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Federalism and the Family Reconstructed

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INTRODUCTION

The family serves as the quintessential symbol of localism. Throughout the debate on federalism, family law emerges as the one clear case in which federal involvement is inappropriate, an uncontested core rendered

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special precisely because almost everything else has been nationalized and the limits on federal power elsewhere are so murky. In *United States v. Lopez*,¹ for instance, the Supreme Court could agree on little else except that Congress's commerce power does not reach "family law (including marriage, divorce, and child custody);"² in fact, the majority opinion repeated this proposition no less than four times.³ Yet courts and commentators, whether in *Lopez* or elsewhere, do not explain the singular status of family law primarily in terms of public policy or institutional design. Rather, they argue that regulation of the family has been wholly local throughout American history and contend that this tradition conclusively demonstrates the intrinsic nature of "family law," a category that they leave highly ambiguous but expansive in scope. Indeed, Chief Justice Rehnquist has claimed that it is actually inappropriate to rely on reasoned analysis when determining family law's place in the federal system, arguing for exclusive localism in family law on the ground that "[i]f ever there were an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic,' it is in the area of domestic relations."⁴ This Article challenges both the existence of an exclusively local tradition in family law and the uncritical use of historical claims in federalism discourse.

This Article does not advocate the nationalization of all of family law. Instead, it analyzes the positive and normative structure of the argument for exclusive localism, which contends that family law has always been under exclusively local jurisdiction and that history should control the family's present and future position in the federal system. It finds that exclusive localism in family law simply misdescribes American history and concludes that family law's actual historical record gives no weight to the claim that tradition should count as a reason for exclusive federal noninvolvement. This is not a judgment about the ultimate wisdom of federal regulation of the family; it is a conclusion that the ground on which the argument for exclusive localism in family law now stands is entirely inadequate. If a cogent case can be made for why family law should be uniquely impervious to federal involvement, it requires a better understanding of what "family law" is and why exclusive localism is appropriate, one that is

1. 514 U.S. 549 (1995) (holding that Gun-Free School Zones Act of 1990 exceeded Congress's authority under Commerce Clause).

2. *Id.* at 564; see also *id.* at 624 (Breyer, J., dissenting).

3. See *infra* note 11.

4. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

consistent with actual past practice and contemporary constitutional norms.

Even if one accepts the historical paradigm currently shaping federalism discourse about family law, claims for exclusive localism do not survive their own standard. The positive aspect of the localist argument from tradition could be analyzed from many different historical vantage points; after all, actually establishing the proposition that family law has been exclusively local throughout American history would require a complete survey of our nation's past. But for several reasons, close scrutiny of Reconstruction is particularly appropriate and my focus here. During Reconstruction, the jurisdictional lines between state and nation began to take their modern shape. Indeed, several historians have described Reconstruction as one of the defining moments in which family law remained under exclusively local control even as the federal government increasingly entered other areas of life.⁵ These accounts, however, have missed a crucial aspect of Reconstruction. Rather than supporting claims for the exclusive localism of family law, Reconstruction was actually the culmination of a sustained national debate about the federal government's ability to intervene in family law, as both present-day and nineteenth-century Americans would understand that term. In the nineteenth century, many Americans defined slavery as a domestic relation and believed that the dispute over federal intervention into slavery importantly turned on whether the federal government could regulate family law. By abolishing slavery, the federal government answered that question and fundamentally altered one of the most significant domestic relations of the time. Yet one need not adopt the popular nineteenth-century view that slavery is itself a domestic relation in order to understand that federal Reconstruction massively intervened into family law.

The legal disabilities that constituted slavery in America involved profound restrictions on family formation, as we would understand that term today. Slaves had no right to marry and no right to parent their children; slave families could be separated at their masters' will. And Reconstruction saw a broad consensus that the federal government could exercise jurisdiction over this sort of family law, one extending from Reconstruction's supporters to a strong majority of its critics. Reconstruction's advocates placed protecting family rights at the core of their project. The far-reaching agreement that the federal government could involve itself in family law was evident in the congressional debates over the 1866 Civil Rights Act and the Fourteenth Amendment, Congress's wildly popular

5. See *infra* note 142.

campaign against polygamy, and even in judicial opinions evaluating prohibitions on interracial marriage in light of Reconstruction. Indeed, the only significant argument that Reconstruction Congressmen offered against federal involvement in family law reflected not a jurisdictional dispute, but a policy concern that would now be considered constitutionally illegitimate: Reconstruction's opponents worried that extending the federal government's promise of equal protection to family law would unsettle social segregation between the races and the legal subordination of women within the household. These claims were unavailing, however, and the Reconstruction Congress concretely improved the familial conditions of the freedmen. Reconstruction consequently belies the claim of exclusive localism in family law.

Moreover, localism's supporters will not find better evidence that family law is exclusively for the states in the years since then. As the historiography of Reconstruction indicates, the authority of claims from history for exclusive localism has obscured federal involvement in family law. The failure of the localist argument to devise a coherent explanation of what it means by family law has not helped matters. But armed with a clear definition of family law, which this Article provides, a survey of just a few prominent examples of modern federal regulation reveals that federal family law is far-reaching, although it certainly does not exclusively occupy the field. The historical case for localism fails on its own terms, as should have been apparent long ago. Simply put, history does not demonstrate the exclusive localism of family law.

At the same time, this historical paradigm, now dominant and unquestioned, demands critical review in its own right. The place of history in federalism is radically undertheorized: Localism's advocates have successfully maintained that history determines jurisdiction over family law without ever explaining why it should. After bringing an important historical record of federal involvement to light, this Article then considers, as current discussion generally does not, how to evaluate the weight that tradition can legitimately exert on modern debate over federalism. Concluding that the actual record of federalism and family law adds almost nothing to the case for exclusive localism, it suggests what this past can teach us about the danger of foregoing critical inquiry to rely on trope; the threat that arguments about federalism will mask and functionally protect the sort of status relations that Reconstruction's critics defended; and the need to be free enough from tradition that we are willing, like the Reconstruction Congressmen determined to protect family rights, to change the

course of history when equality and freedom, core issues of principle and national identity, are in question.

Parts II and III examine the historical claims for localism on their own terms, making clear that the historical record simply does not support the proposition that family law is exclusively for the states. Part IV questions the implicit normative contention that history should control family law's position in the federal system, offering a critical evaluation of history's place in federalism that is largely missing from contemporary debate and suggesting how an appreciation of the examined past can redirect our thinking. But first, Part I indicates what is at stake in this inquiry, revealing how arguments from tradition for exclusive localism dominate debate over "family law," while leaving that term undefined but highly expansive.

I. ARGUING FROM HISTORY FOR LOCALISM

Judges and commentators sometimes offer policy reasons for keeping the federal government as far away from family law as possible, but they clearly expect another argument to carry the day. Localists do not simply rely on history for additional support; they absolutely depend on it to establish family law as uniquely, inherently, and exclusively local, one arena that the federal government categorically may not enter in an age in which the boundaries of federal jurisdiction are otherwise ambiguous and subject to change. Yet advocates contend that history should control family law's present and future position in the federal system without ever explaining their reliance. In point of fact, the Supreme Court's localist discourse on family law appears to have originated in a nineteenth-century opinion that excluded some "domestic relations" cases from federal court although they met the requirements of diversity jurisdiction. This decision was little more than a direct expression of the coverture principles shaping the law at that time, but the Supreme Court upheld the "domestic relations" exception to diversity jurisdiction as recently as 1992 without examining its origins. Family law has been singled out as the lodestar of localism without any space given to the question of why and when history should control. Indeed, family law's unique status has broader implications than even that designation indicates because the operative scope of "family law" in localist discourse is so loosely defined and highly expansive, extending far beyond the confines of diversity jurisdiction. One of the most recent major expressions of the argument for exclusive localism, for instance, included all gender-motivated violence within the definition of family law, successfully limiting a federal statute that in no way turned on familial status or familial relationships.

A. History Marks Family Law as the Lodestar of Localism

Throughout the Supreme Court's case law, the simple fact of (supposed) history appears as the primary explanation for the inherent localism of family law. As this Article will make clear, noninvolvement in family matters has hardly been the federal government's—or the Supreme Court's—consistent regulatory practice.⁶ Indeed, a quick glance at the Court's constitutional decisions alone reveals far-reaching intervention into the regulation of family life.⁷ But *claims* from tradition for federal noninvolvement abound in the Court's jurisprudence on family law, rendering every other consideration distinctly secondary.

Family law's function as the epitome of localism for the Supreme Court is perhaps most clear in *United States v. Lopez*,⁸ which held that the Gun-Free School Zones Act of 1990 exceeded Congress's authority under the Commerce Clause.⁹ In that case, the Court insisted—after decades of liberal interpretation—on limits to the federal commerce power, while (implicitly) acknowledging that these boundaries are extremely difficult to identify. In this sea of uncertainty, the Justices reached out to what they

6. See *infra* Parts II–III.

7. See *infra* text accompanying notes 297–305; *Michael H. v. Gerald D.*, 491 U.S. 110, 118–32 (1989) (plurality opinion) (upholding state statute creating presumption that child born to married woman living with her husband is husband's child and allowing only husband or wife to rebut that presumption); *Palmore v. Sidoti*, 466 U.S. 429, 431–34 (1984) (holding that race cannot be factor in resolving custody dispute between biological parents); *Mills v. Habluetzel*, 456 U.S. 91, 99–102 (1982) (striking down state statute providing that paternity suit for purposes of obtaining child support for illegitimate child must be brought within year of birth); *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (holding that state may terminate rights of natural parents only on clear and convincing evidence); *Caban v. Mohammed*, 441 U.S. 380, 388–94 (1979) (striking down state statute permitting unwed mother, but not unwed father, to block adoption of their child by simply withholding consent); *Lalli v. Lalli*, 439 U.S. 259, 266–76 (1978) (upholding state statute conditioning inheritance of illegitimate children from their father on filiation order made during father's lifetime); *Zablocki v. Redhail*, 434 U.S. 374, 375–77 (1978) (striking down state statute requiring residents subject to child support orders to obtain court approval before marrying and conditioning such approval on ability to support existing children financially); *Quilloin v. Walcott*, 434 U.S. 246, 254–56 (1978) (holding that equal protection does not require that unwed father of illegitimate child have same authority as married or divorced father to veto adoption); *Moore v. City of East Cleveland*, 431 U.S. 494, 498–506 (1977) (striking down city housing ordinance barring extended family members from living together); *Stanton v. Stanton*, 421 U.S. 7, 13–17 (1975) (striking down state child support statute providing that daughters attain majority at 18 but sons attain majority at 21); *Stanley v. Illinois*, 405 U.S. 645, 649–59 (1972) (holding that state was barred from taking custody of children of unwed father, absent hearing and particularized finding that father was unfit parent); *Loving v. Virginia*, 388 U.S. 1, 7–12 (1967) (striking down state laws prohibiting interracial marriage).

8. 514 U.S. 549 (1995).

9. See *id.* at 551.

knew was certain—and certainly off-limits to the national government. The strongest image that the Court could summon to suggest the overbreadth of the United States' view of its authority was to posit that the federal government's interpretation of the Commerce Clause would permit Congress to regulate "family law (including marriage, divorce, and child custody)."¹⁰ Indeed, the Court was so sure that the Commerce Clause leaves family law untouched that it repeated this accusation about the government's position four times.¹¹ In dissent, Justice Breyer, otherwise deeply at odds with the majority, agreed that the Commerce Clause clearly stops short of "marriage, divorce, and child custody." He simply claimed that upholding the Gun-Free School Zones Act, and the government's underlying theory of the federal commerce power, would not threaten exclusive state jurisdiction over family law.¹²

10. *Id.* at 564.

11. See *id.* ("[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.* at 564–65 ("Justice Breyer posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance." (citing *id.* at 624 (Breyer, J., dissenting))); *id.* at 565 ("This analysis [by the dissent in support of the Gun-Free School Zones Act] would be equally applicable, if not more so, to subjects such as family law and direct regulation of education."); *id.* ("Under the dissent's rationale, Congress could just as easily look at child rearing as 'fall[ing] 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.'" (quoting *id.* at 629 (Breyer, J., dissenting)))).

Justice Thomas's concurrence made the majority's point yet again. See *id.* at 585 (Thomas, J., concurring) ("[I]t seems to me that the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.").

12. *Id.* at 624 (Breyer, J., dissenting) (quoting *id.* at 564).

With less emphasis, the *Lopez* Court also identified "criminal law enforcement" as another realm in which federal activity was troubling because "States historically have been sovereign." *Id.* at 564. Given the long tradition of far-reaching federal criminal statutes, this historical claim about localism is, to say the least, problematic. Judith Resnik observes:

As Professor Rory Little has summarized it, by 1790 federal criminal jurisdiction reached bribery, false statements, "murder, maiming, theft, fraud, and even receiving stolen property." Scanning the last two centuries, Professor John Jeffries and Judge John Gleeson conclude that, even before the 1994 crime bill, "federal law reached virtually all robberies, most schemes to defraud, many firearms offenses, all loansharking, most illegal gambling operations, most bribes, and every drug deal, no matter how small"

Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 495 (1996) (quoting Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1063 (1995), and John C. Jeffries Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095–97 (1995)).

But how was the Court so confident that the Commerce Clause leaves family law for the states alone, when the potential reach of federal authority was otherwise the subject of such fundamental dispute in *Lopez*? The only rationale the Court offered for singling family law out was tradition. The government's theory of the Commerce Clause, the majority claimed, would allow federal power into realms "where States historically have been sovereign."¹³ The Court's explanation for the unique status of family law ended there, without ever suggesting why this (asserted) historical position should be controlling. Only Justice Souter's dissent made any observations on the role that history had assumed in the majority opinion. He alone noted—and rejected—what he described as the majority's "suggestion . . . either that a connection between commerce and [traditionally state] subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators."¹⁴

Ultimately, however, the other *Lopez* Justices were much more firmly in line with the Court's jurisprudence. Rather than an anomaly, *Lopez* is merely the most recent and dramatic example of a strong theme. Again and again, the Justices observe that the "regulation of domestic relations . . . has long been regarded as a virtually exclusive province of the States"¹⁵ or (in more extreme form) that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."¹⁶

Only some of these opinions offer any normative rationale for the claimed exclusive localism of family law, and those justifications are clearly put forth as secondary support. When the Court upheld Iowa's one-year residency requirement for divorce in *Sosna v. Iowa*¹⁷—the case that declared family law "a virtually exclusive" state domain¹⁸—it cited Iowa's interest in requiring people seeking a divorce to be attached to the state

13. *Lopez*, 514 U.S. at 564.

14. *Id.* at 609 (Souter, J., dissenting).

15. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); see also *Zablocki v. Redhail*, 434 U.S. 374, 398 (1978) (Powell, J., concurring) ("In my view, analysis must start from the recognition of domestic relations as 'an area that has long been regarded as a virtually exclusive province of the States.'" (quoting *Sosna*, 419 U.S. at 404)).

16. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890)); see also *Rose v. Rose*, 481 U.S. 619, 625 (1987) (same); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) ("This Court repeatedly has recognized that "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.'" (quoting *Hisquierdo*, 439 U.S. at 581) (citation omitted)).

17. *Sosna*, 419 U.S. at 396.

18. *Id.* at 404.

and in insulating its divorce decrees from collateral attack.¹⁹ But this reasoning only served to bolster the localism that the Court's argument from history had already established, and Justice Marshall's dissent was only slightly overstating when it chided the majority for having done no more than "recite the State's traditionally exclusive responsibility for regulating family law matters."²⁰ In turn, Justice Marshall's own majority opinion in *Thompson v. Thompson*²¹ also adopted the guiding premise that federal judicial involvement "in substantive domestic relations determinations" was inappropriate, given "the longstanding tradition of reserving domestic relations matters to the States."²² The influence of Marshall's assumption of federal inexperience was clearly apparent in his holding that the Parental Kidnapping Prevention Act²³ does not create a private federal cause of action; Marshall contended that "[i]nstructing 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."²⁴

Chief Justice Rehnquist has adopted a still stronger version of such arguments from history, perhaps their logical end point. His dissent in *Santosky v. Kramer*,²⁵ which required that parental termination proceedings adopt at least a "clear and convincing" standard of proof,²⁶ purported to offer several policy justifications for federal noninvolvement in family law, contending "that few of us would care to live in a society where every aspect of life was regulated by a single source of law"²⁷ and extolling the states as laboratories that, left "free to experiment with various remedies [, have] produced novel approaches and promising progress."²⁸ But these arguments simply supported the federalist system as a general proposition, rather than explaining why family law in particular should be under exclusively local control. Indeed, Rehnquist's fundamental claim was that a reasonable federal judiciary reviewing state family law should not be

19. See *id.* at 406–07.

20. *Id.* at 423 (Marshall, J., dissenting).

21. 484 U.S. 174 (1988).

22. *Id.* at 186 n.4.

23. Pub. L. No. 96-611, 94 Stat. 3569 (1980) (codified at 28 U.S.C. § 1738A (1994)).

24. *Thompson*, 484 U.S. at 186.

25. 455 U.S. 745 (1982).

26. *Id.* at 747–48.

27. *Id.* at 770 (Rehnquist, J., dissenting).

28. *Id.* at 771 (Rehnquist, J., dissenting); see also *id.* at 773 (Rehnquist, J., dissenting) (making same point).

guided by reason, but by tradition explicitly disconnected from logic. As Rehnquist articulated the nature of the deference he endorsed,

[i]f ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.²⁹

Rehnquist never identified the "good reason" behind the supposed historical localism in family law. This failure is striking and powerfully embodies much of the argument from history for exclusive localism in family law. Whether by implication or express statement, the Justices of the Supreme Court have often indicated their willingness to subordinate policy considerations when family law is at issue. Claims from tradition, not contemporaneous reason, have made family law the lodestar of localism.

B. The Unexplained Elevation of History

In so powerfully privileging the past, the Supreme Court has never explained why its historical claims, even if accurate, should control family law's place in federalism. *Ankenbrandt v. Richards*,³⁰ the Court's 1992 decision sustaining the domestic relations exception to federal diversity jurisdiction, exemplifies this phenomenon and begins to suggest its perils. *Ankenbrandt* offers virtually no basis for upholding the exception, which excludes "domestic relations" cases meeting the requirements of diversity jurisdiction from federal court, beyond citing the asserted tradition of keeping family law exclusively local.³¹ The opinion states little more than that the Court was "unwilling to cast aside an understood rule that has been recognized for nearly a century and a half."³² In fact, the Court's

29. *Id.* at 770 (Rehnquist, J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

30. 504 U.S. 689 (1992).

31. The only policy contention the Court put forward was itself rooted in the historical existence of the exception, which meant that the states had developed "specific proficiency" in family law. *Id.* at 704.

32. *Id.* at 694-95; see also *id.* at 703 ("[O]ur conclusion [is] rooted in respect for this long-held understanding."); *id.* at 715 (Blackmun, J., concurring) (contending, without explanation, that "the unbroken and unchallenged practice of the federal courts since before the War Between the States of declining to hear certain domestic relations cases" justified federal abstention).

The paucity of policy discussion in *Ankenbrandt* notably distinguishes the domestic relations exception from many other legal rules that were originally justified in terms that would not survive modern constitutional scrutiny. Consider Sunday closing laws. These statutes were first enacted in order to promote and enforce Christianity, a motivation now unconstitutional under

localist discourse on family law does appear to have first surfaced in the context of the domestic relations exception. But the history of this exception, and its very reason for coming into being in the nineteenth century, are inextricably connected to a legal view of women that is unconstitutional under modern equal protection doctrine.³³ Indeed, the decision that first established the domestic relations exception to diversity jurisdiction makes no sense at all outside the context of coverture rules. The weight of the argument from tradition for exclusive localism in family law was so strong, and the dominance of its historical paradigm so unchallenged, that the *Ankenbrandt* Court felt that, even here, it could rely on history while leaving the normative implications of the exception's origins unaddressed. The case starkly suggests the need to explain why and when the past should control and the danger that relying on history will functionally preserve the unequal status relations that underlay and motivated now-traditional practices.

The Supreme Court first announced the domestic relations exception in *Barber v. Barber*,³⁴ a nineteenth-century case entangled in the common law doctrine of marital unity. Both *Barber*'s majority and its dissent fully endorsed the doctrine, which held that a woman's civil identity merged into her husband's at marriage and disappeared.³⁵ For jurisdictional purposes, this tenet of marital status law meant that a wife's legal domicile was

the First Amendment. See *McGowan v. Maryland*, 366 U.S. 420, 431–33, 446–47 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592–94 (1961); *Gallagher v. Crown Kasher Super Market*, 366 U.S. 617, 624–26 (1961). Over the last two hundred years, however, many state legislatures have recognized this constitutional problem and defended Sunday closing laws in wholly secular terms. See *McGowan*, 366 U.S. at 434–35; *Two Guys from Harrison-Allentown, Inc.*, 366 U.S. at 595; *Gallagher*, 366 U.S. at 626–28. The Supreme Court, in turn, has upheld these laws precisely on the ground that they have lost their religious flavor. See *McGowan*, 366 U.S. at 444–45, 448–49; *Two Guys from Harrison-Allentown, Inc.*, 366 U.S. at 598; *Braunfeld v. Brown*, 366 U.S. 599, 602–03, 607 (1961); *Gallagher*, 366 U.S. at 630. Whether or not the Court is right about that, these statutes, like most other aspects of public life, are now debated on the basis of contemporary policy arguments that are meant to be dispositive. This is quite different from *Ankenbrandt*, in which the Court assumed that the bare fact of history alone was controlling, without considering whether the origins of the domestic relations exception were in accord with modern constitutional norms.

33. See, e.g., *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down gender-based alimony law under Equal Protection Clause on ground that statute preserved common law status relations, "reinforcing stereotypes about the 'proper place' of women and their need for special protection").

34. 62 U.S. (21 How.) 582 (1859).

35. As Blackstone explained: "By marriage, the husband and wife are one person in law: that is; the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

always identical to her husband's, no matter where she actually lived; diversity jurisdiction in litigation between man and wife was therefore impossible per se. The general proposition that a wife could not maintain a domicile separate from her husband was the foundation of the *Barber* case, and its recognition of an exception to diversity jurisdiction for "domestic relations" cases was nothing other than the expression of this domicile rule in jurisdictional form. All disagreement in *Barber* was limited to whether coverture permitted a special exemption for a wife living apart from her husband under judicial order of separation. The *Barber* majority ultimately found such an exemption and allowed the female plaintiff to invoke diversity jurisdiction in order to enforce a state alimony award.³⁶ The Supreme Court noted in dictum, however, that it "disclaim[ed] altogether any jurisdiction in the courts of the United States" over the actual granting of divorce or alimony decrees.³⁷ The outraged dissent charged that the majority's decision threatened the foundations of coverture and marital unity.³⁸ It was this concern that struck a chord.³⁹ Throughout the nineteenth and early twentieth centuries, the Supreme Court repeated *Barber's* dictum and barred all federal litigation seeking divorce, alimony, or (after an 1890 decision) child custody decrees that was brought outside federal territorial courts.⁴⁰ *Barber*, which reasoned inextricably within

36. See *Barber*, 62 U.S. at 592-94, 597-98.

37. *Id.* at 584.

38. As dissenting Justice Daniel argued:

By Coke and Blackstone it is said: "That by marriage, the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything." . . .

Such being the undoubted law of marriage, how can it be conceived that pending the existence of this relation the unity it creates can be reconciled with separate and independent capacities in that unity, such as belong to beings wholly disconnected, and each *sui juris*?

Id. at 600-01 (Daniel, J., dissenting).

39. Reva Siegel, who has particularly stressed *Barber's* pivotal reliance on the logic of marital unity, notes that "much of the idiom [*Barber*] used to designate marriage as a 'local' matter within discourses of federalism either echoes or can be traced to the common law doctrines of marital privacy," which contended that governmental intervention into the family undermined marital harmony. Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2203 (1996).

40. See, e.g., *De La Rama v. De La Rama*, 201 U.S. 303, 307-08 (1906) (holding that federal courts have jurisdiction over all domestic relations cases arising in federal territories); *Simms v. Simms*, 175 U.S. 162, 167-68 (1899) (same); *Cheely v. Clayton*, 110 U.S. 701, 705 (1884) (same).

By 1890, the Court was announcing in a case involving a child custody dispute that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). By 1930, this proposition had grown to embrace cases of arguably exclusive federal

common law coverture, became the seminal decision excepting "domestic relations" claims from diversity jurisdiction. Indeed, *Barber*, as reinterpreted to emphasize its dicta, became the essential foundation of the entire jurisprudence, since neither *Barber* nor the decisions following offer any explanation or authority for the proposition that some family law cases are not for the federal courts, other than to entwine the notion with the doctrine of marital unity.⁴¹

The history of the domestic relations exception constitutes perhaps the clearest case of a tradition based solely on reasoning that is now constitutionally unacceptable—on reasoning that no longer counts as such. The Supreme Court created the domestic relations exception as a simple extension of coverture rules, and the dispute in *Barber* makes no sense outside the confines of the marital unity doctrine. Subsequent decisions, in

jurisdiction. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930), held that even divorce and alimony claims against a foreign official living in the United States had to be brought in state court. Although Article III and federal statutes noted no exceptions to the requirement that federal courts exercise exclusive jurisdiction over suits against foreign diplomats, see *id.* at 382–83, the Court stated that all this language "[had] to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used," *id.* at 383. To support the supposition that non-territorial cases involving the issuance of divorce or alimony decrees were never to be heard in a federal tribunal, the *Popovici* Court relied exclusively on its own line of cases beginning with *Barber*. See *id.*

41. See *Ankenbrandt v. Richards*, 504 U.S. 689, 694 (1992) ("The *Barber* Court, however, cited no authority and did not discuss the foundation for its announcement. Since that time, the Court has dealt only occasionally with the domestic relations limitation on federal-court jurisdiction, and it has never addressed the basis for such a limitation."); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1080 (1994) ("Historically, the Court's statements concerning the source and scope of the Domestic Relations Exception have provided little guidance for the lower federal courts.").

In fact, several lower court opinions in the 1960s and 1970s brought to light evidence from the colonial period and English practice suggesting that the *Barber* dictum and its progeny may represent an absolutist break from a more complicated past in which national-level courts issued divorce and alimony decrees. Judge Jack Weinstein first made this argument, noting:

The historical reasons relied upon to explain the federal courts' complete lack of matrimonial jurisdiction are not convincing. Colonial courts and the English Chancery were not without power in matrimonial affairs. Even in *Barber* the Supreme Court had referred to "the belief" that existed at the time the Constitution was adopted that the power to decree alimony "belonged to the high court of chancery, in the absence of ecclesiastical tribunals"; it cited, seemingly with approval, several early state cases which held that a court of equity had the "inherent jurisdiction to decree alimony."

Spindel v. Spindel, 283 F. Supp. 797, 806 (E.D.N.Y. 1968) (citations omitted); see also Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973) (Friendly, J.) ("We have no disposition to question that conclusion [by the Supreme Court in finding the exception], whether the history was right or not." (citing *Spindel*, 283 F. Supp. at 802–03)); *Solomon v. Solomon*, 516 F.2d 1018, 1031 (3d Cir. 1975) (Gibbons, J., dissenting) ("Judges Friendly and Weinstein say it as well as it need be said. They make clear that it simply has never been the law that because the dispute is between a present or former husband and wife and involves the marital status it is nonjusticiable in a federal district court.").

turn, rely wholly on *Barber*. But even in *Ankenbrandt*, the Supreme Court relied on the sheer weight of past practice, without ever considering why this tradition was worth such deference or whether its decision to uphold the domestic relations exception would functionally perpetuate the legacy of coverture.

C. The Definition of Family Law in Localism

Family law has become the quintessential symbol of federal noninvolvement on the strength of appeals to history. Yet localists never explain why they have chosen to rely so heavily on the past in this context. Still, a decision like *Ankenbrandt* does not indicate the full scope of what arguments from history have deemed local. The exception to federal jurisdiction that *Ankenbrandt* recognizes is explicitly limited to "divest[ing] the federal courts [in diversity cases] of power to issue divorce, alimony, and child custody decrees."⁴² While the Court offered this fairly crisp delineation of the diversity exception as recently as 1992, claims for exclusive localism in family law are frequently made without such doctrinal precision, leaving ambiguous the exact nature of the law covered. These more indefinite and expansive definitions of family law render the implications of family law's status as the symbol of federal noninvolvement more sweeping than even *Ankenbrandt* suggests.

Rarely stopping to explain what it means by family law, the Supreme Court has often relied on reasoning and language that first appeared in the context of the diversity exception for support in areas falling far outside the limits of *Ankenbrandt*. *Lopez*—with its anxiety that Congress's commerce power not reach "family law (including marriage, divorce, and child custody)"—draws on the particular preoccupations of the diversity exception.⁴³ But, significantly, the case leaves the exact definition of family law indeterminate, while signaling that it is broader than the mere issuance of decrees that occupied *Ankenbrandt*. Similarly, although *Hisquierdo v. Hisquierdo*⁴⁴ concerned whether federal retirement benefits for railroad workers should count as community property, the Court relied on the 1890 decision that expanded the diversity exception to include child custody decrees, quoting it for the absolutist proposition that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United

42. *Ankenbrandt*, 504 U.S. at 703.

43. *United States v. Lopez*, 514 U.S. 549, 564 (1995).

44. 439 U.S. 572 (1979).

States.”⁴⁵ *Rose v. Rose*⁴⁶ quoted the same passage to explain “the constitutional standard” that the Supreme Court had applied in order to determine that the federal laws governing veterans’ disability benefits did not preempt a state child support statute.⁴⁷ Whatever *Ankenbrandt*’s future impact on the Court, it has done little elsewhere to moderate the reigning definitions of family law and the scope of the claim that family law is quintessentially and exclusively for the states. Fought largely after *Ankenbrandt* was decided, the struggle over the Violence Against Women Act,⁴⁸ in which opponents successfully defined family law to include all gender-motivated violence,⁴⁹ is the most notable case in point.

As I explain more fully below,⁵⁰ the best definition of family law may vary with context; claims from history for exclusive localism in family law are most reasonably evaluated against a definition of family law as rich as the one that such assertions typically assume. Establishing exclusive localism within the narrow confines of a decision like *Ankenbrandt* would leave the far more common and expansive claims for the inherent and exclusive localism of family law—in contexts well outside the diversity exception—largely unsupported. For that reason, this Article employs the following three-part definition: Family law, first, determines what constitutes a family and who is or may become a spouse, parent, child, or other family member. Second, family law shapes the legal creation and dissolution of these family relationships. Third, family law establishes the legal rights and responsibilities that family members have because of their familial status. The Violence Against Women Act of 1994 (VAWA), which falls outside each of these categories, exemplifies the indefiniteness and expansionism that give arguments from tradition for exclusive localism in family law such enormous scope.

VAWA creates a federal civil right to be free from gender-motivated violence and entitles the victims of such violence to sue their attackers in federal court for money damages.⁵¹ Its purpose is to compensate for inadequate or nonexistent state remedies.⁵² Its provisions draw directly from older federal civil rights laws penalizing racial discrimination, statutes now

45. *Id.* at 581 (quoting *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890)).

46. 481 U.S. 619 (1987).

47. *Id.* at 625.

48. 42 U.S.C. § 13981 (1994).

49. See *infra* text accompanying notes 61–73.

50. See *infra* Part III.A.

51. See 42 U.S.C. § 13981(a).

52. See *infra* text accompanying notes 57–60.

thought to be at the heart of national jurisdiction.⁵³ VAWA is not concerned with familial status or relationships. Indeed, the Congresses that debated the bill never sought to limit its reach to gender-motivated violence within familial or intimate settings or to otherwise treat violence differently depending on the familial connection between perpetrator and victim. At the same time, the bill introduced in 1990 explicitly intended to disrupt patterns of spousal rape and familial violence.⁵⁴ Such crimes have often been categorized as falling within the purview of family law,⁵⁵ and opposition to the civil rights bill soon centered on the proposition that VAWA would upset a long-standing tradition of leaving "family" matters to the states.⁵⁶ Although the notion that VAWA implicated family law more than equal protection was deeply problematic, the "federalist" critique of VAWA attracted the support of the state and federal judiciary. This opposition drew enormous power from its appeal to a supposedly clear tradition and its incorporation of all gender-motivated violence within the definition of family law. Without ever explaining why history should be dispositive, localists ultimately won substantial limitations on VAWA's civil rights remedy.

