause.

Id. at 5-6 (emphasis added); see also SANDEL, *supra* note 161, at 179 (describing the “more or less enduring attachments and commitments which taken together *partly* define the person I am” (emphasis added)); GUTMANN, *supra* note 12, at 45 (arguing that in a democracy “citizens are persons *partially* constituted by subcommunities” (emphasis added)); MACINTYRE, *supra* note 175, at 220 (“I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations [that are] *in part* what give[] my life its own moral particularity.” (emphasis added)).

¹⁸² For theorists who ascribe to a conception of the situated self but who also expressly embrace the concept of individual autonomy, see MACEDO, *supra* note 12, at 213-27; McClain, *supra* note 12, at 1190; Post, *supra* note 161, at 174.

reflection (as opposed to choice).¹⁸³ To the extent that it involves self-reflection, autonomy is inward-directed, but it is not wholly self-regarding in the atomistic sense; situated autonomy is also profoundly other-regarding. We develop a mature sense of identity by confronting, reconciling, embracing, repressing, or rejecting the values and beliefs that we receive from the world into which we were born and in which we live.¹⁸⁴ Even the most thorough-going theories of the situated self, those insisting on the constituent effects of language itself,¹⁸⁵ must nevertheless account for the

¹⁸³ See MACEDO, *supra* note 12, at 216 (defining autonomy in terms of "the development of the capacity critically to assess and even actively shape not simply one's actions, but one's character itself"); TAYLOR, *supra* note 12, at 337 (describing "Kant's ideal of total rational self-determination [and] of free self-activity"); Kymlicka, *supra* note 175, at 190 ("[T]he process of ethical reasoning is always one of comparing one 'encumbered' potential self with another 'encumbered' potential self."); Michelman, *supra* note 166, at 25-27 (describing the Kantian concept of freedom as involving both will and self-knowledge); Okin, *supra* note 133, at 50 (arguing that no goal should escape self-examination). Galston explicitly rejects the concept of autonomy as self-reflection on the ground that "liberal freedom entails the right to live unexamined as well as examined lives." GALSTON, *supra* note 150, at 254. Although Galston contemplates that the "ways of life guided by unquestioned authority or unswerving faith," *id.*, are threatened by the skepticism he believes is inherent in the practice of self-examination or self-reflection, I am not persuaded that belief and self-understanding are inherently incompatible.

¹⁸⁴ Even as mature, responsible citizens, our identity is not static but evolving, a "self-in-process" that continually works to remake its image in dynamic relation to the world around it. Cf. Julia Kristeva, *Revolution in Poetic Language*, in THE KRISTEVA READER, *supra* note 180, at 90-91 (discussing the "subject in process"); see also MARGARET S. MAHLER ET AL., THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT 3 (1975) ("The biological birth of the human infant and the psychological birth of the individual are not coincident in time. The former is a dramatic, observable, and well-circumscribed event; the latter a slowly unfolding intrapsychic process."). Moreover, at any one time our inner life may be experienced as conflictual, chaotic, and fragmented, and over time our sense of self may radically transform, both manifestations of the contingent and unstable nature of human identity. See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 25 (1990); JANE FLAX, DISPUTED SUBJECTS: ESSAYS ON PSYCHOANALYSIS, POLITICS AND PHILOSOPHY 92-110 (1993). The antiessentialist critique within feminism and feminist legal theory begins with this insight. See ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 158-59 (1988) (criticizing feminist theory for its essentialist view of women); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (criticizing feminist legal theory to the extent it relies on "the notion that a unitary, 'essential' women's experience can be isolated and described"); Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 98-100 (1991) (contending that law has neglected to consider the "negotiated" quality of identities).

¹⁸⁵ See JACQUES LACAN, ECRITS: A SELECTION 147 (Alan Sheridan trans., 1977) (arguing that "what the psychoanalytic experience discovers in the unconscious is the whole structure of language"). For a discussion of the place of Lacanian thought

existence of a speaking subject, a human actor constituted by speech but also capable of narrating his or her own life story. Situated autonomy¹⁸⁶ thus evokes the highly personal process by which the individual comes to create a coherent identity or life story.¹⁸⁷ But situated autonomy also implies a capacity for self-reflection that is itself relational. Autonomy requires an understanding of the self in relation to others; we come to know ourselves not in isolation but in relationship, not through solitary silence but through communication and reflection.

The self-reflective aspect of situated autonomy has roots in a modern psychodynamic understanding of selfhood.¹⁸⁸ No longer

within psychoanalytic theory and its appropriation by feminists, see NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* 187-98 (1989).

¹⁸⁶ Stephen Macedo also employs the term "situated autonomy," by which he means "[t]he active power of persons to shape who they are, to understand, control, and shape their desires." MACEDO, *supra* note 12, at 225. Although his conception of situated autonomy comes close to mine, his vision of the "strong evaluator," *id.* at 217, in many ways resembles the conception of the atomistic self he purports to reject. In his view, for example, situated autonomy would rule out "[q]uiet obedience, deference, unquestioned devotion, and humility," in favor of the "exciting array of possibilities" that make it possible "to decide that next week I might quit my career in banking, leave my wife and children, and join a Buddhist cult." *Id.* at 278. Unfortunately, Macedo appears almost ready to celebrate the stereotypical arrogant and narcissistic attributes of atomistic man, *see id.*, and I am bewildered and somewhat alarmed by his sexist example of the banker, particularly when viewed alongside his exclusion of empathy, nurturance, and devotion from the ideal of liberal citizenship.

¹⁸⁷ Nancy Chodorow describes this process in psychoanalytic terms:

Freud . . . [wanted] . . . to use the scrutiny of individual and self not to celebrate fragmentation but to restore wholeness. He could not accept that the self is the outcome of messy unconscious processes and a warring structure, that it disallows individual morality, autonomy, and responsibility; he wanted to reconstitute the individual and the self he had dissected. That metapsychological dissection shows who we are, but the clinical project of psychoanalysis is to develop individual autonomy and control in the self.

CHODOROW, *supra* note 185, at 155.

¹⁸⁸ My argument here, as well as in the following Section on relational theory, *see infra* part II.C.1, draws on a psychoanalytic understanding of child development and adult therapeutic change. I recognize that psychoanalytic theory is not the only plausible account of individual identity, nor is it the only legitimate methodology for examining psychological growth and change. In my view, however, the psychoanalytic model provides the most persuasive and comprehensive framework for analyzing the liberal view of individual selfhood and moral autonomy. While I agree with critics of psychoanalysis that Freud's theory was unduly deterministic, *see, e.g.*, Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1016 (1982) (arguing that law "should reject all, or at least most, of psychodynamic theory as a scientific, causal account of behavior"), I also believe that the interpretive insights of contemporary psychoanalytic theory provide a meaningful story of child development as well as a meaningful vision of the potential for adult

focused exclusively on the inner dynamics of the patient's mind, contemporary psychoanalysis now views the relationship between analyst and analysand as the medium of self-insight. It is within the intimate analytic relationship, that is, in the process of talking things out with another human being, that the individual learns to create (or more accurately recreate) a story of his life, a narrative account that serves to integrate the splintered fragments of his life experience into a more coherent and satisfying identity.¹⁸⁹ The psychoanalytic relationship captures the personal significance of conversation to self-redefinition as well as the political significance of dialogue to the concept of situated autonomy. Deep self-reflection entails working out one's place in the world either through actual or imagined conversation with another; this process of self-reflection gives rise to a creative narrative we call personal identity.¹⁹⁰

psychological change. Finally, even if one rejects psychoanalysis as a valid framework for understanding human experience, one can still accept its premise, central to my argument here, that the earliest relationships have a deeply formative effect on individual identity.

¹⁸⁹ Dramatic advances in psychopharmacology, especially the recent development of certain antidepressants such as Prozac, and what Peter D. Kramer has called the possibility for "cosmetic pharmacology," PETER D. KRAMER, LISTENING TO PROZAC 15 (1993), have brought to public light issues concerning the extent to which biology may be said to determine our identity. Despite Kramer's claim for the transformative potential of the new antidepressants (a claim which is itself controversial, see Sherwin B. Nuland, *The Pill of Pills*, N.Y. REV. OF BOOKS, June 9, 1994, at 4, 8 (calling Kramer's claims a "psychopharmacological fantasy")), at most biology may be understood to set our temperament; although it may regulate our style of self-reflection (aggressive, inhibited, accepting, resistant, creative, fearful), it can never determine the lived experience from which we form the story of our lives. See FLAX, *supra* note 184, at 118-22 (discussing the relationship between temperament and socialization in the work of D.W. Winnicott).

¹⁹⁰ See ROY SCHAFER, RETELLING A LIFE: NARRATION AND DIALOGUE IN PSYCHOANALYSIS 21-35 (1992) (elaborating a narrative theory of the self). For a discussion of the relationship between literary narrative and psychoanalysis, see PETER BROOKS, READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE at xiv (1984) ("Psychoanalysis, after all, is a primarily narrative art . . ."). In commenting upon Brooks' view, John S. Rickard highlights the connection Brooks makes between narrative, self-reflection, and the creation of identity:

The stakes are indeed high in Brooks' meditation on narrative, for it is clear that he cannot imagine sustained thought without plot and sees narrative as a vital and necessary element of our lives, a psychic process in which we recognize and work through essential psychological needs for coherence and understanding.

. . . Brooks sees the narrative impulse as a more urgent attempt to cope with the human facts of our existence in the body and in time . . . Plot becomes, for Brooks, kinetic rather than static, a desire machine designed and intended to adapt itself to the tensions inherent in the human condition, caught as we are between an often obscure yet powerful past

The elements of individual agency and the capacity for self-reflection central to the concept of situated autonomy prove to be profoundly liberating in personal as well as political terms. In personal terms, self-reflection holds out the promise of psychic integration, the individual's capacity to bring cohesion and meaning to the often disordered and conflicting aspects of her socially inscribed self.¹⁹¹ In political terms, situated autonomy retains the concept of human agency, the idea of individual actors capable of departing from their socially scripted roles. The concept of human agency admits the possibility of resistance to received values and beliefs; it accounts for social nonconformity and political dissidence.¹⁹² The situated self is thus capable of questioning as well

wherein the origins of desire are buried, and a desired future that takes its shape from the past and present.

John S. Rickard, *Introduction* to PETER BROOKS, *PSYCHOANALYSIS AND STORYTELLING* 3 (1994). For a critical appraisal of the psychoanalytic process, see STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 525-54 (1989).

¹⁹¹ For a discussion of the relationship between autobiography and psychoanalysis from a feminist literary perspective, see SHOSHANA FELMAN, *WHAT DOES A WOMAN WANT?: READING AND SEXUAL DIFFERENCE* 1-19 (1993); see also CHODOROW, *supra* note 185, at 171 ("Psychoanalysis, then, is a theory of human nature with positive, liberatory implications, a theory of people as active and creative."). Interestingly, the communitarian Michael Sandel gives us a vivid picture of the subject "empowered to participate in the constitution of its identity":

For a subject to play a role in shaping the contours of its identity requires a certain faculty of reflection. Will alone is not enough. What is required is a certain capacity for self-knowledge, a capacity for what we have called agency in the cognitive sense. . . .

. . . .
 . . . [T]he capacity for reflection enables the self to turn its lights inward upon itself, to inquire into its constituent nature, to survey its various attachments and acknowledge their respective claims, to sort out the bounds—now expansive, now constrained—between the self and the other, to arrive at a self-understanding less opaque if never perfectly transparent, a subjectivity less fluid if never finally fixed, and so gradually, throughout a lifetime, to participate in the constitution of its identity.

SANDEL, *supra* note 161, at 152-53.

¹⁹² I do not mean to go so far as to say that political autonomy, by which I mean the citizen's participation in the collective process of self-government, is a condition of personal autonomy. I associate such a view more with those strong communitarian theorists, and in particular civic republicans, who see political identity as a primary constitutive aspect of the individual. See HANNAH ARENDT, *THE HUMAN CONDITION* 26-27 (1958); Peter Berger, *On the Obsolescence of the Concept of Honour*, in *LIBERALISM AND ITS CRITICS*, *supra* note 181, at 149. I do not think citizenship must play such a formative role in constituting personal identity, and to that extent I consider my views here to be more solidly pluralistic. For views contrary to mine that strive to make political participation the defining feature of liberal freedom and autonomy, see

as accepting, doubting as well as believing, integrating as well as destroying. She is an active, creative, subversive being, always pregnant with the possibility of social and political resistance.¹⁹³

Contemporary liberalism has shown itself surprisingly hospitable to the idea that human beings are to a large extent profoundly shaped by human relationships and the social environment in which they live.¹⁹⁴ Despite the assertions of communitarian critics, all that liberalism must actually insist upon is that human beings possess the capacity for assuming responsibility for socially instilled values and beliefs. The notion of situated autonomy thus proves to be an essential feature of contemporary efforts to reorient liberal theory away from traditional atomistic values and toward what Charles Taylor has termed a more "holist[ic]" political philosophy.¹⁹⁵ Indeed, situated autonomy may be thought of as the central, redemptive feature of the socially-constituted, liberal self.¹⁹⁶ Without a meaningful conception of human agency, the political ideal of individual liberty makes no sense. Situated autonomy preserves an affirmative ideal of human freedom at the

BARBER, *supra* note 12, at xv ("Without participating in the common life that defines them and in the decision-making that shapes their social habitat, women and men cannot become individuals.").