When first introduced, VAWA included three congressional findings: first, that gender-motivated crime violated "the victim's right to equal protection of the laws;" second, that existing federal law "provide[d] a civil rights remedy for gender crimes committed in the workplace, but not on the street or in the home;" and third, that states had inadequately addressed the "bias element" in gender-motivated crimes, which "separates these crimes from acts of random violence."⁵⁷ To substantiate these findings, VAWA's sponsors held hearings exploring discrimination and neglect in state judicial systems and invited several prominent legal scholars to comment on the constitutionality of the bill.⁵⁸ These experts agreed that VAWA was within Congress's authority.⁵⁹ As several stressed, remedying

53. See S. REP. NO. 101-545, at 51 (1990) (explaining that language of VAWA's original civil rights remedy was modelled after 42 U.S.C. §§ 1981, 1983, 1985(c)).

54. See S. 2754, 101st Cong. § 301(a) (1990).

55. For a penetrating historical analysis of the idea that wife beating is a private matter best shielded in familial intimacy, see Siegel, *supra* note 39.

56. See *infra* text accompanying notes 61-73.

57. S. 2754 § 301(a).

58. See S. REP. NO. 102-197, at 33-48 (1991) (summarizing hearings); S. REP. NO. 101-545, *supra* note 53, at 31-34 (same).

59. See, e.g., *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 104-05 (1991) [hereinafter 1991 *Hearing*] (testimony of Professor Cass R. Sunstein, University of Chicago Law School); *id.* at 99-102 (testimony of Professor Burt Neuborne, New York University Law School).

discrimination in state law enforcement is at the core of federal equal protection.⁶⁰

But criticism soon mounted against the bill. VAWA's opponents were certain that history marked family law as exclusively local and that gender-motivated violence was family law. They accordingly contended that the bill's civil rights remedy would federalize matters of inherently state concern and overwhelm the federal courts with inappropriate litigation. The state-based Conference of Chief Justices, which voted on January 31, 1991 to oppose all of VAWA's civil rights remedy, was the earliest prominent opponent.⁶¹ Its entire critique flowed from the emphatic contention that family law was "not federal in nature,"⁶² a proposition that the state judges supported only by noting that such matters have "been traditionally reserved to the states."⁶³ So informed, the Conference denounced VAWA's purported potential to undermine state jurisdiction over family law as a major threat and fatal weakness.⁶⁴ While never challenging the bill's substantive goals, the Chief Justices appealed to history to conclude that VAWA pursued "a narrow objective"⁶⁵ not worth the havoc it would wreak on "the very core of familial relationships."⁶⁶

It soon became clear that such sentiments reflected more than the institutional position of the Chief Justices, who, after all, had personal stakes in maintaining the reputation of state courts.⁶⁷ In September 1991,

In particular, legal scholars testified that Congress had the constitutional authority to enact VAWA under its power to regulate interstate commerce, U.S. CONST. art. I, § 8, cl. 3, and to enforce the Fourteenth Amendment, *id.* at amend. XIV, § 5. For a discussion of the constitutional challenges to VAWA that have arisen in light of the subsequent *Lopez* decision, see *infra* note 84 and accompanying text.

60. See, e.g., 1991 *Hearing*, *supra* note 59, at 104 (testimony of Professor Sunstein) (describing equal protection from violence as "core meaning of 'equal protection of the laws'" and state failure to provide it as denial of equal protection "in the classic sense").

61. See Statement by Conference of Chief Justices on S. 15-Violence Against Women Act of 1991, reprinted in *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 80-84 (1993) [hereinafter 1993 *Hearing*].

62. *Id.* at 82.

63. *Id.* at 80; see also *id.* at 83 ("[S]pousal and sexual violence and all legal issues involved in domestic relations historically have been governed by state criminal and civil law.") (emphasis added).

64. See *id.* at 80.

65. *Id.* at 82.

66. *Id.* at 80.

67. See Letter from Lyle Reid, Chairman of the Committee on State-Federal Relations of the Conference of Chief Justices, to Don Edwards, Chairman of the House Judiciary Committee (Nov. 16, 1993), reprinted in 1993 *Hearing*, *supra* note 61, at 77-78 ("[M]ajor dislocations of state court responsibility for family law should be taken only in the most extreme circumstances. It

the Judicial Conference of the United States, the organization for federal judges, joined its state counterpart in opposing VAWA's provision for a civil rights cause of action. Once again, the assertedly clear history of exclusive localism in family law, and the implicit contention that this tradition exerts compelling normative force, shaped the response. From this baseline, the federal judges could characterize the fact that VAWA would bring "family law" claims into federal courts as a cause of "major state-federal jurisdictional problems."⁶⁸ On this view, the judges could agree that violence against women was an important concern, and still contend that a federal response to inadequate state remedies was a dangerous engine that would overwhelm the federal docket with cases that would not best utilize "scarce judicial resources."⁶⁹

Chief Justice Rehnquist, who chose to speak out against VAWA personally in his capacity as chief administrator of the federal courts, invoked similar themes. The federal judiciary's "precious" resources should, he argued, be "reserved for issues where important national interests predominate."⁷⁰ Rehnquist's only evidence for VAWA's failure to implicate such interests was that family law "ha[s] traditionally been reserved to state courts;"⁷¹ he, too, never denied the seriousness of gender-motivated violence. But the Chief Justice found this vision of history sufficient to demonstrate the intrinsically local character of family law. In this light, he argued that VAWA "would unnecessarily expand the jurisdiction of the federal courts"⁷² and urged Congress to consider the judiciary's concern "that the legislation could involve the federal courts in a whole host of domestic relations disputes."⁷³

VAWA's advocates attempted to counter this criticism, but ultimately had to limit the bill's civil rights remedy significantly. Emphasizing that VAWA would only cover violent crimes motivated by gender dis-

has been argued that Federal action is required because of the inadequacy of State programs given the fact that the problem persists. We do not find this argument convincing.").

68. Report of the Proceedings of the Judicial Conference of the United States (Sept. 23-24, 1991), reprinted in 1993 Hearing, *supra* note 61, at 75 (emphasis added).

69. *Id.*

70. William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH (Office of Legislative and Public Affairs, Administrative Office of the U.S. Courts, Wash., D.C.), Jan. 1992, at 1, 2.

71. *Id.* at 3; see also Remarks of Chief Justice Rehnquist, reprinted in 138 CONG. REC. 6186, 6186 (1992) (making same statement).

72. Rehnquist, *supra* note 70, at 3; see also Remarks of Chief Justice Rehnquist, *supra* note 71, at 6186 (making same statement).

73. Rehnquist, *supra* note 70, at 3; see also Remarks of Chief Justice Rehnquist, *supra* note 71, at 6186 (making same statement).

crimination rather than all violence against women, Joseph Biden, Jr., the bill's chief sponsor in the Senate, argued that VAWA would be no more far-reaching than existing civil rights remedies that focus on race.⁷⁴ "No one," he noted, "would say today that laws barring violent attacks motivated by race or ethnicity fall outside the Federal courts' jurisdiction." "[W]hy," he asked, "are they saying that violent discrimination motivated by gender is not a traditional civil rights violation?"⁷⁵ Why didn't the prevalence of gender-motivated violence, the NOW Legal Defense and Education Fund added, "argue in favor of, not against, passing legislation to remedy it?"⁷⁶

But the counterargument that "family law" is inherently and exclusively for the states was enormously successful in separating VAWA from established federal civil rights law. To win a congressional majority, VAWA's proponents had to restrict the bill's scope substantially. The initial versions of the Act applied to all violent crimes "committed because of gender or on the basis of gender"⁷⁷ and created a statutory presumption that this definition included every rape.⁷⁸ The Senate Judiciary Committee, however, added several important limitations to VAWA's civil rights remedy in May of 1993 to protect state prerogatives and the federal docket.⁷⁹ Most notably, a crime now also had to be "due, at least in

74. See *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 8-11 (1992) (testimony of Sen. Biden).

75. *Id.* at 11 (testimony of Sen. Biden).

76. Prepared Statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund, *reprinted in* 1993 *Hearing, supra* note 61, at 12.

77. See, e.g., S. 15, 102d Cong. § 301(d)(1) (1991). The committee report noted that this "definition of gender-motivated crime [was] based on title VII which prohibits discrimination in employment 'because . . . of sex.'" S. REP. NO. 102-197, *supra* note 58, at 50 (quoting 42 U.S.C. § 2000e-2).

78. For instance, the bill that House members were debating immediately prior to the May 1993 compromises provided that a "crime of violence motivated by the victim's gender" meant, *inter alia*, "a crime of violence that is rape (excluding conduct that is characterized as rape solely by virtue of the ages of the participants), sexual assault, sexual abuse, or abusive sexual contact." H.R. 1133.IH, 103d Cong. § 301(e)(1) (1993).

At one press conference, Senator Biden explained the presumption in the early versions of VAWA this way: "If the crime is a consequence of gender motivation, and that predicate can be laid down in court, then there can be a civil rights action. In almost all rape you'd find that situation." *Press Conference to Release the Report on "The Response to Rape: Detours on the Road to Equal Justice,"* May 27, 1993, *available in* LEXIS, News Library, REUTRN File (statement of Sen. Biden).

79. See S. 11, 103d Cong. (1993) (as amended by Judiciary Committee), *reprinted in* S. REP. NO. 103-138, at 2-37 (1993). On May 27, 1993, the Senate Judiciary Committee favorably reported the bill as amended. See 139 CONG. REC. D597 (daily ed. May 27, 1993).

part, to an animus based on the victim's gender"⁸⁰ and had to rise to the level of a felony that included risk of injury.⁸¹ The legislative history indicated, in addition, that the presumption in favor of covering all rapes had been eliminated.⁸² With these changes, VAWA became law on September 13, 1994.⁸³

The *Lopez* decision in 1995, which identified family law as uniquely beyond the scope of Congress's commerce power, rendered VAWA's civil rights remedy particularly vulnerable to constitutional challenge; the statute has been under constant attack since then.⁸⁴ But even if the Supreme

80. S. 11 § 301(d)(1), reprinted in S. REP. NO. 103-138, *supra* note 79, at 30. For the final formulation, see 42 U.S.C. § 13981(d)(1) (1994) ("[T]he term 'crime of violence motivated by gender' means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender . . .").

81. See S. 11 § 301(d)(2)(A), reprinted in S. REP. NO. 103-138, *supra* note 79, at 30. The 1993 amended bill and the enacted version of VAWA define crimes rising to the level of a felony to include acts that state law would otherwise classify as felonious, but demotes to misdemeanors when committed within the family. See S. 11 § 301(d)(2)(B), reprinted in S. REP. NO. 103-138, *supra* note 79, at 30 (providing that "term 'crime of violence' . . . includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken"); 42 U.S.C. § 13981(d)(2)(A) (same).

In addition, the May 1993 bill explicitly stated that VAWA did not give the federal government jurisdiction over state law claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." S. 11 § 301(e)(4), reprinted in S. REP. NO. 103-138, *supra* note 79, at 30. For the final version, see 42 U.S.C. § 13981(e)(4) (same text). It further established concurrent jurisdiction in federal and state courts over all civil rights claims brought under the Act. See S. 11 § 301(e)(3), reprinted in S. REP. NO. 103-138, *supra* note 79, at 30. For the ultimate codification of this provision, see 42 U.S.C. § 13981(e)(3).

82. See S. REP. NO. 103-138, *supra* note 79, at 51 (explaining that VAWA's civil rights remedy no longer created "a general Federal law for all assaults or rapes against women").

83. See 140 CONG. REC. D1062 (daily ed. Sept. 13, 1994).

84. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 973-74 (4th Cir. 1997) (rehearing en banc granted and opinion vacated, Feb. 5, 1998) (upholding constitutionality of VAWA's civil rights remedy under Commerce Clause), *rev'g* 935 F. Supp. 779, 785-801 (W.D. Va. 1996) (holding that neither Commerce Clause nor Enforcement Clause of Fourteenth Amendment gave Congress authority to enact VAWA's civil rights remedy); *Mattison v. Click Corp.*, No. Civ. A. 97-CV-2736, 1998 WL 32597, at *6 (E.D. Penn. Jan. 27, 1998) (upholding constitutionality of VAWA's civil rights remedy under Commerce Clause); *Crisonino v. New York City Hous. Auth.*, 985 F. Supp. 385, 396-97 (S.D.N.Y. 1997) (same); *Anisimov v. Lake*, 982 F. Supp. 531, 540 (N.D. Ill. 1997) (same); *Seaton v. Seaton*, 971 F. Supp. 1188, 1193-95 (E.D. Tenn. 1997) (same); *Doe v. Hartz*, 970 F. Supp. 1375, 1422-23 (N.D. Iowa 1997) (same), *rev'd in part and vacated in part*, 134 F.3d 1339, 1341 (8th Cir. 1998) (holding that plaintiff failed to state claim that came within scope of VAWA); *Doe v. Doe*, 929 F. Supp. 608, 610 (D. Conn. 1996) (upholding constitutionality of VAWA's civil rights remedy under Commerce Clause).

For expressions within this litigation of the notions that family law is inherently local and that VAWA's civil rights remedy constitutes family law, see *Seaton*, 971 F. Supp. at 1190-91 ("[T]here is no doubt that violence against women is a serious matter in our society . . . [But]

Court ultimately finds this aspect of VAWA constitutional, the argument from history for exclusive localism in (what localists describe as) family law has already achieved a far-reaching victory here. This argument has not only placed Congress's authority to enact VAWA in question, it has profoundly altered the structure and scope of the statute that we now have. Faced with claims that VAWA did not fit within federal jurisdiction, the bill's sponsors both eliminated the presumption in favor of covering all rapes⁸⁵ and added an "animus" requirement that appears in no other federal statute.⁸⁶ Forming a wedge between the Act and other civil rights legislation, the definition of "animus" is both uncertain and the linchpin determining the ultimate reach of VAWA.⁸⁷ What is clear, however, is that VAWA now covers fewer instances of gender-motivated violence.

As the controversy over the Violence Against Women Act makes manifest, the scope of historical claims for the inherent and exclusive localism of family law is as broad and expandable as the reigning definitions of family law itself. Here, as in the Supreme Court's sweeping statements on family law's place, a purported tradition and implicit assertions of its normative dominance had the power to render all other argument apparently unnecessary. Indeed, VAWA's critics said hardly anything in opposition to the bill that was not either an historical account or the direct result of the premise that history should control.

Throughout the debate over federalism and family law, appeals to a supposedly clear past exert enormous force in maintaining family law as the

[t]he framers of the Constitution did not intend for the federal courts to play host to domestic disputes and invade the well-established authority of the sovereign states."); *Doe*, 929 F. Supp. at 615-16 ("Defendant . . . argues that enactment of the VAWA encroaches on traditional police powers of the state and impermissibly 'federalizes' criminal [law], family law, and state tort law."); *Brzonkala*, 935 F. Supp. at 793 ("Family law issues and most criminal issues affect the national economy substantially and in turn have some effect on interstate commerce. These too have interstate travel implications. However, to extend Congress's power to these issues would unreasonably tip the balance away from the states.").

In addition, one district court, in an opinion the Eighth Circuit has since reversed, held that the federal commerce power does not reach the provision of VAWA, 18 U.S.C. § 2262(a)(1) (1994), that makes it a federal crime to cross state lines with the intent to violate a protective order and then to violate that order. See *United States v. Wright*, 965 F. Supp. 1307, 1315 (D. Neb. 1997), *rev'd*, 128 F.3d 1274, 1274-76 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

85. See *supra* note 82.

86. See Sally F. Goldfarb, *Gender Motivation and the Violence Against Women Act: A New Chapter in Federal Civil Rights Law* 24 (Mar. 1995) (unpublished manuscript, on file with author).

87. In its sole discussion of "animus," the 1993 Senate Judiciary Committee Report states: "This new language elucidates the committee's intent that a victim alleging a violation under this section must have been targeted on the basis of his or her gender. The defendant must have had a specific intent or purpose, based on the victim's gender, to injure the victim." S. REP. NO. 103-138, *supra* note 79, at 64.

paragon of localism and in defeating or discouraging federal involvement. There is a deep question, which I will address in Part IV, about the weight and scope that history can legitimately assume when federalism is at issue. But even if one accepts the historical model that courts and commentators have uncritically put forward, Parts II and III reveal that past practice is much more complicated than current discourse suggests. To the extent that arguments for exclusive localism in family law intend to derive their ultimate persuasive force from tradition alone, the examined past strips such claims of firm grounding.

As I will explain more fully below, Reconstruction provides a fruitful vantage point for examining the historical record of family law and federalism. Indeed, it was the culmination of a multigenerational and national debate that was precisely about the federal government's power to regulate family law, as both modern and nineteenth-century Americans would understand that term. Many nineteenth-century Americans defined slavery itself as a domestic relation. But one need not take that view to see Reconstruction as a mammoth struggle over federal intervention into family law. Reconstruction put into issue the legal prohibitions on family formation that helped constitute American slavery—family law as late twentieth-century Americans would define it. Yet, as Part II documents, there was no shared sense during Reconstruction that family law—even in the modern sense—was set apart and quintessentially local. To the contrary, Reconstruction's advocates were determined to extend federal protection to family rights, and a large majority of their critics agreed that the federal government had jurisdiction to intervene in family law if it wished. The only significant argument that Reconstruction Congressmen offered for preserving exclusive localism in family law was a policy concern that is now constitutionally illegitimate under the very Fourteenth Amendment that these men opposed: The representatives who sought to leave family law to the states claimed that federal intervention would threaten social segregation between the races and coverture within the marital relation. Such arguments were defeated, however, and the Reconstruction Congress quickly altered the family law governing the freedmen. In fact, these same Congressmen simultaneously pursued an extraordinarily popular campaign against polygamy, creating in the process another federal family law. The place of family law in the federal system was so unfixed at Reconstruction that localist pronouncements appeared late and only hesitatingly even in opinions reviewing the postwar legality of state bans on interracial marriage, where the pressure to protect state prerogatives reached its peak. Moreover, Part III should dash any hopes that one can find a post-

Reconstruction history of invariable localism free from constitutionally illicit motivations. Although the power of arguments from history has done much to mask it, modern federal family law is far-reaching.

II. THE CONSENSUS ON FEDERAL JURISDICTION AT RECONSTRUCTION

A. Reconstruction as Crux

The dominant historical understanding of the Civil War and Reconstruction interprets slavery in terms of race and not family law.⁸⁸ But to many nineteenth-century Americans, especially Southerners, slavery was a domestic relation. For decades before the Civil War, opponents of federal intervention into slavery made this point consistently.⁸⁹ Although never ignoring race, they importantly framed the legitimacy of federal antislavery efforts as turning on whether the federal government could regulate the family law of the states. Reconstruction was the culmination of a massive, wrenching, and multigenerational debate over the federal government's ability to govern domestic relations, as nineteenth-century Americans understood that term. And by disestablishing slavery, the federal government dramatically reshaped one of the nineteenth century's most important domestic relations.

But one need not accept the nineteenth-century definition of slavery as a domestic relation in order to recognize the Civil War and Reconstruction as tremendous federal interventions into state family law. The forms of subordination and unfreedom that constituted chattel slavery in the United States involved profound restrictions on family relations, as we can understand that term today. Slavery denied its victims the legal right to marry and to be recognized as the parents of their children, and stripped them of the legal prerogatives associated with these family roles. For years before the Civil War, abolitionists focused on this family law within slavery and called for federal intervention on the ground of its horror alone. The debate over slavery and its eradication importantly entailed a struggle over the right of slaves to form families that the law would respect. The congressional architects of Reconstruction understood that disestablishing the family law within slavery was a necessary part of abolishing the institution, and therefore specifically granted the former slaves marital and parental rights, fundamentally altering state family law in the modern sense.

88. See *infra* notes 141–142.

89. See *infra* text accompanying notes 105–118.

At a moment when the relationship between state and nation was importantly reshaped for modernity, Reconstruction was the site of sustained and reflective deliberation over the role of the federal government in family law, both as this category is understood today and as it was understood in nineteenth-century locution. Although it was likely the first such major conversation in our history, this aspect of Reconstruction has remained unexamined. Indeed, Reconstruction is now frequently taken to be a crucial episode in the tradition of federal noninvolvement in family law.⁹⁰ Certainly, Reconstruction is not the only possible point of inquiry into the dual propositions that family law has always been exclusively local in the United States and that history should control family law's future status in the federal system; who knows what one might discover in the New Deal or the War on Poverty, for instance. But Reconstruction is one of the most interesting vantage points from which to examine the claims from tradition for localism, and it demands closer scrutiny.

In contrast, for instance, the Founding's great discourse on federal-state relations hardly speaks to family law and the arguments identifying it as particularly local. Family law may have been firmly local at the nation's inception, but the Framers did little to distinguish family law, as we could define that term today. Instead, the men who participated in the original constitutional debates left most subjects to the states and devoted scant attention to the family. While the Framers did devote significant thought to state control over slavery, their conversation took place several decades before slavery came to be commonly understood as a domestic relation and was instead shaped by the shared recognition that the South never would have agreed to a Constitution that did not protect the peculiar institution.⁹¹

Although the Founders assumed that family law was for the states, they thought the same about almost everything else. These men rarely saw the need to mention the family,⁹² and there is little reason to suspect that

90. See *infra* note 142.

91. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 70-74 (1996); *infra* text accompanying notes 374-375.

92. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 571 (1983) ("The silence of the Constitution on the entire subject of the family does not tell us that marriage and family were unimportant to the founders; it tells us, rather, that the Founders consciously accepted the regulation of family life embodied in [state law and state courts]."); Linda K. Kerber, *The Paradox of Women's Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805*, 97 AM.

the Framers ever contemplated national regulation of family law.⁹³ Their highly scattered references to family law, and the interrelated laws of devise, take local jurisdiction over family law—the usual practice of the British Empire⁹⁴—as a given and make clear that the issue had yet to become contested.⁹⁵ Yet this hardly marked family law as special at the Founding.

The Constitution formed a national union far more powerful than anything the Articles of Confederation would have allowed,⁹⁶ but the authority the nascent national government exercised was as limited as it

HIST. REV. 349, 351 (1992) (“The generation of men who radically transgressed inherited understandings of the relationship between kings and men, fathers and sons, and who radically reconstructed many basic elements of law, nevertheless refused to destabilize the law governing relations between husbands and wives, mothers and children.”); Sylvia A. Law, *The Founders on Families*, 39 U. FLA. L. REV. 583, 586 (1987) (“Virtually nothing in the original constitutional debates directly addresses the situation of women and families . . .”).

93. It is nonetheless quite interesting to note that the American Revolutionaries often used familial analogies to describe their separation from England. As Linda Kerber has explained:

The rhetoric of the revolution positioned the colonists as sons who had outgrown patriarchal constraint and as adult men unfairly enslaved by the British. But republican ideology did not eliminate the political father immediately and completely; rather, it held a liberal ideology of individualism in ambivalent tension with the old ideology of patriarchy. Thus George Washington quickly became the “father of his country”; at the Governor’s Palace in Williamsburg, Virginia, the life-size portrait of George III was quickly replaced by a life-size portrait of Washington in the same pose.

Kerber, *supra* note 92, at 351. Moreover, the consignment of family law to the purview of state regulation did not prevent state courts from developing a body of family law that was fairly uniform across the nation. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 295–96 (1985).

94. See 2 GEORGE E. HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 331–49, 368–69, 371, 373 (1904) (discussing colonial courts’ jurisdiction over divorce and alimony).

95. Alexander Hamilton, for instance, assured one ratifying convention that the Constitution would not “penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals.” 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 268 (photo. reprint 1941) (Jonathan Elliot ed., 1836). In the *Federalist Papers*, Hamilton also twice mentioned “the law of descent” as an example of state regulation that the federal government could and would not disturb. THE FEDERALIST No. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also THE FEDERALIST No. 29, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Tench Coxe, a far less prominent Federalist writing in support of ratification, similarly noted that the states would continue to “regulate descents and marriages” under the federal Constitution. Tench Coxe, *A Freeman II*, PA. GAZETTE, Jan. 30, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 508, 510 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

96. Indeed, the *Federalist Papers* began with the explicit premise that the loose bonds of union in the Articles of Confederation had proven wholly unworkable. See THE FEDERALIST No. 1, at 37 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“For nothing can be more evident to those who are able to take an enlarged view of the subject than the alternative of an adoption of the new Constitution or a dismemberment of the Union.”).

was important.⁹⁷ Although the Framers meant to create a government strong and supple enough to respond to the changing demands of the nation,⁹⁸ federal power at the Founding hardly extended beyond the right to tax, to conduct foreign relations, and to regulate interstate commerce,⁹⁹ with the federal commerce power understood so narrowly that the Framers debated whether it covered interstate roads.¹⁰⁰ While the Founders

97. As H. Jefferson Powell has found:

The text of the Constitution and the ratification-era debates over its interpretation both seemed to confirm that the new federal government was a government with "certain enumerated objects only," not a purely national government with substantive jurisdiction over all matters "so far as they are objects of lawful Government."

H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 664 (1993) (quoting THE FEDERALIST No. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961)). Jack Balkin has similarly noted that:

The degree of federal intrusion into the states' police powers today is much greater than even the most ardent nationalist living in 1787 would have imagined. Even Hamilton, Marshall, and Story, in their most unbridled assertions of national power, would not have contended that the Constitution created the equivalent of a general federal police power whose operation could displace virtually any contrary state economic policy at will.

J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 925 (1988) (book review).

98. See Powell, *supra* note 97, at 665 ("[B]oth the text and the Federalists' ratification arguments made plain the intention of creating a central government with sufficient power and sufficient flexibility to address the needs of the Union as a whole.").

99. The *Federalist Papers* frequently stressed that "the objects of federal legislation" would largely be confined to "commerce, taxation, and the militia." THE FEDERALIST No. 56, at 346-47 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST No. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (listing "[c]ommerce, finance, negotiation, and war"). Article I, section 10, the provision of the Constitution that explicitly prohibits certain state action, reflects these boundaries. It reads:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10.

100. During the Philadelphia convention and the ratification debates, both opponents and supporters of the Constitution assumed that interstate roads would necessarily remain under the states' exclusive jurisdiction. See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 478-80 (1941).

assumed exclusive localism in family law, their constitutional debates also never mention the pervasive administrative law and economic regulation, on subjects ranging from antitrust and securities to employment to health and safety, now within federal jurisdiction. As James Madison explained the Framers' understanding in the *Federalist Papers*, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . extend[ing] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."¹⁰¹

Given this premise, arguments from history cannot reasonably hope to establish that family law is *particularly* local by using the Founding as their base. It was not until decades later that the nation faced a much more viable choice between federal and state jurisdiction. Only during the nineteenth-century struggle over slavery and its eradication, did family law's place in the federal system emerge as a topic of sustained and thoughtful debate. Only then, did volumes of speech replace almost uninterrupted silence.¹⁰²

In 1817, President James Madison vetoed a bill setting aside funds for the construction of roads and canals on the ground that "[t]he power to regulate commerce among the several States' can not include a power to construct roads and canals . . . without a latitude of construction departing from the ordinary import of the terms." James Madison, Message to the U.S. House of Representatives (Mar. 3, 1817), reprinted in JEFFERSON POWELL, *LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY* 313, 313 (1991).

Almost a century after the Founding, the Supreme Court recognized this original understanding of the Commerce Clause, noting:

The navigable waters of the earth are recognized public highways of trade and intercourse. . . . But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control.

Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456, 470 (1875); see also *Veazie v. Moor*, 55 U.S. (14 How.) 568, 574 (1853) (holding that Commerce Clause excludes control over turnpikes).

101. THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he federal government[s] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.").

102. As Richard Fallon has observed, "political preconceptions and preferences" often influence which historical events people select as relevant to federalism debates, with "federalists" emphasizing the Founding alone and "nationalists" stressing the Founding as well as the Civil War and Reconstruction. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1144, 1148 (1988). Fallon faults both of these models for "their role in producing an internally conflicted and contradictory body of law," concluding that each is "too extreme in [its] exclusion of the other's insights." *Id.* at 1150. I am inclined to agree; the claims about family law's *particular* localism guided my decision not to focus on the Founding.

B. Antebellum Context: Race and Family Law Intertwined

The general historical view of Reconstruction presents emancipation as a story of race relations and not family law.¹⁰³ According to the few scholars who have considered family law's place in Reconstruction at all, Congress walked a fine line between race and family law, never allowing itself to encroach upon the latter.¹⁰⁴ While neat, this story masks how Reconstruction was understood and experienced at the time. For the Americans who lived through the Civil War and Reconstruction, slavery and abolitionism were also about family law and the federal government's ability to intervene in state family codes.

Forces on both sides of the slavery question had been making this connection for years before the Civil War broke out. Slavery's defenders argued against federal involvement in the institution on the ground that slavery was a domestic relation. They emphasized the links between slavery and "other" family relations in order to tie their fates together, hoping to associate the two subjects so closely that Northern men uncomfortable about slavery would curb their expressions of disapproval in order to protect the "rest" of family law from similar leveling. Always denying abolitionist charges that they had actual and close biological ties to their slaves,¹⁰⁵

103. See *infra* note 141. For the most remarkable recent account exposing scholars' systemic blindness to the role of black women in Reconstruction, see Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855-1914*, 13 LAW & HIST. REV. 261 (1995) (uncovering lost history of predominantly female challenges to racial segregation in public transportation in years before *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

104. See *infra* note 142.

105. See KAREN SÁNCHEZ-EPPLER, TOUCHING LIBERTY: ABOLITION, FEMINISM, AND THE POLITICS OF THE BODY 101 (1993) ("Abolitionist writings consistently offer the light-skinned child of the slave woman as proof of the miscegenating economy of slavery, so that the child stands as evidence of the gap between plantation life and the ideology of the sacrosanct bourgeois family."); HARRIET BEECHER STOWE, UNCLE TOM'S CABIN; OR, LIFE AMONG THE LOWLY 107, 178, 182, 548 (Ann Douglas ed., 1981) (1852); Frances H. Green, *The Slave-Wife*, in LIBERTY CHIMES 81, 87 (Providence, Ladies Anti-Slavery Society 1845) (recounting story of slave woman who "was white. At least no one would suspect that she had any African blood in her veins."). Abolitionist Lydia Maria Child reported that she had

been told of a young physician who went into the far Southern states to settle, and there became in love with a very handsome and modest girl, who lived at service. He married her; and about a year after that event, a gentleman called at the house and announced himself as Mr. J***** of Mobile. He said to Dr. W*****, "Sir, I have a trifling affair of business to settle with you. You have married a slave of mine." The young physician resented the language; for he had not entertained the slightest suspicion that the girl had any other than white ancestors since the flood. But Mr. J. furnished proof of his claim . . . [When the husband informed his wife of her purchase] the poor woman

slave owners contended, nevertheless, that the master-slave relationship was best understood as a familial connection operating along the same tenets of hierarchy, dependency, and intimacy that governed ties amongst white relatives. In turn, antislavery advocates denounced the gulf between the basic rights that white families took for granted and the familial conditions that slaves endured. Where articulate Southerners redefined family law to include the institution of slavery as a whole, abolitionists focused on what late twentieth-century observers would consider to be the family law within slavery. They argued for federal intervention on the ground that the South's purportedly familial institution denied slaves the legal right to be recognized as spouses and parents, and the legal opportunity to enjoy the prerogatives associated with these familial positions. The struggle over the federal government's role in regulating family law pervaded the antebellum debate over slavery, no matter which definition of family law one accepted and which view of slavery one took.

1. The Antebellum Proslavery Discourse on the Family

As tension mounted between North and South, slaveholders came to commonly describe slaves as part of their owners' families, embedded in hierarchical relations of dependency and mutual obligation that paralleled, precisely but at a lower level, those governing bonds between white men and their wives and legitimate children. This vision sought to justify the slave system normatively by describing it as grounded on the "fundamental" principle "that all living on the plantation, whether colored or not, are members of the same family."¹⁰⁶ In this view, Southern slavery was "a patriarchal, social system. The master [was] the head of his family. Next to wife and children, he care[d] for his slaves. He avenge[d] their

burst into tears and said, "That as Mr. J. *was her own father*, she had hoped that when he heard she had found an honorable protector, he would have left her in peace."

LYDIA MARIA CHILD, *ANTI-SLAVERY CATECHISM* 17 (Newburyport, Charles Whipple 1836).

106. Foby, *Management of Servants*, *S. CULTIVATOR*, Aug. 1853, at 226–28, *reprinted in* *ADVICE AMONG MASTERS: THE IDEAL IN SLAVE MANAGEMENT IN THE OLD SOUTH* 305, 306 (James O. Breeden ed., 1980). Foby's article, published in a prominent southern agricultural journal, soon generated a largely favorable response from another southern planter who agreed that:

The plan of uniting all under one family or fraternity is not only an evidence of kindness and humanity, but I [Floyd] view it as a duty due to the servant, that he may feel that he is not a dumb brute but that his master looks upon him as a human being, capable of giving and receiving kindness, and feels a wish that they work for each other's benefit.

Floyd, *Management of Servants*, *S. CULTIVATOR*, Oct. 1853, at 301, *reprinted in* *ADVICE AMONG MASTERS*, *supra*, at 312, 312.

injuries, protect[ed] their persons, provide[d] for their wants, and guide[d] their labors. In return, he [was] revered and held as protector and master."¹⁰⁷ On this theory of family law, Southern statutory codes classified the bond between master and slave as a domestic relation.¹⁰⁸

As early as the 1820 congressional debate over the admission of Missouri to the union, proslavery advocates had elaborated this claim for slavery as a domestic relation into a specific political argument against federal intervention. By the start of this first major battle over the expansion of slavery into the West, Southern Congressmen were already including slavery with the family in the private domain, and already associating such privacy with state control on the ground that federal interference in this realm would inevitably disrupt not only the peculiar institution itself, but also the hierarchical foundation of present relations between white husbands and wives, and white parents and children. In supporting Missouri's admission as a slave state, Representative Alexander Smyth of Virginia

107. 1 THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA*, at ccxviii (Philadelphia, T. & J.W. Johnson & Co. 1858). A future Confederate officer similarly explained that:

The Slave Institution at the South, increases the tendency to dignify the family. Each planter is in fact a Patriarch—his position compels him to be a ruler in his household. From early youth, his children and servants look up to him as the head, and obedience and subordination become important elements of education. Where so many depend upon one will, Society necessarily assumes the Hebrew form. Domestic relations become those which are most prized—each family recognises its duty, and its members feel a responsibility for its discharge. The Fifth Commandment becomes the foundation of Society. The State is looked to only as the ultimate head in external relations, while all internal duties, such as support, education, and the relative duties of individuals, are left to domestic regulation.

C.G. MEMMINGER, *LECTURE DELIVERED BEFORE THE YOUNG MEN'S LIBRARY ASSOCIATION, OF AUGUSTA, APRIL 10TH, 1851*, at 14–15 (Augusta, Ga., W.S. Jones 1851). Along the same lines, George Fitzhugh, a prominent if extreme defender of slavery, observed that women, children, and slaves were "everywhere the subjects of family government. . . . [S]laves, wives and children have no other government; they do not come directly in contact with the institutions and rulers of the State." GEORGE FITZHUGH, *SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY* 105 (Richmond, A. Morris 1854); see also *State v. Mann*, 13 N.C. (2 Dev.) 263, 265 (1829) ("[The master-slave relation has been compared] to the other domestic relations . . . [such as] the parent over the child . . ."); *Sarter v. Gordon*, 11 S.C. Eq. (2 Hill Eq.) 121, 135 (1835) ("[In almost] every instance where a slave has been reared in a family, there exists a mutual attachment between the members of it and himself. The tie of master and slave is one of the most intimate relations of society.").

108. See PETER W. BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH*, at xi (1995). For more on the familial analogy in proslavery thought, see generally ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 100–02, 131–34 (1988); EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 73–75 (1974); Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 *LAW & INEQ. J.* 187, 191–95 (1987).

dwelled on the intimacy slavery supposedly engendered. Without mentioning the legal and political structure that kept slaves bound to their masters, he presented the relationship between slaveholder and slave as beyond the reach of proper federal involvement because essentially familial and wholly personal. "Will," Smyth asked,

you compel the citizen of Kentucky, the wants of whose children require more lands, when he is about to remove to Missouri, to sell the nurse who has fed his children from her breast, the faithful man who has long attended on his person, the maids of his wife and daughters, and the little children born in his family, before he can remove to the country of his choice? Yes; this you propose to do; yet talk of your humanity!¹⁰⁹

Senator Nicholas Van Dyke of Delaware warned even more explicitly that federal limitations on slavery threatened the same privacy that shielded the patriarchal relationships defining the white family.¹¹⁰ As he explained, the scope of domestic relations was well understood: "They are those of husband and wife—to which happily succeeds that of parent and child, too often followed by that of guardian and ward; with all which is connected that of master and servant, either by voluntary or involuntary servitude."¹¹¹ All of these bonds, Van Dyke continued, "exist in the bosom of the family, in the humble walks of private life, and have no connexion with the general political interests of the Union."¹¹² Each, Van Dyke argued in an age before the South's defeat convinced even slavery's

109. 35 ANNALS OF CONG. 1010 (1820) (statement of Rep. Smyth). Representative John Sergeant of Pennsylvania soon rose to challenge the "[g]entlemen of the South, particularly those from Virginia, who speak of their slaves as a part of their family." *Id.* at 1215. As he noted, the admission of Missouri as a slave state would surely stimulate the domestic slave market. Then slave families would experience the real family separations:

The ties of domestic life will be violently rent asunder, and those whom nature has bound together, suffer all the pangs of an unnatural and cruel separation. Unfeeling force, stimulated by unfeeling avarice, will tear the parent from the child, and the child from the parent—the husband from the wife, and the wife from the husband.

Id. (statement of Rep. Sergeant).

110. See *id.* at 308–09 (statement of Sen. Van Dyke). Representative Louis McLane of Delaware similarly contended (four decades before the Civil War radically expanded everyone's conception of the scope of federal power) that the exact same logic preventing federal involvement in marital and parental relations barred Congress from outlawing slavery in Missouri:

Could we say that property should not descend to all the children equally, or not devisable by will? Could we define the marital rights, or establish certain relations between parent and child, guardian and ward, or master and servant? No one can pretend that we could, and for the plain reason that they are objects of municipal power, of which we are entirely destitute. The relation of master and slave is but a domestic relation

Id. at 1152 (statement of Rep. McLane).

111. *Id.* at 309 (statement of Sen. Van Dyke).

112. *Id.* (statement of Sen. Van Dyke).

defenders that Congress could regulate the family,¹¹³ was protected from federal interference by the principle that the federal government's constitutional mandate did not extend to "the internal regulations, the private or domestic concerns of the States."¹¹⁴ Each would be endangered if that principle was breached for antislavery. "If," Van Dyke reasoned,

Congress [could] regulate one, why not all of these domestic relations? They all stand on the same level, and if one be within the grasp of [congressional] power, what shall exempt or protect the rest? Even the contract of marriage, and the period of release from guardianship may become the subject of discussion in some future Congress, on the admission of some future State. If such a power exists, who shall stay its hand or prescribe its limits?¹¹⁵

Indeed, Senator William Pinkney of Maryland predicted—almost three decades before the appearance of an organized woman's movement¹¹⁶—that antislavery's proposed invasion of domestic privacy in the name of republicanism would lead "some romantic reformer, treading in the footsteps of Mrs. Wolstonecraft, [to] propose to repeal our republican law *salique*, and claim for our wives and daughters a full participation in political power."¹¹⁷ Pinkney was "no friend to female government," but "if it be true that all the men in a republican Government must help to wield its power, and be equal in rights," he queried, "why not all the *women*? . . . Why is it that their exclusion from the power of a popular Government is not destructive of its republican character?"¹¹⁸ The proslavery argument that federal anti-

113. See *infra* text accompanying notes 190–195.

114. 35 ANNALS OF CONG. 308 (1820) (statement of Sen. Van Dyke).

115. *Id.* at 309 (statement of Sen. Van Dyke). By 1858, this type of argument had proven so successful (in some quarters) that the premier treatise on the law of slavery confidently concluded "that the right of each State to regulate for itself its domestic relations, so far as this question is concerned, seems now to be acknowledged by the statesmen of the country; and that, hence, the existence of slavery in a State is no ground for rejecting its admission into the Union." 1 COBB, *supra* note 107, at ccx (citing, *inter alia*, *Dred Scott v. Sandford*).

116. See sources cited *infra* note 176.

117. 35 ANNALS OF CONG. 413 (1820) (statement of Sen. Pinkney). A "law *salique*" is a legal code that bars women from inheriting land or succeeding to the throne. See RANDOM HOUSE UNABRIDGED DICTIONARY 1693–94 (Stuart Berg Flexner ed., 2d ed. 1987) (definitions of "Salique" and "Salic law").

118. 35 ANNALS OF CONG. 413 (1820) (statement of Sen. Pinkney). Along the same lines, Senator Richard M. Johnson of Kentucky suggested that applying rigorous republican reasoning to the slavery question would threaten the legal subordination of women and children:

In what way, I would ask, is the just principle of representation violated, by taking three-fifths of the slaves into the calculation? The answer is given, because slaves have no political rights. And what political rights have the female and the minor? . . . In the one case no complaint is made, but in the other injustice is urged. Every argument,

slavery efforts would threaten the private hierarchies of both race and family law was well developed long before the onset of the Civil War, and would blossom again after the South's defeat.

2. Abolitionists on the Family Law of Slavery

This proslavery discourse had a directly analogous counterpart in the abolitionist critique of the treatment of families under slavery. Notwithstanding the common nineteenth-century view that slavery was itself a domestic relation, chattel slavery as practiced in the Southern states entailed severe restrictions on family formation, as we can understand that term today. American slaves had no right to marry¹¹⁹ and no legal claim to their children.¹²⁰ Every slave state permitted the forced separation of slave

true or false, must be brought to bear upon this subject; which, in the end, will effect nothing, and is, in fact, worse than nothing.

... The fact is, we shall be better employed in confining ourselves to the great objects of the Confederacy, and leave every State to manage its own concerns.

Id. at 356–57 (statement of Sen. Johnson).

119. See, e.g., Opinion of Daniel Dulany, 1 H. & McH. 559, 563 (Md. 1767) (“I adopt the rule of the civil law . . . that slaves are incapable of marriage.”); *Howard v. Howard*, 51 N.C. (6 Jones) 235, 239 (1858) (“The relation between slaves is essentially different from that of man and wife joined in lawful wedlock.”); *Andrews v. Page*, 50 Tenn. (3 Heisk.) 653, 660 (1871) (“[I]t was generally held, in the slaveholding States, that the marriage of slaves was utterly . . . void”); WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 106 (Negro Univ. Press, photo. reprint 1968) (1853) (abolitionist legal scholar reporting that “[a] slave cannot even contract matrimony, the association which takes place among slaves, and is called marriage, being properly designated by the word *contubernium*, a relation which has no sanctity, and to which no civil rights are attached”) (citation omitted). Only one Southern court ever held that slave marriages had any legal effect. See *Girod v. Lewis*, 6 Mart. (O.S.) 559, 559–60 (La. 1819). Southern jurists widely denounced the 1819 Louisiana Supreme Court decision, and the Louisiana legislature overturned it in 1825. See GROSSBERG, *supra* note 93, at 130–31.

Southern lawyers and judges developed a two-part justification for the ban on legal slave marriages. First, they contended that slave marriages were impossible because slaves had no legal ability to consent. See, e.g., 1 COBB, *supra* note 107, at 242–43 (proslavery authority on slavery law reporting that “[t]he inability of the slave to contract extends to the marriage contract, and hence there is no recognized marriage relation in law between slaves”). Second, they argued that slaves could not marry because their marital rights and duties would conflict with their obligations to their masters. See *Frank & Lucy v. Denham's Adm'r*, 15 Ky. (5 Litt.) 330, 331 (1824) (noting that slaves could not fulfill their marital responsibilities without doing violence to slaveholders' rights); 1 COBB, *supra* note 107, at 246 (“[T]o fasten upon a master of a female slave, a vicious, corrupting negro, sowing discord, and dissatisfaction among all his slaves; or else a thief, or a cut-throat, and to provide no relief against such a nuisance, would be to make the holding of slaves a curse to the master.”); GROSSBERG, *supra* note 93, at 130–31.

120. See, e.g., *Frazier v. Spear*, 5 Ky. (2 Bibb) 385, 386 (1811) (finding that “the father of a slave is unknown to our law”). In denying the parental rights of slave mothers, a South Carolina court placed “the young of slaves . . . on the same footing as other animals.” *M'Vaughters v.*

families,¹²¹ and the best evidence suggests that approximately one in six slave marriages ended in involuntary separation.¹²² Rather than submerg-

Elder, 4 S.C.L. (2 Brev.) 7, 12 (1809). Angelina Grimké, a prominent abolitionist, made the same point to opposite effect. Slave parents, she reported, were almost never consulted as to the disposition to be made of their children; they [had] as little control over them, as have domestic animals over the disposal of their young. Every natural and social feeling and affection [was] violated with indifference; slaves [were] treated as though they did not possess them.

Testimony of Angelina Grimké Weld, in TIMOTHY DWIGHT WELD, *AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES* 52, 56-57 (Arno Press 1969) (1839).

121. See, e.g., *Cannon v. Jenkins*, 16 N.C. (1 Dev. Eq.) 376, 379 (1830) ("Most commonly the articles [slaves] sell best, singly; and therefore they ought, in general, to be so offered."); *Howard*, 51 N.C. (6 Jones) at 239 ("The relation between slaves is essentially different from that of man and wife joined in lawful wedlock . . . [W]ith slaves it may be dissolved at the pleasure of either party, or by the sale of one or both, depending on the caprice or necessity of the owners."); *Lawrence v. Speed*, 5 Ky. (2 Bibb) 401, 404 (1811) ("[I]t cannot be denied to be in general true that it is the duty of the sheriff to sell separately property [a slave mother and her child] which is divisible in its nature . . ."); *Lee v. Fellowes & Co.*, 49 Ky. (10 B. Mon.) 117, 119 (1849) ("A [court] sale [of slaves] in gross would be often detrimental to the best interests of debtor and creditor, and ought not to be countenanced . . ."); *McLane v. Spence*, 6 Ala. 894, 895, 897 (1844) (observing in reference to "a man and his wife and ten children" that "it could not be tolerated that twelve slaves, most of whom were grown, should be sold in one lot").

However, Alabama, Georgia, and Louisiana prohibited (at least officially) some sales separating mothers from their very young children. In 1806, Louisiana outlawed the selling of children under the age of ten apart from their mothers. See 1 *DIGESTE GENERAL DES ACTES DE LA LÉGISLATURE DE LA LOUISIANE* Code Noir § 9, at 221 (L. Moreau Lislet ed., New Orleans, Benjamin Levy 1828) (approved June 7, 1806); see also *Childers v. Johnson*, 6 La. Ann. 634, 639 (1851) (basing holding on this 1806 statute). In 1829, Louisiana extended the ban to out-of-state slave children. See *An Act relative to the introduction of Slaves in this State, and for other purposes, in ACTS PASSED AT THE FIRST SESSION OF THE NINTH LEGISLATURE OF THE STATE OF LOUISIANA* no. 24, §§ 15-16 (approved Jan. 31, 1829); see also *Kellar v. Fink*, 3 La. Ann. 17 (1848) (voiding sale based on statutes of June 7, 1806 and Jan. 31, 1829). In 1852, Alabama required creditors seizing a slaveholder's assets to sell slave children under ten with their mothers, unless the child was five or older and one of the parties to the action produced an affidavit showing that "his interest [would] be materially prejudiced, by selling the slaves together." THE CODE OF ALABAMA § 2056, at 392 (John J. Ormond et al. comp., Montgomery, Brittan & De Wolf 1852), reprinted in *A DOCUMENTARY HISTORY OF SLAVERY IN NORTH AMERICA* 189 (Willie Lee Rose ed., 1976). Similarly, an 1854 Georgia law provided that probate sales should sell children "not exceeding five years" with their mothers, but made an exception when "such division cannot in any wise be effected without such separation." *An Act to regulate the sale and division of Slaves, in certain cases therein named, in COMPILATION OF THE GENERAL AND PUBLIC STATUTES OF THE STATE OF GEORGIA* no. 171, § 1 (Howell Cobb ed., New York, Edward O. Jenkins 1859) (approved Feb. 18, 1854).

122. Herbert Gutman's analysis of the information that nine thousand Mississippi and northern Louisiana freedmen gave to Union army clergy registering their marriages found "that about one in six (or seven) slave marriages were ended by force or sale." HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 318 (1976). John Blassingame's study of marriage certificates for emancipated slaves that the Union army and the Freedmen's Bureau collected in Tennessee, Louisiana, and Mississippi between 1864 and 1866 found that slaveholders had terminated 32.4% of the 2888 analyzed slave marriages. See JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 175-77, 341, 361 tbl.17 (2d ed. 1979). Working with an 1878 survey of the black households in one

ing such violations into their campaign against slavery as a political, economic, and racial institution, abolitionists devoted tremendous time and energy to denouncing the family law within slavery. They called for federal intervention on the ground that slavery denied slaves the ability to form legally recognized family relationships and to enjoy the rights associated with familial status.¹²³

Throughout the 1830s, a portrait of a slave family about to be wrenched apart on the auction block dominated the masthead of the *Liberator*, the preeminent antislavery newspaper.¹²⁴ Abolitionist speakers wanted their audiences to imagine how they would feel if their "wife, the partner of [their] bosom, the mother of [their] babes" were "ruthlessly snatched" from them and their "beloved children stolen before [their] eyes."¹²⁵ Indeed, the *Liberator's* first issue asked:

Art thou a parent? shall thy children be
Rent from thy breast, like branches from the tree,
And doom'd to servitude, in helplessness,
On other shores, and thou ask no redress?¹²⁶

Harriet Beecher Stowe's *Uncle Tom's Cabin* (1852),¹²⁷ the best seller of the nineteenth century¹²⁸ and in many ways the culmination of the

southern Virginia town, Jo Ann Manfra and Robert R. Dykstra reported that over one-third (35.3%) of the town's *terminated* slave marriages had ended in forced separation. See Jo Ann Manfra & Robert R. Dykstra, *Serial Marriage and the Origins of the Black Stepfamily: The Rowanty Evidence*, 72 J. AM. HIST. 18, 32–33 (1985). In addition, one study of slave women in Georgia found that more than half of the mothers apparently lived apart from their husbands. However, this study did not differentiate between widows, women whose husbands lived nearby, and women whose husbands had been sold away. See Betty Wood, *Some Aspects of Female Resistance to Chattel Slavery in Low Country Georgia, 1763–1815*, 30 HIST. J. 603, 609 (1987).

123. For abolitionist condemnation of the forced separation of slave families at auction, see, e.g., [GEORGE WASHINGTON CARLETON], *THE SUPPRESSED BOOK ABOUT SLAVERY!* (William Loren Katz ed., Arno Press 1968) (1864); JOHN THEOPHILUS KRAMER, *THE SLAVE-AUCTION* (Boston, Robert F. Wallcut 1859); [MORTIMER THOMSON], *WHAT BECAME OF THE SLAVES ON A GEORGIA PLANTATION? GREAT AUCTION SALE OF SLAVES, AT SAVANNAH, GEORGIA, MARCH 2D & 3D, 1859*, at 16 (n.p. 1863) (describing separation at sale of Jeffrey and Dorcas, two young slaves who "had told their loves, had exchanged their simple vows, and were betrothed, each to the other as dear, and each by the other as fondly beloved as though their skins had been of fairer color"); WELD, *supra* note 120, at 167, 174.

124. See, e.g., *LIBERATOR*, Apr. 23, 1831, at 1 (masthead's first appearance).

125. REVEREND PETER RANDOLPH, *SKETCHES OF SLAVE LIFE: OR, ILLUSTRATIONS OF THE 'PECULIAR INSTITUTION'* 70–71 (Maxwell Whiteman ed., Afro-American History Series No. 234, photo. reprint 1969) (1855).

126. *The Salutation*, *LIBERATOR*, Jan. 1, 1831, at 1, 1.

127. STOWE, *supra* note 105.

128. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 89 (1988) (noting that *Uncle Tom's Cabin* is "the best seller of all time in proportion to population").

abolitionist protest,¹²⁹ gave new elaboration to this attack on family law under slavery. While Stowe denounced forced labor and racial prejudice, she highlighted another story of slavery, a tale "told too oft,—every day told,—of heart strings rent and broken,—the weak broken and torn for the profit and convenience of the strong!"¹³⁰ In *Uncle Tom's Cabin*, slavery's central violation is its devastation of the family—"its outrages on the feelings and affections."¹³¹ For Stowe as for other abolitionists, the national debate over slavery put more than political, economic, or racial rights at issue. Slavery's desecration of familial bonds was a distinct injustice that demanded rectification in its own right.

Somewhat more gingerly, abolitionists also described the systemic sexual exploitation of slave women by white men as a family crime and ground for federal intervention.¹³² Slaves had no legal protection against rape,¹³³ and slave women were sold into concubinage or prostitution at

129. Upon meeting Stowe in 1862, President Lincoln reportedly remarked, "[s]o you're the little woman who wrote the book that started this great war!" JOAN D. HEDRICK, *HARRIET BEECHER STOWE: A LIFE*, at vii (1994); see also MCPHERSON, *supra* note 128, at 89–90.

130. STOWE, *supra* note 105, at 202. For more on forced separation, see *id.* at 49, 208–11, 467, 479. For discussion of the legal prohibition on slave marriage, see *id.* at 63, 187.

131. *Id.* at 200.

132. That understanding of family law does not accord with this Article's definition, although it does resonate with the arguments against VAWA that assumed that family law included all gender-motivated violence, including rape.

133. See, e.g., *Vail v. Bird*, 6 La. Ann. 223, 224 (1851) (defining sexual relations between slaveholder and female slave as "mutual" liaison); *George (a Slave) v. State*, 37 Miss. 316, 318–20 (1859) (holding that no statute or common law doctrine made slave-on-slave rape a crime, although master of raped slave had right to bring suit "for the injury done him in the loss of service, or the diminution in value of his slave"); *Alfred (a Slave) v. State*, 37 Miss. 296, 316 (1859) (barring slave woman from testifying against overseer who allegedly raped her).

On the vulnerability of slave women to sexual exploitation by white men, see also LYDIA MARIA CHILD, *AN APPEAL IN FAVOR OF THAT CLASS OF AMERICANS CALLED AFRICANS* 23 (Arno Press 1968) (1836); JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 93–104 (1988); GENOVESE, *supra* note 108, at 413–21; CHARLES OLCOTT, *TWO LECTURES ON THE SUBJECT OF SLAVERY AND ABOLITION* 112 (Massillon, Ohio 1838) (denouncing "customary ravishment and prostitution of colored women").

Georgia actually modified its law on the eve of the Civil War, rewriting its statutory definition in 1861 to provide that rape was "the carnal knowledge of a female, whether free or slave, forcibly and against her will." THE CODE OF THE STATE OF GEORGIA § 4248, at 824 (R.H. Clark et al. comps., Atlanta, John H. Seals 1861). Penalties under the new code, however, explicitly differentiated according to the race of the assailant and the victim. A white man found guilty of raping a white woman could be imprisoned for between two and twenty years, while a black man convicted of the same crime was subject to death. The penalty for raping "a slave, or free person of color" was a "fine and imprisonment, at the discretion of the court." *Id.* § 4249, at 824, § 4704, at 918. Notwithstanding this statutory change, no rape case involving a white defendant and a slave victim subsequently appeared in Georgia's appellate court records. See BARDAGLIO, *supra* note 108, at 69 n.140.

"fancy girl" markets devoted specifically to that purpose.¹³⁴ Abolitionists, particularly the women among them, mourned the plight of slave women, denouncing legalized rape as an outrage to the slaves' female delicacy, modesty, and chastity.¹³⁵ But other antislavery advocates also described legalized rape under slavery as violating the prerogatives of slave husbands and fathers. In an era in which marital rape remained wholly legal,¹³⁶ many abolitionists assumed without question, and argued without

134. These markets were concentrated in New Orleans. See FREDERIC BANCROFT, *SLAVE TRADING IN THE OLD SOUTH* 328, 334 (Frederick Ungar Publ'g Co. 1959) (1931); GEORGE BOURNE, *SLAVERY ILLUSTRATED IN ITS EFFECTS UPON WOMAN AND DOMESTIC SOCIETY* 62–63 (Books for Libraries Press 1972) (1837) (recounting visit "to the *girl-market*"); CHILD, *supra* note 133, at 196–97 (denouncing "temporary connexions" between "White gentlemen of the first-rank" and New Orleans quadroons); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 798–99 (1993).

135. Indeed, Harriet Jacobs, an escaped slave, defined the central trauma of female enslavement as sexual vulnerability. As she observed, "there [was] no shadow of law to protect [the slave girl] from insult, from violence, or even from death; all these are inflicted by fiends who bear the shape of men." HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 27 (Jean Fagan Yellin ed., Harvard Univ. Press 1987) (1861). A female slave similarly explained to Frances Kemble why she did not attempt to defend her virtue by resisting white men's unwanted sexual overtures: "[W]e do anything to get our poor flesh some rest from de whip; when he made me follow him into de bush, what use me tell him no? he have strength to make me." FRANCES ANNE KEMBLE, *JOURNAL OF A RESIDENCE ON A GEORGIAN PLANTATION IN 1838–1839*, at 270 (John A. Scott ed., Univ. of Georgia Press 1984) (1863); see also SARAH GRIMKÉ, *LETTERS ON THE EQUALITY OF THE SEXES AND OTHER ESSAYS* 59 (Elizabeth Ann Bartlett ed., Yale Univ. Press 1988) (1838) ("In our slave States, if amid all her degradation and ignorance, a woman desires to preserve her virtue unsullied, she is either bribed or whipped into compliance, or if she dares resist her seducer, her life by the laws of some of the slave States may be, and has actually been sacrificed to the fury of disappointed passion."); STOWE, *supra* note 105, at 45, 160, 182, 186, 288, 472–73, 608; Caroline W. Healy Dall, Amy, 10 LIBERTY BELL 4, 11 (Boston, National Anti-Slavery Bazaar 1849) (recounting fictional tale of Amy, "[t]he [mulatto] offspring of a lawless and unrequited affection, [who] had, nevertheless, unconsciously dedicated her whole being to vestal chastity. But nothing availed."); Green, *supra* note 105, at 94 (describing fictional plight of Clusy Davis, who "was beautiful. She was in her master's power. She was in the power of every white man that chose to possess her.").

136. See, e.g., JAMES SCHOULER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS; EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT* § 36, at 63 (Boston, Little, Brown, and Co. 3d ed. 1882) ("Living in the same house, but wilfully declining matrimonial intimacy and companionship, is *per se* a breach of duty, tending to subvert the true ends of marriage.").

Many legal writers on the marital rape exemption find its common law origins in a seventeenth-century statement by Lord Matthew Hale. See SUSAN ESTRICH, *REAL RAPE* 72 (1987); Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 L. & SOC. INQUIRY 941, 947 (1995); Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 307 (1977); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1255–56 (1986); 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (P.R. Glazebrook ed., Professional Books Ltd. 1971) (1736) ("[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."). As late as 1977, every state in America either applied the common

hesitation, that male slaves, like free men, should control sexual access to their female relatives. Francis Green's *The Slave-Wife*, a nicely representative abolitionist short story, insisted that laws allowing masters to rape their female slaves transgressed the rights that slave husbands should enjoy as part of their familial status. Green's account of a slave woman tortured for refusing her master's sexual advances ended with the following instruction: "Think of that, husbands—ye who have beds you can call your own! ye who had honor to lose—I must submit to see her scourged, because she would not yield herself willingly!"¹³⁷ Green's vision was typical. Again and again, abolitionists asked the male members of their audiences to imagine their wives and daughters "every moment liable to be polluted—and, if [they] refuse submission, to be lacerated, then forced by [their] tyrant to comply."¹³⁸ Legalized rape, abolitionists stressed, did more than violate slave women; it left their husbands and fathers with no right to defend them.

All of this sustained advocacy made clear that slavery was not just economic, political, or racial subjugation, and that emancipation would not be complete until it extended to family formation. Indeed, Harriet Beecher Stowe offered an essentially familial definition of both slavery and freedom in *Uncle Tom's Cabin*:

To your fathers, freedom was the right of a nation to be a nation. To [a slave], it is the right of a man to be a man, and not a brute; the right to call the wife of his bosom [h]is wife, and to protect her from lawless violence; the right to protect and educate his child; the right to have a home of his own, a religion of his own, a character of his own, unsubject to the will of another.¹³⁹

When she concluded her epic with a call for abolitionist volunteers, Stowe was not asking them to battle racial prejudice alone. To the contrary, *Uncle Tom's Cabin* became the most popular and influential book of the nineteenth century by revealing slavery's most intimate violations and demanding specifically familial reform.¹⁴⁰

law rule or provided a statutory exemption for marital rape. See *The Marital Rape Exemption*, *supra*, at 308.

137. Green, *supra* note 105, at 99.

138. BOURNE, *supra* note 134, at 126.

139. STOWE, *supra* note 105, at 544–45.

140. Stowe articulated her call this way:

And you, mothers of America,—you who have learned, by the cradles of your own children, to love and feel for all mankind,—by the sacred love you bear your child; by your joy in his beautiful, spotless infancy; by the motherly pity and tenderness with which you guide his growing years; by the anxieties of his education; by the prayers you

C. The Reconstruction Debates

Although historically intertwined, race and family law are dichotomized in the leading modern accounts of Reconstruction. The standard histories of the period devote little or no attention to family law at all.¹⁴¹ While several women's historians have considered the role of family law in Reconstruction, their work stresses how mindful Congressmen were to

breathe for his soul's eternal good;—I beseech you, pity the mother who has all your affections, and not one legal right to protect, guide, or educate, the child of her bosom!

Id. at 623.

Many slaveholding characters in Stowe's novel express abolitionist sentiments when confronted with the forced separation of slave families. For instance:

Mrs. Shelby stood like one stricken. Finally, turning to her toilet, she rested her face in her hands, and gave a sort of groan.

"This is God's curse on slavery!—a bitter, bitter, most accursed thing!—a curse to the master and a curse to the slave! I was a fool to think I could make anything good out of such a deadly evil. It is a sin to hold a slave under laws like ours,—I always felt it was. . . ."

"Why, wife, you are getting to be an abolitionist, quite."

"Abolitionist! if they knew all I know about slavery, they *might* talk!"

Id. at 84–85.

141. Perhaps the leading work on Reconstruction includes no discussion of family law as such. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* (1988). Although Foner mentions that the emancipated slaves believed that family rights were an essential part of freedom, he never explores the point. See *id.* at 55–56, 78, 82, 84. Similarly, Foner briefly describes the involuntary apprenticeship laws that Southern states enacted immediately after abolition, but does not consider their implications for the parental rights of the freedmen. See *id.* at 40–41, 201; see also *infra* Part II.C.4. For other prominent accounts of Reconstruction that do not address family law (or mention it only in passing), see HERMAN BELZ, *EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA* 109, 111 (1978); DAN T. CARTER, *WHEN THE WAR WAS OVER: THE FAILURE OF SELF-RECONSTRUCTION IN THE SOUTH, 1865–1867* (1985); JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* (2d ed. 1994).

In contrast, while Herbert Gutman's classic study of the black family covers Reconstruction, its main purpose is to disprove the common claim that slavery left African-Americans socially and culturally disorganized, unable to form lasting familial bonds, and prone to sexual promiscuity. Gutman's book therefore offers detailed, localized accounts of the depth of family ties amongst the emancipated slaves, without systematically attempting to link this history to national Reconstruction politics. See GUTMAN, *supra* note 122, at 366–85, 402–31. For more on the familial relations of the emancipated slaves during Reconstruction, see LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 229–47 (1979). For more work analyzing the internal dynamics of slave families, see JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 137–40 (7th ed. 1994); ANN PATTON MALONE, *SWEET CHARIOT: SLAVE FAMILY AND HOUSEHOLD STRUCTURE IN NINETEENTH-CENTURY LOUISIANA* 205–72 (1992); BRENDA E. STEVENSON, *LIFE IN BLACK AND WHITE: FAMILY AND COMMUNITY IN THE SLAVE SOUTH* 161, 206–57 (1996); Brenda E. Stevenson, *Black Family Structure in Colonial and Antebellum Virginia: Amending the Revisionist Perspective*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES, AND POLICY IMPLICATIONS* 27 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995).

distinguish race and family law. In this view, the Reconstruction Congress stayed as far away from all aspects of family law as possible in order to ensure that coverture rules would survive the emancipation of the slaves.¹⁴² Both of these rubrics, however, focus on only one strand of the conversation at Reconstruction.¹⁴³

142. Patricia Lucie, for instance, has concluded that:

It would be too much to say that [Reconstruction Congressmen] deliberately avoided the necessary changes in the Constitution to achieve equality under law between the races for fear of giving women rights. Rather they judged that when a measure went far enough to limit a state's freedom to legislate on married women's property, family law, marriage, or divorce it went too far in altering the balance between the federal government and the states.