¹⁹³ Judith Fetterley has described this subversive self in literary terms as a "resisting reader." See JUDITH FETTERLEY, *THE RESISTING READER: A FEMINIST APPROACH TO AMERICAN FICTION* at xxii (1978) ("Clearly, then, the first act of the feminist critic must be to become a resisting rather than an assenting reader . . . to begin the process of exorcizing the male mind that has been implanted in us").

¹⁹⁴ See GALSTON, *supra* note 150, at 75 ("The revolt against traditional authority in which liberalism originates does *not* entail repudiation of all social determination of individual identity."); RAWLS, *supra* note 168, at 29-35 (offering a "political conception of the person" that purports to avoid metaphysical claims); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 488 (1989) ("We can have only the thoughts, and ambitions, and convictions that are possible within the vocabulary that language and culture provide, so we are all, in a patent and deep way, the creatures of the community as a whole.").

¹⁹⁵ Taylor, *supra* note 161, at 159.

¹⁹⁶ Empathy may be another. See BARBER, *supra* note 12, at 137 ("For what is crucial [for strong democracy] is not consent pure and simple but the active consent of participating citizens who have imaginatively reconstructed their own values as public norms through the process of identifying and empathizing with the values of others."); Dailey, *supra* note 12, at 1283-85 (arguing that a feminist ideal of empathy "offers liberalism the possibility of political union built upon bonds deeper than self-interest"). In fact, empathetic understanding may be a crucial feature of the process of self-reflection, as the psychotherapeutic relationship suggests. For the importance of empathy in psychoanalytic practice and theory, see HEINZ KOHUT, *THE ANALYSIS OF THE SELF: A SYSTEMATIC APPROACH TO THE PSYCHOANALYTIC TREATMENT OF NARCISSISTIC PERSONALITY DISORDERS* 300-07 (1971).

same time that it stakes out the final defensive boundary against the threat of unmediated and crushing governmental power.

C. Civic Character and Parental Authority

The civic virtue of situated autonomy returns us to the question of parental authority. Where does the self-reflective, integrated, autonomous self that underlies the contemporary ideal of liberal citizenship come from? Situated autonomy is not an innate condition, a natural state of being, but an acquired capacity whose origins lie in earliest childhood.¹⁹⁷ Unlike the civic virtues of rational thought, toleration, and public-spiritedness, situated autonomy cannot successfully be instilled through public education; our capacity for active and responsible self-reflection is a virtue first learned in the context of intimate human relations.¹⁹⁸

In an attempt to clarify the family's role in the developmental process that gives rise to situated autonomy, this Section examines with greater rigor the concept of the situated self which informs the contemporary critique of atomism. In particular, it distinguishes two approaches to understanding the way in which the individual may be said to be "encumbered" by her social context. The first view focuses on a relational model of selfhood that understands the individual's sense of self as evolving out of primary caretaking relationships during infancy. The second view focuses on a communal model of identity that understands the individual's substantive values and beliefs as originally instilled through primary familial relations.¹⁹⁹ Sorting out the relational and communal

¹⁹⁷ The fact that autonomy is to some extent itself a socially-inscribed capacity explains why it is absent from some highly-communitarian cultures. See RAZ, *supra* note 12, at 391 ("For those who live in an autonomy-supporting environment there is no choice but to be autonomous . . .").

¹⁹⁸ See *infra* notes 204-06 and accompanying text. Christopher Lasch, although arguably a strong communitarian with a quite conservative agenda, focuses on the role that the family plays in what the Frankfurt School saw as the "reproduction of society":

If the reproduction of culture were simply a matter of formal instruction and discipline, it could be left to the schools. But it also requires that culture be embedded in personality. Socialization makes the individual want to do what he has to do; the family is the agency to which society entrusts this complex and delicate task.

LASCH, *supra* note 131, at 4. In a twist on the more common concept of the "embedded self," Lasch refers here to "culture embedded in personality." *Id.*

¹⁹⁹ Seyla Benhabib and Drucilla Cornell draw a similar, but more antagonistic, distinction between communitarian and feminist critiques of the unencumbered self:

approaches from within the general critique of atomism will help to explain what is at stake when the liberal state assumes responsibility for regulating family life. A deepened understanding of the concept of situated autonomy brings us back, in Part III, to the question of federalism and the important role that state authority over family law plays in promoting the ideal of liberal citizenship.

1. The Relational View of the Situated Self

Critics of liberal atomism often rely upon a relational model of selfhood, one that emphasizes the formative effect that primary human relations, and particularly the mother-child relationship, have on the shape of human identity.²⁰⁰ The psychological premise of the relational model is closely related to the more general turn within modern psychoanalytic theory away from the primacy of the Oedipus complex toward an increasing emphasis on the importance of the earlier pre-oedipal stage of infant development. Object-relations theory focuses on the infant's pre-oedipal differentiation from its primary caregiver as an essential step in the development of a separate (and psychologically healthy) sense of self.²⁰¹

Despite many common elements in their critique of the liberal concept of the self, feminist and communitarian perspectives differ: whereas communitarians emphasize the situatedness of the disembedded self in a network of relations and narratives, feminists also begin with the situated self but view the *renegotiation* of our psychosexual identities, and their *autonomous reconstitution* by individuals as essential to women's and human liberation.

Seyla Benhabib & Drucilla Cornell, *Introduction* to *FEMINISM AS CRITIQUE: ESSAYS ON THE POLITICS OF GENDER IN LATE-CAPITALIST SOCIETIES* 1, 12-13 (Seyla Benhabib & Drucilla Cornell eds., 1987). I agree with Benhabib and Cornell that strong communitarian theories come close to a "traditionalism that accepts social roles uncritically," *id.* at 13, but I also believe that contemporary liberalism is capacious enough to embrace the "renegotiation" and "autonomous reconstitution" of feminist thought.

²⁰⁰ See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 77-83 (1978) (analyzing the nature of the early mother-child relationship); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* 28-34 (1976) (discussing the female role in early child care); OKIN, *supra* note 9, at 4 (studying the injustice of the division of labor between the sexes). For criticism of the essentialist nature of relational feminism, see *infra* notes 206-07 and accompanying text.

²⁰¹ Object-relations theory encompasses a quite diverse body of literature. For an overview of the field, see JAY R. GREENBERG & STEPHEN A. MITCHELL, *OBJECT RELATIONS IN PSYCHOANALYTIC THEORY* (1983). For object-relations theorists specifically concerned with the primacy of the mother-infant relationship, see MAHLER ET AL., *supra* note 184; D.W. WINNICOTT, *THE MATURATIONAL PROCESSES AND THE FACILITATING ENVIRONMENT: STUDIES IN THE THEORY OF EMOTIONAL DEVELOPMENT*

One central concern of object-relations theorists is the relational process of intrapsychic differentiation—the fact that our sense of ourselves as distinct, bounded beings originates within relationships. Born in a state that can only be described as the antithesis of autonomy,²⁰² we learn to negotiate the boundary between ourselves and others and to become self-governing within complex relations characterized by dependence, trust and love. Paradoxically, relational theory teaches us that the origins of individual autonomy lie in the primary human condition of dependence.²⁰³

37-55 (1965). For works by object-relations theorists, see W.R.D. FAIRBAIRN, *PSYCHOANALYTIC STUDIES OF THE PERSONALITY* (1952); HARRY GUNTRIP, *PERSONALITY STRUCTURE AND HUMAN INTERACTION: THE DEVELOPING SYNTHESIS OF PSYCHODYNAMIC THEORY* (1961); THOMAS H. OGDEN, *THE MATRIX OF THE MIND: OBJECT RELATIONS AND THE PSYCHOANALYTIC DIALOGUE* (1986); Otto Kernberg, *Structural Derivatives of Object Relationships*, 47 INT'L J. OF PSYCHO-ANALYSIS 236 (1966). In contrast to classical Freudian theory, with its emphasis on instinctual drives and the primary importance of the Oedipus complex, object-relations theory focuses on the formative importance of early relationships and especially on the early mother-infant dyad. In Mahler's view, for example, the infant initially develops a close, symbiotic relationship with a primary caregiver, "a dual unity within one common boundary," MAHLER ET AL., *supra* note 184, at 44, and then proceeds to differentiate herself from the caregiver in a developmental process of separation and individuation. See *id.*

It is interesting to note that Freud at the end of his career commented upon the importance of the mother-child relationship in a way that foreshadowed object-relations theory:

A child's first erotic object is the mother's breast that nourishes it; love has its origin in attachment to the satisfied need for nourishment. There is no doubt that, to begin with, the child does not distinguish between the breast and its own body; when the breast has to be separated from the body and shifted to the 'outside' because the child so often finds it absent, it carries with it as an 'object' a part of the original narcissistic libidinal cathexis. This first object is later completed into the person of the child's mother, who not only nourishes it but also looks after it and thus arouses in it a number of other physical sensations, pleasurable and unpleasurable. By her care of the child's body she becomes its first seducer. In these two relations lies the root of a mother's importance, unique, without parallel, established unalterably for a whole lifetime as the first and strongest love-object and as the prototype of all later love-relations—for both sexes.

SIGMUND FREUD, *AN OUTLINE OF PSYCHO-ANALYSIS* 45 (James Strachey trans., W.W. Norton & Co. 1969) (1949).

²⁰² Clinical researchers have begun to study the infant's capacity to distinguish self from others, thereby suggesting that the child is born with some rudimentary sense of autonomous identity. See DANIEL N. STERN, *THE INTERPERSONAL WORLD OF THE INFANT: A VIEW FROM PSYCHOANALYSIS AND DEVELOPMENTAL PSYCHOLOGY* 10 (1985) (positing that infants "experience a sense of an emergent self from birth" and "never experience a period of total self/other undifferentiation"). Such evidence would not necessarily negate the critical importance of the relational processes that follow birth.

²⁰³ See CHODOROW, *supra* note 185, at 159 ("Even the sense of agency and autonomy remain relational in the object-relations model, because agency develops

The relational model brings into sharper focus the Supreme Court's identification of parental authority as a fundamental right in liberal society. Ideally, children develop a sense of an autonomous self—they construct the boundaries and fill the content of their own identity—by seeing themselves reflected back in the caring eyes of their close family members.²⁰⁴ We forge a sense of individual identity and self-direction out of intimate, loving relations. And parents are understood to be ideally situated to provide the environmental conditions necessary for successful psychological differentiation; the virtues of love, trust and empathy are commonly considered beyond the capacity of state institutions to provide.²⁰⁵

in the context of the early relationship with the mother and bears the meaning of her collaboration in and response to it.”).

²⁰⁴ The importance of maternal mirroring to the development of the self is emphasized most strongly in the branch of psychoanalysis called self psychology. See HEINZ KOHUT, *THE RESTORATION OF THE SELF* 93-94 (1980); D.W. WINNICOTT, *PLAYING AND REALITY* 111-18 (1974). Jessica Benjamin criticizes self psychology as misleading because it ignores the subjectivity of the mother: “The mother cannot (and should not) be a mirror; she must not merely reflect back what the child asserts; she must embody something of the not-me; she must be an independent other who responds in her different way.” JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION* 24 (1988).

²⁰⁵ See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) (noting that the “affirmative process of teaching, guiding, and inspiring by precept and example . . . is beyond the competence of impersonal political institutions”); CHODOROW, *supra* note 185, at 149 (“The personal environment and quality of care experienced by the developing individual . . . provide the context and material from which the individual forms and shapes her or his psyche.”); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 13-16 (1979) (discussing the importance of parents in the child's transformation to a well-functioning adult); TALCOTT PARSONS & ROBERT F. BALES, *FAMILY, SOCIALIZATION AND INTERACTION PROCESS* 16 (1955) (noting that because “the human personality is not ‘born’ but must be ‘made’ through the socialization process[,] . . . families are necessary”); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472-78 (1983) (discussing the inability of the law to enforce parents' mere obligation to prepare children for their adult lives). Winnicott opines that the capacity for moral responsibility arises in the first two years of life:

The environmental essential here is the continued presence of the mother or mother-figure

. . . Strong or repressive measures, or indoctrination even, may suit society's need in the management of the antisocial individual, but these measures are the worst possible thing for healthy persons, for those who can grow from within It is these latter, the healthy, who grow into the adults who constitute society, and who collectively establish and maintain the moral code for the next decades, till their children take over from them.