Patricia Lucie, *On Being a Free Person and a Citizen by Constitutional Amendment*, 12 J. AM. STUD. 343, 350 (1978). Similarly, Amy Dru Stanley has observed that "[w]hen confronted with the legal counterpoint between marriage and slavery [during the debates on the 1866 Civil Rights Act], congressional Republicans recast the achievement of emancipation as a question simply of race." Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 480 (1988).

This view has filtered into the legal literature. See, e.g., Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 207-08, 215 (1992) ("When Congress debated the Thirteenth Amendment . . . members inquired whether it would alter the traditional relationship of husband and wife. . . . [T]he Congressmen's anxiety was treated as absurd by sponsors of the Amendment . . . Congress constructed the Thirteenth Amendment . . . to address what it believed to be the root of slavery . . . coerced labor.").

Peggy Cooper Davis's work constitutes a rare exception to the strict separation between family law and race in accounts of Reconstruction. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997). Davis's object, however, is to anchor family privacy doctrines constitutionally by connecting substantive due process to a series of thickly described stories about the history of slavery, antislavery, and Reconstruction that highlight the importance of family law to freedom. See *id.* at 4-13, 216-17, 248-49; see also Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1361-67, 1371-73 (1994); Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 302-11, 314-22, 334-57, 376-94 (1993); Peggy C. Davis, *Law, Science, and History: Reflections Upon In the Best Interests of the Child*, 86 MICH. L. REV. 1096, 1110-19 (1988) (book review).

143. The historical work on the intersection between race and family law in slavery is much stronger. W.E.B. Du Bois, an African-American leader and historian in the first half of this century, perhaps first stressed the restrictions on family formation that slaves endured. His list of "[t]he essential features of Negro slavery in America" read, in full:

1. No legal marriage.
2. No legal family.
3. No legal control over children.

ATLANTA UNIV., PUB. NO. 13, *THE NEGRO AMERICAN FAMILY* 21 (W.E. Burghardt Du Bois ed., 1908). Modern histories of the experience of black women under slavery elaborate this theme. See PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 39, 41-46 (1984) (exploring systematic sexual exploitation of slave women by white men and laws enslaving every child born from these unions); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 12 (1985) ("[For slaveholders,] racial and patriarchal ideologies [were] wedded to the pursuit of profit. As blacks, slave women were exploited for their skills and physi-

The men responsible for Reconstruction clearly did not contemplate preempting all of state family law. But the limits they placed on themselves did not reflect any sense that family matters were beyond federal reach. Reconstruction Congressmen normatively approved of much of the state family law already in place; and were particularly anxious to avoid disturbing state laws that prohibited interracial marriage and enforced hierarchical status relations between husbands and wives, and parents and children.¹⁴⁴ At the same time, these men were ready to intervene in state family law—as both we and they would define the term—when they felt that it was important to do so. They had just survived and supported a Civil War in which the federal government eradicated what many nineteenth-century Americans took to be a domestic relation inherently under state control, and as Congressmen they were ready to deal slavery its final blows. Moreover, the architects of Reconstruction also eagerly involved themselves in family law as we, too, would understand the subject. Aware of the restrictions that American slavery placed on family formation, they were anxious to protect emancipated slaves' families and, more generally, to establish federal standards for certain basic family rights that no state would ever be allowed to fall below. Indeed, they placed

cal strength in the production of staple crops; as women, they performed a reproductive function vital to individual slaveholders' financial interests . . ."); *id.* at 43 ("Because slaveholders valued the reproduction of the plantation work force just as highly as increases in their annual crop . . . , it would be difficult to argue that racial prejudice superseded sexual prejudice as an ordering principle for this peculiar society. . . . [T]he two systems shared a dense, common tangle of roots . . .").

In the legal literature, a number of scholars have drawn on this historical work to offer accounts of slavery that focus on the connections between race and gender. See Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 329 (1996) ("Under slavery, defining who is property and who owns property—who was Black and who was white—then became a matter of regulating reproduction and subordinating women on the basis of a racially stratified construction of gender."); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1438 (1991) ("From slavery on, Black women have fallen outside the scope of the American ideal of womanhood. . . . Black women's historical deviation from traditional female roles has engendered a mythology that denies their womanhood.").

Along somewhat different lines, Akhil Reed Amar and Daniel Widawsky have discussed white masters who enslaved the children they themselves had fathered with slaves in order to ground their argument that the Thirteenth Amendment "provides the best constitutional vehicle to conceptualize and characterize cases [of extreme child abuse]." Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1360, 1366 (1992); see also Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 466–67 (1995) ("Slave women were breeders against their will as women. They were forced to be wet nurses as women, and sexual playthings as women. . . . So, the slavery experience should, I suggest, teach us that intimate association between men and women does not in and of itself guarantee respect and protection.").

144. See *infra* Part II.C.2.

extending significant federal protection to the family at the forefront of their mission. Even a substantial majority of Reconstruction's opponents conceded that the federal government could exercise jurisdiction over family law, arguing against the project on (now constitutionally illicit) policy grounds alone. And Reconstruction's advocates overcame these objections to pass laws and a Fourteenth Amendment that concretely improved the family law governing the freedmen.

1. The Centrality of Family Law for Reconstruction's Architects

When the men behind Reconstruction were convinced that an aspect of state family law merited federal involvement, they displayed no hesitation about intervening. Painfully cognizant of the history of American slavery, these men realized that political freedom was ultimately worthless without the right to marry, to raise a family, and to maintain a home. Refusing to allow the freedom they had given the slaves in the Thirteenth Amendment to turn into "a mere paper guarantee,"¹⁴⁵ they therefore set out to establish that the federal government would protect certain core family rights and to ensure that the freedmen would be able to form recognized family relations. While Reconstruction's congressional supporters saw no need to wrest the basic machinery of family law out of the states' hands, they made clear that there were national standards for family law that no state or section of the nation would be permitted to deviate below.¹⁴⁶

145. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer).

146. Freedmen also frequently expressed their understanding that emancipation necessarily entailed the right to marry freely, parent their children, and keep their families together. In 1864, Spotswood Rice, an African-American soldier in the Union army, wrote his enslaved daughters to reassure them that the federal government would soon promote a familial reunion: "Dont be uneasy my children[.] I expect to have you. If Diggs dont give you up this Government will and I feel confident that I will get you[.]" Letter from Spotswood Rice to My Children (Sept. 3, 1864), in *THE BLACK MILITARY EXPERIENCE* 689, 689 (Ira Berlin et al. eds., 1982). Rice similarly invoked federal authority in his simultaneous letter to Kittey Diggs, his daughters' owner:

my Children is my own and I expect to get them and when I get ready to come after mary I will have bout a powrer and autherity to bring hear away and to exacute vengencens on them that holds my Child[.] you will then know how to talke to me[.] . . . I have no fears about geting mary out of your hands[.] this whole Government gives chear to me and you cannot help your self[.]

Letter from Spotswood Rice to Kittey Diggs (Sept. 3, 1864), in *THE BLACK MILITARY EXPERIENCE*, *supra*, at 690, 690. Immediately after the Civil War, many freedmen enthusiastically pursued just the sort of familial reunification that Spotswood Rice had so eagerly anticipated. As one Freedmen's Bureau agent in South Carolina observed,

[the emancipated slaves] had a passion, not so much for wandering, as for getting together; and every mother's son among them seemed to be in search of his mother;

Reconstruction Congressmen eagerly reported on the state of family law in the former Confederacy. What they found horrified them and spurred them to action. Even as the states were ratifying the Thirteenth Amendment, the South was enacting a flurry of "Black Codes." These laws, which Reconstruction would render specifically illegal,¹⁴⁷ prevented the emancipated slaves from marrying freely, hampered them as they parented their children, and left them (or their wives and daughters) unprotected from rape. Mississippi, for example, had "compel[led] all freedmen to marry whomsoever they [were then] living with, and to support the issue of what was in many cases compulsory cohabitation."¹⁴⁸ South Carolina, Senator Sumner informed his colleagues, left no black child "safe for one moment from a compulsory serfdom." The state permitted the involuntary "apprenticeship" of black children whose parents were "paupers, or unable to afford them a comfortable maintenance, or whose parents [were] not teaching them habits of industry and honesty, or [were] persons of notoriously bad character, or [were] vagrants, or ha[d] been convicted of infamous offenses."¹⁴⁹ The Black Code of Tennessee similarly provided that the children of "vagrant" blacks could "be bound out" involuntarily "to a master by the county court."¹⁵⁰ Kentucky did not criminalize the rape of black women by white men,¹⁵¹ and Sumner reported that black women had "no

every mother in search of her children. In their eyes the work of emancipation was incomplete until the families which had been dispersed by slavery were reunited.

JOHN WILLIAM DE FOREST, *A UNION OFFICER IN THE RECONSTRUCTION* 36 (James H. Croushore & David Morris Potter eds., 2d ed. 1968). An oration commemorating the first anniversary of emancipation similarly called the occasion

a day of gratitude for the freedom of matrimony. Formerly there was no security for domestic happiness. Our ladies were insulted and degraded with or without their consent. Our wives were sold, and husbands bought, children were begotten and enslaved by their fathers, we therefore were polygamists by virtue of our condition. But now we can marry and live together till we die, raise our children and teach them to fear God, O! black age of dissipation, thy days are nearly numbered.

John T. Shuften, *An Outline of the Oration Delivered by Chaplain Henry M. Turner, in Springfield Baptist Church, on January 1st, 1866, Being the Celebration of the First Anniversary of Freedom*, COLORED AM. (Augusta, Ga.), Jan. 13, 1866, at 1, 4.

147. See *infra* Part II.C.4.

148. CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (statement of Rep. Windom) (quoting letter from Lieutenant Stewart Eldridge to Major General Howard (Nov. 28, 1865)).

149. *Id.* at 93 (1865) (statement of Sen. Sumner) (quoting South Carolina statute). On the involuntary apprenticeship of black children after the Civil War, see *infra* Part II.C.4.

150. CONG. GLOBE, 39th Cong., 1st Sess. 509 (1866) (statement of Sen. Donnelly).

151. See *id.* at 651 (statement of Rep. Grinnell). "[T]he rape of a white woman by a negro man [was] punishable by death, and the Governor of the State [could not] commute." *Id.*

Acting independently, Ulysses S. Grant, commanding general of the United States army, attempted to void state rape statutes that imposed different penalties on black and white perpetrators by ordering the military to protect freedmen "from prosecutions in any of said [former

rights that [were] respected" in areas of the Gulf states where no Union soldiers were stationed.¹⁵²

Determined to rectify horrors that they saw as an intrinsic part of slavery, the men responsible for Reconstruction wholeheartedly intervened into the restrictions on family rights that importantly constituted American servitude. Senator John Sherman of Ohio set the tone. The 1866 Civil Rights Act¹⁵³ was the immediate prelude to the Fourteenth Amendment and the statute that Amendment constitutionalized.¹⁵⁴ The Act's first version prohibited legal discrimination in the former Confederate States "by reason or in consequence of a previous condition or status of slavery or involuntary servitude."¹⁵⁵ Sherman, however, immediately objected that such an act would not adequately protect the freedmen.¹⁵⁶ He proposed instead that the bill be amended to "secure to the freedmen of the southern States certain rights, naming them, defining precisely what

Confederate] States charged with offenses for which white persons are not prosecuted or punished in the same manner and degree." General Orders No. 3, Jan. 12, 1866, Adjutant General's Office, reprinted in *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 123 (Edward McPherson ed., 2d ed. 1875).

152. CONG. GLOBE, 39th Cong., 1st Sess. 92 (1865) (statement of Sen. Sumner) (quoting "a trustworthy traveler who has recently traversed the Gulf States").

153. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. The first section of the Act reads, in part: [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id. § 1, at 27. The current version of the 1866 Civil Rights Act is codified at 42 U.S.C. § 1981 (1994).

154. Congress enacted the 1866 Act under its authority to enforce the Thirteenth Amendment, but the Act's constitutionality under that Amendment was disputed. Virtually all scholars agree that the principal purpose of Section 1 of the Fourteenth Amendment was to establish the constitutionality of the 1866 Civil Rights Act and to ensure that it could not be repealed. *See, e.g.,* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 22-23 (1977); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 48 (1988); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

155. CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865) (statement of Sen. Wilson).

156. *See id.* at 41 (statement of Sen. Sherman).

they should be." Specifically, Sherman argued that emancipation would be hollow unless Congress "secure[d] to these freedmen the right to acquire and hold property, to enjoy the fruits of their own labor, *to be protected in their homes and family*, the right to be educated, and to go and come at pleasure." "These," Sherman declared, were "among the natural rights of free men."¹⁵⁷ The Senate accepted Sherman's proposal with little discussion, and immediately amended the 1866 Civil Rights bill to include, *inter alia*, the rights "to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as it is enjoyed by white citizens."¹⁵⁸ Although the amended bill was less explicit in its intervention into family law than Sherman had been, to the nineteenth-century mind extending equal contractual and property rights to freedmen encompassed marital and parental rights.¹⁵⁹

Michigan Senator Jacob Howard articulated the underlying conception of federalism perhaps most eloquently.¹⁶⁰ There was, he declared, "no invasion of the legitimate rights of the States." The Thirteenth Amendment had guaranteed the former slaves liberty, and "simply

157. *Id.* at 42 (statement of Sen. Sherman) (emphasis added). Later, Senator Sumner also stressed the importance of providing specific protection for family rights under the Civil Rights Act. See *id.* at 91 (statement of Sen. Sumner) (quoting regulations that accompanied 1861 proclamation emancipating Russian serfs).

158. *Id.* at 42.

159. Mainstream nineteenth-century legal theory understood a man's right to control and protect his wife and children as a property right. See GROSSBERG, *supra* note 93, at 25. As Ohio Representative Chilton White, a defender of slavery, put it, a man had "property in the service of [his] child" and a husband had "a right of property in the service of his wife." CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865); see also CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Wood) ("The social and domestic relations are equally matters of individual ownership with flocks and herds, houses and lands. The affections of a man's wife and children are among the dearest of his possessions, and as such are under the protection of the law."). All sides of the abolitionist debate saw the right to marry as a contractual right. Thomas R.R. Cobb, the author of an apologist treatise on slavery law, reported that "[t]he inability of the slave to contract extends to the marriage contract, and hence there is no recognized marriage relation in law between slaves." 1 COBB, *supra* note 107, at 242-43. Abolitionist legal scholar William Goodell lamented that "[a] slave [could not] even contract matrimony." GOODELL, *supra* note 119, at 106 (emphasis added). Frederick Douglass, the leading black abolitionist and black intellectual of the nineteenth century, informed his audiences that he was "ready to prove, by the laws of slave states, that three million of the people of those States are utterly incapacitated to form marriage contracts." Frederick Douglass Discusses Slavery (Dec. 8, 1850), in 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 313 (Herbert Aptheker ed., 1951) (emphasis added).

160. See CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard).

reliev[ing] the slave from the obligation to render service to his master" would leave him far from free. Howard refused to allow the former Confederacy and its sympathizers to trap the emancipated slaves in such a state. The purpose of Reconstruction was to make the bondman "the opposite of a slave, to make him a freeman." And as was "the universal understanding of the American people," a freeman had "the right of having a family, a wife, children, home." "What definition," Howard asked, would "you attach to the word 'freeman' that does not include these ideas?"¹⁶¹ Faced with a history of servitude that systematically violated private boundaries and armed with a conviction that family rights were essential to freedom, the Reconstruction Congress felt no dissonance in extending its work into the realm of family law.

The same vision of federalism guided the enactment of the Freedmen's Bureau Bill,¹⁶² the second prelude to the Fourteenth Amendment. Proponents started with the premise "that the poorest man, be he black or white, . . . is as much entitled to the protection of the law as the richest and proudest man."¹⁶³ Convinced that extending freedom meant protecting family rights, they made their conviction that the federal government should do so clear. Advocates like Senator Henry Wilson of Massachusetts stressed that the Freedmen's Bureau Bill would guarantee that every man's family and home would be legally protected. The Bill meant that

the poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land . . . [T]he poor man's cabin, though it may be the cabin of a poor freedman in

161. *Id.* (statement of Sen. Howard).

162. Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866). Section 14 of the Act reads, in part:

[I]n every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States, the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery.

Id. § 14, at 176-77.

163. CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Sen. Wilson).

the depths of the Carolinas, is entitled to the protection of the same law that protects the palace of a Stewart or an Astor.¹⁶⁴

Massachusetts Representative Thomas Eliot agreed that family rights were central to freedom. "Slavery," he reminded his colleagues,

cannot know a home. Where the wife is the property of the husband's master, and may be used at will; where children are bred, like stock, for sale; where man and woman, after twenty years of faithful service from the time when the priest with the owner's sanction by mock ceremonies pretended to unite them, are parted and sold at that owner's will, there can be no such thing as home. Sir, no act of ours can fitly enforce their freedom that does not contemplate for them the security of home.¹⁶⁵

Safeguarding family rights was at the core of the Freedmen's Bureau Bill and the entire Reconstruction project.

2. The Consensus on Federal Jurisdiction over Family Law

Reconstruction's advocates were so committed to the proposition that family rights were "civil rights" within the meaning of their legislation, that they refused to retreat from this position even when their opponents focused on their two deepest vulnerabilities, the accusation that they favored interracial sex and procreation (always referred to as amalgamation or miscegenation)¹⁶⁶ and the charge that Reconstruction would disturb

164. *Id.* (statement of Sen. Wilson).

165. *Id.* at 2779 (statement of Rep. Eliot).

166. The term "miscegenation" originated in an anonymous pamphlet first published in December 1863 that purported to advocate widespread interracial marriage and to congratulate the Republican Party for its leadership on the issue. The tract, MISCEGENATION: THE THEORY OF THE BLENDING OF THE RACES, APPLIED TO THE AMERICAN WHITE MAN AND NEGRO (Literature House 1970) (1864), claimed abolitionist authorship. On that pretense, its authors sent the work to several prominent antislavery leaders for review and garnered some tentative praise in return. It soon became clear, however, that ardent opponents of Lincoln had actually written and distributed the pamphlet as a hoax meant to ensnare the president and his party before the 1864 election. Democrats like Representative Samuel Sullivan Cox of Ohio cited the abolitionists' comments as evidence that the Republican Party was "moving steadily forward to perfect social equality of black and white, and can only end in this detestable doctrine of—miscegenation!" CONG. GLOBE, 38th Cong., 1st Sess. 712 (1864). Despite such efforts, however, the play seems to have had little effect on the 1864 election results. (Representative Cox, for instance, lost his congressional seat.) Its most lasting impact was linguistic. "Miscegenation," a clear pejorative, quickly became white America's term of choice for interracial sex and marriage. See MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH 144–45 (1997); MCPHERSON, *supra* note 128, at 789–91; FORREST G. WOOD, BLACK

state laws subordinating wives to husbands. Southern apologists understood full well that their opponents in Congress intended to abolish the "domestic relation" of slavery, including its restrictions on family formation—family law as both we and they would understand the term. What's more, they conceded that the federal government could regulate family law—in both senses—if it wished. Their opposition, instead, explicitly and continually expressed the anxiety that extending federal equal protection to family law would unseat state anti-miscegenation and coverture laws. In response, many of the men responsible for Reconstruction reaffirmed their normative and political commitment to preserving these particular state family laws. Strikingly, however, they never defended themselves by explaining that the entire category of family law, as such, was beyond the reach of federal power.

White America's fear of interracial sex and marriage, the most dreaded examples and the purportedly inevitable consequences of social mixing between whites and blacks, reached a peak after the Civil War.¹⁶⁷ Although the sexual exploitation of black women by white men had been a systemic part of slavery,¹⁶⁸ abolition tore down the absolute distinction between slave and master, leaving whites eager to impose new boundaries between the races.¹⁶⁹ "Racial purity" became a symbolic linchpin of white supremacy in an era in which the appearance of evolutionary paradigms encouraged a far more demographic conception of the polity, one that located the nation's fate in reproductive activity itself.¹⁷⁰ In 1866, Horatio R. Storer, the leader of the nineteenth-century campaign against abortion,

SCARE: THE RACIST RESPONSE TO EMANCIPATION AND RECONSTRUCTION 53–62 (1968); Sidney Kaplan, *The Miscegenation Issue in the Election of 1864*, 34 J. NEGRO HIST. 274, 277–98 (1949).

167. See DAVID H. FOWLER, *NORTHERN ATTITUDES TOWARD INTERRACIAL MARRIAGE: LEGISLATION AND PUBLIC OPINION IN THE MIDDLE ATLANTIC AND THE STATES OF THE OLD NORTHWEST, 1780–1930*, at 238 (1987); HODES, *supra* note 166, at 1–2, 10. This anxiety should be distinguished from the actual incidence of interracial marriage, which almost vanished after the Civil War. See Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 315–17 (1995).

168. See *supra* text accompanying notes 132–138.

169. See, e.g., HODES, *supra* note 166, at 147–48, 157–58, 199–202; Emily Field Van Tassel, "Only the Law Would Rule Between Us": *Anti-Miscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 896–98 (1995).

170. As one white Southerner explained at the time:

If we have social equality, we shall have intermarriage, and if we have intermarriage we shall degenerate; we shall become a race of mulattoes; we shall be another Mexico; we shall be ruled out from the family of white nations. Sir, it is a matter of life and death with the Southern people to keep their blood pure.

DAVID MACRAE, *THE AMERICANS AT HOME* 297 (E. P. Dutton & Co. 1952) (1870).

published a highly influential essay that compared the fertile female body to America's Great Plains and warned native-born white women that "the future destiny of the nation" depended upon their relative birth rates.¹⁷¹ During Reconstruction, anti-miscegenation laws, which had assumed a relatively minor position in Southern slave codes, spread to a number of Southern states for the first time.¹⁷²

In the midst of this anti-miscegenation scare, an emerging woman's rights movement was beginning to contest many other aspects of state family law. In the 1860s, coverture rules still governed familial status, dissolving the legal identity of wives into their husbands.¹⁷³ Married women had little, or no, right to contract, own property, file suit, or obtain custody of their children.¹⁷⁴ Children were similarly restricted, with state family codes granting parents in general and fathers in particular almost unquestioned custody and control.¹⁷⁵ By the mid-nineteenth century, however,

171. HORATIO ROBINSON STORER, *WHY NOT?* 85 (Boston, Lee and Shepard 1866). For a brilliant account of Storer's campaign, see CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 217–44 (1985); see also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 299 (1992) ("Translating the creed of manifest destiny into reproductive terms, Storer fused America's populations, territories, and women in a powerful image of reproductive potentiality. . . . In this vision, the state was its populations, and its identity was determined by the reproductive conduct of its female citizens."). For more on the eugenics movement, see MAROUF A. HASIAN, JR., *THE RHETORIC OF EUGENICS IN ANGLO-AMERICAN THOUGHT* (1996); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 843–59 (1986).

172. Alabama, Georgia, Mississippi, and South Carolina had no anti-miscegenation statutes before the Civil War. See FOWLER, *supra* note 167, at 217, app. During Reconstruction, each of these states prohibited interracial union. See Van Tassel, *supra* note 169, at 903–05; Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371, 373–75 (1994) (discussing Alabama).

In all, thirty-eight states and commonwealths banned interracial marriage during the nineteenth century. Anti-miscegenation laws were concentrated in the South and West, with the Northeast and Midwest relying on private prejudice to accomplish the same end. See GROSSBERG, *supra* note 93, at 127.

173. See, e.g., ZEPHANIAH SWIFT, *A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES* 91 (Hartford, Oliver D. Cooke 1810) ("[T]he law considers the husband and wife to be one person, and their interest to be the same . . .").

174. See GROSSBERG, *supra* note 93, at 25; Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1368 (1983) (noting that "wives were treated as civilly dead" in many situations). See generally NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982).

175. See, e.g., *State v. Paine*, 23 Tenn. (4 Hum.) 523, 533 (1843) (noting common law status of children "as the property of the husband and the father, having no will of their own, no rights in contradiction to his power and authority, and only considered *through him* as a portion of the community in which they lived"); GROSSBERG, *supra* note 93, at 235; Jill Elaine Hasday, *Before Privacy: The Origins of Public Intervention Against Child Abuse* 45–49 (Mar. 25, 1997) (unpublished manuscript, on file with author).

organized feminist challenges to this regime were causing widespread alarm.¹⁷⁶

The simplest and most effective retort to charges that Reconstruction would undermine state anti-miscegenation and coverture laws would have been to explain that, while Reconstruction would guarantee civil equality, it would not disturb state jurisdiction over family law. After all, legal thought in this period carefully distinguished between "civil rights," the basic prerequisites of freedom that all agreed the 1866 Civil Rights Act and the Fourteenth Amendment would protect, and "social rights," which almost everyone thought that Reconstruction would not touch.¹⁷⁷ The definition of each category was in flux,¹⁷⁸ and Reconstruction's supporters could have easily argued that family law fell entirely within the purview of social rights, to which federal action would not extend. But the advocates of Reconstruction, determined to protect freedmen in their marriages and families, refused to repudiate federal jurisdiction.

Indeed, as late as the end of the nineteenth century, fathers still successfully utilized stubborn child laws, which permitted the criminal prosecution of disobedient or unruly children. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*, BOSTON 1880-1960, at 190-91 (1988); S.M. WILCOX, *U.S. BUREAU OF EDUCATION, LEGAL RIGHTS OF CHILDREN* 27 (Washington, D.C., U.S. Bureau of Education Circulars of Information 1880).

176. See *infra* text accompanying notes 186-189. For an overview of the nineteenth-century woman's rights movement, see ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869* (1978); ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* (rev. ed. 1975); AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920* (W.W. Norton & Co. 1981) (1965).

177. Lawmakers also classified rights into a third, "political" category, but that was largely irrelevant to the debate over the status of anti-miscegenation. For supporters' explanations of the reach of the 1866 Civil Rights Act, see CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) (statement of Sen. Trumbull) (explaining that "[t]he bill is applicable exclusively to civil rights"); *id.* at 1117 (statement of Rep. Wilson) (noting that bill did not mean "that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal").

The Supreme Court similarly resorted to the distinction between civil, political, and social rights in *Plessy v. Ferguson*, 163 U.S. 537 (1896), concluding that "[t]he object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality," *id.* at 544.

For more on the distinction between civil, political, and social rights, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1014-23 (1995); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119-29 (1997); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause*, Dr. Du Bois, and Charles Hamilton Houston, 74 J. AM. HIST. 884, 886-90 (1987).

178. See McConnell, *supra* note 177, at 1017; Siegel, *supra* note 177, at 1119-29; Tushnet, *supra* note 177, at 886-90.

Although the slur of miscegenation was explosive, Reconstructionists chose a less sweeping response. They ridiculed the suggestion that whites would want to marry blacks and claimed that, regardless, Reconstruction would not affect "separate but equal" anti-miscegenation laws on the ground that such statutes restricted and punished whites and blacks equally. Rather than disclaiming federal jurisdiction over family law, Illinois Senator Lyman Trumbull, Chair of the Senate Judiciary Committee and principal author of the 1866 Civil Rights Act, was sorry to hear that in Senator Garret Davis's Kentucky "there [was] such a disposition to amalgamation that nothing but penalties and punishments [could] prevent it."¹⁷⁹ Laws against interracial marriage were, he stressed, unnecessary "where there [was] no disposition for this amalgamation."¹⁸⁰ Representative John Farnsworth of Illinois agreed and declared that neither he "nor [his] friends require[d] any restraining laws to prevent [them] from committing any error in that direction."¹⁸¹

Trumbull, a respected constitutional lawyer and former state supreme court justice,¹⁸² was also quick to assert that Reconstruction would not touch state laws that prohibited black men from marrying white women as long as these statutes placed the same penalties on white men who attempted to marry black women.¹⁸³ Senator William Pitt Fessenden of Maine, who led the Joint Committee on Reconstruction, seconded the argument that there was "no discrimination" in statutes that gave a black man "the same right [or lack thereof] to make a contract of marriage with a white woman that a white man has with a black woman."¹⁸⁴ And Farnsworth went further. If one of his colleagues feared the temptation of amalgamation, he had no hesitation about enacting a prophylactic *federal* statute. Farnsworth would "very cheerfully join with [the tempted member] in voting the restraining influence of a penal statute." He would "vote to punish [amalgamation] by confinement in the State prison, or, if [his colleague] please[d], by hanging—anything rather than [that Congressmen] should be betrayed into or induced to form any such unnatural relations."¹⁸⁵

179. CONG. GLOBE, 39th Cong., 1st Sess. 420 (1866) (statement of Sen. Trumbull).

180. *Id.* at 600 (statement of Sen. Trumbull).

181. *Id.* at 204 (statement of Rep. Farnsworth).

182. For Trumbull's biography, see 19 *DICTIONARY OF AMERICAN BIOGRAPHY* 19–20 (Dumas Malone ed., 1936); HORACE WHITE, *THE LIFE OF LYMAN TRUMBULL* (1913).

183. See CONG. GLOBE, 39th Cong., 1st Sess. 322, 420 (1866) (statement of Sen. Trumbull).

184. *Id.* at 505 (statement of Sen. Fessenden).

185. *Id.* at 204–05 (statement of Rep. Farnsworth). According to Michael McConnell and Steven Bank, Reconstruction's advocates eventually abandoned their claim that state anti-miscegenation laws survived the Fourteenth Amendment as long as those statutes conformed to

Reconstruction's advocates also did not resort to localism in order to counter accusations that their work would undermine state coverture doctrines. Rather than contending that the federal government had no jurisdiction over family law, they expressed their substantive agreement with state laws subordinating wives to husbands (and children to parents) and insisted that their intervention into state family codes was carefully tailored to preserve such interfamilial hierarchy, granting black women and children only the rights that their white counterparts enjoyed. As Representative Henry Bromwell of Illinois explained, there was no need to give white women the legal entitlements that black men needed so desperately:

Ladies are a part of the family with most of us. . . . [I]nasmuch as the negro is not even of the white family is of a different race and so treated, . . . you have no right to strip him of every attribute of manhood You do not associate with him; you do not affiliate with him; you do not go with him in counsel; you do not sympathize with him None of these causes operate in regard to the family¹⁸⁶

For this reason, Representative Samuel Shellabarger of Ohio continued, the whole effect of the 1866 Civil Rights Act was

to require that whatever rights . . . the States may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not do so as to one race, you shall treat the other likewise. It does not prohibit you from discriminating between citizens of the same race, or of different races, as to what their rights to testify, to inherit, &c., shall be. But if you do discriminate, it must not be "on account of race, color, or former condition of slavery."¹⁸⁷

the requirements of separate but equal. McConnell reports that "not a single supporter of the 1875 [Civil Rights] Act attempted to deny that under their interpretation, anti-miscegenation laws were unconstitutional." McConnell, *supra* note 177, at 1018. Similarly, Bank contends that

supporters of the Civil Rights Act of 1875 . . . were unwavering in their rejection of symmetrical equality. Moreover, when directly confronted with the miscegenation question, several Republicans called for the repeal of anti-miscegenation statutes on the basis of their understanding of equality, and no supporter of the bill sought to avoid the issue by defending the constitutionality of anti-miscegenation laws or by invoking the principle of symmetrical equality.

Bank, *supra* note 167, at 305.

186. CONG. GLOBE, 39th Cong., 1st Sess. 410 (1866) (statement of Rep. Bromwell).

187. *Id.* at 1293 (statement of Rep. Shellabarger). Less articulately, Senator Trumbull silenced contentions that the 1866 Civil Rights Act would give wives an equal right to contract with a curt "Oh, no." *Id.* at 1782 (statement of Sen. Trumbull).

Indeed, Representative James Wilson of Iowa, Chair of the House Judiciary Committee and floor manager of the Civil Rights Act, noted that he had successfully amended the Act early on to read that all citizens would enjoy the same legal protection "*as is enjoyed by white citizens*" because he believed this phrase clearly indicated that the bill preserved the legal distinctions states made between men and women, and parents and children.¹⁸⁸ Building on this precedent, Pennsylvania Representative Thaddeus Stevens countered accusations that the Fourteenth Amendment would permit Congress to extend equal property rights to married women by stating only that "[w]hen a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality."¹⁸⁹ Reconstruction's advocates normatively accepted certain aspects of state family law, but they refused to deny federal jurisdiction.

Moreover, as the very existence of this debate suggests, a strong majority of Reconstruction's opponents agreed that marriage *was* a civil right within the purview of the federal government. They, too, could have relied on claims about the inherent and exclusive localism of family law to counter much of the Reconstructionist project in one fell swoop. Yet although they found the substantive policies of Reconstruction horrifying and much preferred state control, Reconstruction's critics conceded that the federal government could regulate family law.

Indiana Senator Thomas Hendricks's charge that Reconstruction would overturn state laws prohibiting interracial marriage was rooted in his understanding that "to marry according to one's choice [was] a civil right" the federal government could protect.¹⁹⁰ As Senator Davis explained, federal legislation like the Freedmen's Bureau Bill "provide[d] that the freedman shall be entitled to all the civil rights and privileges that a white man is entitled to" and white men, of course, had an uncontroverted right to marry white women.¹⁹¹ Even if this sort of reasoning was flawed, Maryland Senator Reverdy Johnson, a moderate and former United States Attorney General,¹⁹² anticipated that some courts would adopt it and that

188. *Id.* at app. 157 (1865) (statement of Rep. Wilson) (emphasis added).

189. *Id.* at 1064 (statement of Rep. Stevens).

190. *Id.* at 318 (statement of Sen. Hendricks); see also *id.* at 632 (statement of Rep. Thornton).

191. *Id.* at 417–18 (statement of Sen. Davis); see also *id.* at app. 181 (1865) (same); *id.* at 598 (1866) (same); *id.* at 604 (statement of Sen. Cowan); *id.* at 629 (statement of Rep. Marshall).

192. See 10 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 182, at 113.

interracial marriages would destroy "the harmony and peace of society."¹⁹³ Indeed, even President Andrew Johnson's veto of the 1866 Civil Rights Act, which Congress ultimately overrode, acknowledged that the bill lawfully reached state interracial marriage statutes. The sole reassurance that Johnson's veto message could offer to those who rightly feared that the 1866 bill would soon become law was to explain that some state anti-miscegenation laws could survive the bill's passage under the formal equality (separate but equal) arguments that Reconstructionist Congressmen had developed.¹⁹⁴ Only Illinois Representative Samuel Moulton ever clearly asserted that marriage was not a civil right within the meaning of the Reconstruction statutes and the Fourteenth Amendment, insisting instead that marriage was simply "a matter of mutual taste, contract, and understanding between the parties." But he knew that he was in the minority.¹⁹⁵ The Reconstruction consensus that the federal government had jurisdiction over family law was profound and widespread. Reconstruction's advocates were intent on creating statutory and constitutional protection for familial rights, and most of their opponents agreed that they could. Indeed, as this section suggests, the case for exclusive localism in family law at Reconstruction was almost entirely rooted in normative concerns that would now be considered constitutionally illegitimate.

3. Status Relations and the Case for Localism at Reconstruction

In the thousands of pages of congressional debate leading to the Fourteenth Amendment, Congressmen volunteered only two justifications for keeping the federal government far away from the family. First, some

193. CONG. GLOBE, 39th Cong., 1st Sess. 505-06 (1866) (statement of Sen. Johnson).

194. As President Johnson explained:

I do not say this bill repeals State laws on the subject of marriage between the two races, for as the whites are forbidden to intermarry with the blacks, the blacks can only make such contracts as the whites themselves are allowed to make, and therefore cannot, under this bill, enter into the marriage contract with the whites. I cite this discrimination, however, as an instance of the State policy as to discrimination, and to inquire whether, if Congress can abrogate all State laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally, Congress may not also repeal the State laws as to the contract of marriage between the two races?

Id. at 1680 (veto message of President Johnson).

195. *Id.* at 632 (statement of Rep. Moulton); see also *id.* (statement of Rep. Moulton) ("[It is not] a civil right for a white man to marry a black woman or for a black man to marry a white woman. It is a simple matter of taste, of contract, of arrangement between the parties."); *id.* at 633 (statement of Rep. Moulton) ("[M]arriage is not a civil right, as contemplated by the provisions of this [1866 Civil Rights] bill.").

members claimed to see no logical reason why Reconstruction's massive intervention into race relations should unsettle family law. This discourse was most notable for its thinness, respecting the status quo without explication. Ohio Representative John Bingham, for instance, dismissed the notion that the President's suspension of Confederate "municipal authorities"¹⁹⁶ reached Southern marriages as "Paganism," without further inquiry.¹⁹⁷ More prominently, however, Congressmen voiced the concern that extending Reconstruction's guarantee of equal protection to family law would threaten the social segregation of the races and disrupt the legal hierarchies placing husband over wife, and parent over child. This latter, more substantial rationale had deep antebellum roots in proslavery thought.¹⁹⁸ Without question, it is now contrary to the very Fourteenth Amendment that localist Congressmen opposed.¹⁹⁹

Rather than argue that the federal government lacked jurisdiction over family law, Reconstruction's critics elaborated the disastrous implications for public policy—and private relationships—of introducing federal equal protection into family law. Senator Garrett Davis, certain that marriage would be a civil right within the meaning of the Reconstruction enactments,²⁰⁰ warned that Reconstruction would likely override state anti-miscegenation laws and state penal codes that subjected black men who raped white women to death while only imprisoning whites who committed the same crime.²⁰¹ Particularly incensed over the threat to asymmetrical rape statutes, Davis declared that such a transformation was "preposterous, . . . absurd and unsound."²⁰² His Kentucky, Davis assured his fellows, would never submit to such a corruption of its law, notwithstand-

196. *Id.* at 159 (statement of Rep. Smith).

197. *Id.* (statement of Rep. Bingham); *see also id.* at 479 (statement of Sen. Saulsbury).

198. *See supra* Part II.B.1.

199. *See, e.g.,* *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down gender-based alimony law under Equal Protection Clause on ground that statute preserved common law status relations, "reinforcing stereotypes about the 'proper place' of women and their need for special protection"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("To deny this fundamental freedom [marriage] on so unsupportable a basis as the racial classifications embodied in [state anti-miscegenation] statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."); *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (beginning long line of cases striking down de jure racial segregation and noting in context of education that "[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

200. *See supra* note 191 and accompanying text.

201. *See* CONG. GLOBE, 39th Cong., 1st Sess. 598 (1866) (statement of Sen. Davis).

202. *Id.* (statement of Sen. Davis).

ing "[a]ll the legislation that may be devised by Congress, and all the oppressive and unjust discriminations sought to be introduced against the white man."²⁰³

Senator Edgar Cowan of Pennsylvania, a conservative Republican, agreed. He wondered whether his colleagues really wanted to see "the President . . . intervene with bayonet and ball" if a state punished a black man for marrying a white woman. Was that, Cowan asked, "prudent, politic, lawful, or constitutional?"²⁰⁴ Representative John L. Dawson of Pennsylvania was even more direct. "[T]his Government," he declared, "was made by and for the white race." Under abolitionist guidance, federalizing family law would "involve[] and demand[] social equality." "[Black] children [would] attend the same schools with white children" and interracial marriages would soon follow, with the black man enjoying "the privilege of free miscegenation accord[ed] him."²⁰⁵

Along much the same lines, Reconstruction's congressional opponents also argued that involving the federal government in family law would threaten the legal subordination of wives to husbands and children to parents. In Congress, Senator Cowan raised his voice again to predict that allowing Reconstruction to disturb state family law with notions of equal protection would endanger "the involuntary servitude of [his] child to [him], . . . or the *quasi* servitude which the wife to some extent owes to her husband."²⁰⁶ While the Senator never denied federal jurisdiction over family law, Cowan urged narrower statutes on the ground that Congress did not want to "actually liberate the minor from the control of his parent or guardian" or to "actually entitle the wife to be paid for her services, [rather than having her wages] go to the husband."²⁰⁷ Similarly, New York Repre-

203. *Id.* at 397 (statement of Sen. Davis). Following Davis's line of argument, Representative Andrew J. Rogers of New Jersey asked:

Has Congress the power to enter the domain of a State, and destroy its police regulations with regard to the punishment inflicted upon negroes? For instance, the State of Kentucky, provides by law that if a negro man commits a rape upon a white woman, he shall be punished by death; but a white man committing a rape upon a white woman is to be punished by imprisonment.

Id. at 1121 (statement of Rep. Rogers).

204. *Id.* at 604 (statement of Sen. Cowan).

205. *Id.* at 541 (statement of Rep. Dawson).

206. *Id.* at 499 (statement of Sen. Cowan).

207. *Id.* at 1784 (statement of Sen. Cowan); *see also id.* at 499 (same). Cowan similarly observed:

[A] married woman in no State that I know of has a right to make contracts generally. . . . Now, I ask Senators . . . whether they are willing . . . to interfere with regard to the contracts of married women. . . . I say that this bill . . . confers upon married

sentative Robert Hale warned that the Fourteenth Amendment's "extremely vague, loose, and indefinite" language would enable Congress to guarantee married women equal property rights, at a time when one could not find "a State in the Union where disability of married women in relation to the rights of property [did] not to a greater or less extent still exist." "[S]ubjects of this character," he insisted, would consequently better remain objects of exclusively state concern.²⁰⁸

Such localist appeals, however, were unavailing. Reconstruction's opponents never effectively countered their adversaries' contention that certain basic family rights were essential to freedom and that Congress could guarantee these rights without endangering state anti-miscegenation and coverture laws. The results—the Civil Rights and Freedmen's Bureau Acts of 1866 and the Fourteenth Amendment—concretely improved the family law governing the emancipated slaves.

4. Outcome

The Reconstruction enactments quickly altered the landscape of family law for the freedmen. Although the impact of this federal law varied and could occasionally (as with the postwar challenges to anti-miscegenation discussed below) go beyond what Congress had intended,²⁰⁹ the consequences of Reconstruction in the postwar period importantly reflected the familial concerns of its congressional authors. The fate of state laws permitting the involuntary apprenticeship of freedchildren is one of the more notable cases in point.²¹⁰

women, upon minors, upon idiots, upon lunatics . . . the right to make and enforce contracts

Id. at 1781–82 (statement of Sen. Cowan).

208. *Id.* at 1064 (statement of Rep. Hale).

209. See *infra* Part II.D.2.

210. Laura Edwards has recently written a fascinating account of the ways in which North Carolina freedmen used their new legal ability to marry as the foundation from which to attack racial discrimination of many sorts. See LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* 40–54 (1997) [hereinafter EDWARDS, *GENDERED STRIFE AND CONFUSION*]; Laura F. Edwards, "The Marriage Covenant Is at the Foundation of All Our Rights": *The Politics of Slave Marriages in North Carolina After Emancipation*, 14 *LAW & HIST. REV.* 81 (1996) [hereinafter Edwards, *The Marriage Covenant*]. There is, however, less of a litigated record on the right of freedmen to marry. While the white South fiercely contested the former slaves' efforts to control their children and their children's labor, they frequently encouraged the freedmen to marry. Marriages among the emancipated slaves, it was thought, would make the freedmen economically responsible for themselves and their families, protecting the public fisc from the claims of unattached women and children and encouraging all former slaves to return to productive labor. See EDWARDS, *GENDERED STRIFE AND CONFUSION*, *supra*, at 34–40; Edwards, *The Marriage Covenant*, *supra*, at 91–94;

Enacted throughout the South in the immediate aftermath of the Civil War, these statutes attempted to recreate the conditions of bondage—including slavery's restrictions on family formation—as closely as possible.²¹¹ Legalizing family separation and ignoring all parental rights, they authorized local judges to apprentice black children without their parents' consent and under conditions resembling slavery in their harshness and lack of compensation.²¹² More than twenty-five hundred children were so "apprenticed" within the first month after emancipation, often to their former masters.²¹³ By 1867, approximately ten thousand freedchildren had been bound in Maryland alone.²¹⁴ The Reconstruction Congress specifically targeted these laws as violations of parental prerogatives,²¹⁵ and its work soon rendered them void.

PETER KOLCHIN, *FIRST FREEDOM: THE RESPONSES OF ALABAMA'S BLACKS TO EMANCIPATION AND RECONSTRUCTION* 59–60 (1972); LITWACK, *supra* note 141, at 240–41.

211. Many freedmen understood involuntary apprenticeship in explicitly familial terms and argued that countervailing federal intervention was justified and required to protect the family rights of the emancipated slaves. For instance, leaders of the African-American community in Baltimore called on President Johnson to sign the 1866 Civil Rights bill

[b]ecause everywhere throughout the State our homes are invaded and our little ones seized at the family fireside, and forcibly bound to masters who are by law expressly released from any obligation to educate them either in secular or religious knowledge; and because the Legislature of Maryland would not, by the repeal of this law, give us the right to a home or guarantee to us the safety of our children around the hearth while we were at labor, or their support in our old age.

The Civil Rights Bill: Petition of Loyal Colored Men, BALTIMORE AM. AND COM. ADVERTISER, Mar. 19, 1866, at 1.

212. See S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. 172–74, 180–81, 187–88, 190–91, 197–98, 200–02, 208, 224–26 (1867) (reprinting Southern Black Codes on apprenticeship); ROBERTA SUE ALEXANDER, *NORTH CAROLINA FACES THE FREEDMEN: RACE RELATIONS DURING PRESIDENTIAL RECONSTRUCTION, 1865–67*, at 45, 89, 113 (1985); GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN'S BUREAU* 80, 179 (1955); EDWARDS, *GENDERED STRIFE AND CONFUSION*, *supra* note 210, at 39, 41–45; BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY* 139–42 (1985); FONER, *supra* note 141, at 201; GUTMAN, *supra* note 122, at 402; WILMA KING, *STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH-CENTURY AMERICA* 151–52 (1995); KOLCHIN, *supra* note 210, at 63–64; LITWACK, *supra* note 141, at 191, 237–38, 365–66; Edwards, *The Marriage Covenant*, *supra* note 210, at 97–98, 101–06, 116–19; W.A. Low, *The Freedmen's Bureau and Civil Rights in Maryland*, 37 J. NEGRO HIST. 221, 229, 231–32 (1952); John B. Myers, *The Freedman and the Law in Post-Bellum Alabama, 1865–1867*, 23 ALA. REV. 56, 62–63, 66–67 (1970); Rebecca Scott, *The Battle over the Child: Child Apprenticeship and the Freedmen's Bureau in North Carolina*, 10 PROLOGUE 100, 104 (1978); Richard Paul Fuke, *Black Marylanders, 1864–1868*, at ch.10 (1973) (unpublished Ph.D. dissertation, University of Chicago) (on file with author); Joseph Patrick Reidy, *Masters and Slaves, Planters and Freedmen: The Transition from Slavery to Freedom in Central Georgia, 1820–1880*, at 213–18 (1982) (unpublished Ph.D. dissertation, Northern Illinois University) (on file with author).

213. See KING, *supra* note 212, at 151; see also FONER, *supra* note 141, at 40–41.

214. See Low, *supra* note 212, at 233.

215. See *supra* text accompanying notes 149–150.

Immediately after the establishment of the Freedmen's Bureau, emancipated slaves turned to the federal agency for assistance in liberating their children from unwanted apprenticeships.²¹⁶ "Not a day passes," reported one Annapolis officer, "but my office is visited by some poor woman who has walked perhaps ten or twenty miles to see the agent of the bureau, and try to procure the release of her children taken forcibly away from her and held to all intents and purposes in slavery."²¹⁷ In 1867, this man estimated that the parents of apprenticed children had registered no less than two thousand complaints with his office in the past year.²¹⁸ The Freedmen's Bureau was not able to help every parent who came to its door, and some agents and offices were less devoted to that task than others.²¹⁹ But many Bureau officials recognized that Reconstruction had given the former slaves a right to raise their children, to control their children's labor, and to keep their families together, and they eagerly combated involuntary apprenticeship on that basis. In setting out the rules under which his office would operate, Eliphalet Whittlesey, the assistant commissioner for the Freedmen's Bureau in North Carolina, made clear that "children may be bound to service *with the consent* of their parents only." As he explained, "[i]n law parents [including freedmen] have a right to their children. The principle is an important one, though in exceptional cases, its application may work badly."²²⁰ Superintendent Allen G. Brady similarly understood involuntary apprenticeship in terms of the rights of freedparents, rather than their children, and assailed the practice on that ground: "Great care," he insisted to his subordinates, "must be exercised that *none* except orphans, or children whose parents give their consent, be bound out as apprentices."²²¹

216. See *FIELDS*, *supra* note 212, at 149; *FONER*, *supra* note 141, at 201; *KING*, *supra* note 212, at 144, 152–54; *KOLCHIN*, *supra* note 210, at 64–67; *LITWACK*, *supra* note 141, at 237–38; *Low*, *supra* note 212, at 233–34; *Reidy*, *supra* note 212, at 215–16.

During the months before Congress established the Freedmen's Bureau, the United States Army, acting at the direction of particular local commanders in the occupied South, took a leading role in combatting the involuntary apprenticeship of emancipated slaves. See *FIELDS*, *supra* note 212, at 148–49; *Fuke*, *supra* note 212, at 185–91.

217. O.O. HOWARD, REPORT OF THE COMMISSIONER OF THE BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS 41 (Washington, Government Printing Office 1867).

218. See *id.*

219. See *KING*, *supra* note 212, at 152; *Scott*, *supra* note 212, at 101–02, 104, 107–08.

220. *Scott*, *supra* note 212, at 102–03.

221. *Id.* at 109. Along the same lines, Oliver Otis Howard, the commissioner of the Freedmen's Bureau in Maryland, decreed "that children cannot be bound out without consent of the parents, or in case of an orphan, not without consent of an officer of this Bureau, or a guardian approved by such authority. . . . [C]onsent should be obtained, otherwise the parent will have the

As early as 1867, a family of former slaves had won, with the Bureau's support, the seminal case establishing that the 1866 Civil Rights Act, and the Thirteenth Amendment that it was meant to enforce, had rendered all involuntary apprenticeships illegal.²²² Two days after her emancipation, Elizabeth Turner, then eight years old, was bound as an apprentice to her former master, Philemon T. Hambleton.²²³ The terms of the agreement differed dramatically from those governing white apprentices, giving Turner no right to an education,²²⁴ setting her total salary for ten years of work at \$37.50,²²⁵ and according her master a transferable "property" interest in her service.²²⁶ Although Hambleton claimed to have received the consent of Turner's mother, she was also one of his former slaves and the voluntariness of any agreement on her part was highly questionable.²²⁷ Riding circuit in Maryland, Chief Justice Salmon P. Chase of the United States Supreme Court held that Turner's "alleged apprenticeship" was "involuntary servitude, within the meaning of these words in the [thirteenth] amendment." He also found that any apprenticeship of a black child that did not adopt the same terms and conditions that governed white apprentices violated the Civil Rights Act of 1866.²²⁸ The decision spelled the end for involuntary apprenticeships,²²⁹ and soon thereafter 235 apprenticed black children were freed in one subdistrict of the Maryland Freedmen's Bureau alone.²³⁰ As Reconstruction's supporters had intended,

right to the child." *Freed Slaves in Maryland—Indenture of Colored Children*, SUN (Baltimore), July 24, 1865, at 4; see also KING, *supra* note 212, at 152.

222. See *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247). Henry Stockbridge, the freedmen's lawyer, was a Bureau affiliate appointed specifically to combat the involuntary apprenticeship of former slaves. See Low, *supra* note 212, at 228.

223. See *Turner*, 24 F. Cas. at 337-39.

224. See *id.* at 339.

225. See *id.* at 338.

226. *Id.* at 339 (quoting Maryland apprenticeship statute).

227. See *id.* at 338.

228. *Id.* at 339.

229. See Low, *supra* note 212, at 245 ("[In *re Turner*] made the system of apprenticeship legally untenable. Slowly and often reluctantly, whites of Maryland began to release bound Negro apprentices in larger numbers than ever before. Toward the close of the year following the decision, a letter from the Bureau was often sufficient in procuring the release of Negro youths."); FONER, *supra* note 141, at 602 ("The post-Reconstruction labor system embodied neither a return to the closely supervised gang labor of antebellum days, nor the complete dispossession and immobilization of the black labor force and coercive apprenticeship systems envisioned by white Southerners in 1865 and 1866."); Edwards, *The Marriage Covenant*, *supra* note 210, at 119 (on North Carolina); Fuke, *supra* note 212, at 215 ("From October 1867, to July 1868, Negro apprenticeship in Maryland gradually crumbled. Planters in most tidewater areas accepted the consequences of the inevitable and quietly released their children. Some resisted to the end, but eventually, they too had to submit.").

230. See GUTMAN, *supra* note 122, at 412.

their federal intervention had helped destroy the restrictions on family formation that were constitutive of American slavery and helped provide the freedmen with the family rights inherent in freedom.

D. Congress's Anti-Polygamy Campaign and the Postwar Anti-Miscegenation Litigation

The assertion of federal authority over family law in the mid-nineteenth century was not limited to Reconstruction itself. During the same years that Congress enacted the 1866 Civil Rights Act and the Fourteenth Amendment, it pursued an aggressive and overwhelmingly popular campaign against polygamy, in the process enacting a federal family law undeniably directed at whites. Indeed, the notion that family law was particularly and exclusively local was so undeveloped at the time that even courts reviewing the postwar legality of state anti-miscegenation laws made the contention late and with little emphasis, writing the majority of their opinions on the assumption that the federal government could regulate family law and demonstrating real concern that Reconstruction had actually reached far enough into the family that it legalized interracial sex and marriage.

1. Anti-Polygamy and Federal Family Law

Uncle Tom's Cabin had a counterpart in the mid-nineteenth century in another wildly popular genre of reformist fiction.²³¹ Anti-polygamy novels, and the platform of the Republican Party from 1856 onwards, called polygamy and slavery "twin relics of barbarism," warning that the first would lead its victims into the latter.²³² When the Republicans took over Congress in 1860, they displayed no compunction about using federal

231. In fact, the Mormons first publicly confirmed their commitment to polygamy in 1852, the same year that Harriet Beecher Stowe published *Uncle Tom's Cabin*. See GUSTIVE O. LARSON, *THE "AMERICANIZATION" OF UTAH FOR STATEHOOD* 37 (1971) (noting 1852 announcement). On anti-polygamy fiction, see generally Sarah Barringer Gordon, "Our National Hearthstone": Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America, 8 *YALE J.L. & HUMAN.* 295 (1996). Anti-polygamy ultimately became far more popular and widespread than abolitionism. See EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900*, at 129 (1988) ("In 1856 the Republican Party platform set as its goals the eradication of the twin relics of barbarism: slavery and polygamy The first goal was controversial and was achieved only through a bloody civil war. On the other hand, everyone—except the Mormons—favored the eradication of polygamy.").

232. Republican Platform of 1856, reprinted in *NATIONAL PARTY PLATFORMS, 1840-1956*, at 27, 27 (Kirk H. Porter & Donald Bruce Johnson comps., 1956).

power to destroy the intertwined evils. Both horrors called for a powerful assertion of federal control over family law.

By the time of the Civil War, polygamy had been the official policy of a section of the United States for almost a decade.²³³ The Mormon church, which dominated the territory of Utah from its establishment, publicly acknowledged plural marriage as a fundamental element of the Mormon faith in 1852.²³⁴ A sweeping territorial statute functionally codified the practice by granting the Church absolute control over family law for all Church members.²³⁵ After 1852 in the territory of Utah, polygamy was unquestionably legal, openly practiced, and a guiding premise of much territorial legislation. Mormon leaders defended the family form as a local prerogative in a federal system, a domestic relation that—like slavery—the Constitution protected from national regulation or control.²³⁶

Using this analogy to opposite effect, anti-polygamy advocacy linked polygamy and slavery in order to demand federal regulation of family life.²³⁷

233. During many of the same years that Congress pursued its anti-polygamy campaign against the Mormons, the federal government also intervened to restructure the marital relation amongst American Indians. By 1883, the Secretary of the Interior was intent on "impress[ing] [the Indians] with our idea of this important relation." 1 REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EXEC. DOC. NO. 1, pt. 5, at xi (1883). To this end, he recommended to Congress that the federal government prohibit polygamy amongst the Indians. The Secretary also sought to require Native American men to support their wives and children financially, a strategy meant to both "civilize the Indians" and protect the federal budget. *Id.* at x-xi. The Secretary explained:

Some system of marriage should be adopted, and the Indian compelled to conform to it. The Indian should also be instructed that he is under obligations to care for and support, not only his wife, but his children, and on his failure, without proper cause, to continue as the head of such family, he ought in some manner to be punished, which should be either by confinement in the guard-house or agency prison, or by a reduction of his rations.

....

The Government having attempted to support the Indians until such time as they shall become self-supporting, the interest of the Government as well as that of the Indians demands that every possible effort should be made to induce them to become self-supporting at as early a day as possible.

Id. at xi-xii. As part of the resulting campaign to reorder Native American marriage practices, the Commissioner of Indian Affairs established in 1883 a system of "Indian courts" with jurisdiction to punish polygamy and concubinage criminally. See *Report of the Commissioner of Indian Affairs*, in 2 REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EXEC. DOC. NO. 1, pt. 5, at 9, 10-11 (1883); *Report of the Commissioner of Indian Affairs*, in 2 REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EXEC. DOC. NO. 1, pt. 5, at 5, 28-30 (1892).

234. See LARSON, *supra* note 231, at 37.

235. See 1851 Deseret Laws 67, § 3.

236. See DAVIS BITTON, *Polygamy Defended: One Side of a Nineteenth-Century Polemic*, in THE RITUALIZATION OF MORMON HISTORY AND OTHER ESSAYS 34, 41-42, 44 (1994).

237. Analogies to slavery remained prominent in anti-polygamy for years after Appomattox, with advocates drawing strength from the success of abolition. The women who founded the

Beginning in the early 1850s, novels, lectures, and newspaper editorials argued that both peculiar institutions systematized male debauchery, denying women access to valid marriages and subjecting them instead to institutionalized sexual exploitation. According to this account, polygamy meant the enslavement of women in a “sink of iniquity,”²³⁸ a “monstrous combination of superstition, ignorance, and debauchery.”²³⁹ Indeed, the anti-polygamy argument continued, plural wives, like bondsmen, spent their lives performing backbreaking work without reward from indolent and physically abusive masters. Polygamy, along with slavery, allowed its patriarchs to become “to the last degree demoralized, effeminate, and lazy” and transformed women into “inhuman wretches”—“white slaves.”²⁴⁰ Worse yet, Mormon control over Utah left polygamy’s victims without legal recourse. As one anti-polygamist explained, with localities controlling family law, the Mormons

“were at liberty to form such laws as suited them, to establish precedents and decisions, conformable to their own views; and, above all,

Anti-Polygamy Standard in Utah in 1880, for instance, made their newspaper the namesake of the *National Anti-Slavery Standard*, a leading abolitionist journal. Their inaugural issue proclaimed:

It took long years of agitation before the Anti-Slavery party of the United States succeeded in abolishing that system which was a shame and disgrace to our country, but they did succeed at last! And the women who inaugurated the Anti-Polygamy Society are determined to persevere and keep this subject agitated until it, like the other twin relic of barbarism shall no longer be a foul blot on our escutcheon as a nation, but shall also be a thing of the past.

The Ladies' Anti-Polygamy Society of Utah, *ANTI-POLYGAMY STANDARD* (Salt Lake City), Apr. 1880, at 1, 1. Harriet Beecher Stowe herself voiced a similar ambition in 1874:

Our day has seen a glorious breaking of fetters. The slave-pens of the South have become a nightmare of the past; the auction-block and whipping-post have given place to the church and school-house; and the songs of emancipated millions are heard through our land.

Shall we not then hope that the hour is come to loose the bonds of a cruel slavery whose chains have cut into the very hearts of thousands of our sisters—a slavery which debases and degrades womanhood, motherhood, and the family?

Harriet Beecher Stowe, *Preface* to T.B.H. STENHOUSE, “TELL IT ALL”: THE STORY OF A LIFE’S EXPERIENCE IN MORMONISM, at vi (Hartford, A.D. Worthington & Co. 1874).

238. *The Modern Sodom*, *NAT’L INTELLIGENCER*, Apr. 20, 1857, at 3.

239. *Current Affairs*, *DAILY SAN JOAQUIN REPUBLICAN*, May 22, 1857, at 2. For a postwar reiteration of this theme, see *THE WOMEN OF MORMONISM; OR, THE STORY OF POLYGAMY AS TOLD BY THE VICTIMS THEMSELVES* 113 (Jennie Anderson Froiseth ed., Detroit, C.G.G. Paine 1882) (“[Polygamy] renders man coarse, tyrannical, brutal, and heartless. It deals death to all sentiments of true manhood. It enslaves and ruins woman. It crucifies every God-given feeling of her nature.”).

240. ALFREDA EVA BELL, *BOADICEA, THE MORMON WIFE: LIFE SCENES IN UTAH* 34, 32, 54 (Baltimore, Arthur R. Orton 1855); see also David Brion Davis, *Some Themes of Counter-Subversion: An Analysis of Anti-Masonic, Anti-Catholic, and Anti-Mormon Literature*, 47 *MISS. VALLEY HIST. REV.* 205, 221 (1960) (“[According to the anti-polygamy literature,] Mormons raped and lashed recalcitrant women, or seared their mouths with red-hot irons.”).

the utter impossibility of escape or appeal, exercised a wonderful influence over the dissatisfied, and aided, more than anything else, in causing them to abide by their fate, and conform to the circumstances in which they were placed."²⁴¹

For anti-polygamy thinkers and their broad base of supporters, the solution was clear. As Kate Field declared in her popular lecture tours across the nation, "[t]he cure for the disease" of polygamy would be found "in a universal marriage law. 'It [was] a disgrace that there [was] no United States marriage law.'"²⁴²

Anti-polygamists demanded coercive federal regulation of family law. After succession and the withdrawal of Southerners who had recognized anti-polygamy's abolitionist ties and thwarted its progress,²⁴³ Congress quickly responded. Informed by a decade of consistent advocacy coupling polygamy with slavery to identify both as degraded family forms, federal legislators were convinced that polygamy constituted, as its opponents warned, a crisis in marriage. Repudiating the Mormon claim that family

241. MARIA WARD, *FEMALE LIFE AMONG THE MORMONS: A NARRATIVE OF MANY YEARS' PERSONAL EXPERIENCE* 294-95 (New York, J.C. Derby 1855), *quoted in* Gordon, *supra* note 231, at 329.

242. LILIAN WHITING, *KATE FIELD: A RECORD* 446 (Boston, Little, Brown, and Co. 1899) (quoting Mr. Charles A. Dana, *Miss Kate Field as a Model of Self-Possession and Enduring Interest*, N.Y. SUN). Whiting reported Field's popularity and influence in no uncertain terms:

There is no exaggeration in saying that Miss Field aroused the entire country with these lectures. Her statements offered a revelation of conditions little known. Rarely has such fire and eloquence and splendor of oratory, combined with the mental discipline of trained thought, scholarly acquirements, and finished elegance, been known in the annals of the lyceum.

Id. at 429-30.

Field, who lectured on a wide variety of subjects, also advocated "a national marriage law" to combat escalating divorce rates. *Id.* at 451 (quoting Field). For discussion of the connection between anti-polygamy, anti-divorce, and other movements to regulate deviant family forms, see Davis, *supra* note 240, at 219 ("[Anti-Mormon] literature was written in a period of increasing anxiety and uncertainty over sexual values and the proper role of women. . . . [M]inisters and journalists pointed with alarm at the spread of prostitution, the incidence of divorce, and the lax and hypocritical morality of the growing cities. . . ."); KIMBALL YOUNG, *ISN'T ONE WIFE ENOUGH?* 26-27 (1954).

243. On the South's concerns, see, e.g., CONG GLOBE, 36th Cong., 1st Sess. 1410 (1860) (statement of Rep. Branch) ("I will suggest to my friends upon this side of the House, that if we . . . render polygamy criminal, it may be claimed that we can also render criminal that other 'twin relic of barbarism,' slavery, as it is called in the Republican platform of 1856."); *id.* at app. 197 (statement of Rep. Keitt) ("If there is power in Congress to inspect the morals of a nascent political community, and of its own autocratic will to decree this and prohibit that, where will you find a check upon its power?"); *id.* (statement of Rep. Keitt) ("And shall we, under the impulse of an honest reprobation of an offensive and hated practice in Utah, sanction this hideous usurpation of power? I never will. If you allow Congress to declare polygamy in the Territories to be a crime, and to punish it, where will you stop?").

law was Utah's exclusively local prerogative, Congress enacted a legislative scheme that completely displaced the established local code governing family law in Utah.