WINNICOTT, *supra* note 201, at 102, 104-05. The preference for family over institutional care for older children may be weakening. See Mary-Lou Weisman, *When Parents Are Not in the Best Interests of the Child*, ATLANTIC MONTHLY, July 1994, at 43

The fundamental right of parents to raise their children rests upon the assumption that state institutions, and in particular public schools, cannot offer the quality and degree of human intimacy that children require during their earliest years in order to develop the foundation for a stable, differentiated, self-reflective sense of identity.²⁰⁶

Some relational feminists argue that the biological bond between mother and infant is the primary determining factor in the differentiation of the self. Verging on a theory of biological essentialism, these feminists urge that a female's sense of self is grounded in a primary connection to the biological mother, whereas a male's sense of self is grounded in a primary separation from her.²⁰⁷ Connection and separation from the mother thus define the meaning of gender and suggest the psychic primacy of the maternal relationship over all others. Although relational feminists seize upon the mother-child relationship in order to construct a psychological account of gender differences, the relational model need not be reduced to a deterministic (and essentialist) theory of gender identity. We may recognize the significance that primary mothering has on the formation of gender identity in young

(discussing how contemporary orphanages may raise older children to become better-functioning adults than in-home care).

²⁰⁶ See, e.g., Bartlett, *supra* note 150, at 903 ("The infant's need for continuity is most often described as the need for attachment, which can be fulfilled only in a close and selective relationship between a child and a caregiver.").

²⁰⁷ See, e.g., CHODOROW, *supra* note 185, at 45 ("I shall propose that, in any given society, feminine personality comes to define itself in relation and connection to other people more than masculine personality does."); West, *supra* note 180, at 16 (noting a "female child[']s . . . sense of identity [is] 'continuous' with her caretaker's, while a young boy[']s . . . sense of identity . . . is distinguished from his caretaker's"); cf. Jane Flax, *Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* 245 (Sandra Harding & Merrill B. Hintikka eds., 1983) (discussing the negative effect on children when women assume sole child-rearing responsibilities for infants). Carol Gilligan has developed an influential relational model of moral development, but she explicitly does not make any claims regarding the origins of the gender difference she documents. See GILLIGAN, *supra* note 180, at 2 ("No claims are made about the origins of the differences described or their distribution in a wider population, across cultures, or through time."). Despite such disclaimers, relational feminists (as well as some object-relations theorists) fall into a dangerous tendency to idealize the mother-infant relationship and to rely on an essentialist conception of maternity and mothering. See, e.g., BENJAMIN, *supra* note 204, at 8 (promising to show that "the structure of domination can be traced from the relationship between mother and infant into adult eroticism, from the earliest awareness of the difference between mother and father to the global images of male and female in the culture").

children without positing a biological basis for it. Instead, the effect of primary mothering on the construction of gender may inhere in the cultural role of women as primary caretakers and in the traditional absence of nurturing fathers, rather than in any "natural" or biological difference between women and men.

Thus, the relational account's insight into the psychic differentiation of the self does not necessarily designate a specific human object (or Other) against whom the infant learns to define itself. Although the infant's psychic need for at least one intimate, loving relationship establishes a basis for preferring non-institutional to institutional primary care, it does not necessarily establish a clear basis for preferring parental over third-party child-rearing. Non-institutional care clearly gives children the psychological foundation for developing their capacity for situated autonomy, but non-institutional care may take many forms. Third parties, such as relatives, foster parents, or those in the position of psychological parent to the child, might all seek a legal right to custody. Indeed, it is the relational model, with its emphasis on the importance of early affective ties, that provides the foundation for making psychological parenthood the determining factor in custody decisions. However, as long as someone is available to fill the role of psychological parent for the child, there may be situations where a change in caregivers is, for other reasons, desirable. Ultimately, as the next Section discusses, all decisions of this sort put courts in the uncomfortable position of evaluating what is in the best interests of children, an evaluation that requires decision-makers to articulate and enforce substantive values relating to the good family life.²⁰⁸

Having opened the door to third-party claims, the relational model nevertheless reinforces the principle of parental authority.²⁰⁹ What leads the relational model to favor parents over third

²⁰⁸ See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 260 (asking "where is the judge to look for the set of values that should inform the choice of what is best for the child").

²⁰⁹ The possibility of state termination of parental rights makes evaluating the relational model's view of parental authority somewhat complicated. When the state terminates parental rights and places the child for adoption, one might say that parental authority has not been undermined; parental authority has been transferred, but preserved. Yet it is correct to say, I think, that in any case in which the state alters parental rights, even if only to transfer them, the substance of those rights—the authority of parents to raise children free from governmental control—has been negated.

parties in most cases is its emphasis on the importance of continuity of attachment in young children's lives.²¹⁰ The degree of attachment assumed to be necessary in the earliest years implies the development of a relationship over time; because most children begin their lives in the care of at least the biological mother, the relational emphasis on continuity naturally favors the rights of biological parents or, similarly, the legal parents of adopted infants.²¹¹

The relational understanding of situated autonomy illuminates what is at stake in political terms when states regulate family life. Constitutional protection for parental authority reflects in part the importance of psychological autonomy to the ideal of liberal citizenship. State regulations that unreasonably undermine the development of the child's capacity for an autonomous sense of self, however well-meaning, jeopardize the civic interests of the liberal state in raising psychologically independent, self-directing, autonomous citizens. State authority over the family must be limited by the liberal need for citizens possessing a developed psychological capacity for autonomous thought and action. The relational approach illuminates how the liberal ideal of citizenship necessarily places limits on the states' moral aspirations for family life.

2. The Communal View of the Situated Self

In contrast to relational theorists, communitarian-oriented scholars have tended, not surprisingly, to emphasize the constitutive effect that social affiliations have on the development of human identity.²¹² These theorists focus on the central role that kinship,

²¹⁰ See GOLDSTEIN ET AL., *supra* note 205, at 31-39 (arguing that continuity in early relationships is essential for the development of healthy adults); cf. Bartlett, *supra* note 150, at 902 (concluding that "it seems reasonable to adopt as an operating principle the notion that a break in family continuity is detrimental to a child").

²¹¹ But this is not necessarily the case, because in any particular instance parenthood can always be challenged by a third party claiming to have a deeper psychological bond to the child. Moreover, the relational model alone cannot provide a principled justification for resisting state removal of infants from biological parents at birth, a practice often advocated in the context of maternal drug use during pregnancy, without resorting to a biological account of the mother-child bond. Because the relational model does not in every instance favor parental authority, it provides only part of the justificatory foundation for the constitutional enforcement of parental authority. The communal model of the situated self provides the remaining part. See *infra* part II.C.2.

²¹² I use the term "communitarian-oriented" to indicate that this view is shared by communitarian, liberal, feminist, and other critics of the atomistic self. See *supra* note 175 and accompanying text.

neighborhood, education, religion, politics, and other social ties play in constituting the individual's sense of self.²¹³ Unlike the relational model, the communitarian thesis does not speak directly to the psychic formation of the self; rather, it focuses on the social inculcation of particular values and beliefs.²¹⁴ The importance of familial relations from this perspective, therefore, is in the transference of particular substantive ways of life.²¹⁵ Families are the first and perhaps primary "community of origin" for developing children, the one within and against which children learn to define themselves.²¹⁶

The communal understanding of human identity has clarified the importance of parental authority in the liberal state. Parental authority erects a crucial barrier against the state's power to inculcate substantive values and beliefs in developing children.²¹⁷

²¹³ See Sandel, *supra* note 181, at 6 ("Open-ended though it be, the story of my life is always embedded in the story of those communities from which I derive my identity—whether family or city, tribe or nation, party or cause."). Liberal theorists oriented around the communitarian conception of the self exhibit the same emphasis. See BARBER, *supra* note 12, at 91 ("We can learn how to become creative individuals *within* the families, tribes, nations, and communities into which we are born . . ."). For an exploration of the constitutive effects of the workplace environment on adult female identity, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1824-39 (1990).

²¹⁴ The inculcation of substantive values and beliefs is not wholly distinct from the development of a differentiated sense of self; we do not become a self first, and then mold that self in the image of parental values. Instead, the inculcation of substantive values directly shapes the contours of our early sense of self; it may determine, for example, whether we will develop to be more or less morally independent or conforming. Similarly, our sense of a distinct self emerges from within the values, beliefs and general way of life that define our familial world. Overall, of course, the formative influences of biological temperament, primary caregiving, and substantive family values combine in a complex developmental process whose ultimate, and ideal, outcome is the situated, autonomous self.

²¹⁵ See John H. Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 821 (1978) (noting that the family instills in children "the sense of belonging and having roots in a distinct tradition").

²¹⁶ Marilyn Friedman rejects prevailing communitarian theory as antifeminist. See Friedman, *supra* note 175, at 277 (noting that "communitarian philosophy as a whole is a perilous ally for feminist theory"). Yet, because she ultimately concedes the importance of "communities of origin" to our early sense of self and concludes that "communities of choice foster not so much the constitution of subjects but their reconstitution," *id.* at 289, her position is not dramatically different from the theory of the situated self presented in this article.

²¹⁷ See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) (noting that the "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed

In the liberal view, the recognition of parental rights prevents the state from enforcing its own conception of the good family life. Particularly with respect to children, whose belief systems are still being formed, liberalism's commitment to preserving a relatively broad sphere within which differing conceptions of the good life may flourish explains the important role that parental authority ultimately plays in preserving human liberty against the threat of governmental oppression and tyranny. By ensuring that the primary constitutive force in the child's life is not the state, parental authority diminishes the threat of governmental control over the substantive values and beliefs that shape individual identity.²¹⁸

Contrary to traditional liberal wisdom, the importance of parental authority does not inhere in governmental neutrality or family privacy. Parental rights instead represent a political determination that the virtue of situated autonomy is best served by limiting the state's role in the raising of children. At the same time that parental authority works to conform children to the ideal of liberal citizenship, it also serves to insulate those same children from the direct threat of state-prescribed values and beliefs. Indeed, one of the deepest paradoxes of liberal citizenship resides in the civic virtue of situated autonomy, a virtue that, once instilled, resists the very idea of instilled virtue. Situated autonomy seeks an uneasy reconciliation between the child's embeddedness in the family's way of life and her capacity to resist her social embeddedness by forging her own identity. The communal thesis insists that it is our embeddedness, and most important of all our embeddedness in families, that protects us from the totalitarian threat of state-imposed values and beliefs.

Like the relational model, the communal approach illuminates not only the importance of parental authority in the liberal state,

to the ideal of individual liberty and freedom of choice"); *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion) (noting that "the Constitution prevents [the state] . . . from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns"); Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 992 (1975) ("Our political commitment to diversity of views, lifestyles, and freedom of religion is promoted by allowing families to raise children in a wide variety of living situations and with diverse childrearing patterns.").

²¹⁸ See *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) (noting that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State").

but also the threat to individual liberty posed by state regulation of family life. If families wield a formative influence on individual identity, as they certainly do, then state regulations affecting family life may undermine in a profound and insidious way the very idea of individual liberty. Seen as a form of state-prescribed orthodoxy, family law potentially undermines the very concept of private morality. The communal understanding of the situated self highlights that the political stakes of family regulation are nothing less than the preservation of individual moral freedom.

* * *

The relational and communal conceptions of the situated self each contribute to our understanding of the importance of parental authority in the liberal state. Yet despite its importance, the right of parental authority obviously does not exclusively define the relationship between the liberal state and the maturing child. Parental authority is not absolute; it gives way when parents fail to nurture their children in a minimally acceptable manner, when families break apart, or when parents or children simply give up on one another. Moreover, because the state sets the terms and conditions of family life to begin with,²¹⁹ parents are not entirely free of state-imposed constraints even within their recognized sphere of authority.²²⁰

Once we understand that the state exercises broad and profound influence within the domestic sphere—that there are necessary and inherent limitations on the scope of parental authority—we must consider the implications for liberalism. How should liberalism come to terms with the fact that the state enforces moral norms governing the quality and structure of family life? If parental

²¹⁹ See *supra* notes 133-36 and accompanying text.

²²⁰ See Bartlett, *supra* note 150, at 885. Professor Bartlett describes these constraints:

The state, in addition to imposing duties on parents, also constrains certain of their rights. For example, in disciplining children, parents may not injure them severely. Parents may not, even for religious reasons, make unconventional decisions about their children's medical treatment if such treatment is likely to result in the child's death. A parental decision to commit a child to a mental institution is subject to review by professionals of the institution. Parents may not put their children to work in violation of child labor laws, and they do not have unlimited options in educating their children.

Id. (footnotes omitted).

authority serves to protect developing children from state-prescribed values and beliefs, then what safeguards exist in the context of family law? The following Part first explores more closely the moral dimensions of family law and the need for a communitarian model of legal decision-making. It then explains why, in a liberal democracy committed to safeguarding individual liberty, this sphere of communitarian decision-making belongs to the states. The following Part also examines the role of the federal government in preventing state regulation of the family from undermining fundamental liberal rights.

III. A LOCALIST THEORY OF FAMILY LAW

Communitarianism has the potential for helping us discover a politics that combines community with a commitment to basic liberal values.²²¹

This Part resumes the discussion of federalism and explains why governmental authority over the family as a constitutional matter belongs to the states. The discussion begins by elaborating the way in which legal regulation of family life is, at least in significant part, an inherently communitarian endeavor. While "the claims of community are several,"²²² I use the term "communitarian" here to identify the source for the moral legitimacy of family law. I do not mean to suggest that family law is a product of strong communitarian lawmaking; it does not arise within a political community defined by a full moral consensus, homogeneous lifestyle, or teleological moral vision. Contemporary family law is communitarian in the less comprehensive sense of deriving its moral content from the shared values of the relevant political community.²²³

²²¹ Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 320 (1985).

²²² Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 688 (1992).

²²³ Stephen Gardbaum labels this less comprehensive form of communitarian decision-making "metaethical communitarianism." See *id.* at 705-19. What strong communitarian theorists tend to mean by shared values is a communal recognition of some objective, transcendent truth, or a degree of communal agreement that approaches universality. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988) (noting that "[r]epublican thought is characterized by a belief in universalism"). The emphasis on universally shared values characteristic of strong communitarianism implies either a level of social homogeneity or a belief in transcendent truth that is clearly at odds with the pluralistic conditions of liberal democracy.

Unlike their classical republican counterparts, contemporary civic republican scholars appeal to dialogue and practical reason rather than transcendent truth as the

Family law should be viewed as the product of a normative discourse among a community of citizens living in a particular place at a particular time in history.²²⁴

Section A describes how family law calls upon legislatures and courts to take sides in the clash among competing views of what constitutes the good life for parents and children. Section B then explains why the communitarian nature of family law reveals the fundamental value of localism in the constitutional design. That Section promotes state authority over family law as an essential means for strengthening both the processes of communitarian decision-making and the virtues of national citizenship in the liberal state. Finally, Section C elaborates the important role of the federal government in preserving individual rights by setting constitutional limits on state moral authority.

A. *The Communitarian Nature of Family Law*

Family law does not conform to the liberal model of politics and adjudication. By this, I do not mean simply that state regulation of the family transgresses the traditional liberal view of the family as a private institution, although this is certainly the case.²²⁵ More

source of these universal community values. See Michelman, *supra* note 166, at 23-24 (explaining the contemporary appeal of the tradition of civic dialogue in terms of "practical reason"); Sunstein, *supra*, at 1541 (relying on "practical reason" to settle "normative disputes with substantively right answers"). Although contemporary civic republican scholars emphasize dialogue and situated reason, nevertheless they do stress community consensus and uncontested norms. But see Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1505 (1988) (articulating an "inclusory, plurality-protecting ideal" of republicanism). For that reason, although my view of family law fits the republican model, I prefer to elaborate a model of community dialogue from within a liberal paradigm that begins with an emphasis on social diversity and political conflict. Cf. C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 U. FLA. L. REV. 491, 521 (1989) (questioning "whether the choice between republican liberalism and Michelman's liberal republicanism really makes a difference").

²²⁴ My argument that family law is communitarian in the sense that it requires the state to act on a particular conception of the good resembles the theory of liberalism developed by Joseph Raz in *The Morality of Freedom*. See RAZ, *supra* note 12, at 133. Whereas Raz promotes a perfectionist state in all areas of political life, my argument in this Article speaks only to family law and rests on the place of families and the needs of developing children in liberal society.

²²⁵ See *supra* part II.A. Liberalism can, with little effort, restrict its conception of privacy to the individual's fundamental right to make decisions regarding important matters of family life, see, e.g., *Roe v. Wade*, 410 U.S. 113, 147-64 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 446-55 (1972), thereby preserving the fundamental liberal boundary between the sphere of collective power and the sphere of individual liberty. This understanding of privacy is not altered by the concept of the situated self nor

pointedly, state regulation of the family as it has always existed in this country defies the fundamental liberal norm of governmental neutrality on questions of the good life.²²⁶ We are accustomed to the idea that liberalism is incompatible with moral argument; we assume that lawmaking in a liberal society should concern itself with protecting individual interests and facilitating individual desires and not with enforcing communal values.²²⁷ As long as a particular domestic lifestyle comports with the basic liberal conception of justice, as long as it does not seriously undermine the development of civic character or the liberal state's ability to reproduce itself,²²⁸ we would expect that the principle of governmental neutrality on questions of the good life would assure state nonintervention. Given the deeply formative effect that family life has on the child's emerging sense of self, we might most vehemently insist on governmental impartiality with respect to the domestic sphere. At

by the virtue of situated autonomy, both of which remain solidly committed to the notion of individual agency, however embedded the individual agent is understood to be. See *supra* part II.C. With the concept of privacy reoriented around the principle of individual (but situated) autonomy, parental authority can be detached from the notion of family privacy and claim its proper role in the cultivation of civic character.

²²⁶ See, e.g., Kymlicka, *supra* note 147, at 883 (defining liberal neutrality as "the view that the state should not reward or penalize particular conceptions of the good life but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued"). For discussions of the principle of neutrality within liberal thought, see DWORKIN, *supra* note 168, at 203; CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 42-47 (1987); RAWLS, *supra* note 168, at 190-95; RAZ, *supra* note 12, at 110-33.

²²⁷ I should note that this traditional view of liberalism is misleading in two respects. First, liberalism is not inherently inhospitable to moral argument; not only does liberalism take a position on the meaning of the good political life, it also promotes an ideal of the good citizen that itself implies a shared understanding of the good family life. Around each of these foundational concepts—politics, citizenship and family—may be found a constellation of moral assumptions and normative ambitions that define the liberal political framework. See, e.g., RAZ, *supra* note 12, at 1 (introducing his "essay on the political morality of liberalism"). Thus, when liberals make a claim to moral neutrality, they necessarily mean to claim a sphere of personal freedom and autonomy that is framed or limited by the moral imperatives of liberalism itself. This distinction between the morality that defines the framework of liberal politics and the sphere of individual moral freedom is sometimes characterized as a distinction between the right and the good. See, e.g., RAWLS, *supra* note 168, at 173-213 (discussing the priority of the right over the good). Second, this Article contends that liberalism must also accept moral argument even within the realm of social life that we traditionally conceive of as personal freedom. Cf. RAZ, *supra* note 12, at 133 (promoting a "perfectionist moral pluralism . . . which allows that certain conceptions of the good are worthless and demeaning, and that political action may and should be taken to eradicate or at least curtail them").

²²⁸ See *supra* part II.B.

the very least, we should expect liberalism to demonstrate a firmly tolerant attitude toward those family lifestyles that do not directly impair the continued viability of liberal society itself.

In stark contrast to moral neutrality, however, the law of family relations radiates an aura of impassioned conviction on the meaning of the good life.²²⁹ My insistence on the communitarian significance of family law is certainly not in itself a novel insight; we are all familiar with the view of domestic relations law as emotionally charged, value-laden, and decidedly unlaw-like. Similarly, we are all aware of the fact that American family law has its roots in ecclesiastical law, and that its current form continues to be profoundly shaped by the Judeo-Christian moral tradition. The prevailing wisdom, however, views family law as an unfortunate and perhaps anachronistic departure from the liberal ideal of a morally neutral state.²³⁰ Indeed, there exists a relatively widespread perception that the law of family relations is becoming increasingly "liberalized," and to a certain extent this is true.²³¹ It is certainly fair to

²²⁹ See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1805 (1985); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 1004-06 (1989); see also *Poe v. Ullman*, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting) ("[The] inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well."). Although sensitive to the moral nature of family law, Justice Harlan nevertheless assumes a static, and therefore quite conservative, moral vision. See *id.* at 546 (concluding that the laws against adultery, fornication and homosexual practices "form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis"). For a case that follows Justice Harlan's views on homosexual conduct, see *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²³⁰ In reference to the domestic relations exception to federal diversity jurisdiction, Lea Brilmayer describes "the *peculiar* deference federal courts accord to states in family cases," LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 346 (1986) (emphasis added), as follows:

[This deference] may be due largely to the nature of domestic relations law. Domestic relations cases are usually emotionally charged; and substantive family law lacks clearly delineated standards. Because the cases are highly fact-specific, it is difficult to develop clear-cut principles. Family law has also been heavily imbued, historically, with moral and religious overtones. Under the circumstances, federal courts have carved a special exception for domestic relations cases . . . from federal diversity jurisdiction so as not to intrude into the cultural norms of the states.

Id. (footnote omitted).

²³¹ I discuss the ideological and doctrinal shift toward the liberalization of family life in greater detail in Dailey, *supra* note 130, at 972-79; see also Martha Minow, "Forming Underneath Everything that Grows": Toward a History of Family Law, 1985 WIS. L. REV. 819, 827-34 (critiquing the traditional historical account of family); Olsen,

say that the traditional liberal principles of individual autonomy and gender equality have been applied in recent years to limited aspects of the domestic sphere. With respect to relations among adult family members, the law has shed much of its public moral content in favor of an approach facilitating private interests and desires. The Supreme Court has imposed a standard of equal treatment on state marriage requirements, for example, by prohibiting states from enforcing miscegenation laws,²³² and the states themselves have all moved in the direction of granting no-fault divorces after a specified waiting period.²³³ Wives are now less likely to receive lifetime support after a divorce, particularly if the marriage was of short duration or there were no children,²³⁴ a development that reflects a shift away from the assumption that women cannot be economically self-supporting and toward a principle of gender-blind neutrality. The law of child custody has discarded its traditional presumption of maternal primacy in favor of the principle of gender neutrality underlying the now-prevailing approaches of joint custody, primary caretaker and psychological parenthood.²³⁵

We would be right, therefore, to infer some important liberalization of the legal relationship between husband and wife. Yet despite an increased concern for the principles of individual choice and gender neutrality, the laws governing marriage and divorce nonetheless continue to reflect substantive views on desirable family arrangements. Persons of the same sex,²³⁶ persons closely related to each other,²³⁷ persons already married,²³⁸ persons who refuse testing for certain infectious diseases,²³⁹ and mentally incompetent

supra note 148, at 840 n.10 (referring to "the shift that has taken place from seeing the family as an organic group to seeing it as a contract among individuals").

²³² See *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

²³³ See *Schneider*, *supra* note 229, at 1809. For examples of no-fault divorce statutes, see CONN. GEN. STAT. ANN. § 46b-40 (West Supp. 1995); 23 PA. CONS. STAT. ANN. § 3301 (1991).

²³⁴ See WEITZMAN, *supra* note 108, at 163-75.

²³⁵ See JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 516-22, 623-40, 644-49 (3d ed. 1992).

²³⁶ See, e.g., N.J. STAT. ANN. § 37:1-1 (West 1968) (prohibiting certain marriages but not explicitly outlawing same-sex marriage, although interpreted that way by *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)); OHIO REV. CODE ANN. § 3101.01 (Anderson Supp. 1994) (sanctioning only heterosexual marriages).

²³⁷ See, e.g., FLA. STAT. ANN. § 741.21 (West 1986) (outlawing incestuous marriages); MO. ANN. STAT. § 451.020 (Vernon 1986) (same).

²³⁸ See, e.g., COLO. REV. STAT. ANN. § 18-6-201 (West 1986 & Supp. 1994) (outlawing bigamy); 18 PA. CONS. STAT. ANN. § 4301 (1983) (same).

²³⁹ See, e.g., N.J. STAT. ANN. § 37:1-20 (West 1968) (requiring a certificate of syphilis testing for marriage license); WASH. REV. CODE ANN. § 26.04.210 (West 1986)

persons²⁴⁰ are prohibited from marrying in most states, while those seeking a divorce may have to comply with waiting periods,²⁴¹ submit to counseling and mediation,²⁴² and negotiate their way through the highly-charged normative laws governing alimony and property distribution.²⁴³ The question of who gets what after divorce continues to reflect society's deeply-held views regarding moral worth and moral transgression. The principle of equitable distribution, which governs the financial outcome of divorce in the vast majority of states, empowers the judge to allocate marital resources according to what seems just or fair in the particular circumstances.²⁴⁴ While an examination into the parties' personal expectations, agreements, or motives may prove useful for the decision-maker, personal understandings do not necessarily govern the parties' ultimate financial standing. Even in cases involving written prenuptial agreements—perhaps the most distinctly liberal of family law doctrines—most jurisdictions impose a standard of unconscionability not applicable in traditional contract law which allows the judge to overlook agreements that appear deeply unfair or unjust to one of the parties.²⁴⁵ Whatever steps lawmakers and courts have taken in the direction of liberalizing the legal relationship between adult family members remain decidedly tentative.

(requiring venereal testing for marriage).

²⁴⁰ See, e.g., ILL. ANN. STAT. ch. 750 para. 5/301 (Smith-Hurd 1993) (dissolving marriages due to incapability to consent); N.J. STAT. ANN. § 37:1-9 (West 1968) (preventing issuance of a marriage license when a party is adjudicated mentally incompetent).