Representative Daniel Gooch of Massachusetts proposed as early as 1860 an anti-polygamy statute that would have also transformed adultery, fornication, and lewd cohabitation into federal crimes.²⁴⁴ As he explained, "a judicious parent . . . permits the child to regulate and govern his own conduct so long as he applies wholesome and salutary rules to himself; but when he fails to do that, the parent again resumes the exercise of control over his own offspring."²⁴⁵ Representative William Elliot Simms of Kentucky agreed that rather than "interfere" with local family law, federal anti-polygamy legislation would safeguard the institution of marriage and preserve national virtue.²⁴⁶

The Morrill Act of 1862 criminalized bigamy, annulled the incorporation of the Mormon Church, and prohibited any religious organization from owning real estate worth more than \$50,000.²⁴⁷ Like all subsequent anti-polygamy legislation, it was limited to the territories,²⁴⁸ which the Constitution places under Congress's plenary authority.²⁴⁹ But while the anti-polygamy campaign was not the legal equivalent of other instances of federal intervention into family law,²⁵⁰ it is a close historical analogy to Reconstruction, highly illustrative of contemporary thought. To

244. See *id.* at 1540 (statement of Rep. Gooch).

245. POLYGAMY IN UTAH: SPEECH OF THE HON. DANIEL W. GOOCH OF MASSACHUSETTS, HOUSE OF REPRESENTATIVES, APRIL 4, 1860 (Washington 1860).

246. CONG. GLOBE, 36th Cong., 1st Sess. app. 199 (1860) (statement of Rep. Simms).

247. See An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah (Morrill Act), ch. 126, §§ 1–3, 12 Stat. 501, 501–02 (1862); see also *Reynolds v. United States*, 98 U.S. 145, 166–68 (1878) (upholding Morrill Act and declining to find religious exemption).

248. See, e.g., Morrill Act § 1, at 501 (outlawing bigamy in territories "or other place over which the United States have exclusive jurisdiction").

249. See U.S. CONST. art. IV, § 3, cl. 2 (granting Congress plenary authority over United States territory and property).

250. For instance, the Supreme Court has upheld the constitutionality of territorial courts whose judges are appointed under Article I, rather than Article III, on the ground that Congress exercises all powers of government in the territories, including those that the states normally discharge. See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

The recent legislative hearings on the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C.A. § 1738C (West Supp. 1998)), nevertheless provide an interesting footnote to the legal principles differentiating Congress's activities in the territories. Supporters of the 1996 statute—which promulgates a federal definition of marriage, denies federal benefits to same-sex couples, and permits states to refuse to recognize same-sex marriages performed in other states—cited the federal anti-polygamy legislation as precedent for their proposed federal regulation of marriage law. See *Defense of Mar-*

nineteenth-century minds, slavery and polygamy were of a kind. Both were "relics of barbarism" that demanded federal intervention in order to ensure proper family relations. The Morrill Act, which defined marriage, was a statement of federal family law, setting out national standards and preempting an entire local family code. Indeed, a federal court citing the *Barber* dictum that disclaimed federal jurisdiction over marriage and divorce now felt compelled to add a caveat: Congress, the court carefully noted, has "prohibited polygamy in any 'territory or other place over which the United States has exclusive jurisdiction.'"²⁵¹

After the Civil War, Congress's attention soon returned to anti-polygamy, still determined to assert national control over deviant family relations and to close the now-apparent gaps in the 1862 Act.²⁵² As Congressmen debated the Civil Rights Act of 1866, New York Representative Elijah Ward stepped forward to denounce the "great and *remaining* barbarism of [their] age and country," one that still had to "be swept (*like the twin system of slavery*) from the Territories of the Republic." The Mormons, he declared, were defiantly "sustaining the abominable system of polygamy." In fact, "the crime and abomination consequent thereon [were] largely on the increase." Ward did not understand why the Morrill Act had not been effective, but he was determined to see Congress adopt "means adequate" to abolishing polygamy. To that end, Ward proposed that the House Committee on Territories "inquire and ascertain what means, civil or military, may lawfully be resorted to to effectually eradicate this evil from the land, and what legislation is needed, if any, to effect that object, and what reasons exist why the laws against polygamy have not been executed." The resolution passed without need for debate.²⁵³

riage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. 32 (1996) (statement of Rep. Sensenbrenner) ("There is precedent for the Congress acting in this area and some of it's 100 years old. The admission of Utah to the Union was delayed for several years until such time as Utah agreed to abolish polygamy and not to legalize polygamy once admitted to the Union.").

251. *In re Hobbs*, 12 F. Cas. 262, 264 (N.D. Ga. 1871) (No. 6,550) (quoting Morrill Act). The court also noted that "Congress . . . ha[d] enacted laws regulating marriage and divorce in the District of Columbia." *Id.*

252. The Morrill Act was ultimately unenforceable, largely because Utah grand juries, which Mormons dominated, refused to indict. See LARSON, *supra* note 231, at 62. The poorly drafted statute also required proof of multiple marriages without directing Utah to keep marriage records, and set a three-year statute of limitations, which the Mormons allegedly evaded by sending polygamists abroad on three-year missions immediately after their plural marriages. See FIRMAGE & MANGRUM, *supra* note 231, at 149-51.

253. CONG. GLOBE, 39th Cong., 1st Sess. 138 (1866) (statement of Rep. Ward) (emphasis added).

Later that year, the Territories Committee reported that "the laws of the United States [were] openly and defiantly violated throughout the [Utah] Territory." It called for a "practical

Over the next twenty years, Congress would enlarge the jurisdiction of federal territorial courts in Utah,²⁵⁴ disenfranchise polygamists,²⁵⁵ exclude all faithful Mormons from juries,²⁵⁶ and lower the standard of proof necessary to establish polygamy.²⁵⁷ In upholding these federal assaults on polygamy, the Supreme Court explained that abolishing this familial arrangement was necessary for national security. As the Court reasoned in 1885, America's freedom and national virtue rested on

the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.²⁵⁸

Indeed, the Edmunds-Tucker Act of 1887²⁵⁹ added a whole new chapter to the federal law of the family. Having extended federal jurisdiction in the territories to divorce cases in 1874,²⁶⁰ Congress now defined and criminal-

solution to the evils and abuses complained of," but had some difficulty proposing one. H.R. REP. No. 39-96, at 1 (1866). Another report, from the House Judiciary Committee in 1867, similarly conceded "[t]he humiliating fact . . . that the law is at present practically a dead letter in the Territory of Utah," concluding "that the gravest necessity exists for its enforcement." H.R. REP. 39-27, at 3 (1867).

254. The Poland Act, ch. 469, 18 Stat. 253 (1874), granted federal district courts in Utah exclusive jurisdiction over federal crimes, *see id.* § 3, at 254, and the ability to empanel juries whose membership was at least half non-Mormon, *see id.* § 4, at 254-55. It also provided that the United States Supreme Court could review on appeal any decision about polygamy or bigamy from the Utah Supreme Court, rather than only those that invalidated a federal law or upheld a local one against constitutional challenge. *See id.* § 3, at 254.

255. *See* An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes (Edmunds Act), ch. 47, § 8, 22 Stat. 30, 31-32 (1882).

256. *See id.* § 5, at 31.

257. *See id.* § 3, at 31. The Edmunds Act criminalized cohabitation with more than one woman at a time. Thus, prosecutors did not need to prove multiple marriages. *See id.*

258. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (upholding Edmunds Act of 1882); *see also* *Davis v. Beason*, 133 U.S. 333, 341 (1890) ("[Bigamy and polygamy] tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment."); *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("[P]olygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.").

259. An act to amend an act entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two (Edmunds-Tucker Act), ch. 397, 24 Stat. 635 (1887).

260. *See* Poland Act, ch. 469, § 3, 18 Stat. 253, 253-54 (1874).

ized adultery,²⁶¹ incest,²⁶² and fornication;²⁶³ abolished spousal immunity and permitted plural wives to testify against their husbands in polygamy cases;²⁶⁴ granted the first wives of polygamous men a dower right;²⁶⁵ and provided that children who were born to subsequent wives more than twelve months after the enactment of this statute would be considered illegitimates who could not inherit.²⁶⁶

Four months after the Supreme Court upheld the Edmunds-Tucker Act in 1890,²⁶⁷ the Mormon Church capitulated, renouncing polygamy as an element of the faith.²⁶⁸ Congress, however, was still not satisfied—even when the Utah territory had otherwise met the criteria for statehood. In 1894, Congress enacted legislation that conditioned Utah's admission into the union on its agreement to provide in its state constitution, in language "irrevocable without the consent of the United States," that "polygamous or plural marriages are forever prohibited."²⁶⁹ To this day, the Utah Constitution states that polygamy is "forever prohibited."²⁷⁰ Congress understood polygamy to be on a par with slavery, and its anti-polygamy

261. See Edmunds-Tucker Act § 3, at 635–36.

262. See *id.* § 4, at 636.

263. See *id.* § 5, at 636.

264. See *id.* § 1, at 635.

265. See *id.* § 18, at 638–39.

266. See *id.* § 11, at 637. This provision represented a change in policy from the Edmunds Act of 1882 § 7, at 31, which stated that children of polygamous marriages who were born before 1883 would be considered legitimate.

The Edmunds-Tucker Act also directed the U.S. Attorney General to see that the Mormon Church corporation was abolished and all but \$50,000 of its property escheated, finally enforcing the Morrill Act's mandate. See Edmunds-Tucker Act § 13, at 637, § 17, at 638. Lastly, the 1887 Act disenfranchised women in the Utah territory, reversing territorial law. See *id.* § 20, at 639; Sarah Barringer Gordon, "The Liberty of Self-Degradation": Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America, 83 J. AM. HIST. 815 (1996).

267. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

268. See LARSON, *supra* note 231, at 263–64 (reprinting Mormon manifesto making this declaration).

269. The Utah Enabling Act states that:

[The Utah constitutional] convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited.

An Act To enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States, ch. 138, § 3, 28 Stat. 107, 108 (1894).

270. UTAH CONST. art. III, § 1.

campaign importantly paralleled Reconstruction. Convinced that polygamy, like slavery, was a perversion of domestic relations, Congress intervened here, as in Reconstruction, to enforce national standards of proper familial conduct.

2. Federalism in the Anti-Miscegenation Litigation

The postwar place of family law in the federal system was so complicated and in flux, and the familial concerns of Reconstruction so clear, that even courts reviewing the contention that the 1866 Civil Rights Act and the Fourteenth Amendment had rendered state anti-miscegenation statutes unlawful thought it possible that federal power reached so far into familial relations as to be able to legalize the domestic arrangement that whites most feared. With the scope of federal authority unclear, judges assumed that federal law could regulate marriage. Displaying real signs of worry, they tried to explain, in this light, why the particular federal actions undertaken during Reconstruction had left interracial relationships unprotected. The assertion that family law was exclusively within the states' purview, which—if established—would have disposed of these unsettling challenges quickly and easily, appeared only after a number of years of litigation, and only as one of many arguments. Clearly, the proposition was not self-evident, even when protecting white America from social horror was at stake.

As their congressional opponents had predicted, the 1866 Civil Rights Act and the Fourteenth Amendment soon gave rise to claims that the states could no longer prohibit interracial marriage.²⁷¹ In fact, a few early challenges actually succeeded.²⁷² In *Burns v. State*,²⁷³ the Alabama Supreme Court rejected the argument, which congressional supporters of the 1866 Civil Rights Act had developed, that the 1866 Act did not disturb formally

271. The Supreme Court essentially settled this controversy in 1883, by holding that prohibitions on interracial adultery and fornication satisfied the requirements of equal protection if they punished blacks as harshly as whites. See *Pace v. Alabama*, 106 U.S. 583, 585 (1883), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184, 184 (1964); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

272. See also *State v. Webb*, 4 Cent. L.J. 588, 588–89 (Tex. Dist. Ct. 1877) (rejecting claim under Civil Rights Act of 1866, but holding that abolition had repealed Texas anti-miscegenation law by implication), *rev'd*, *Fraser v. State*, 3 Tex. Ct. App. 263, 277 (1877) (holding that Texas anti-miscegenation statute was not repealed by implication).

273. 48 Ala. 195 (1872) (reversing conviction of justice of the peace for marrying interracial couple), *limited by* *Ford v. State*, 53 Ala. 150, 151 (1875), *overruled by* *Green v. State*, 58 Ala. 190, 197 (1877).

equal restraints on the marital choices of whites and blacks.²⁷⁴ More strikingly, every member of the Louisiana Supreme Court agreed in *Hart v. Hoss & Elder*²⁷⁵ that marriage was "a civil contract" within the meaning, and under the jurisdiction, of the 1866 Civil Rights Act.²⁷⁶ These two decisions were quickly reversed, and no other state would overturn its anti-miscegenation laws in light of Reconstruction. But the notion that the states had exclusive jurisdiction over marriage was hardly responsible for the successful defense of anti-miscegenation. That argument did not surface in the judicial opinions until 1871, when the Indiana Supreme Court articulated it in *State v. Gibson*²⁷⁷ as a sidelight to a somewhat bizarre holding. Subsequent cases cited *Gibson* for the proposition, but never felt comfortable relying on its weight. The claim that family law was exclusively for the states was too strong, and too doubtful, to carry the day.²⁷⁸

Gibson held that the Fourteenth Amendment did not add to the powers of the federal government at all, a dubious and distinctly minority posi-

274. As the court explained:

The [1866 Act] intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other. . . . It can not be supposed that this discrimination [the anti-miscegenation statute] was otherwise than against the negro, on account of his servile condition, because no State would be so unwise as to impose disabilities in so important a matter as marriage on its most favored citizens, without consideration of their advantage.

Burns, 48 Ala. at 197.

275. 26 La. Ann. 90 (1874) (recognizing validity of interracial marriage for purpose of children's inheritance).

276. *Id.* at 98 ("The [1866] law declares [that people of color] 'shall have the same right, in every State and Territory in the United States, to make and enforce contracts' Marriage is a civil contract."); *id.* at 101 (Morgan, J., dissenting) ("Marriage is, with us, a civil contract; inheritance is regulated by law. White persons and persons of color may by this [1866] act contract marriage; colored children may inherit. This proposition I do not dispute.").

Although civil law, rather than common law, governed this Louisiana decision, the state's family law policies during the nineteenth century generally conformed with those adopted in common law states. See ELIZABETH BOWLES Warbasse, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861*, at 56 (1987); Mary Ann Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TUL. L. REV. 21, 25-26, 28 (1974).

277. 36 Ind. 389 (1871). A much more limited claim about state jurisdiction over family law appeared in a federal opinion that same year. In upholding Georgia's anti-miscegenation law, Judge John Erskine remarked that "[t]he marriage relation, which is a civil institution, has hitherto been regulated and controlled by each state within its own territorial limits, and I cannot think it was intended to be restrained by the [fourteenth] amendment." But he quickly retreated from that general statement, adding the important caveat: "so long as the state marriage regulations do not deny to the citizen the equal protection of the laws." *In re Hobbs*, 12 F. Cas. 262, 264 (N.D. Ga. 1871) (No. 6,550).

278. I am very grateful to Reva Siegel for first drawing my attention to this theme in *Gibson* and later cases. See Siegel, *supra* note 177, at 1121-23 & n.46.

tion.²⁷⁹ Along the way, however, the case declared that regulation of the marital relation was wholly outside the scope of federal authority: "The right, in the states, to regulate and control, to guard, protect, and preserve" marriage was, the court explained, "of inestimable importance, and [could not] be surrendered, nor [could] the states suffer or permit any interference therewith."²⁸⁰ Several state courts adopted this latter point, invoking *Gibson* as support for the claim that "no power on earth"²⁸¹ could prevent the states from enforcing their anti-miscegenation statutes²⁸² because marriage was "left solely by the Federal Constitution and the laws to the discretion of the states."²⁸² If sound, this proposition alone was enough to defeat all legal assaults on state anti-miscegenation laws. But judges determined to prevent interracial marriage actually devoted relatively little space to *Gibson's* argument from jurisdiction. Instead, they wrote the majority of their opinions on the assumption, which they apparently believed was more likely, that the federal government could regulate marriage, and then offered a host of reasons explaining that Congress had not exercised all of its potential authority.

At least one of these defensive arguments showed clear signs of worry that Reconstruction had actually reached into the core of state family law to legalize interracial marriage. Courts considering state anti-miscegenation laws easily explicated the social horror of interracial union as a ground for its illegality,²⁸³ and turned to the same formal equality arguments that Reconstruction's congressional defenders had employed and that the Supreme Court ultimately accepted as adequate justification for

279. See *Gibson*, 36 Ind. at 393 ("The fourteenth amendment . . . did not enlarge the powers of the federal government, nor diminish those of the states. The inhibitions against the states doing certain things have no force or effect. They do not prohibit the states from doing any act that they could have done without them.").

280. *Id.* at 403.

281. *State v. Jackson*, 80 Mo. 175, 176 (1883); see also *id.* at 178 (citing *Gibson*).

282. *Frasher v. State*, 3 Tex. Ct. App. 263, 275-76 (1877) (citing *Gibson*); see also *Green v. State*, 58 Ala. 190, 195 (1877) (citing *Gibson* to suggest that marital regulation is beyond limits of federal power). Years later, *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896), also cited *Gibson*, but not on federalism grounds.

283. See *Jackson*, 80 Mo. at 179 ("[I]f the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds . . ."); *Frasher*, 3 Tex. Ct. App. at 277 ("Civilized society has the power of self-preservation, and, marriage being the foundation of such society, most of the states in which the negro forms an element of any note have enacted laws inhibiting intermarriage between the white and black races."); *Green*, 58 Ala. at 194 ("Who can estimate the evil of introducing into the most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred?").

anti-miscegenation laws.²⁸⁴ In addition, they made the case, which Reconstruction's congressional supporters had rejected, that miscegenation was a social right that Reconstruction left unprotected by definition.²⁸⁵ But still feeling unsure, judges reviewing state anti-miscegenation statutes also insisted that marriage was a status relation not reducible to mere contract, and therefore not a contract within the meaning of the 1866 Civil Rights Act.²⁸⁶ This last argument, at odds with the broad consensus in Congress, was a dramatic indication of concern. The nineteenth century is generally known as "the golden age of contract law" in American history²⁸⁷ because of the significance of libertarian thought in this period and the weight consequently given to the notion that people have the right to order their own lives through voluntary agreement.²⁸⁸ To a significant extent, legal thought measured progress and freedom by the expansion of the realm of life under

284. See *Jackson*, 80 Mo. at 177 ("The act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons . . ."); *Green*, 58 Ala. at 192 ("There is no discrimination made in favor of the white person, either in the capacity to enter into such a relation, or in the penalty."); *Frasher*, 3 Tex. Ct. App. at 276 ("It is conceded by [defense counsel] that, if the statute upon which this prosecution is based punished both the white person and the negro alike, it . . . would be constitutional, and clearly within the legislative powers of the state."); *supra* note 271 (discussing Supreme Court decision that accepted formal equality defense of state anti-miscegenation laws).

285. See *Green*, 58 Ala. at 196 ("The amendments to the Constitution were evidently designed to secure to citizens, without distinction of race, rights of a civil or political kind only—not such as are merely social, much less those of a purely domestic nature. The regulation of these belongs to the States."). This argument was frequently articulated in a discourse of taste and sensibility. See *Jackson*, 80 Mo. at 176 ("It may interfere with the taste of negroes who want to marry whites, or whites who wish to intermarry with negroes, but the State has the same right to regulate marriage in this respect that it has to forbid the intermarriage of cousins and other blood relations."). For a fuller account of the way that courts wielded the social rights designation to limit the scope of equality in the post-emancipation period, see Siegel, *supra* note 177, at 1119–29.

286. See *Green*, 58 Ala. at 193–94 ("Marriage is not treated as a mere contract between the parties, subject as to its continuance, dissolution and effects, to their mere pleasure and intentions. But it is treated as a civil institution' . . . [M]arriage is not a contract, but a *status* . . .") (quoting Judge Story's treatise on conflict of laws); *Frasher*, 3 Tex. Ct. App. at 276 ("Marriage is not a contract protected by the Constitution of the United States, or within the meaning of the Civil Rights Bill. Marriage is more than a contract within the meaning of the act. It is a civil *status* . . .").

287. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 275 (2d ed. 1985).

288. On the legal and intellectual history of contract, see PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823*, at 489–501 (1975); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 160–85 (1977); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 18, 75, 103 (1956).

contractual control. As Henry Sumner Maine's influential treatise articulated the notion in a chapter on family law, women, and slavery, the "movement of the progressive societies ha[d] hitherto been a movement from *Status to Contract*."²⁸⁹ Modernity, the editor of the *Nation* agreed, meant "releas[ing] all human beings from obligations imposed by imperative law, and . . . submit[ting] our social relations more and more to the dominion of contract simply."²⁹⁰ In this light, deeming marriage a status beyond contract was an undeniable step backward, one taken only to ensure that anti-miscegenation laws survived a Reconstruction that courts understood had left even prohibitions on interracial union, now the sacred heart of state family law, vulnerable.

All told, when the postbellum nation was redrawing the lines of federal and state jurisdiction for the modern age, there was no consensus that family law was particularly and exclusively local. Far from it. Reconstruction's supporters in Congress believed that guaranteeing family rights in the 1866 Civil Rights Act and the Fourteenth Amendment was one of their most pressing tasks, and the strong majority of their opponents agreed that the federal government could exercise jurisdiction over family law. Indeed, as Congress worked to make familial protections part of the legacy of Reconstruction, it simultaneously conducted an overwhelmingly popular campaign against polygamy, one that turned on creating a national law of the family to set standards that no family, white or black, would be allowed to deviate below. Assertions of exclusively local jurisdiction over family law looked so dubious that even courts intent on preserving state anti-miscegenation laws in the wake of Reconstruction wrote most of their opinions on the assumption that the federal government could regulate interracial marriage, and offered an explanation for why Congress had not done so that showed real concern that state anti-miscegenation statutes were in danger.

289. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 165 (New York, Charles Scribner & Co. 1871). Maine specifically identified the decision to marry as a contractual one, noting that "from her coming of age to her marriage all the relations [the female] may form are relations of contract." *Id.* at 164.

290. E.L. Godkin, *The Labor Crisis*, 105 N. AM. REV. 177, 183 (1867). Godkin also applied the same principles to marriage:

So also in the relations of husband and wife, the tendency of legislation in all modern states . . . is to reduce marriage to an instrument for the legitimization of children simply, leaving all the relations of husband and wife which are not necessary to this end to be regulated by individual will.

Id.

The consensus during Reconstruction that the federal government could exercise jurisdiction over family law—evident in the debates over the 1866 Civil Rights Act and the Fourteenth Amendment, the anti-polygamy campaign, and even the anti-miscegenation cases—was so broad that it included most opponents of Reconstruction as well as Reconstruction's supporters. Conceding the jurisdictional question, Reconstruction's detractors offered only the policy consideration, rooted in antebellum proslavery thought and now constitutionally illicit, that extending the federal government's guarantee of equal protection to family law might destabilize the social segregation of the races and disrupt the legal subordination of wives and children.

Part II has problematized both the existence of and the reasoning behind the history of exclusive localism in family law. Part IV will critically consider, as contemporary debate largely does not, the weight and scope that federalism can legitimately give to a tradition of federal noninvolvement in family law in light of these origins. But before we get there, Part III takes the record of family law and federalism to the present. Without attempting to narrate the entire intervening history between Reconstruction and the late twentieth century, it offers a new perspective on modern federal family law. Although largely concealed behind the force of arguments from history for exclusive localism, federal regulation of the family has remained substantial throughout the modern age.

III. A NEW PERSPECTIVE ON MODERN FEDERAL FAMILY LAW

The argument for exclusive localism in family law has devised no clear definition of family law itself, as the juxtaposition of the domestic relations exception to diversity jurisdiction and the debate over the Violence Against Women Act perhaps best illustrates. Historical accounts of Reconstruction demonstrate another form of the failure to identify family law. During Reconstruction, Congress and the entire nation engaged in a massive debate over federal involvement in family law and importantly intervened into state family codes, as both we and nineteenth-century Americans would understand those terms. Yet several historians have actually highlighted Reconstruction as a crucial episode in the tradition of exclusive localism in family law. This Article is no place to rehearse all the ways in which the federal government has been involved in family law since Reconstruction. But it does draw to a prominent place of view how the question of family law's proper position in the federal system is entangled in issues of characterization. From that perspective, this part examines some notable examples of modern federal regulation of the family.

My point here is not that the federal provisions discussed below have been wrongly characterized as laws about taxation, citizenship, social welfare, social security, or the like. Rather, it is that important aspects of these federal regulatory regimes also and at the same time fall within a quite reasonable definition of family law—and that this aspect of these federal statutes has been systematically overlooked. I make these observations for positive and descriptive purposes, rather than for normative or prescriptive ones. The mere fact that federal statutes can be classified as family law should, at this point, suggest nothing about the legitimacy of federal jurisdiction. As I have indicated throughout this Article and will discuss more fully in Part IV, a coherent normative argument for categorically assigning family law to either the states or the federal government has yet to be articulated. Instead, this part briefly discusses some important instances of federal regulation in order to begin mapping what arguments from history for exclusive localism in family law have obscured. Part I recounted how localists employ an understanding of family law so unrigorous and expansive that it includes a statute like the Violence Against Women Act, which has no connection to familial status or relationships at all. Without offering a comprehensive account of modern federal-state relations, this part elaborates an explicit and reasoned definition of family law in order to suggest what localists have failed to register as family law.

It finds that federal law importantly regulates the family, even if one excludes what constitutional adjudication, rather than democratic policymaking, has wrought. To be sure, family law has never been under predominantly federal control; the weight and persistence of certain forms of state regulation are undeniable. But exclusive localism is simply suspect as a description of current practice. The scope, and very existence, of this modern federal family law remains all but invisible to us largely because of the long-standing authority of arguments from history for exclusive localism and their failure to produce a coherent definition of family law itself.

A. The Relevant Definition of Family Law

The reigning localist discourse on family law is both extremely ambiguous and frequently expansive in scope. *Ankenbrandt* placed family law within narrow and technical confines. There, the Court defined “domestic relations” for purposes of the exception to diversity jurisdiction to include only the “power to issue divorce, alimony, and child custody decrees,”²⁹¹ allowing a tort claim for child abuse to remain in federal court

291. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

because it was outside the exception's historical contours.²⁹² But claims from tradition for exclusive localism much more commonly adopt a far broader, if substantially less defined, understanding of family law. Before *Ankenbrandt* and in *Lopez*, the Supreme Court rarely indicated what it meant by family law, but often relied on reasoning and language developed in support of the domestic relations exception to decide questions far outside the scope of a decision like *Ankenbrandt*. A case adjudicating a divorced spouse's claim to federal railroad retirement benefits would quote a statement from the 1890 decision that first included child custody decrees within the diversity exception, the absolutist proposition that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."²⁹³ Indeed, the debate over VAWA, conducted largely after *Ankenbrandt* was decided, employed such a far-reaching and unexplained definition of family law that it included without question legislation that was never dependent on familial status or relationships.²⁹⁴

The appropriate delineation of family law may vary with context. Arguments from history for exclusive localism, however, cannot survive critical review in their current form based on a definition as limited as that operative in *Ankenbrandt*. Even if the issuance of divorce, alimony, and child custody decrees has been under exclusively state control, that would not support localists' much more typical and sweeping statements—in contexts extending far beyond the concerns of *Ankenbrandt*—about the inherent character of all of family law. Although the indefiniteness governing the scope of family law in almost all of the localism discourse does not deserve to be replicated, assessing the possibility that claims from tradition can rely on a modern practice of exclusively state jurisdiction does require a richer understanding of family law.

To this end, my account of federal family law applies, as indicated above, the following definition: Family law, first, determines what constitutes a family and who counts as or may become a spouse, a parent, a child, or another family member. This category includes some of the rights that particularly concerned the congressional authors of Reconstruction, such as the basic principles that consenting adults should be able to legally marry

292. See *id.* at 704.

293. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890)); see also *Rose v. Rose*, 481 U.S. 619, 625 (1987) (same); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) ("This Court repeatedly has recognized that "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States."" (quoting *Hisquierdo*, 439 U.S. at 581) (citation omitted)).

294. See *supra* text accompanying notes 48–56.

and that no people should be categorically denied the right to parent their children. Second, family law structures the legal creation and dissolution of these family relationships, thus exercising legal control over marriage, adoption, divorce, annulment, alimony, child support, child custody, property division, the determination of paternity, and the termination of parental rights. Third, family law establishes the legal rights, and associated legal obligations, that family members have because of their familial status. This category includes both rights and responsibilities that family members have with respect to each other and laws that otherwise regulate family members based on their familial status. Laws requiring each spouse to support the other financially, marital rape exemptions, and federal statutes protecting children against parental abuse and neglect fall within the first half of this category.²⁹⁵ The latter half of this category includes, as we shall see, federal tax, citizenship, social welfare, and social security laws that turn on one's status as a spouse, parent, child, or other family member.²⁹⁶

B. Modern Federal Family Law

Armed with an appropriate and clear definition of family law, its presence in modern federal statutes, regulations, and case law becomes easy to recognize. As a preliminary matter, it is worth noting that many of the Supreme Court's constitutional holdings, and the federal law they have encouraged, fall within the above definition of family law. Overall, it seems fairer and more telling to focus on what democratic action rather than constitutional mandate has produced when considering the record of localism in modern family law. The Supreme Court is less representative of the polity, and some—but not all—of its decisions on family life reflect the general application of constitutional principles. The Equal Protection Clause, for instance, applies equally to all state legislation, rather than singling out family law. At the same time, it is still striking how often the Court's constitutional decisions have established uniform family law policies for the nation, the Justices' professed commitment to exclusive localism notwithstanding. For instance, the decisions in the 1970s that first subjected gender classifications to intermediate scrutiny under the Equal Protection Clause²⁹⁷—especially *Orr*

295. See *infra* text accompanying notes 321–329.

296. See *infra* text accompanying notes 306–320, 330–346.

297. *Craig v. Boren*, 429 U.S. 190, 197–99 (1976), first clearly articulated this intermediate standard, although *Reed v. Reed*, 404 U.S. 71, 75–77 (1971), was the first Supreme Court

v. Orr (1979),²⁹⁸ which found gender-based alimony laws unconstitutional—spurred a massive rewriting of state marital status law.²⁹⁹ Supreme Court case law, starting with *Meyer v. Nebraska* (1923)³⁰⁰ and *Pierce v. Society of Sisters* (1925),³⁰¹ has constitutionalized a particular vision

case that ruled in favor of a woman who asserted that her state had denied her equal protection of the laws.

298. 440 U.S. 268, 283 (1979).

299. In 1969, twenty-six states and the District of Columbia authorized alimony awards to wives but not husbands. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 12 n.33 (1987). By the time the Court decided *Orr* a decade later, "about forty states had already 'de-sexed' alimony and had authorized its award, under appropriate circumstances, to either spouse." Doris Jonas Freed & Timothy B. Walker, 21 FAM. L.Q. 417, 474 (1988). *Orr* compelled the remaining states to fall into line and rewrite their family law to be gender-neutral. See, e.g., Lee Hargrave, *Louisiana Constitutional Law*, 46 LA. L. REV. 535, 542-43 (1986) ("After [*Orr*], the Louisiana courts followed suit. About the same time, the Louisiana legislature amended the alimony statutes to be gender-neutral."); Isabel Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55, 71 (1987) ("For almost a decade (1972-1980), the debate over the distributional rules governing marital property upon divorce was caught up in the intricacies of New York politics. . . . [*Orr*] broke the legislative impasse. . . . The New York choice was [now] either to eliminate alimony or make it available to either spouse."); Ronald J. Resmini, *The Law of Domestic Relations in Rhode Island*, 29 SUFFOLK U. L. REV. 379, 411 (1995) ("Subsequently [to *Orr*], the Rhode Island General Assembly redefined the concept of alimony to mandate that 'alimony shall be construed as payments for the support and maintenance of either the husband or wife.'" (quoting 1979 R.I. Pub. Laws ch. 279, § 2)); W. Henry Parkman, Note, *The Significance of Stokes v. Stokes: An Examination of Property Rights Upon Divorce in Georgia*, 16 GA. L. REV. 695, 705 n.55 (1982) (discussing 1979 Georgia law enacted "to revise and modernize certain laws of this State which relate to intrafamilial duties, rights and obligations, . . . so as to comply with those standards of equal protection under the law announced in the United States Supreme Court decision in the case of *Orr v. Orr*" (quoting 1979 Ga. Laws 466, § 1)).