²⁴¹ See, e.g., CONN. GEN. STAT. ANN. § 46b-67 (West 1986) (instituting a 90-day waiting period); MICH. STAT. ANN. § 25.89(6) (Callaghan 1984) (instituting a 60-day waiting period).

²⁴² See, e.g., N.H. REV. STAT. ANN. § 458:7-b (Supp. 1994) (requiring courts to order parties in divorce proceedings to undergo marital counseling in certain situations); R.I. GEN. LAWS § 15-5-29 (1988) (giving courts discretion to order marital mediation).

²⁴³ See, e.g., CONN. GEN. STAT. ANN. § 46b-81, -82 (West 1986) (concerning property distribution and alimony).

²⁴⁴ Community property laws, which exist in nine states, also appear illiberal in their subordination of the principle of individual rights to the principle of spousal equality. See, e.g., CAL. FAMILY CODE § 2550 (West 1994) (instituting default of equal asset distribution in divorce proceedings); LA. REV. STAT. ANN. § 9:2801 (West 1991 & Supp. 1995) (same).

²⁴⁵ See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1985); see also *DeLorean v. DeLorean*, 511 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 1986) (suggesting that prenuptial agreements rendering one spouse destitute or putting one spouse in the public charge will be unenforceable); *In re Button*, 388 N.W.2d 546, 551-52 (Wis. 1986) (invalidating a substantively inequitable prenuptial agreement).

While adult family relations in theory might lend themselves to liberal principles, the relationship between adults and children in the family clearly does not. The communitarian nature of family law finds its deepest roots in legal regulations governing the parent-child relationship. As we have seen, liberalism promotes parental authority as a means of instilling the important virtue of situated autonomy in future citizens.²⁴⁶ Yet parental rights are not absolute. In cases where parents differ over an important aspect of childrearing, as often occurs in the context of divorce, the courts are called upon to resolve the dispute in accordance with their understanding of what is in the best interests of the child. Custody battles between fit parents, for example, require courts to determine which parent will provide the better home for the child, where the meaning of "better" is often left to the discretion of the judge.²⁴⁷ In cases where the quality of parenting is brought into question by state intervention, courts must also determine the proper placement of the child in accordance with substantive standards on child development. In all families split by serious conflict, which may include the majority of families in this country, authority over the child shifts from parents to the state.

The normative dimension of legal standards such as equitable distribution or the best interests of the child—standards which govern the breakdown of traditional, intact families—is easily grasped. If the presence of communally shared views on the good life were actually limited to the application of these two standards, then we would not be warranted in identifying family law as a communitarian legal realm. But the communitarian dimension of family law extends far beyond the standards governing the breakdown of traditional families. The traditional custody dispute between divorcing parents is only the most familiar instance in which the state enforces substantive norms. With respect to a wide

²⁴⁶ See *supra* part II.

²⁴⁷ The approach advanced in *Beyond the Best Interests of the Child* attempts to replace this standard with the rule that custody must always go to the psychological parent. See GOLDSTEIN ET AL., *supra* note 205, at 53. Some courts in turn have reduced the standard of the psychological parent to the more objectively identifiable primary caregiver. See, e.g., *Garska v. McCoy*, 278 S.E.2d 357, 360-61 (W. Va. 1981). Although the concepts of psychological parent and primary caregiver have wielded considerable force in custody determinations, they are not always the determinative factors in custody decisions. See, e.g., *In re Kovacs*, 854 P.2d 629, 632-33 (Wash. 1993) (en banc) (rejecting a presumption favoring placement with the primary caregiver). Moreover, the process of identifying the psychological parent or the primary caregiver itself raises normative issues.

variety of less familiar family issues, the moral content of legal rules and standards is equally apparent.

Disputes over medical decision-making on behalf of children are illustrative. *Curran v. Bosze*,²⁴⁸ for example, involved the question whether a noncustodial father could consent to a bone marrow harvesting of his twin daughters over the objection of the custodial mother.²⁴⁹ The harvesting would have been performed for the benefit of the twins' half brother, who was dying of leukemia. The Illinois Supreme Court ultimately concluded that the best interests of the children would not be served by forcing the twins to undergo the harvesting procedure against the wishes of the custodial parent. The court determined that medical donation cannot be compelled in any situation where "an existing, close relationship between the donor and recipient" does not exist;²⁵⁰ the child must derive some personal, tangible benefit from the continued survival or improved welfare of the recipient.²⁵¹ The issue in this case turned on the court's conception of the good life for children: would the young twins benefit from the remote possibility of saving another child's life? The Illinois Supreme Court concluded, with some misgivings, that they would not.²⁵²

The communitarian role of the state extends beyond the resolution of disputes between legal parents; it goes to the underlying definition of parenthood itself and to the question of who may lay claim to a legal interest in the child. The new reproductive

²⁴⁸ 566 N.E.2d 1319 (Ill. 1990).

²⁴⁹ See *id.* at 1321.

²⁵⁰ *Id.* at 1343.

²⁵¹ See *id.*

²⁵² The Illinois Supreme Court's attitude toward its own role in the fate of the ill boy, Jean Pierre, is reminiscent of Robert Cover's depiction of the Civil War era judges who enforced fugitive slave laws against the dictates of their own moral values. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 6 (1975). The Illinois Supreme Court noted at the end of its long opinion:

This court shares the opinion of the circuit court that Jean Pierre's situation "evokes sympathy from all who've heard [it]." No matter how small the hope that a bone marrow transplant will cure Jean Pierre, the fact remains that without the transplant, Jean Pierre will almost certainly die. The sympathy felt by this court, the circuit court, and all those who have learned of Jean Pierre's tragic situation cannot, however, obscure the fact that, under the circumstances presented in the case at bar, it neither would be proper under existing law nor in the best interests of the 3½-year-old twins for the twins to participate in the bone marrow harvesting procedure.

Curran, 566 N.E.2d at 1345 (alteration in original). Jean Pierre died two months later. See *Boy at Center of Suit for a Marrow Donor Is Dead of Leukemia*, N.Y. TIMES, Nov. 20, 1990, at B9.

technologies have exposed in dramatic ways the moral component to legal parenthood. Although disputes relating to gestational surrogacy contracts raise some of the most complex issues relating to human identity and the meaning of parenthood,²⁵³ even the relatively less complicated traditional surrogacy arrangements expose the substantive values underlying legal definitions of parenthood. In the well-known *Baby M* case,²⁵⁴ for example, the New Jersey Supreme Court concluded that a woman who conceived through artificial insemination with no original intention to raise the child as her own was nevertheless the child's legal parent.²⁵⁵ Although it ultimately recognized the mother's rights, the court's need to justify its decision revealed the normative gap between biological and legal parenthood. Similarly, in *Michael H. v. Gerald D.*,²⁵⁶ the United States Supreme Court upheld a California evidentiary statute that denied a biological father any rights with respect to a child with whom he had already established a relationship.²⁵⁷ The Supreme Court concluded that nothing prevents the State of California from bestowing the privileges of legal fatherhood on the man to whom the mother is married rather than on the child's natural father.²⁵⁸

The diverse laws governing adoption in this country provide another example of communitarian lawmaking. Adoption laws establish a procedural framework for transferring final authority over a child from the state to private individuals, a framework particularly attentive to issues surrounding parental coercion and third-party profiteering. In addition, however, adoption laws and policies clearly incorporate societal judgments concerning the "good parent" and the "good identity" for children. Courts evaluate prospective adoptive parents on the basis of age, health, marital status, sexual orientation, wealth, and general psychological well-being. Similarly, race and religion play a central role in adoptive placements, a role often mandated by so-called state matching laws.²⁵⁹ Such laws, which create a presumption that children

²⁵³ In *Johnson v. Calvert*, 851 P.2d 776 (Cal.), cert. denied, 114 S. Ct. 206 (1993), which involved a dispute between genetic parents and a gestational mother over the right to legal parenthood of the child, the California Supreme Court decided in favor of the genetic parents. See *Johnson*, 851 P.2d at 787.

²⁵⁴ In re *Baby M*, 537 A.2d 1227 (N.J. 1988).

²⁵⁵ See *id.* at 1242-43.

²⁵⁶ 491 U.S. 110 (1989).

²⁵⁷ See *id.* at 129-30.

²⁵⁸ See *id.*

²⁵⁹ See, e.g., ARK. CODE ANN. § 9-9-102 (Michie 1993) ("In the placement of

should be placed in families of the same race or religious background, rest on a particular view of human identity as constituted around the factors of race and religion. Not only do adoption laws reflect the community's shared views on ideal child development, it is impossible to imagine how we might reconstruct the law of adoption without appealing to substantive values. The process of finding individuals well-suited to raise parentless children simply cannot be accomplished without some vision of what children need and who is best situated to meet those needs.

The communitarian dimension of family law characterizes not only the doctrines internal to the field, but also the boundaries of the field itself. What falls within the realm of family law and what lies outside it are deeply contested issues which ultimately turn on how we choose to define the family itself. The definitional boundaries of the family can only be resolved by elaborating a shared vision of what a family should be in this society.²⁶⁰ We might wish to include homosexual unions within our legal definition of the family, but we must also be able to justify excluding a group home for college students or even, perhaps, the relationship between a live-in childcare provider and the infant for whom she

adoption of a child of minority racial or ethnic heritage . . . the court shall give preference [to] . . . [a] family with same racial or ethnic heritage as the child"); MINN. STAT. ANN. § 259.29 (West Supp. 1995) (providing for racial and ethnic consideration with regard to adoption). The legality of state matching laws has been thrown into question by the Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553, 108 Stat. 3518, 4056-57 (to be codified at 42 U.S.C. § 5115a) (prohibiting state agencies from denying adoptive placements solely on the basis of race).

²⁶⁰ The Supreme Court grappled most directly with the definition of "family" in *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977). Justice Brennan framed the issue in that case as whether "the relation of foster parent to foster child [is] sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection." *Id.* at 842. In concluding that it did not, Justice Brennan noted that "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Id.* at 843. He went on to note, however, that "biological relationships are not [the] exclusive determination of the existence of a family." *Id.* at 843. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children." *Id.* at 844 (quoting *Wisconsin v. Yoder*, 406 U.S. 205 (1972)) (second alteration in original). Although foster families may serve this role, Justice Brennan concluded, foster parents possess only "the most limited constitutional 'liberty' in the foster family," *id.* at 846, since unlike a "natural family," whose origins lie "entirely apart from the power of the State," the foster family "has its source in state law and contractual arrangements." *Id.* at 845.

cares. And we simply cannot draw definitional lines such as these and remain wholly, or even minimally, "neutral."

Although liberals insist that "modern democracy is precisely characterized by the absence of a substantive common good,"²⁶¹ any viable liberal democratic theory must make room for a politics of the common good relating to the family. In practical terms, it is simply impossible for liberalism to bracket the "family question." In considering the best custodial placement for a child, whether blood relatives may marry, whether a woman may adopt the biological child of her lesbian lover, or whether an unmarried woman may claim alimony when her long-term lover leaves her, family law raises important questions concerning the good family life. Issues involving the removal of children from their homes, the approval of adoptive parents, the rights of gestational surrogates, and custody over young children upon divorce foreclose a stance of liberal neutrality. Rather than viewing family law as incompatible with the ideal of liberal justice—as a subject needing to be recast in the image of governmental neutrality on questions of the good life—we need to understand liberalism as compatible with, and dependent upon, a domestic sphere governed by communitarian norms.²⁶²

Liberals have historically been quite wary of community, although this wariness may be waning even among traditional liberal theorists.²⁶³ Still, the liberal fear of communitarian decision-

²⁶¹ Chantal Mouffe, *Democratic Citizenship and the Political Community*, in DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY 225, 229 (Chantal Mouffe ed., 1992).

²⁶² Michael Sandel is among those communitarian theorists who believe that liberalism's need for communitarian politics compromises the entire liberal enterprise. He concludes:

[I]f my argument is correct, if the liberal vision we have considered is not morally self-sufficient but parasitic on a notion of community it officially rejects, then we should expect to find that the political practice that embodies this vision is not *practically* self-sufficient either—that it must draw on a sense of community it cannot supply and may even undermine.

Sandel, *supra* note 45, at 91. Although I agree that the liberal tradition has officially rejected community, I disagree with Sandel's conclusion that it must do so.

²⁶³ See, e.g., Dworkin, *supra* note 194, at 479 (purporting to "test" the assumption that "liberalism . . . is hostile to the value or importance of community"). Communitarian politics that emphasize democratic decision-making might also appeal to the populist tradition. See, e.g., Rapaczynski, *supra* note 7, at 405 ("It was populism, rather than liberalism, as well as the defense of a peculiar, provincial mode of life that found the ideology of federalism useful and congenial."); Sandel, *supra* note 45, at 92-93 ("From Jefferson to the populists, the party of democracy in American political debate had been, roughly speaking, the party of the provinces, of decentralized

making reflects a valid concern for the preservation of individual liberty against the potentially coercive and oppressive force of communal will.²⁶⁴ Yet to acknowledge this concern as legitimate does not mean that community has no role at all to play in a liberal regime. As we have already seen, liberalism needs communitarian decision-making in the realm of domestic relations in part to provide for the civic development of its own citizens. At the same time, liberalism must also erect effective safeguards against the potentially oppressive effects of a regulatory sphere oriented toward the enforcement of communally shared values and norms. The wholly unrestrained enforcement of community values within the realm of family life would pose an intolerably grave threat of governmental tyranny over our intimate lives. In the following Section, I propose that state authority over the core domain of family law serves a crucial function in safeguarding individual liberty against the potentially dangerous excesses of communitarian decision-making. In Section C, I explain that the federal government also has an essential role to play in ensuring that state authority over the family is not exercised so as to undermine fundamental rights or the familial preconditions of citizenship in liberal society.

B. *State Sovereignty over Family Law*

The localist approach to constitutional federalism presented in this Section affirms the importance of state authority over family law to the stable flourishing of liberal democracy in this country. As the following discussion elaborates, localism makes a three-fold contribution to the prevention of governmental tyranny over family life. First, 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

power, of small-town and small-scale America.”).

²⁶⁴ See Shklar, *supra* note 129, at 21 (positing that liberalism “has only one overriding aim: to secure the political conditions that are necessary for the exercise of personal freedom”).

develop within the states' smaller, relatively more accessible political locales.

Second, state sovereignty over family law serves to diffuse governmental power over the formation of individual values and moral aspirations. Localism serves to decentralize direct governmental authority over the moral development of children; it diminishes the national government's power to mold the moral character of future citizens in its own monolithic image. Localism promotes diversity—not in the traditional sense of protecting the states as "laboratories of experiment" for the national project²⁶⁵—but in the name of preserving citizen choice in matters of family life. As long as the citizen's right to exit local communities is guaranteed in a meaningful way, localism promotes diversity as an important barrier against moral tyranny on the national scale.

Third and finally, localism reserves to the federal government the role of ensuring that states do not override fundamental liberal values. Most importantly, the federal government retains ultimate responsibility for protecting the rights of individual privacy, equality, and parental authority in the sphere of family life. In the discussion that follows, I first explore the value of state sovereignty over family law in the constitutional design. Section C then turns to the role of the federal government in the regulation of family life.

1. Strengthening Communitarian Decision-Making

Family law raises the question of whether and in what way communitarian decision-making can be carried out across a large, morally heterogeneous nation.²⁶⁶ Communitarian decision-making

²⁶⁵ See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 49-50 (1930) ("The very notion of our federalism calls for free play of local diversity in dealing with local problems."). For consideration of what Professor Amar calls the "laboratory" perspective, see Akhil R. Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233-36 (1994).

²⁶⁶ In some ways, this question is nothing more than a modern recasting of the revolutionary debate between the federalists and antifederalists over the issue of state sovereignty: a debate apparently won, if not by the federalists themselves, then by their nationalist successors in the aftermath of the Civil War and the New Deal. See *supra* part I.A. Yet the fact that this debate was long ago settled in favor of a national liberal politics is precisely what distinguishes the modern question of communitarian decision-making from the revolutionary one; the issue now raised is how we may foster a limited politics of the common good relating to the family without undermining the liberal principles that define our national political ideal.

directed to the good family life—however democratic and pluralistic—entails a degree of civic engagement and a measure of community identity that are dangerous and undesirable on a national scale. The process of formulating shared values within a pluralistic society requires both a high degree of citizen initiative and a strong sense of communal bonds. As I elaborate below, these aspects of communitarian decision-making—civic engagement and community identity—are more likely to be realized at the state rather than federal level.²⁶⁷

The communitarian dimension of family law calls for a deliberative political process by which a diverse citizenry comes to provisional agreement on questions of the good family life.²⁶⁸ In a pluralistic society, a communitarian model of legal decision-making must emphasize the value of democratic self-government.²⁶⁹ While also an important part of efforts to revitalize

²⁶⁷ Professor Post has also noted the possibility of a “communitarian defense for federalism.” Robert C. Post, *Justice Brennan and Federalism*, 7 CONST. COMMENTARY 227, 235 (1990). In his view, this defense stresses “the values of local participation and celebrates the ability of small communities to foster a kind of *gemeinschaft* that constitutes and embraces the identities of those who comprise them.” *Id.* at 238. Professor Post also rightly acknowledges, however, the need to know “whether the states in fact comprise [such] communities.” *Id.*

²⁶⁸ Much of the recent writing within liberal theory focuses on the value of participatory democracy and how best to reshape the contemporary liberal landscape in a more participatory form. Benjamin Barber has offered perhaps the most impassioned defense of, as well as the most detailed plan for, implementing participatory democracy on the national as well as local scale. See BARBER, *supra* note 12, at 261-311 (advocating the implementation of neighborhood assemblies, television town meetings, national referenda, electronic balloting, and, on an experimental basis, vouchers for housing, education, and transportation); see also YOUNG, *supra* note 12, at 91 (arguing that justice requires “participation in public discussion and processes of democratic decisionmaking”); Hanna F. Pitkin & Sara M. Shumer, *On Participation*, DEMOCRACY, Fall 1982, at 43, 43 (“Everyone . . . is capable not merely of self-control, of privately taking charge of his own life, but also of self-government, of sharing in the deliberate shaping of their common life. Exercising this capacity is prerequisite both to the freedom and full development of each, and to the freedom and justness of the community.”). Contemporary proponents of participatory democracy often rely on the work of Hannah Arendt, see ARENDT, *supra* note 192; HANNAH ARENDT, *ON REVOLUTION* (Greenwood Press 1982) (1963); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (new ed. 1973), despite the fact that Arendt’s theory of politics, with its rigid distinction between the public sphere of politics and the private sphere of personal, economic, and social obligations and needs, seems dangerously antidemocratic. See Pitkin & Shumer, *supra*, at 46.

²⁶⁹ See YOUNG, *supra* note 12, at 91-95; Michelman, *supra* note 166, at 75; Pitkin & Shumer, *supra* note 268, at 43. In promoting a similar idea of “deliberative universalism,” Amy Gutmann argues that “[d]eliberation (within the bounds of what is reasonable) provisionally resolves fundamental moral conflicts here and now, but not necessarily once and for all.” Amy Gutmann, *The Challenge of Multiculturalism in*

traditional liberal politics,²⁷⁰ civic participation is central to the communitarian endeavor. The task of formulating a shared vision of the good family life requires that citizens consider and make known their views on family issues. Citizens must actually engage in political dialogue about, and come to some shared understanding of, the good life for parents and children.²⁷¹ Citizen passivity and political disengagement²⁷² threaten to reduce the deliberative

Political Ethics, 22 PHIL. & PUB. AFF. 171, 199 (1993). In her view, "the give and take of respectful argument can create the broadest justifiable consensus across a range of reasonable but conflicting positions because mutual respect enjoins an economy of moral disagreement, the search for substantive points of convergence between fundamentally irreconcilable positions." *Id.*

²⁷⁰ Contemporary proponents of institutional federalism in particular stress the value of civic participation to our liberal democracy. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (naming the opportunity for civic participation in government as an advantage of federalism). Professor Merritt explains the liberal benefits of increased participation:

The second major advantage of federalism lies in the ability of state and local governments to draw citizens into the political process. The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decisionmaking. This participation, in turn, provides myriad benefits: it trains citizens in the techniques of democracy, fosters accountability among elected representatives, and enhances voter confidence in the democratic process. For these reasons, the opportunity to participate personally in governmental decisionmaking is an important part of the democratic process.

Merritt, *supra* note 28, at 7-8 (footnotes omitted); see also A.E. Dick Howard, *Judicial Federalism: The States and the Supreme Court*, in *AMERICAN FEDERALISM: A NEW PARTNERSHIP FOR THE REPUBLIC* 215, 237 (Robert B. Hawkins, Jr. ed., 1982) ("[B]y promoting citizen participation in the making of governmental decisions, by fostering civic education, and by promoting democratic choices at the local level, federalism enhances fundamental constitutional values.").

²⁷¹ As noted earlier, theorists from both the liberal and communitarian perspectives seem to be converging upon the value of civic participation and dialogue. See *supra* note 161. For civic republicans emphasizing deliberation, see Michelman, *supra* note 166, at 19 (noting that "[r]epublicanism favors a highly participatory form of politics, involving citizens directly in dialogue and discussion"); Sunstein, *supra* note 223, at 1554 ("The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue."). For liberal theorists emphasizing deliberation, see generally BARBER, *supra* note 12, at 163-212 (elaborating the importance of political participation to his theory of strong democracy); see also MACEDO, *supra* note 12, at 58 ("Liberalism establishes, for good reason, a process of public debate about itself among other things."); Gutmann, *supra* note 269, at 199 (promoting a theory of "deliberative universalism"); cf. GALSTON, *supra* note 150, at 248 (admonishing that liberal democratic theory "is not free to give participatory virtues pride of place or to remain silent about the virtues that correspond to representative institutions"). For a discussion of the value of political participation in liberal theory, see CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

²⁷² I recognize that the failure to participate may result from economic and

model of communitarian politics to a form of state moral authoritarianism. State authority over family law decreases the risk that a politics devoted to the good family life will degenerate into governmental oppression.

The scale of national politics not only impedes citizen participation, but also dilutes the sense of community identity necessary to the deliberative process of working out shared values and norms in family law. States are not fungible political units; rather each state enjoys a particular history, a particular geography, a particular climate, and a particular population that necessarily shares a set of situated interests and disputes.²⁷³ The kind of impressionistic views we all hold of the differences among states—the slow charm of Georgia (or alternatively its conservative moralism), the creative excitement of New York (or alternatively its inhuman chaos), the visionary optimism of California (or alternatively its zany materialism)—are often what attract people to particular places and give rise

political oppression as much as from apathy. For an argument that certain oppressed groups in our society are systemically barred from political participation and that removing barriers to their participation must entail affirmative group rights, see YOUNG, *supra* note 12, at 183-91.

²⁷³ See Kaden, *supra* note 56, at 854. Professor Kaden observes:

Experience also supports the traditional claim that federalism promotes variety in political choice and counters the impulse toward social and ideological homogeneity by allowing cultural differences to find expression in different places. Despite the homogenizing effects of media and mobility on twentieth-century American life, the existence of separate state and local governmental units still provides avenues for expression of the variations in style in different parts of the country. Tax burdens, public services, habits of living, and patterns of tolerance do vary as one moves from Maine to Alabama or New York to New Mexico, reflecting in part the differences in the political choices made by subnational governmental authorities. Thus one state opts for an elaborate system of subsidized postsecondary education while another spends far less on this service; one state chooses to permit the use of marijuana while others continue to prosecute for possession; and one state appeals to retired persons by supplementing the natural advantage of climate with tax preferences, while another discourages this type of migration.

Id. (footnotes omitted); see also ELAZAR, *supra* note 14, at 11-25 (maintaining that particular issues unite states internally); Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1216-17 (1994) ("The states are not simply small subdivisions of the nation; they have decided cultures, traditions, and histories—longer than the nation's."); Briffault, *supra* note 42, at 1345 ("Due to the states' permanence, clearly marked jurisdiction, inherent authority, and structural role in the organization of the national government, people are more likely to organize their thoughts about the political world in terms of the states. This, in turn, may lead people to think about some of the broader aspects of American society—economic, social, and cultural questions—in terms of the states.").

to a shared sense of belonging. State citizens in our pluralistic society possess what we might call a situated identity, one that arises from both the abstract idea and the concrete experience of living in a particular place at a particular time in history.²⁷⁴

Even at the state level, the communitarian emphasis on civic participation and communal interests may seem a false ideal in the contemporary United States. Some proponents of communitarianism view the states as simply too large to sustain an authentic politics rooted in direct citizen participation, meaningful public dialogue, and the development of shared values and goals across a heterogeneous population.²⁷⁵ Yet the point here is not that the states live up to some abstract ideal of communitarian politics, however that might be conceived, for clearly they do not. It would be impossible to claim, for example, that California—with a population of 17 million—offers the kind of communitarian decision-making associated with the ancient Greek polis or the New England town meeting. Rather the point is that the states potentially offer a relatively more inclusionary, deliberative political life than the national government ever could.

Although communitarian theorists have tended to reject the states in favor of more localized political bodies, this Article supports state authority over family law rather than municipal, regional, or other nongeographic authorities for several reasons.

²⁷⁴ Cf. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 658 (1981) ("I am inclined to believe that the very long-range trends are distinctly in the direction of rendering geography a less salient corollary of ideological differences. But I am also inclined to believe that this is a matter of degree and that there remain important ideological correlates to the political lines within America."). But see Choper, *supra* note 15, at 1572 ("[A]lthough some social and cultural differences among the people in the country may be identified by reference to state and regional boundaries, the divergence thus defined exists more plainly in its statement than in reality.").