300. 262 U.S. 390 (1923) (holding that state prohibition on teaching foreign languages to children violates Fourteenth Amendment's Due Process Clause). In recognizing a Fourteenth Amendment right "to marry, establish a home and bring up children," *id.* at 399, the *Meyer* Court specifically rejected alternative conceptions of parental rights, noting:

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Id. at 402.

301. 268 U.S. 510 (1925). In striking down a state statute requiring all children to attend public school, the *Pierce* Court reasoned that the act:

unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and

of parental relations that grants parents, and denies the state, primary control over their children's education and upbringing.³⁰² The Court's recognition and highly detailed regulation of the constitutional right to abortion and birth control have both severely limited the possibility of state variation³⁰³ and prompted significant federal law that preempts the states entirely.³⁰⁴ Similar examples abound.³⁰⁵

More notably, Congress has enacted a substantial body of legislation that falls within the definition of family law articulated above. Modern federal family law is, first and most obviously, a significant component of

direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 534–35.

302. For the most notable modern case adhering to this principle, see *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (allowing Amish parents to remove their children from school after eighth grade for religious reasons). For more discussion of the normative choice that *Meyer* and *Pierce* represent, see Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property, 33 WM. & MARY L. REV. 995, 997 (1992) ("Along with protecting religious liberty and intellectual freedom, *Meyer* and *Pierce* constitutionalized a narrow, tradition-bound vision of the child as essentially private property.").

303. Note, for instance, how precisely the Court has defined the contours of permissible parental notification provisions for minors seeking abortions. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (holding that state could not lawfully authorize absolute parental veto over decision of minor to terminate her pregnancy); *Bellotti v. Baird*, 443 U.S. 622, 646–51 (1979) (plurality opinion) (striking down state statute that did not permit any minor to obtain judicial consent to nonemergency abortion without informing available parents, and that allowed a court to overrule minor's decision to have abortion even if court found minor mature and fully competent to make decision independently); *H.L. v. Matheson*, 450 U.S. 398, 407–13 (1981) (upholding state law requiring doctor to notify, if possible, parents of minor seeking abortion, as statute applied to immature and dependent minors); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (plurality opinion) (upholding state statute requiring every unemancipated minor seeking nonemergency abortion to either obtain consent from one parent or prove to court that she "is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests").

Interestingly enough, *Roe v. Wade*, 410 U.S. 113 (1973), the decision recognizing a constitutional right to abortion, actually identifies the interests at issue by examining the particular history of state statutes criminalizing abortion in the nineteenth century, see *id.* at 148–52; Siegel, *supra* note 171, at 278 n.64 ("*Roe* . . . draws its authority from the nation's history and traditions. The privacy right *Roe* recognized protects a liberty available to women at common law, and the state regulatory interests *Roe* recognized are those embodied in nineteenth century criminal abortion statutes, as the Court understood them.").

304. See, e.g., Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994) (creating federal criminal penalties and civil remedies to protect right of access to abortion clinics); *Rust v. Sullivan*, 500 U.S. 173, 177–81 (1991) (upholding federal regulations prohibiting federally-funded clinics from: providing counseling or referrals concerning abortion; engaging in activities that encourage, promote, or advocate abortion; and remaining physically or financially connected to organizations performing prohibited abortion activities); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding federal "Hyde Amendment" that severely limited federal funding for abortions performed under Medicaid program).

305. See cases cited *supra* note 7.

uniquely federal responsibilities. Federal tax laws, for instance, establish what constitutes a family for their purposes, distribute privileges and burdens on the basis of marital status, and only recognize relationships of dependency if they exist within certain specified family groups.³⁰⁶ While the federal tax code frequently uses state determinations of family status as a baseline for establishing federal rights, it often expands or contracts state definitions to suit federal purposes, a course with far-reaching substantive ramifications given the impact of the federal income tax system and what turns within it based on family status.³⁰⁷ All of these tasks are important tax functions; but in defining what counts as a family and in establishing the legal rights and responsibilities that family members have because of their status, they also satisfy the first and third parts of my definition of family law.

The family law within federal citizenship policy has been the subject of national debate for almost a century. In 1907, Congress provided that

306. See, e.g., 26 U.S.C. § 151 (1994) (allowing federal income tax deductions for certain spouses and dependents); *id.* § 152 (a)–(b) (defining “dependents” for federal income tax purposes to include, *inter alia*, stepchildren, siblings, half-siblings, parents, stepparents, nieces, nephews, aunts, and uncles); *id.* § 7703 (determining marital status for federal income tax purposes); *Druker v. Commissioner*, 697 F.2d 46, 49–51 (2d Cir. 1982) (upholding higher federal income tax rates for some married taxpayers, while noting that this “marriage penalty” may influence people’s decision about whether to marry and remain married); *Mapes v. United States*, 576 F.2d 896, 898–904 (Ct. Cl. 1978) (upholding marriage penalty and observing that it may affect decisions about whom to marry); DANIEL R. FEENBERG & HARVEY S. ROSEN, RECENT DEVELOPMENTS IN THE MARRIAGE TAX 2, 9–15 (National Bureau of Econ. Research Working Paper No. 4705, 1994) (predicting that 52% of married couples filing jointly would pay more federal income tax in 1994 than they would have paid if divorced (an average of \$1244 more) and 38% would pay less than if divorced (an average of \$1399 less)); CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 9 (1997) (“The federal income tax code assumes that married couples combine their incomes and other resources to support themselves and their dependents, and therefore imposes taxes on the joint incomes of spouses. . . . [Unmarried couples or family members] must pay taxes on their separate incomes, even if they consume together.”); see also EDWARD J. MCCAFFERY, TAXING WOMEN 268 (1997) (arguing that federal “tax system in context is deeply biased against working wives and mothers”); Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1392 (1975) (noting Internal Revenue Code’s substantial concern with “the status of marriage and the family”); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1157–59 (1981) (discussing taxation of unmarried cohabitants); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 987–98 (1993) (“Major, structural aspects of the tax laws were put in place at a time when traditional families . . . were dominant. These aspects persist to this day, serving as an anchor against the emergence of more modern and flexible family models.”).

307. See, e.g., 26 U.S.C. § 152(b)(1) (defining brother and sister, categories that count as dependents, to “include a brother or sister by the halfblood”); *id.* § 2(b)(2)(C) (“[A] taxpayer shall be considered as not married at the close of his taxable year if at any time during the taxable year his spouse is a nonresident alien . . .”); *id.* § 2(b)(2)(D) (“[A] taxpayer shall be considered as married at the close of his taxable year if his spouse . . . died during the taxable year.”).

an American woman's marriage to an alien terminated her United States citizenship.³⁰⁸ The law conditioned women's nationality on their (state-defined) marital status, but it did more than that. Much like the domestic relations exception to diversity jurisdiction, this federal statute was enacted, understood, and challenged as a direct expression of the coverture principles that dominated all of family law at the time. In upholding the 1907 law, the Supreme Court explained that "[t]he identity of husband and wife is an ancient principle of our jurisprudence. . . . And this was the dictate of the act in controversy."³⁰⁹ As an approving legal treatise of the time elaborated, "[t]he woman merges her nationality in that of her husband upon marriage to a foreigner" because "[s]he does not enjoy in coverture, any other or different rights and privileges from those enjoyed by her husband."³¹⁰

In the 1910s, 1920s, and 1930s, an organized woman's movement challenged this federal policy as part of its struggle to eradicate marital status law, provoking a national debate over the role of the federal government in perpetuating and contributing to a family law founded on coverture rules. Where their opponents contended that marriage-based citizenship laws for women were a necessary component of "family

308. See An Act In reference to the expatriation of citizens and their protection abroad, ch. 2534, § 3, 34 Stat. 1228, 1228-29 (1907). For more on the 1907 Act, see Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 POL. & SOC'Y 1, 9-11 (1984); Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, at 23-24 (July 1997) (unpublished manuscript, on file with author) ("By punishing American women who would introduce foreign elements into the body politic, the act was akin to state laws which criminalized or nullified marriages between whites and persons of color. . . . [T]he 1907 act [also] showed that Congress took the primacy of male citizenship and headship of the family for granted.").

This statute joined an 1855 federal law that granted foreign women automatic citizenship upon their marriage to a United States citizen or upon the naturalization of their alien husbands. See An Act to secure the Right of Citizenship to Children of Citizens of the United States born out of the Limits thereof, ch. 71, § 2, 10 Stat. 604, 604 (1855).

309. *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).

310. PRENTISS WEBSTER, *A TREATISE ON THE LAW OF CITIZENSHIP IN THE UNITED STATES TREATED HISTORICALLY* 299, 297 (Fred B. Rothman & Co. 1980) (1891). Candice Lewis Bredbenner has a somewhat different view of the 1907 Act. As she explains it,

the appearance of marital expatriation in 1907 seemed untimely; its declaration of women's political dependence was better suited to that earlier era when the common law doctrine of coverture ruled and a woman suffered civil death upon marriage. However, Congress did not pass the Expatriation Act of 1907 to revive the dying legal concept of coverture, although lingering presumptions about female dependence certainly informed the statute's provisions. . . . Congress was responding to a general demand from inside and outside the government to enact restrictive nationality and immigration laws.

CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* 56-57 (1998).

unity,"³¹¹ women like Sophonisba Breckinridge, dean of what is now the University of Chicago's School of Social Work,³¹² condemned these federal statutes for reinforcing husbands' "general dominion" over their wives and children³¹³ and demanded "that the married woman . . . be treated as an adult person capable of self-determination."³¹⁴ This national debate produced a flurry of new federal laws that seriously diminished, although they did not eliminate, the role of marital status in determining American citizenship.³¹⁵

311. As Representative Martin Dies of Texas explained in opposing one reform bill that feminists advocated: "The basis of this bill is equal rights. Of course, it has always been our theory, especially in my State, that the man is the head of the home and his domicile is the domicile of his wife." *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the House Comm. on Immigration and Naturalization*, 73d Cong. 29 (1933) (statement of Rep. Dies).

312. See FLEXNER, *supra* note 176, at 215.

313. SOPHONISBA P. BRECKINRIDGE, *MARRIAGE AND THE CIVIC RIGHTS OF WOMEN* 6 (1931).

314. *Id.* at 17.

315. In 1920, both the Democratic and the Republican Party platforms promised to enact federal legislation providing that American women would not lose their United States citizenship by marrying foreigners. See Democratic Platform of 1920, *reprinted in* NATIONAL PARTY PLATFORMS, 1840-1956, *supra* note 232, at 213, 219; Republican Platform of 1920, *reprinted in id.* at 229, 236. Enacted in 1922 and 1931, the first and second Cable Acts fulfilled this promise and generally made Congress's citizenship policy less dependent on sex and marital status. See An Act Relative to the naturalization and citizenship of married women, ch. 411, 42 Stat. 1021 (1922); An Act To amend the naturalization laws in respect of posting notices of petitions for citizenship, and for other purposes, ch. 442, 46 Stat. 1511 (1931). In 1934, Congress eliminated the sex distinction in laws that allowed legitimate children born abroad to U.S. citizen fathers to become citizens, but denied the same privilege to the foreign-born legitimate children of U.S. citizen mothers. See An Act To amend the law relative to citizenship and naturalization, and for other purposes, ch. 344, 48 Stat. 797 (1934). American immigration policy continued to distinguish, however, between the *illegitimate* children of citizen mothers and the *illegitimate* children of citizen fathers. See Nationality Act of 1940, ch. 876, §§ 201, 205, 54 Stat. 1137, 1138-40 (imposing harsher requirements on illegitimate children of citizen fathers); *infra* note 318.

In explaining their support for the first Cable Act, some Congressmen stated that the ratification of the Nineteenth Amendment in 1920 represented a national rejection of coverture rules that accordingly made reforming the law of women's citizenship necessary. Representative John Jacob Rogers of Massachusetts, for instance, noted that

there was no particular force in the demand for this bill until the nineteenth amendment became a part of the organic law of the land. But when women were given civil equality with men, the right to vote, it seems to me that that moment it became ludicrous for us to say that thereafter the rights of women to citizenship shall be dependent on the rights of men. At that moment the doctrine of dependent or derived citizenship became as archaic as the doctrine of ordeal by fire.

62 CONG. REC. 9047 (1922) (statement of Rep. Rogers); see also *id.* at 9041 (statement of Rep. Vaile) ("The second event which has demonstrated the need for a change in our present laws was the nation-wide adoption of woman suffrage [Woman] is now in name, as well as in fact, an equal partner in the business of conducting the American Government."); *id.* at 9043 (statement

Today, family law, and disputes over its content, continue to occupy an important place in federal policy regulating United States citizenship, although attention now focuses on the alien relatives of American citizens. The modern immigration code accords substantial advantages to people who fall within its articulation of the family. In order to identify which family bonds it will recognize and privilege, this body of federal law creates and administers detailed definitions of familial relations enacted specifically for federal purposes.³¹⁶ It establishes, for instance, what counts as a sham marriage³¹⁷ or "a bona fide parent-child relationship."³¹⁸ Indeed, much of the law determining who can immigrate to this country turns on a uniquely federal family status: The "immediate relatives" of United States citizens are permitted to immigrate without numerical restriction, although their admission counts toward the numerical cap on annual immigration that applies to all other immigrants.³¹⁹ In fiscal year 1996, for example, "immediate relatives" accounted for thirty-three percent of all immigration

of Rep. Raker) ("We have extended suffrage to women, and all the dire troubles and complications which were predicted, the question of the division of the family and the want of their attendance upon the polls and their interest in Government affairs, have all been wiped away and everything of the kind proven to be a myth."); *id.* at 9048 (statement of Rep. Siegel) ("As to the right of the woman to be an independent American citizen in her own right there can be no controversy, because the nineteenth amendment to the Constitution has settled that for all time.").

316. For more on who the immigration code excludes from its definition of the family, see, e.g., *Kahn v. INS*, 36 F.3d 1412, 1414–15 (9th Cir. 1994) (holding that state law does not conclusively determine whether family ties (here, a common law marriage) exist for purposes of deportation waiver); *Adams v. Howerton*, 673 F.2d 1036, 1039–41 (9th Cir. 1982) (holding that same-sex marriage is not recognized for immigration purposes, even if valid under state law).

317. See 8 U.S.C. § 1154(c)(2) (1994) (providing that petition for permanent residency cannot be approved if "the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws").

318. Under the immigration code, an illegitimate child falls within the legal definition of a child if he is sponsored by his natural mother or is sponsored by his natural father and "has or had a bona fide parent-child relationship" with that father. See 8 U.S.C. § 1101(b)(1)(D) (1994). The Supreme Court recently reviewed the constitutionality of this distinction based on the sex of an illegitimate child's citizen parent. See *Miller v. Albright*, 118 S. Ct. 1428 (1998). Five Justices agreed that the distinction violates the equal protection rights of citizen fathers. See *id.* at 1445 (O'Connor, J., concurring in judgment); *id.* at 1455 (Breyer, J., dissenting). However, two of these Justices concluded that the *Miller* plaintiff, the illegitimate child of a citizen father, lacked standing to pursue her father's claim and therefore declined to join a holding on the merits. See *id.* at 1442–43 (O'Connor, J., concurring in judgment). The law, accordingly, stands for the moment. See *id.* at 1432 (Stevens, J., announcing judgment of the Court and delivering an opinion).

319. The term "immediate relatives" includes spouses, unmarried minor children, parents when the citizen is at least twenty-one years old, and certain widows and widowers. See 8 U.S.C. § 1151(b)(2)(A)(i) (1994). In turn, federal immigration law defines children, for instance, to include, *inter alia*, stepchildren, legitimated children, and adopted children who have achieved that status by a certain age. See *id.* § 1101(b)(1)(A)–(C), (E).

to the United States, and all family-based admissions accounted for sixty-five percent of the year's immigration.³²⁰

Federal family law also extends far beyond singularly federal domains to create interactive federal-state control over family life. Although state law occupies much of the field, federal legislation importantly regulates the parental relation in families with no particular connection to the federal government—leaving some elements of the law to the states and taking others for itself. The Child Support Enforcement Act (CSEA),³²¹ for example, oversees much more than the enforcement of existing state court orders. It also structures the creation of legally recognized parental relationships; in exchange for financial and other incentives, CSEA largely determines state procedures for establishing paternity.³²² In addition, the Act helps define the rights and responsibilities of parents upon the dissolution of their marriage or other relationship, requiring states to conform to highly specific guidelines on the content of child support orders.³²³ The Adoption Assistance and Child Welfare Act³²⁴ uses similar incentives to shape other routes to the legal formation of parental relationships. This Act specifies the standards of review that state courts must apply to foster care placements.³²⁵ It also regulates state adoption policies by, for instance,

320. See U.S. IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, 1996, at 13–15, 19 (1997). The modern federal family law governing American Indian families is also far-reaching. For instance, Congress has exerted enormous control over the creation and dissolution of parental relationships with Indian children. The Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (1994), both structures proceedings for the termination of parental rights, *see id.* § 1913, and sets forth the principles governing adoptive placements, *see id.* § 1915.

321. Pub. L. No. 93-647, 88 Stat. 2337 (1975) (codified as amended at 42 U.S.C. §§ 651–669 (1994)).

322. See, e.g., 42 U.S.C. § 666(a)(5)(C) (requiring participating states to create “a hospital-based program for the voluntary acknowledgment of paternity during the period immediately before or after the birth of a child”); *id.* § 666(a)(5)(B) (requiring participating states “to require the child and all other parties, in a contested paternity case, to submit to genetic tests upon the request of any such party”); *id.* § 666(a)(5)(F) (specifying how objections to genetic testing results must be made).

323. CSEA, for example, creates national uniformity by requiring states to “petition for the inclusion of medical support as part of any child support order whenever health care coverage is available to the absent parent at a reasonable cost.” *See id.* § 652(f).

324. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C. §§ 620–628, 670–679a (1994)).

325. The Victims of Child Abuse Act, Pub. L. No. 101-647, 104 Stat. 4792 (1990) (codified as amended at 42 U.S.C. §§ 13001–13041 (1994)), offers additional assistance and training to state judicial personnel and attorneys based on Congress’s finding that the Adoption Assistance and Child Welfare Act makes “substantial demands on the courts handling abuse and neglect cases,” 42 U.S.C. § 13021(a)(2), including requiring state courts to “(A) determine whether the agency made reasonable efforts to prevent foster care placement; (B) approve voluntary nonju-

requiring states to pay the adoption expenses of parents adopting "a child with special needs,"³²⁶ a protected category that the federal statute itself defines at length.³²⁷ Along the same lines, the Adoption and Safe Families Act³²⁸ employs detailed conditions on federal spending in order to accelerate the adoption of neglected and abused children and the termination of their biological parents' rights. Among many other requirements, a state seeking funding under this federal statute must agree to begin proceedings to terminate parental rights once a child has spent fifteen out of the last twenty-two months in foster care and must initiate such proceedings almost immediately if the child was abandoned or abused.³²⁹

Similarly, the federal government's many social welfare and benefits programs do not merely impact on family life; they constitute federal family law. From its origins in 1935 as the dominant provider of means-tested relief to its recent termination, Aid to Families with Dependent Children (AFDC) explicitly regulated based on family status, importantly establishing the legal rights and obligations associated with particular family roles. AFDC's guiding premise was that needy children and their caretaker relatives, but not other able-bodied adults, have a federal entitlement to a minimum level of support. While the Social Security Act of 1935, which created AFDC,³³⁰ defined the range of possible caretaker relatives broadly,³³¹ federal administrators subsequently defined need to turn narrowly on marital status—treating widows much more favorably solely because they had once been wives. For decades, welfare's designers were concerned that a generous welfare policy for single women would make marriage less attractive to them, foster undue female independence, and "usher in a new relationship between man and wife."³³² The federal social security board therefore sanctioned "suitable home" policies that subjected mothers who had never married to much harsher requirements than those

dicial placement; and (C) provide procedural safeguards for parents when their parent-child relationship is affected," *id.* § 13021(a)(3).

326. Adoption Assistance and Child Welfare Act, 42 U.S.C. § 673(a).

327. *See id.* § 673(c).

328. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

329. *See id.* § 103(a)(3) (amending 42 U.S.C. § 675(5)).

330. *See* Social Security Act, ch. 531, §§ 401–406, 49 Stat. 620, 627–29 (1935) (repealed 1996).

331. The Act defined "caretaker relative" to cover a father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt. *See id.* § 406(a).

332. ABRAHAM EPSTEIN, *INSECURITY: A CHALLENGE TO AMERICA* 639 (1933). Epstein was a prominent social insurance advocate whose proposals significantly shaped the Social Security Act. *See* LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935*, at 148 (1994).

widows faced.³³³ Even when never-married women (and two-parent families) eventually managed to participate in the AFDC program in large numbers, work requirements that were enacted as late as the 1970s continued to differentiate legal rights based on marital status. Federal welfare law completely exempted all married women from the work obligations that were a condition of aid for single women with no children under the age of six;³³⁴ in other words, AFDC defined the bundle of rights associated with being a married woman to include the ability to participate in the nation's most important means-tested welfare program without satisfying any of its work requirements.

A more recent example of family law within federal benefits programs is even more sweeping in scope. The Defense of Marriage Act of 1996 (DOMA) does more than regulate interstate relations by permitting states to refuse to recognize same-sex marriages performed in other states; it also affirmatively preempts much of the effect that state recognition of such marriages would have. DOMA defines marriage as the union of one man and one woman for the purpose of all federal laws, rulings, regulations, and interpretations, and denies federal benefits to same-sex couples.³³⁵ For all federal purposes, it makes any contrary state determination of family status irrelevant.

Federal family law can also be found within the federal social security system. While this Article is no place for a complete account of social

333. See FEDERAL SECURITY AGENCY, SOCIAL SECURITY BOARD, BUREAU OF PUBLIC ASSISTANCE, BUREAU CIRCULAR NO. 9, at § 209, at 1 (May 1, 1940).

334. See Act of Dec. 28, 1971, Pub. L. No. 92-223, 85 Stat. 802, 805-06 (repealed 1996); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1264-67 (1983). Tellingly, Johnnie Tillmon, a welfare mother and leader of the National Welfare Rights Organization in the 1960s and early 1970s, described AFDC in explicitly familial terms:

The truth is that A.F.D.C. is like a super-sexist marriage. You trade in a man for the man. But you can't divorce him if he treats you bad. He can divorce you, of course, cut you off anytime he wants. But in that case, he keeps the kids, not you.

The man runs everything. In ordinary marriage, sex is supposed to be for your husband. On A.F.D.C., you're not supposed to have any sex at all. You give up control of your own body. It's a condition of aid. You may even have to agree to get your tubes tied so you can never have more children just to avoid being cut off welfare.

The man, the welfare system, controls your money. He tells you what to buy, what not to buy, where to buy it, and how much things cost. If things—rent, for instance—really cost more than he says they do, it's just too bad for you. He's always right.

Johnnie Tillmon, *Welfare is a Woman's Issue*, MS., Spring 1972, at 111, 111.

335. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C.A. § 1738C (West Supp. 1998)); see also HOUSE COMM. ON THE JUDICIARY, DEFENSE OF MARRIAGE ACT, H.R. REP. NO. 104-664, at 10 (1996) ("The word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times.").

security, it is worth noting one very significant way in which the program distributes benefits based on marital status and structures the dissolution of the marital relationship. In addition to entitling workers in qualified industries to old age benefits based on their history of paid employment,³³⁶ the social security program also grants "spousal benefits" to the spouses, surviving spouses, and divorced spouses of these workers. This entitlement is a right that recipients enjoy solely because of their family status, which is defined in the social security statutes and regulations to build on, but importantly diverge from, state law. The spousal benefit provisions cover all present spouses once their marriage has lasted one year,³³⁷ but exclude surviving spouses who remarry before the age of sixty,³³⁸ divorced spouses who were married for less than ten years,³³⁹ and any divorced spouse (with infrequent exception) who ever remarries.³⁴⁰ Although the social security program otherwise rewards paid labor, the spousal benefit does not depend on its recipients' work history; spouses eligible to receive benefits based on their past employment must forgo such payments in order to collect based on their marital relationship,³⁴¹ and spousal benefits are set as a fraction (up to fifty percent for spouses and divorced spouses, up to one hundred percent for surviving spouses) of the payment the "primary" spouse receives.³⁴² While the spousal benefit provisions hardly represent the sum total of the

336. As Alice Kessler-Harris has explained, the social security program initially excluded nearly half the working population, including farmworkers, casual laborers, domestic servants, and laundry workers, as well as seamen, the self-employed, government employees, and those who worked for nonprofit groups. Because the program did not provide benefits to those who worked in covered occupations intermittently or for only a few years, more than three-fifths of fully employed African Americans were denied coverage. Sixty percent of the excluded workers were female—in a labor force where less than 30 percent of women were employed. Probably as many as 80 percent of wage-earning black women were deprived of participation and benefits.

Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in *U.S. HISTORY AS WOMEN'S HISTORY* 87, 92 (Linda K. Kerber et al. eds., 1995).

337. See 42 U.S.C. § 416(b)(2) (on wives), 416(f)(2) (on husbands) (1994).

338. See *id.* § 402(e)(1)(A), 402(e)(3) (on widows), 402(f)(1)(A), 402(f)(4) (on widowers).

339. See *id.* §§ 402(b)(1)(G)(ii), 416(d)(1) (on divorced wives), 402(c)(1)(G)(ii), 416(d)(4) (on divorced husbands).

340. See *id.* § 402(b)(1)(C), 402(b)(3) (on divorced wives), 402(c)(1)(C), 402(c)(4) (on divorced husbands). If the "primary" spouse dies, however, the social security program treats the divorced spouse as a surviving spouse for purposes of the remarriage rules. See *id.* §§ 402(e)(1)(A), 402(e)(3), 416(d)(2) (on surviving divorced wives), 402(f)(1)(A), 402(f)(4), 416(d)(5) (on surviving divorced husbands).

341. See *id.* § 402(b)(1)(D) (on wives and divorced wives), 402(c)(1)(D) (on husbands and divorced husbands), 402(e)(1)(D) (on widows), 402(f)(1)(D) (on widowers).

342. See *id.* § 402(b)(2) (on wives and divorced wives), 402(c)(3) (on husbands and divorced husbands), 402(e)(2)(A) (on widows), 402(f)(3)(A) (on widowers).

social security system, they are no minor footnote either. The spousal benefit is the means by which most women receive social security. It grants them the legal right to a higher payment by virtue of their marital status than they would have obtained if lacking the required family relationship and dependent only on their paid work histories.³⁴³

Indeed, the family law within this important feature of the social security program has an even farther-reaching impact than that. Spousal benefit law not only creates a valuable new legal right attached to status as a spouse, it also notably structures the termination of this familial status, at least at divorce.³⁴⁴ As applied to divorced spouses, the federal government's spousal benefit provisions are at odds with most state divorce law. Where the social security program limits a divorced spouse's spousal benefits to fifty percent of the "primary" spouse's entitlement and entirely excludes from spousal benefits divorced spouses who were married for less than ten years, the trend in state divorce law is to include contractual pension rights in marital or community property and to divide them equitably.³⁴⁵ The Supreme Court, however, has indicated in a closely analogous case on federal railroad retirement benefits that it interprets the Social Security Act

343. In 1996, only 36.2% of all female recipients of social security collected benefits based on their own work history. Over a third (37.4%) of the women receiving social security collected as spouses, surviving spouses, or divorced spouses because their employment history did not qualify them for worker benefits at all. The remaining 26.3% of the female recipients were entitled to collect social security benefits based on their work histories, but instead collected spousal benefits because these latter benefits entitled them to larger payments. See Donald T. Ferron, *Social Security Benefits for Women Aged 62 or Older, December 1996*, SOC. SECURITY BULL., No. 4 1997, at 32, 32, 34 tbl.2; see also SOCIAL SECURITY ADMINISTRATION, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 1997, at 201 tbl.5.A14 (providing same information).

People collecting social security as independent workers receive payments based on their years of paid employment and average wages. See 42 U.S.C. § 415(d) (1994); Ferron, *supra*, at 33. This rubric systematically disadvantages women, who tend to devote more of their lives to unpaid labor and to be paid less when they do enter the marketplace. See Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 279-81 (1989); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 38-41 (1996).

344. The Employee Retirement Income Security Act (ERISA), federal law that regulates retirement plans worth trillions of dollars in the aggregate, similarly preempts state law governing property distribution at divorce (and death). Since 1984, Congress has granted surviving and divorced spouses specific, limited property rights in private employee pension benefits. See Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified in scattered sections of 26 U.S.C. and 29 U.S.C.); see also *Boggs v. Boggs*, 117 S. Ct. 1754, 1758, 1760 (1997) (holding that ERISA preempts state community property law permitting deceased first wife to make testamentary transfer of her interest in husband's undistributed pension benefits and noting that residents of community property states alone have perhaps \$1 trillion in retirement plans).

345. See Bonnie C. Kittinger, Note, *Should Married Couples Share Social Security Earnings Credit?*, 26 J. FAM. L. 601, 606 (1987/1988).

to bar claims by one spouse against the social security entitlement of the other.³⁴⁶ As federal family law, the Social Security Act, with its provision of limited spousal benefits, therefore preempts state property distribution principles, restructuring the termination of the marital relationship according to the federal government's requirements.

This part briefly reviews only a few areas of modern federal regulation, but it should be sufficient to indicate what the claims from history for exclusive localism in family law have failed to register. While the federal laws that I outlined above are not wrongly classified as tax, citizenship, social welfare, or social security statutes and regulations, they also and simultaneously are important examples of federal family law. Just as a factual matter, exclusive localism simply misdescribes family law in modern America. A clear and appropriate definition of family law quickly uncovers notable federal regulation of the family. Only the continuing power of arguments from history, and their failure to produce a coherent and consistent definition of family law, has blinded us to that reality.

Even if one accepts the claim, which localists have uncritically put forward, that history should control the place of family law in the federal system, Parts II and III reveal that localism lacks a firm grounding in tradition. During Reconstruction, the culmination of a multigenerational debate over federal involvement in family law, there was a broad consensus that the federal government had jurisdiction over family law, as both we and nineteenth-century Americans would understand the category. This agreement extended from the debates on the 1866 Civil Rights Act and the Fourteenth Amendment, to the anti-polygamy campaign and the litigation over state anti-miscegenation laws. It encompassed most of Reconstruction's critics as well as Reconstruction's supporters and produced federal law that concretely improved the family law governing the freedmen. Moreover, the only significant policy concern that Congressmen raised against federal intervention into family law, maintaining social segregation between the races and coverture within the marital relationship, is rooted in antebellum proslavery discourse and now constitutionally illegitimate. While the argument from tradition for exclusive localism fails to characterize and identify family law appropriately, a clear definition of the subject reveals an important body of modern federal family law.

346. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Court held that benefits payable pursuant to the federal Railroad Retirement Act are not community property subject to division at divorce, see *id.* at 581–91. In dicta throughout the opinion, the Court indicated that it would apply the same analysis to social security benefits. See *id.* at 574–77, 579, 582–83, 585–87. Subsequent state court decisions have consistently followed this dicta. See Becker, *supra* note 343, at 288 n.125; Kitinger, *supra* note 345, at 607.

In this light, Part IV considers, as current thinking largely does not, the role that history should assume in federalism debates and the specific force—and lessons—of the past that this Article has uncovered.

IV. THE PLACE OF HISTORY IN FEDERALISM

The Supreme Court and the judiciary in general have been extremely unreflective about the place of history in federalism.³⁴⁷ *Lopez*, paradigmatic of the Court's entire localist discourse, never once indicates why it relies on history to identify family law as uniquely beyond the reach of the federal commerce power.³⁴⁸ Scholars, too, have been remarkably silent, given the Court's clear, if unexplained, assumption that history dictates the resolution of this debate. But the weight and scope that history can appropriately exert in disputes over what should be under national jurisdiction and what under local control remains a profound question, particularly because federalism in the context of the debate over family law has less to do with textual interpretation, a fairly familiar proposition, and more with structural concerns: The claim in *Lopez* about the inherent localism of family law was not a quasi-contractual argument about the original intent of particular constitutional provisions, but an implicit assertion that history, in the sense of exclusive practice over many years, should control family law's place in the federal system.³⁴⁹ This contention about the power of tradition as an argument demands critical inquiry, whatever one thinks about

347. See *supra* Part I.

348. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) ("[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.* at 564–65 ("Justice Breyer posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance." (citing *id.* at 624 (Breyer, J., dissenting))); *id.* at 565 ("This analysis [by the dissent in support of the Gun-Free School Zones Act] would be equally applicable, if not more so, to subjects such as family law and direct regulation of education."); *id.* ("Under the dissent's rationale, Congress could just as easily look at child rearing as 'fall[ing] 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.'" (quoting *id.* at 629 (Breyer, J., dissenting))).