²⁷⁵ See Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 271 (1993) (asserting that "states could never engender the kind of democratic participation in public affairs that is possible on a local basis"); Frug, *supra* note 44, at 1069 ("Reestablishing the definition of political democracy as popular involvement in the decisionmaking process . . . is possible only at the local level." (footnotes omitted)); Rose, *supra* note 36, at 94 ("[R]epublicanism, with its self-rule and civic participation, is only possible at a level more localized than the states."). Although Hanna Pitkin and Sara Shumer suggest that meaningful participatory democracy can occur only in face-to-face dialogue within "small and local associations," Pitkin & Shumer, *supra* note 268, at 51, their vision that the outcome of "democratic political struggle . . . remains contested as much as shared," *id.* at 47, a theory effectively merging the liberal and communitarian models, informs my thesis of state sovereignty presented here.

First, state authority is expressly recognized by the Constitution and any claim to regulatory authority by local communities other than the states would be much more difficult to sustain as a matter of constitutional principle. Second, family law as presently organized operates almost exclusively at the state level. The likelihood that authority over family law would devolve to other communities, involving among other things the disruption and relocation of entire judicial departments, seems highly unlikely. Third, I believe the states may actually be better situated in a practical sense than more localized communities to exercise authority over family life.²⁷⁶ Finally, the distinctiveness of family law may make it unsuitable to decision-making at a level more localized than the states. There are advantages to some degree of uniformity in family law. Giving more localized communities the power to define the terms and conditions of marriage or parenthood, for example, would likely prove too destabilizing and chaotic for the broader social order. Nevertheless, a localist approach to family law is certainly compatible with efforts to resituate state regulatory authority along the lines of alternative local communities. Whatever the merits of these more localized efforts, however, it remains clear that the national community is simply too weak and its citizenry too dispersed, heterogeneous, and numerous to reach even provisional agreement on complex moral issues of family law.

2. Fostering Diversity

However open and participatory political decision-making on the family may be, the communitarian model of family law must still confront the issue of legal authority.²⁷⁷ Despite striving for shared moral answers, communitarian lawmaking does not, and cannot, suppress the moral pluralism that is foundational to liberal society. Even open participation in the process of fashioning answers to questions of the good family life is not enough to protect dissenting individuals and families from the threat of moral oppression. The diffusion of governmental authority among the fifty states is also urgently needed as a structural safeguard for individual liberty in

²⁷⁶ See Briffault, *supra* note 42, at 1306 ("Local governments typically lack the political, legal, and fiscal capacities and cultural associations to be effective subnational focal points and counterweights to national power.").

²⁷⁷ See Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 7 (1989) (arguing that "[t]he authoritarian character of constitutional law is inconsistent with the egalitarian quality of the community of discourse").

matters of family life.²⁷⁸ Federal regulation of the family poses a much greater threat of governmental tyranny for the simple reason that national laws are more difficult than state laws to elude.²⁷⁹ The existence of fifty bodies of state laws on the family provides some degree of choice for families who care to relocate and offers at least some opportunity for exit to families who feel themselves oppressed.²⁸⁰ State authority over family law erects a structural

²⁷⁸ As Section C explains, in addition to the structural safeguard of federalism, the federal government has a role in safeguarding individual rights against the potentially oppressive effects of communitarian decision-making. See *infra* part III.C.

²⁷⁹ See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1503 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDER'S DESIGN* (1987)). McConnell writes:

The main reason oppression at the federal level is more dangerous is that it is more difficult to escape. If a single state chose, for example, to prohibit divorce, couples seeking a divorce could move (or perhaps merely travel) to other states where their desires can be fulfilled. Oppressive measures at the state level are easier to avoid. Important recent examples of this phenomenon are the migration of homosexuals to cities like San Francisco, where they received official toleration, and the migration of individuals from Massachusetts to New Hampshire to escape high rates of taxation.

Id. For other examples of federalism's effect on citizens' choice, see Althouse, *supra* note 273, at 1217 & n.26 (discussing Wisconsin's history with respect to antislavery and criminal procedural rights); Amar, *supra* note 265, at 1237 (discussing an 1890 Wyoming suffrage law extending the franchise to women as an effort to induce women to move there).

In *Roth v. United States*, 354 U.S. 476 (1957), Justice Harlan expressed a similar concern about federal uniformity in the context of First Amendment law:

Quite a different situation is presented . . . where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted.

Id. at 506 (Harlan, J., concurring and dissenting).

²⁸⁰ See Van Alstyne, *supra* note 11, at 777-78 (noting that states cannot bar the exit of citizens who find the "moral climate" overly repressive, although suggesting that the opportunity for exit may diminish the differences among state laws). This argument from diversity is related to the economic argument that the right of exit increases interstate competition, thereby increasing government accountability. See Richard A. Epstein, *Exit Rights Under Federalism*, LAW & CONTEMP. PROBS., Winter 1992, at 147, 149; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 886 (1983). The foundational work in this area is ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

defense against the potentially tyrannous consequences of moral lawmaking on a uniform national scale.²⁸¹

State diversity is of vital constitutional importance in the domain of family law, a legal sphere directly constitutive of children's developing sense of self and moral identity. As discussed earlier,²⁸² the liberal ideal of citizenship, at the heart of which lies the virtue of situated autonomy, requires that maturing children be protected to the extent possible from governmentally instilled moral values. Although parental authority serves as a rights-based shield against the morally coercive power of the state, parental rights are often not controlling. In the absence of parental authority, federalism serves to defuse governmental tyranny over the moral autonomy of developing children by preserving some measure of regulatory diversity at the state level. State authority destroys the national government's power to mold the moral identity of developing citizens in its own monolithic image.

While it is true that localism does not guarantee a diversity of views—the issue of gay marriage shows that state sovereignty does not eliminate moral uniformity altogether²⁸³—significant diversity in the sphere of family regulation nevertheless exists. Laws relating to alimony,²⁸⁴ the enforceability of prenuptial agreements,²⁸⁵ the

²⁸¹ Citizens must be able, however, to take advantage of localism; they must be free to exit and to enter states according to their preferences. See Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 915 (1993) (noting that "[t]he right to travel provides us with the ability to experiment with modes of living other than those sanctioned at home and to return with the potentially transformative knowledge we have gained"). In addition to the freedom to travel, see *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (noting that "inhibiting migration . . . into the State is constitutionally impermissible"), the meaningful exercise of the right to exit might also imply certain affirmative constitutional entitlements. For example, it might provide a basis for individuals to assert a claim to minimum welfare benefits that would enable families to leave their state of origin and to resettle within their state of choice. For related arguments tying federalism to affirmative state entitlements, see Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977).

²⁸² See *supra* part II.

²⁸³ But cf. *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993) (holding that a state statute limiting marriage to two persons of the opposite sex is subject to strict scrutiny under the Hawaii Constitution).

²⁸⁴ States differ on the factors which courts may consider when awarding custody. Compare 23 PA. CONS. STAT. ANN. § 3701(b)(14) (1991) (listing "marital misconduct of either of the parties" as a relevant factor in determining alimony) with MINN. STAT. ANN. § 518.552(2) (West 1990) (providing that maintenance shall be awarded

standards for adoption,²⁸⁶ and the legality of surrogacy contracts²⁸⁷ are only a few examples. This diversity of state laws provides a structural defense against the potentially tyrannous impact of national laws on the growth of children into morally autonomous citizens. State sovereignty over family law fosters diversity with the aim of preserving individual moral liberty.

C. *The Role of the Federal Government*

Although the states possess exclusive authority for regulating the core domain of family life,²⁸⁸ state authority cannot be wholly without boundaries. Communitarian decision-making in the area of family life raises serious concerns regarding the preservation of individual liberty. We have already seen that localism provides some structural protection against moral oppression by reinforcing state diversity and providing some opportunity for citizen choice through exit. Structural safeguards alone, however, are not a sufficient defense against the excesses of communitarian decision-making in a liberal society. The federal government also has a vital role to play in ensuring that state regulation of family life does not undermine fundamental rights essential to the development of civic character in maturing children.

The federal government always operates in the area of family law against a background of presumptive state authority. In the core domain of family law, which includes marriage, divorce, and child custody, the states possess exclusive regulatory authority subject only to constitutional limitations relating to the rights of equality, privacy, and parental authority. In other areas of legitimate federal regulatory concern that bear directly or indirectly on family

"without regard to marital misconduct").

²⁸⁵ See, e.g., Lewis Becker, *Premarital Agreements: An Overview*, in *PREMARITAL AND MARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING AND NEGOTIATING ENFORCEABLE MARITAL AND COHABITATION AGREEMENTS* 1, 1 (Edward L. Winer & Lewis Becker eds., 1993) ("State law regarding premarital agreements varies considerably; different states take vastly different approaches to legal issues associated with these agreements.").

²⁸⁶ Compare N.H. REV. STAT. ANN. §§ 161:2, 170-B:4 (1994) (denying gay individuals the opportunity to be foster or adoptive parents) with *In re Tammy*, 619 N.E.2d 315 (Mass. 1993) (allowing gay individuals to adopt).

²⁸⁷ Compare WASH. REV. CODE ANN. § 26.26.250 (West Supp. 1995) (making surrogacy contracts illegal) and LA. REV. STAT. ANN. § 9:2713 (West 1991) (making surrogacy contracts unenforceable) with VA. CODE ANN. § 20-165(A) (Michie 1990) (providing that only married couples may enter into such agreements).

²⁸⁸ For a definition of this core domain, see *supra* paragraph preceding note 11.

life—areas such as taxation, immigration, and bankruptcy—a presumption of state authority arises that may be overcome only by a sufficiently important federal interest. Finally, the federal government may also act to reinforce state authority by funding state endeavors and resolving interstate jurisdictional disputes.

1. Setting Constitutional Limits

The fundamental rights of equality, privacy, and parental authority set federal constitutional limits on state authority over family law. With respect to racial equality, the Supreme Court has held that prohibitions on interracial marriage are constitutionally impermissible²⁸⁹ and that race cannot be a factor in resolving custody disputes between two biological parents.²⁹⁰ Similarly, Congress recently passed the Howard M. Metzenbaum Multiethnic Placement Act of 1994,²⁹¹ which prohibits states from making foster care or adoptive placements solely on the basis of race, color, or national origin. The stated purpose of the Act is to promote the best interest of children by facilitating adoption and eliminating discriminatory placement practices.²⁹² While real controversy exists over the merits of interracial adoption,²⁹³ the federal

²⁸⁹ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“[T]he freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State.”).

²⁹⁰ See *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984). In *Palmore*, the state court awarded custody of the child to the father on the ground that the mother's remarriage to a man of a different race would prove damaging to the child. See *id.* at 430-31. In reversing the state court judgment, the Supreme Court stated: “The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.” *Id.* at 434 (footnote omitted).

²⁹¹ Pub. L. No. 103-382, 108 Stat. 3518, 4056.

²⁹² See § 552(b), 108 Stat. at 4056.

²⁹³ See, e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) (arguing for the elimination of current policies favoring same-race adoption placements); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 REV. L. & SOC. CHANGE 33 (1993-1994) (arguing that interracial adoption unfairly places the burdens of racial integration on children). The Act itself reflects the complexity of the issues surrounding interracial child placement by providing that “[n]othing in this section shall be construed to affect the application of the Indian Child Welfare Act of 1978 (25 U.S.C. [§] 1901 et seq. [(1988)])”. Howard M. Metzenbaum Multiethnic Placement Act, § 553(f), 108 Stat. at 4057. Under this provision, Native American children as a class are exempt from the requirement that an expeditious placement overrides racial considerations. Why this should be so for Native American and not other minority children is not entirely self-evident.

government may act to remedy the effects of racial discrimination on children. The general subject of foster care and adoptive placement is off-limits to federal regulation, but the specific issue of racial equality in child placements clearly is not.²⁹⁴

Gender equality in the family is also an important arena of federal concern. Since the early 1970s, the Supreme Court has struck down state laws that discriminate between adult men and women within the family on the basis of sex.²⁹⁵ Although families may choose to conform to traditional gender patterns, states may no longer dictate that they do so. Moreover, states may not presume that women's primary responsibility for child care renders them unwilling or unfit to assume the duties of citizenship. As recently as 1961, the Supreme Court concluded that, because a "woman is still regarded as the center of home and family life," a state may exempt women as a class from jury service.²⁹⁶ By 1975, the Court had repudiated this reasoning in part on the ground that "all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy."²⁹⁷

An example of federal legislation that speaks to gender equality in family life is the recently passed Safe Homes for Women Act of 1994.²⁹⁸ As part of a national initiative to reduce domestic vio-

²⁹⁴ The federal government's role with respect to eliminating racial discrimination in family law finds its educational counterpart in *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (outlawing racial segregation in public education).

²⁹⁵ See *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981) (invalidating a Louisiana statute giving a husband "exclusive control over the disposition of community property"); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding unconstitutional the provision of the AFDC program that only provided welfare benefits if the father, but not the mother, was unemployed); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating a New York statute that allowed an unwed mother, but not an unwed father, to block the adoption of their child); *Orr v. Orr*, 440 U.S. 268, 282-83 (1979) (invalidating an Alabama statute that imposed an alimony obligation on husbands, but not on wives, as a violation of the Equal Protection Clause of the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (invalidating the gender distinctions in the survivors' benefits provisions of the Social Security Act); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (striking down an Illinois statute which presumed unwed fathers were unfit to retain custody of their children).

²⁹⁶ *Hoyt v. Florida*, 368 U.S. 57, 62 (1961). The statute in *Hoyt* allowed women to serve as jurors only if they affirmatively registered their desire to do so. See *id.* at 58.

²⁹⁷ *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1430 (1994); see also *id.* at 1424 (noting that the reasoning of *Hoyt* had been repudiated).

²⁹⁸ Pub. L. No. 103-322, 108 Stat. 1925 (to be codified at 18 U.S.C. §§ 2261-2266 and scattered sections of 42 U.S.C.). The Safe Homes for Women Act was passed as part of the comprehensive Violent Crime Control and Law Enforcement Act of 1994. See Pub. L. No. 103-322, 108 Stat. 1796 (to be codified at scattered sections of 18 U.S.C. and 42 U.S.C.).

lence, the Act makes it a federal crime for a person to engage in "interstate domestic violence," which is defined as violence against one's spouse or intimate partner that occurs in the course of, or as a result of, crossing state lines.²⁹⁹ The federal government's effort to address the problem of violence against women in the home should come as no surprise. The pervasiveness of domestic abuse against women and the degree of trauma and impairment suffered by female victims transform what might otherwise be considered an individualized and isolated incident of physical abuse, one no different from stranger assault on the street, into a systemic pattern of gender discrimination in the home. The Safe Homes for Women Act reflects a federal effort to enforce the adult woman's right to equal protection and bodily integrity in the domestic sphere. The issue of gender equality among adult family members is a legitimate and important matter of federal regulatory concern.

In addition to promoting racial and gender equality in family life, the federal government also bears responsibility for protecting the adult individual's right of privacy within the realm of family relations. It should be emphasized that the right of privacy—the right to make decisions in important matters of family life—attaches to adult citizens. As the Supreme Court's enforcement of parental authority makes clear, children by definition lack the legal, and presumably moral, capacity to make decisions on their own.³⁰⁰ Together, the right of privacy and the right of parental authority define the basic constitutional framework of individual rights within the family.

This constitutional framework can be discerned most clearly in the context of abortion. In *Planned Parenthood v. Casey*,³⁰¹ the Supreme Court considered a Pennsylvania abortion statute requiring a married woman to notify her spouse and an unmarried minor to obtain either the consent of a parent or authorization by a court for

²⁹⁹ See § 40221, 108 Stat. at 1926 (to be codified at 18 U.S.C. § 2261).

³⁰⁰ The authority of parents embraces the right to control the religious, medical, educational, and cultural upbringing of children, *see, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."), as well as the right to decide the terms of family membership. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion) (striking down a city ordinance that prevented a grandmother from residing with her two grandchildren). For a further discussion of parental authority, *see supra* part II.

³⁰¹ 112 S. Ct. 2791 (1992).

the procedure.³⁰² With respect to adult women, the Court invalidated the spousal consent provision on the ground that the provision imposes an undue burden on a woman's ability to decide whether to terminate her pregnancy.³⁰³ In contrast, the Court upheld the provision requiring either parental consent or judicial authorization before a minor may obtain an abortion.³⁰⁴ The decision illustrates that children, even those mature enough to become pregnant, are vulnerable to state regulation in ways adult family members are not. The abortion question highlights the line separating the federally protected domain of adult liberty from the state-regulated domain of parents and their children.

Although the states exercise exclusive regulatory authority over the core domain of family law, the federal government obviously retains some regulatory influence on family life. In part, federal authority exists because it must; the breathtaking expansion of federal legislation over the past half-century means the federal government confronts the family in numerous and diverse ways.³⁰⁵ Federal taxation,³⁰⁶ immigration,³⁰⁷ retirement benefits,³⁰⁸ and bankruptcy laws³⁰⁹ are among the most obvious examples of federal legislation that intersects with family life.³¹⁰ The pertinent

³⁰² See *id.* at 2803.

³⁰³ See *id.* at 2829; see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (holding that "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period").

³⁰⁴ See *Casey*, 112 S. Ct. at 2832; see also *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1990) (upholding two-parent notification with judicial by-pass). For a discussion of the *Hodgson* decision, see Dailey, *supra* note 130, at 982-94, 1008-16.

³⁰⁵ See Resnik, *supra* note 11, at 1721-29.

³⁰⁶ See *id.* at 1722 (noting that federal tax laws set the parameters for what comprises a household); see also Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1392 (1975) (examining how changing attitudes regarding the family, parents, children, and the role of the state may be shaped by federal tax laws).

³⁰⁷ See Resnik, *supra* note 11, at 1728-29 (delineating the ways federal immigration law defines family units and affects family life).

³⁰⁸ See Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1988); Resnik, *supra* note 11, at 1723 (commenting that the 1984 amendments to ERISA "give surviving spouses a forced share of pension rights").

³⁰⁹ See, e.g., *Farrey v. Sanderfoot*, 500 U.S. 291, 292 (1991) (holding that a bankrupt husband could not avoid his former wife's judicial lien); Resnik, *supra* note 11, at 1726-28 (discussing the intersection of bankruptcy law, women, and family law).

³¹⁰ Federal welfare laws are another example. While discussion of welfare is beyond the scope of this Article, I should note that, to the extent that federal welfare laws condition receipt of federal funds on the state eligibility rules governing family

question in any case involving a federal regulatory scheme that directly or indirectly bears on family law³¹¹ is whether the federal interest is sufficiently important to outweigh the presumption in favor of state authority. A clearly expressed intent to preempt state law would not be sufficient; the federal government must justify the imposition of a uniform family law with a strong federal interest.

2. Reinforcing State Authority

Although the regulation of the core domain of family law belongs to the states, the national government may act in a limited way to promote and reinforce state responsibility. The Child Support Enforcement Act³¹² is one example of federal legislation that seeks to promote state responsibility in the area of family regulation. The Act deploys monetary and other incentives to encourage the states to develop plans for establishing and enforcing child and spousal support orders.³¹³ The Act also requires participating states to formulate specific guidelines on child support.³¹⁴ Because the federal law induces the states to take responsibility for child support standards and enforcement, it can be viewed as reinforcing rather than undermining state authority.³¹⁵

behavior and organization, they raise serious federalism concerns. What makes welfare such a complex issue is the important connection between government aid and full citizenship in liberal society. *See* LINDA GORDON, *PITIED BUT NOT ENTITLED* 288 (1994) ("We cannot do without the concept of entitlement because it is fundamental to citizenship."). This connection may implicate a duty on the part of the federal government to provide aid to poor families with children while at the same time preventing the government from using that aid to impose moral norms on otherwise functioning families.

³¹¹ I am assuming that the federal scheme does not regulate the core domain of family law, which includes marriage regulations, divorce, and child custody. *See supra* paragraph preceding note 11. If it does so, then the federal scheme should be invalidated as a violation of state sovereignty.

³¹² 42 U.S.C. §§ 651-669 (1988 & Supp. V 1993).

³¹³ *See* § 654.

³¹⁴ *See* § 667.

³¹⁵ The federal regulations promulgated pursuant to the Act may overstep federal bounds to the extent they mandate rigid guidelines over discretionary standards, *see* 45 C.F.R. § 302.56(c)(2) (1994) (requiring that state guidelines "[b]e based on specific descriptive and numeric criteria and result in a computation of the support obligation"), require that the states consider "all earnings and income of the absent parent," § 302.56(c)(1), and require that the states provide for the "child(ren)'s health care needs." § 302.56(c)(3). It is significant, however, that the Act allows the guideline amounts established by the states to be rebutted in any particular case "as determined under criteria established by the State." § 302.56(g).

Reinforcing state initiative through its spending power is one way in which the federal government may reinforce state authority; another is settling jurisdictional disputes that threaten to undermine one state's authority vis-à-vis another's. An example of federal legislation that seeks to settle interstate jurisdictional conflicts is the Parental Kidnapping Prevention Act of 1980.³¹⁶ In an effort to reduce the incentives for parents to kidnap their children, the Act requires states to accord full faith and credit to the prior custody decrees of other states.³¹⁷ Once a state exercises jurisdiction in conformity with the Act, no other state may assume concurrent jurisdiction. The jurisdictional provisions of the Parental Kidnapping Prevention Act are intended to resolve disputes among the states, but are not meant to supplant state authority over the merits of child custody determinations.

A recent Supreme Court decision confirms the Parental Kidnapping Prevention Act's jurisdictional focus. In *Thompson v. Thompson*,³¹⁸ the states of California and Louisiana, notwithstanding the Act, had come to conflicting custody decrees. The father of the child brought suit in federal district court in California seeking to establish the validity of the California decree. In an opinion by Justice Marshall, the Supreme Court held that the Parental Kidnapping Prevention Act did not provide a private cause of action in federal court for enforcement of its jurisdictional provisions.³¹⁹ Justice Marshall's reasoning rested on congressional deference to state authority over domestic matters: "Instructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve. This is a cost that Congress made clear it did not want the PKPA to carry."³²⁰ In Marshall's words, a private cause of action under the Act would

³¹⁶ 28 U.S.C. § 1738A (1988).

³¹⁷ Prior to the Parental Kidnapping Prevention Act, parents receiving an unfavorable custody decision in one jurisdiction had an incentive to remove their children illegally and seek modification in the courts of another jurisdiction. Federal legislation was considered necessary in this area because custody decrees, being open to modification at any time, were not subject to the Full Faith and Credit Clause. See *Thompson v. Thompson*, 484 U.S. 174, 187 (1988).

³¹⁸ 484 U.S. 174 (1988).

³¹⁹ See *id.* at 178-80. Justice Marshall, however, is not among the Justices who believe that the federal courts "should get out of the business of implied private rights of action altogether." *Id.* at 192 (Scalia, J., concurring).

³²⁰ *Id.* at 186-87 (footnotes omitted).

"involve the federal courts in substantive domestic relations determinations."³²¹

While Justice Marshall adopted a localist interpretation of the Act, his opinion nevertheless left open the possibility that Congress might in the future create an express federal cause of action in interstate child custody cases. To the extent that the jurisdictional provisions rely on substantive standards such as "the best interests of the child," however, the Court's decision denying a federal forum for enforcement of the Act seems compelled on constitutional as well as statutory grounds. Were Congress to provide for a private cause of action, the federal courts would find themselves involved in substantive decisions concerning the best interests of children, child abuse, and child abandonment, decisions that would prove determinative to the ultimate outcome of the suit. Conferring jurisdiction on the federal courts to make conclusive determinations concerning the proper custodial placement for children in every case involving a dispute between parents residing in different states would directly and substantially erode state authority over child custody.

As it stands, however, the Parental Kidnapping Prevention Act simply seeks to arbitrate jurisdictional conflicts among states. Like the Child Support Enforcement Act, the Parental Kidnapping Prevention Act works to reinforce state responsibility over custody matters, in this case by clarifying which state possesses ultimate and exclusive authority over the particular dispute. To the extent that the Act fails to accomplish its goal—as the situation in *Thompson* illustrates—jurisdictional conflicts among states over child custody must be considered an unfortunate but necessary cost of federalism.

CONCLUSION

State sovereignty over substantive domains of law seems inextricably woven with the idea of competing, antagonistic governmental entities each vying for a larger share of the regulatory pie at the expense of the other. The concept of sovereignty may appear incompatible with a view of governmental relations premised on interdependent and shared political aims. Not surprisingly, the modern paradigm of cooperative federalism emerged out of the collapse of dual federalism's more antagonistic conception of

³²¹ *Id.* at 186 n.4. Justice Marshall refers to determinations concerning the "best interests" of the child in 28 U.S.C. § 1738A(c)(2)(B)-(D) (1988).

federal-state relations. Beyond its troubling historical reputation, therefore, state sovereignty may seem an obsolete political model in a world where governmental boundaries are so fluid and governmental interests so intertwined.

Yet state authority over family law need not be understood as inherently incompatible with either the complex workings of our modern industrial state nor with a national commitment to equality, toleration, and individual rights. Instead, as explained in this Article, state sovereignty may reflect a more developed appreciation of the communitarian underpinnings of the liberal state and the role of the family in fostering the virtues of citizenship in liberal society. State authority over the domain of family life arises from the dynamic relationship between the civic needs of the national liberal polity and the communitarian aspirations of its constituent states. The localist theory of family law recognizes that the constitutional commitment to individual liberty entails a corresponding appreciation for the importance of state authority over the domain of human relations that, in a truly comprehensive way, gives life to the liberal citizen.