349. Lawrence Lessig is one of the few scholars who has considered history's role in the interpretation of federalism. Lessig's work, however, focuses on the constitutional text, the Founding understanding, and how broadly or narrowly to read the total scope of federal power. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 127–30 (1995). In contrast, the localist argument about family law more immediately raises the questions of how history, in the sense of repeated practices over time, should affect what falls on which side of the national/local divide and why family law should be immune from the dramatic increases in federal power acknowledged almost everywhere else.

whether or when family law should be under federal authority.³⁵⁰ In this part, I offer three standards for judging the force that history should bring to bear on the federalism debate. Concluding that the actual record of federalism and family law adds almost no weight to the case for exclusive localism, I go on to suggest what the history that I have uncovered can teach.

The first, and perhaps clearest, reason to rely on history when deciding where to draw lines between national and local jurisdiction is the simple fact of longevity itself. Where it exists, longevity can produce settled expectations, established institutions, and specialized competence. It allows both public and private entities to engage in long-range planning and resource allocation, and also permits individuals to order their lives based on clearly understood expectations and limitations. Indeed, in some measure, one must rely on something like longevity—what is and has been the case—to avoid having to reconsider everything constantly and all at once. More than that, repeated practices can, over time, become part of our articulation of national and personal identity. It is this socially expressive aspect of longevity, rather than the arguments for predictability, that concerned Justice Scalia, for instance, in his dissent from the Supreme Court's recent decision to open the Virginia Military Institute to women after over one hundred and fifty years of exclusively male admissions.³⁵¹

An argument from longevity could be quite powerful then, although one might suspect that its usefulness for localism's advocates will be limited since family law became a symbol of exclusive and inherent localism precisely because federal involvement was so patent and pervasive everywhere else. Certainly, the notion that the federal government has stayed far away from family law is untenable. Reconstruction was the culmination of a

350. For an example of a policy argument about family law and federalism that delves into the virtues of federal versus state control, see Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1820 (1995) ("[S]tate sovereignty over family law . . . promot[es] 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.").

351. Justice Scalia articulated his position this way:

[The Court] counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

....

... [I]n my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them . . . For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.

United States v. Virginia, 518 U.S. 515, 566–68 (1996) (Scalia, J., dissenting).

multigenerational debate over the federal government's role in family law—as both present-day and nineteenth-century Americans would define that category—and the work of Reconstruction's congressional architects concretely improved the family law governing the emancipated slaves. Equipped with a coherent and appropriate definition of family law, the far-reaching scope of modern federal family law also becomes clear. To the extent that expectations of exclusive localism in family law now exist, they originate in misguided historical arguments that have masked the reality of federal involvement and failed to devise a coherent definition of family law itself. Courts and commentators cannot easily rely on a vision of history that is simply not correct—on a claimed longevity that does not actually exist.

Reason—the continuing persuasive power of historical rationales and the linked recognition that past practice can reflect the best judgment of intelligent and thoughtful historical actors—constitutes a second ground for giving weight to history in federalism questions. In fact, a commitment to reason underlies the very notion of a rule of law, which demands, for example, that judges explain themselves and record their opinions for posterity so that future decisionmakers can evaluate the merits of the original thinking as well as the bare precedent of the earlier outcome. Such a required articulation helps protect the polity from tyranny in the form of blind commitment to the unregulated passions and predilections of individual people, present or past. It means that we should consider why something was done as well as the fact of its accomplishment.

Reconstruction's supporters involved themselves in family law in order to abolish slavery and all of its constitutive elements. They extended federal protection to certain basic family rights because they were convinced that those rights were essential to freedom and equality. These motivating principles, it almost goes without saying, survive the test of time remarkably well. In contrast, the logic that drove arguments for exclusive localism in family law during Reconstruction reflected concerns that are now constitutionally illegitimate: maintaining social segregation between the races and coverture within the marital relation. The reasoning that underlies the origins of the domestic relations exception to diversity jurisdiction, where the Supreme Court's localist discourse on family law first appeared, is similarly unsatisfying. The Court created this exception in *Barber* solely to provide jurisdictional support for the marital unity doctrine, and *Barber* makes no sense in a world without coverture.

Moreover, localists' subsequent reliance on claims from history has suppressed the development of policy explanations for exclusive localism in

family law that are meant to be fully persuasive. *Ankenbrandt*, for instance, acknowledged that the domestic relations exception has no constitutional basis,³⁵² but assumed that the supposed history of exclusive localism in family law was itself sufficient to justify affirming the doctrine.³⁵³ Indeed, the Chief Justice of the United States has argued that reason is actually an inappropriate guide where family law's place in the federal system is concerned. As Rehnquist has explained, "[i]f ever there were an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic,' it is in the area of domestic relations."³⁵⁴ It should be clear that such thinking neither remains persuasive nor reflects decisionmaking processes that we can reasonably endorse. The argument from tradition for exclusive localism in family law fails the test of reason.

As a third consideration, the force of arguments for relying on history to determine jurisdiction over family law might very well depend on the frequency with which history is dispositive elsewhere and on the quality of the rationale advanced for appealing to the past in some cases and not others. This standard of consistency relates to the rule of law as well: When the same grounds for privileging history apply (or do not) in many cases, then relying on past practice in one analogous situation but not others has not been explained.

Although localists have implicitly asserted that history should control family law's position in the federal system, history has not been consistently used to understand the claims of federalism elsewhere, and has instead often yielded to the weight of significant, principled exigencies. The common law, for instance, classified employment, with slavery, marriage, and parenthood, as part of domestic relations. Blackstone drew no categorical line between the law of "*master and servant*," "*husband and wife*," and "*parent and child*." To the contrary, he discussed all three together as "[t]he three great relations in private life."³⁵⁵ Keeping in this tradition, nineteenth-

352. See *Ankenbrandt v. Richards*, 504 U.S. 689, 695–97 (1992).

353. See *id.* at 694–95 ("[W]e are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half . . ."); *id.* at 703 ("[O]ur conclusion [is] rooted in respect for this long-held understanding . . ."); *id.* at 715 (Blackmun, J., concurring) (contending, without explanation, that "the unbroken and unchallenged practice of the federal courts since before the War Between the States of declining to hear certain domestic relations cases" justified federal abstention).

354. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

355. BLACKSTONE, *supra* note 35, at *410. Kent's *Commentaries*, which adapted Blackstone for an American audience, similarly identified the three domestic relations as "husband and wife," "parent and child," and "master and servant." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 75, 190, 248 (O.W. Holmes, Jr. ed., Boston, Little, Brown, and Co. 12th ed. 1873); see also ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT

century legal treatises highlighted the regulatory commonalities between employment, marriage, and parenthood, examining each alongside the other. The subtitle of James Schouler's *Treatise on the Law of the Domestic Relations* (1882) is typical and telling: *Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant*.³⁵⁶ This legal regime, however, importantly reflected the economic centrality of home production in our nation's early history.³⁵⁷ When modes of production changed and important exigencies calling for national involvement arose, the federal government massively intervened into labor-management relations in the late nineteenth and early twentieth centuries, first in diversity cases granting injunctions to enforce employer property rights³⁵⁸ and then through federal antitrust prosecutions,³⁵⁹ federal

RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 56 (1991) ("[In colonial legal thought,] [r]esident servants were like wives and children because all were members of the household and all were the legal dependents of the head. . . . Household dependents were . . . understood to come under the 'government' of the head of household.").

356. SCHOULER, *supra* note 136; see also TAPPING REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF THE COURTS OF CHANCERY* (Albany, William Gould & Son 3d ed. 1867); Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LABOR & WORKING-CLASS HIST. 56, 70 (1995) ("The legal commonalities among the domestic relations during the nineteenth century were commonalities of authorized power: of masters/employers over slaves/servants/apprentices/employees, of husbands over wives, parents over children. They were recognized, deplored, and defended as such."); Van Tassel, *supra* note 169, at 883 ("Dependent statuses were arranged in a hierarchy under the rule of the husband/father/master. Wives occupied the step under husband, with the other statuses ranging in descending order to children, wage laborers, indentured servants and apprentices, down finally to slaves . . .").

357. See JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* 30-98 (1990); NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 19-62 (2d ed. 1997).

358. William Forbath has described how federal courts in the early twentieth century used injunctions to "repeatedly [tear] critical swaths of government authority over labor protest away from more sympathetic local officials." "As one labor journalist remarked, the injunction did 'away with local grand juries, local petit juries, local officers [and elected officials] of all kinds.'" William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1179-80 (1989) (quoting NAT'L LAB. STANDARD, Aug. 15, 1901, at 1); see also WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 98-127 (1991); FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 5, 15 (1930) ("[Federal courts] are drawing unto themselves labor controversies with increasing measure [T]he federal courts, under the Supreme Court's lead, have dealt with labor controversies apart from the authority of federal legislation and untrammelled by state decisions."); Sylvester Petro, *Injunctions and Labor-Disputes: 1880-1932*, 14 WAKE FOREST L. REV. 341, 351-53 (1978) (reporting that federal courts issued 182 labor injunctions between 1880 and 1932).

359. See, e.g., HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 207 (1991) ("After 1890 many organized labor activities were declared [by federal courts] unlawful under section 1 of the Sherman Antitrust Act Some strikes in the railroad industry were additionally condemned under the Interstate Commerce Act of 1887, and a few were enjoined directly under the commerce clause itself"); TONY FREYER, *REGULATING BIG BUSINESS:*

administrative agencies and boards,³⁶⁰ and federal statutes setting wages and hours.³⁶¹ History was not thought to control the inherent character of employment in a way that made such a change in jurisdiction impossible, and now employment (like race) is no longer known as a relation that history tells us is quintessentially for the states.

A converse phenomenon, where a long tradition of uninterrupted federal involvement has not been held to make a legal category intrinsically national, characterizes arguments for restricting or eliminating diversity jurisdiction. The Founders were convinced that national union depended on the existence of a judicial forum that could combat prejudice against out-of-state litigants.³⁶² Federal courts have heard diversity cases since the

ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880–1990, at 112 (1992) (“After the federal government used the Sherman Act during the Pullman strike and elsewhere to prosecute unions for actions courts found to be unlawful interference with trade, [labor leader Samuel] Gompers denounced [federal antitrust laws as] . . . ‘the very instruments employed to deprive labor of the benefit of organized effort’”).

360. This process culminated in the creation of the National Labor Relations Board. See National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (1994)). For the history of the Wagner Act’s origins, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993).

361. See Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (1994)); GEORGE E. PAULSEN, *A LIVING WAGE FOR THE FORGOTTEN MAN: THE QUEST FOR FAIR LABOR STANDARDS, 1933–1941*, at 150–51 (1996) (“[N]ational wage and hour regulation became possible because millions of Americans were no longer willing to accept labor as simply . . . subject to the iron law of the marketplace. . . . Since regulation of the national marketplace was beyond state jurisdiction, the choice seemed to be either national regulation or continuing industrial disorder.”).

362. In the 1780s, there was widespread concern that discrimination against out-of-state creditors would subvert interstate and international commerce. See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, The Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 87–89 (1993); Wythe Holt, “To Establish Justice”: *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1453–58.

In the *Federalist Papers*, Alexander Hamilton made the unifying purpose of diversity jurisdiction clear:

It may be esteemed the basis of the Union that “the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.” And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority* it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

THE FEDERALIST No. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Judiciary Act of 1789.³⁶³ They long were the largest category of federal cases,³⁶⁴ and currently account for approximately one-quarter of the federal civil docket.³⁶⁵ In contrast, Congress did not extend general federal question jurisdiction to federal trial courts until 1875.³⁶⁶ Nevertheless, the long tradition of federal diversity jurisdiction, and the fundamentally national concerns that motivate it, have not emerged as notable obstacles to diversity's critics.³⁶⁷ They have already succeeded in significantly restricting

Similarly, John Marshall argued at the Virginia ratifying convention that diversity jurisdiction would "preserve the peace of the Union." Speech of John Marshall (June 20, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1434 (John P. Kaminski & Gaspare J. Saladino eds., 1993). James Madison elaborated, stating that:

It may happen that a strong prejudice may arise in some States, against the citizens of others, who may have claims against them. We know what tardy, and even defective administration of justice, has happened in some States. A citizen of another State might not chance to get justice in a State Court, and at all events he might think himself injured.

Speech of James Madison (June 20, 1788), in *id.* at 1414.

363. See An Act to establish the Judicial Courts of the United States, ch. 20, § 12, 1 Stat. 73, 79–80 (1789) (codified as amended at 28 U.S.C. § 1332(a) (1994)).

364. See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 18 (1948) ("In the lower [federal] courts the business originated predominantly in diversity and admiralty. . . . The whole federal judicial system from 1790 to 1815 gave almost its entire attention to the settlement of the simplest types of commercial and property disputes."); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 141 (1973) ("[I]n 1789 . . . diversity of citizenship was one of the major heads of federal judicial business Without diversity jurisdiction, the circuit courts created by the First Judiciary Act would have had very little to do.") (citation omitted).

365. See LEONIDAS RALPH MECHAM, *ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1996 REPORT OF THE DIRECTOR* 135–37, tbl.C-2 (1996).

366. See An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, ch. 137, § 1, 18 Stat., pt. 3, at 470, 470 (1875) (codified as amended at 28 U.S.C. § 1331 (1994)). In 1801, Congress did grant federal trial courts jurisdiction over cases arising under the Constitution. See An Act to provide for the more convenient organization of the Courts of the United States, ch. 4, § 11, 2 Stat. 89, 92 (1801). It withdrew this jurisdiction, however, a year later. See An Act to repeal certain acts respecting the organization of the Courts of the United States; and for other purposes, ch. 8, § 1, 2 Stat. 132, 132 (1802).

367. Diversity's critics generally dispute the existence of in-state bias, arguing that the notion is a relic from an age before the development of a national market and a national culture. See, e.g., FRIENDLY, *supra* note 364, at 141 (noting that "[t]here is simply no analogy between today's situation and that existing in 1789"); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 522 (1994) ("[A]s the danger of state court prejudice is far less today than it was in 1789, federal judges may justifiably limit diversity jurisdiction to parties who can show actual bias by the state tribunal."); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1687 (1992) ("[E]vidence of bias is now weak at best, and the nationalizing role of diversity jurisdiction is no longer needed. It follows that there is no longer any valid basis to justify the fundamental incompatibility of diversity jurisdiction with the most basic principles of federalism.").

diversity jurisdiction by pushing its amount in controversy requirement ever higher.³⁶⁸ Even arguments for diversity's abolition have appeared within the federal judiciary and the academic literature.³⁶⁹

To some extent, localists' atypical reliance on history when family law is discussed may simply reflect the misapprehension that family law's jurisdictional tradition is somehow less complicated or ambiguous than other tales from the past. As Judith Resnik has recently observed, almost every aspect of the federal/state balance has been in flux over the course of American history, creating many historical records that do not support any one particular modern allocation to the exclusion of all others.³⁷⁰ Yet the history of diversity does not control discussion about its continued existence as part of federal jurisdiction, although it is hard to imagine a clearer tradition. More fundamentally, it is extremely difficult to find a reason in

Alternatively, critics argue that federal and state courts indistinguishably share whatever bias exists. See, e.g., SUBCOMMITTEE TO THE FEDERAL COURTS STUDY COMMITTEE, REPORT TO THE FEDERAL COURTS STUDY COMMITTEE OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES 453 (1990) (acknowledging that federal juries are drawn from wider pools than state juries, but dismissing distinction on assumption that any bias in a state is equally distributed throughout); Carl McGowan, *Federal Jurisdiction: Legislative and Judicial Change*, 28 CASE W. RES. L. REV. 517, 531 (1978) (arguing that "differential federal and state jury bias is not likely" because federal and state juries are drawn from same state).

368. The Judiciary Act of 1789 limited diversity jurisdiction to cases in which more than \$500 was at issue. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Congress has repeatedly raised this bar, which now limits diversity jurisdiction to cases with more than \$75,000 in dispute. See 28 U.S.C. § 1332(a) (codifying Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850); see also Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552 (raising amount in controversy from more than \$500 to more than \$2000); Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (raising amount in controversy to more than \$3000); Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, 415 (more than \$10,000); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (1988) (more than \$50,000). For arguments supporting the further reduction of diversity jurisdiction, see, e.g., FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38 (1990) (recommending that diversity jurisdiction cover only "complex multi-state litigation, interpleader, and suits involving aliens"); Louis H. Pollak, *Amici Curiae*, 56 U. CHI. L. REV. 811, 823 (1989) (book review) (advocating elimination of diversity jurisdiction over cases brought by in-state plaintiffs against out-of-state defendants); William H. Rehnquist, *Address of the Chief Justice*, 21 ST. MARY'S L.J. 5, 7-8 (1989) (same); Pushaw, *supra* note 367, at 522 (supporting limitation of diversity jurisdiction to parties able to demonstrate "actual bias by the state tribunal").

369. See FRIENDLY, *supra* note 364, at 140-42; Richard Allan, *Démarche or Destruction of the Federal Courts—A Response to Judge Friendly's Analysis of Federal Jurisdiction*, 40 BROOK. L. REV. 637, 655-56 (1974); Judge Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 349-51 (1976); Thomas D. Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 963-64 (1979).

370. See Resnik, *supra* note 12, at 472-74, 493-94; Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 174-75, 217-18, 230 (1995).

the actual record of family law and federalism for why historical arguments for exclusive localism should be controlling here, but not elsewhere. This record, remember, does not satisfy the tests of longevity and reason.

This Article is not a brief for the nationalization of all of family law. As *Lopez* made clear, Congress may act where, but only where, it has a constitutional basis for doing so.³⁷¹ The issue is not whether Congress can constitutionally regulate families; it is how Congress can exercise its commerce, Fourteenth Amendment, or other enumerated powers. The localist argument has been that family law's history places some doctrinal limit on the use of this constitutional authority or, less frequently but implied in *Lopez*, that the historically exclusive localism of family law somehow diminishes the federal government's constitutional power to act in that sphere.³⁷² I have to conclude that the argument from history for exclusive localism in family law, as presently articulated, has no weight in either regard. This is not a judgment about the ultimate merit of federal involvement in family law. It is also not a statement about the weight of precedent generally, or about the potential value of using history for support elsewhere. It is a conclusion about what can count as a reason for exclusive localism in family law and why. The history of family law and federalism—which has long counted as the primary and controlling reason explaining why family law is inherently and exclusively local—should not be considered one.

One might add other criteria to my three means of evaluating the power of tradition. But longevity, reason, and consistency are clearly among the foremost grounds for giving deference to the past when one is deciding what should be under local jurisdiction and what under national control. The history that this Article brings to light satisfies none of these standards. Indeed, it reveals that exclusive localism in family law seriously misdescribes the historical record and that localists have failed to develop a coherent account of what they mean by "family law" itself. Compare, for instance, the opposition to the Violence Against Women Act, which asserted that a bill that never turned on familial status or familial relationships constituted family law, and the volumes of decisions and treatises that elucidate "commerce." "Commerce" is textual,³⁷³ whereas the term "family

371. See *United States v. Lopez*, 514 U.S. 549, 566–67 (1995).

372. See *id.* at 609 (Souter, J., dissenting) ("The [majority's] suggestion is either that a connection between commerce and [traditionally state] subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators.").

373. See U.S. CONST. art. I, § 8, cl. 3 ("[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

law" never appears in the Constitution. But the contrast between the time, energy, and thought that lawyers and judges have spent to define commerce and the complete lack of effort devoted to explaining why the Violence Against Women Act is family law remains striking. Faith, and not reason, controlled the controversy over the Violence Against Women Act. If localists hope to defend doctrinal or constitutional limitations on Congress's authority over family law, they will have to articulate their case in radically different terms. The analysis that now controls debate over family law's place in the federal system is grotesquely inadequate, unable even to clarify the limits of its claims. In order to judge the merits of exclusive localism in any given case, we would need to know far more than what the assertions that appear in the VAWA dispute, or in *Lopez*, will ever offer. If some cogent reason exists for why family law alone should be impervious to federal involvement, we need a better understanding of what "family law" is and why exclusive localism is appropriate, one that can be reconciled with actual past practice and sustainable constitutional norms.

But does the actual record of federal regulation of the family, and the historical association of localism with concerns to preserve illicit status relations, constitute a burden to those arguing that family law is particularly and exclusively local? Do these advocates now have to overcome the nature of their claim's origins? I would not go that far. After all, the whole tenor of the modern debate over family law reveals that the past has been obscured, from everyone concerned. At the same time, the history of family law and federalism should leave us with three abiding concerns, linked to the reasons one might rely on the past. Each suggests how Congress should exercise its constitutional authority when family law is at issue.

The record this Article has uncovered reveals, first, a time when family law's position in the federal system was the product of sustained thought and careful contemplation, suggesting that it can be so again. The Reconstruction consensus that the federal government could exercise jurisdiction over family law was not preordained, but a matter of critical reflection at a moment when the lines of state and national power were redrawn for modernity. The legislative history of the 1866 Civil Rights Act and Fourteenth Amendment contains a profound and wide-ranging debate about the nature of national citizenship and the familial rights inherent in freedom. Today, the same claims to tradition that have served to mask the historical record have frequently also made the place of family law in federalism a matter of rote recitation, a proposition so certain that it never needs elaboration or qualification. Localism's advocates now use historical arguments, and the implicit contention that they should control, to

suppress discussion and analysis, turning all other normative claims into mere supplements. Although powerful enough to defeat cogent arguments for national involvement like those presented in VAWA's support, localists have never articulated a normative justification for their own position that they expected to be independently persuasive. Localism is incredibly undertheorized, dominated by incantatory reiteration at the expense of normative deliberation. For too long, invoking history has sufficed for invoking reason. The real legacy of family law and federalism constitutes an invitation to intelligent inquiry, not a reason to avoid the effort.

Second, this history does place a burden on all courts, Congressmen, and commentators to avoid replicating, in modern form, the defense of status relations that drove Reconstruction's critics. The arguments for localism in family law during Reconstruction explicitly aligned private control with local control, the preservation of white social supremacy and coverture with federal noninvolvement and state autonomy. The concerns of Reconstruction's critics are now constitutionally illegitimate under the very Fourteenth Amendment that these men opposed, and are unlikely to be publicly articulated—or understood—in such an obvious and explicit form ever again. But history illustrates how localist policies keeping the federal government out of family law can functionally protect racial or sexual hierarchy from public intervention, suggesting how this might be accomplished in the name of state autonomy without any explicit appeals to status. This should not preclude all arguments that link private and local governance, but our past should make us all concerned enough about the association that we are genuinely vigilant in exposing implicit or functional defenses of status relations and willing to consider the possibility that they exist.

This is particularly true given the sheer longevity of the historical connection between localism and substantive arguments for inequality, which extends far beyond Reconstruction to span the first two centuries of our nation's existence. Until at least the middle of the twentieth century, the regional struggle over slavery, abolitionism, and civil rights for African-Americans importantly shaped federalism traditions and debate. Although never solely concerned with race, federalism arguments in America were long entangled in the sectional battles over racial status that were their most common context, and frequently developed and deployed to bolster objections to abolition and civil rights.

These links are apparent from the nation's inception. The Founders never conflated federalism with the status of slavery, and federalist con-

cerns structured debate at the constitutional convention on many issues.³⁷⁴ At the same time, the convention's discourse on structural principles and regional rights also and inextricably reflected the fact, acknowledged then and stressed consistently thereafter in debates over slavery, that the South never would have agreed to national union without constitutional protection for its peculiar institution.³⁷⁵ Building on this tradition, John C. Calhoun's argument in the early nineteenth century for the independent sovereignty of each state offered a federalist vision that had implications far beyond slavery, but was primarily presented, understood, and debated as a theory permitting Southern states to nullify federal antislavery efforts.³⁷⁶ Only three decades later, Jefferson Davis reiterated Calhoun's claims to justify the succession effort that Davis led, a cause as inseparable from the preservation of slavery as it was from regionalism.³⁷⁷ When President Harry Truman proposed federal civil rights initiatives in 1948 that were more substantial than anything seen since Reconstruction,³⁷⁸ the "Dixiecrats" who left the Democratic Party in response inextricably intertwined their

374. See RAKOVE, *supra* note 91, at 33, 59–81 (discussing Founders' attempts to address sectional economic differences and myriad jealousies dividing large and small states); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 524–32 (1969) (discussing convention debates on role of states in federal government).

375. For an analysis of this understanding at the constitutional convention, see RAKOVE, *supra* note 91, at 93 ("It was not a superiority at bluffing that gave the South the edge at Philadelphia No bluff was needed to suggest that a Constitution that struck a serious blow at slavery would never survive the hurdles of ratification."); *id.* at 73 ("There was no *principled* basis on which the three-fifths rule could be fully justified, [James] Wilson [of Pennsylvania] observed on July 11. . . . 'These were difficulties however which he thought must be overruled by the necessity of compromise.'").

The recognition that union in 1789 had been premised on the North's agreement to protect slavery in the Constitution remained a fundamental tenet of debate a third of a century later, when Missouri's 1820 petition for admission as a slave state sparked the first major battle over the extension of slavery to the West. See 35 ANNALS OF CONG. 1097 (1820) (statement of Rep. Cook) (arguing in favor of Missouri's admission as slave state on ground that constitutional protection for slavery had secured "the blessings of a union of the States"); *id.* at 1135 (statement of Rep. Hemphill) (opposing Missouri's admission because Constitution's "obligatory" compromise on slavery, then "necessary to save us from domestic discord and foreign ambition," was no longer necessary now that America's "national strength bids defiance to any nation").

376. See JOHN NIVEN, *JOHN C. CALHOUN AND THE PRICE OF UNION 181–82, 191–92, 196–99* (1988).

377. Like Calhoun, Davis argued that the Constitution made each state, "in the last resort, the sole judge as well of its wrongs as of the mode and measure of redress." In explaining why the Confederate states had resumed "all their rights as sovereign and independent States and dissolved their connection with the other States of the Union," Davis stressed that the northern-dominated Congress had "impair[ed] the security of property in African slaves," whose labor had become "absolutely necessary for the wants of civilized man." 1 JEFFERSON DAVIS, *THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY, INCLUDING DIPLOMATIC CORRESPONDENCE, 1861–1865*, at 63–82 (James D. Richardson ed., 1966).

378. See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 330 (1949).

substantive objections into the language of federalism, explaining that they would “‘stand firmly for states’ rights and therefore against any nominee for president or vice-president of the United States who refuses to take an open and positive stand against the ‘civil rights’ recommendations.’”³⁷⁹ As federal efforts to protect African-Americans mounted in the 1950s and 1960s, opponents continued to articulate their protests largely in federalist terms. While these arguments were never reducible to a simple defense of racial hierarchy, the voices raising Calhoun’s theories to assert that the Supreme Court lacked constitutional authority to desegregate schools,³⁸⁰ or contending that Congress’s commerce power did not reach the Civil Rights Act of 1964,³⁸¹ predominately wielded these claims, as Calhoun himself had done over a century before, to defend their substantive objections to civil rights for African-Americans.

Although only one aspect of federalism’s history in America, the lasting power of this association between federalism and the defense of

379. *Id.* at 332 (quoting Mississippi Democratic executive committee). Along the same lines, South Carolina Governor (now Senator) Strom Thurmond declared that “[a]ll the laws of Washington, and all the bayonets of the Army cannot force the negroes into their ([white] southerners) homes, their schools, their churches and their places of recreation and amusement.” *Id.* at 333 (quoting Thurmond). Charles Wallace Collins, the author of an influential treatise intended to provide the intellectual basis for the Dixiecrat movement, bitterly opposed all federal civil rights initiatives and defended white supremacy as “a practical doctrine” that was needed “to enable the white people of the South to live in contact with large numbers of Negroes without the loss of the identity of their ancient culture and their racial purity.” CHARLES WALLACE COLLINS, *WHITHER SOLID SOUTH?: A STUDY IN POLITICS AND RACE RELATIONS* 40 (1947). In explaining why the nation had to respect this view, Collins stressed that the United States was “a Federal union of States,” in which the national government had “limited delegated powers which have been conferred by written organic law.” *Id.* at ix. He argued that:

No study of the Negro legislative program [could] be at all adequate unless it [took] into account the circumstance that it is a movement toward stateism in a broad scheme for national planning which, if it became the law of the land, would nationalize all civil rights and thus effectively deprive the States of their republican form of government. . . . [T]he whole Negro program is infected with the deadly virus of stateism.

Id. at x. For an analysis of the reception that *Whither Solid South?* received from its intended audience, see Helen Fuller, *The New Confederacy*, *NEW REPUBLIC*, Nov. 1, 1948, at 10, 12 (“A second-rate book by an unknown author became the ‘Mein Kampf’ of a new movement because it appeared at the strategic moment. . . . [In Governor Fielding Wright’s inaugural address], the voice was that of the Governor of Mississippi but the thoughts came from *Whither Solid South?*”).

380. See ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 146 (2d ed. 1994) (“[T]he southern foes of the Desegregation doctrine . . . mounted a counterattack against the Court. . . . [T]he Calhounian slogan of ‘interposition’ was heard in the land once more, with states earnestly proclaiming their sovereignty and impeaching the nation’s, as if . . . the Civil War [had] never [been] fought.”).

381. See *id.* at 151 (“[M]any Southerners, led by Senator Ervin of North Carolina, argued that Congress lacked the power to pass the Civil Rights Act [of 1964], that it was not the genuine ‘regulation of commerce’ that its supporters described it as being.”).

status should redouble our efforts to uncover such connections and our openness to the possibility that they persist. For instance, Judith Resnik has argued that the federal judiciary's current campaign to locate family law cases in state court reflects a devaluation of "[w]omen and the families they sometimes inhabit"—"hostility to seeing women as legitimate participants in the national world" and the linked assumption that family law does not raise issues of sufficient import to merit federal attention.³⁸² Naomi Cahn has expanded on this critique, finding parallels between the Supreme Court's "rhetoric confining family law to the states" and "earlier language that confined women to the private sphere."³⁸³ Like the common law that inseparably associated women with the family in order to exclude both from the privileged public realm, the modern Court, she concludes, "accepts the existence of a just family in a private sphere" and is therefore eager to relegate "the interdependency issues of family law" to the separate, lesser world of the states.³⁸⁴ The history presented here does not establish or disprove these particular interpretations of the modern debate and case law, but it does add to their *a priori* plausibility.

As we have seen, gender, like race, can exert a profound imaginative force, even over a body of thought never reducible to an ahistorical claim about sexism or racism. Certainly, localists have not yet articulated a coherent account of either their commitment to federal noninvolvement in family law or their reliance on tradition. Particularly in light of the absence of clear historical support for exclusive localism in family law, it remains to be explained why family law has become the icon of federal noninvolvement, so symbolically immune from the force of time that courts and commentators identify it as the sole residuum of an allocation between state and nation otherwise clearly left in the past. Why, of all the sites of possible regulatory interest, has family law sole among them become the lodestar that history will not alter and that reasoned analysis should not touch? Why does *Lopez* single out family law as indissolubly, trans-historically equated with the states? Are we confident that we can found a modern constitutional regime on the reasons that the Framers and subsequent partisans had for protecting local control over family law? The past shows us how the language of federalism can mask a discourse about status and, as clearly, calls upon all of us to unearth whatever connections persist.

382. Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1749–50, 1766 (1991).

383. Cahn, *supra* note 41, at 1105.

384. *Id.* at 1103, 1105.

Finally, the history of Reconstruction cautions us about becoming too faithful to any past. At a crucial moment, Reconstruction Congressmen were willing to undertake a massive reorganization of state and national jurisdiction. Certain that family rights were at the heart of freedom, they refused to be bound by tradition when core issues of national identity and principle were at stake. Such a critical and reflective stance toward history aligns with the Founders' vision of the Constitution as a covenant that would evolve along with the nation, remaining useful throughout its course.³⁸⁵ It is emblematic of the entire project of Reconstruction and the Fourteenth Amendment, which radically and self-consciously departed from past practice and settled expectations.³⁸⁶ The legacy of Reconstruction urges us to always be alive to the implications of law for freedom and equality, and to be ever ready to revise the course of history once again.

385. See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (explaining that Framers did not intend for their personal "purposes, expectations, and intentions" to control Constitution's future meaning).

386. As Cass Sunstein has noted, modern equal protection doctrine under the Fourteenth Amendment also frequently adopts a critical posture toward the past. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) ("The [equal protection] clause does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted.").