# FEDERALISM AND FAMILY

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## I. INTRODUCTION

Under our federalist system, the axiom has it, family law resides within the province of the states.[1] This article disputes that axiom and seeks to arrive at a more precise understanding of the relationship between federalism and family.

In its 1995 decision in United States v. Lopez, the Supreme Court invalidated the Gun-Free School Zones Act, a federal statute criminalizing handgun possession in proximity to a school yard.[2] When Congress passed the Gun-Free School Zones Act, the Court held, it exceeded its authority under the Commerce Clause.[3] Defending the need to impose limits on the scope of congressional power, the Court explained:

> [U]nder the Government's . . . 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. Under the theories that the

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I owe a tremendous debt of gratitude to Jerry Frug, who patiently and reassuringly supervised my LL.M. work, and Wendy Parmet, who has been a generous and trusted mentor. Duncan Kennedy, Christopher Taylor, Steve Subrin, Mary O'Connell, and Martha Minow all offered critical advice over the course of the paper's development. Finally, the paper would have suffered greatly had it been written without the support and confidence of George Adler, Elaine Adler, David Adler, and especially Nancy Hathaway.

[1] *See, e.g.*, Anne C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1821 (1995); Ellen Kandoian, Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life, 75 Geo. L.J. 1829, 1831 (1987).

Use of the terms "federalism" and "federalist" in this article refer only to the idea of dual sovereignty over the same territory, not to any ideological position, such as "states' rights," about how power ought to be allocated between the two jurisdictions.

[2] 514 U.S. 549 (1995).

[3] *Id.*

> Government presents . . . it is difficult to perceive any limitation on federal power . . . .[4]

Family law, in the Court's view, is the area of law paradigmatically suited to state control. Congressional regulation of family would signal the falling of the final outpost of federalism. It would mean that the powers of Congress were no longer enumerated, but had devolved into plenary police powers—the very spectacle of completely centralized sovereign control against which the framers of the Constitution struggled.

Why is family found at the end of this slippery slope? Why is it so plain to the Lopez majority that family is fundamentally incompatible with federal lawmaking? In fact, don't federal bodies exert enormous control over families? Congress and the executive branch agencies regulate family through a vast array of statutory and regulatory schemes, from taxation to immigration to unemployment benefits.[5] The federal courts too have spoken on a number of family matters that implicate constitutional rights to privacy, equal protection, and due process, such as the use of contraceptives in the privacy of the marital bedroom and the relative rights of putative and presumed fathers.[6]

Considering the extensive federal involvement in family, the rhetoric found in Lopez starts to look like denial. And why deny it? Why not concede that both federal and state bodies exert control over the intimate lives of Americans? What danger is posed by surrendering the position that family is incompatible with federal governance?

Over time the exercise of federal and state power has taken on a series of associations. We associate a strong federal government, for example, with the abolition of slavery and enforcement of civil rights, while we link deference to state sovereignty with antipathy to progress in these areas.[7] In

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[4] *Id.* at 564.

[5] *See, e.g.*, 11 U.S.C. § 302 (1998) (permitting the commencement of joint filing by spouses for bankruptcy under chapter 11). *See also* Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682, 1699, 1721-29, 1752 (1991).

[6] *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Michael H. v. Gerald D., 491 U.S. 110 (1989).

[7] *Cf.* Theodore Eisenberg, Civil Rights Legislation 3 (3rd ed. 1981); Erwin Chermerinsky, Federalism Not as Limits, But as Empowerment, 45 U. Kan. L. Rev. 1219, 1240 (1997).

another example, some states have implemented the values of their majorities by enacting legislation limiting the distribution of pornography, while federal control has been invoked to squash the will of these communities and protect a particular vision of the constitutional right to free speech and press.[8]

Such associations reveal an image of the state as a small, intimate community, engaged in an internal dialogue to determine its values, and exercising its police powers in service of those values. The federal role, by contrast, protects individual rights from the tyranny of intra-state majorities. But it is also big and impersonal, distant from the people, and ill-positioned to consider questions best answered by reference to community values.

Family's axiomatic place under federalism reflects its historical relegation to the private sphere. Regulation of the family, the thinking goes, is better-suited to the states because states are the locus of community dialogues on questions of values. "Values," in this context, stand opposed to individual rights and bare self-interest—those individualist norms that govern the public sphere. Family acts as a safe haven, a private realm in which altruist, rather than individualist, norms rule.[9] Governance of the family, therefore, falls to the states, whose superior proximity to the values of the people make it the entity best suited to moral discourse.

As a factual matter, however, the federal government exerts tremendous power over family. Why, then, does the Lopez Court stubbornly maintain that family law lies within the exclusive province of the states, in spite of the clear empirical wrongness of this position? How can the seemingly endless exceptions to the rule be rationalized?

The thesis of this article is that investment in state rather than federal control over family is incidental to our legal culture's larger investment in preserving family's place in the private sphere. The federalist division of labor with respect to family parallels the theoretical divide between the public and private spheres. A rhetoric has evolved to rationalize incidents of federal participation in family matters, treating them as exceptions to the general rule that family law lies within the province of the states. By treating the many instances of federal governance of family as exceptions, the general rule that

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[8] *See* Jacobellis v. Ohio, 378 U.S. 184 (1964), for an example of Justice Brennan reversing a state court's finding that a film is obscene and undeserving of First Amendment protection.

[9] *See, e.g.*, Christopher Lasch, Haven in a Heartless World: The Family Besieged (1979); Dailey, *supra* note 1, at 1827. *See also* Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976), regarding individualism and altruism as contradictory yet coexisting ideals.

family law is state law is sustained. I call this process of creating exceptions and justifying them for the purpose of sustaining the rule, "exceptionalization."

This *exceptionalization* of federal attention to family matters divides the family into a series of dichotomies, the exceptional sides of which are seen to be consonant with federal lawmaking. Family plays the role of a haven, or an altruist exception that sustains the general rule of individualism. Likewise, this article contends, multiple aspects of the family must be exceptionalized before they can be regarded as individualist in character. It is these exceptional, individualist aspects of family that garner federal attention.

The problem with this process of exceptionalization is that distinguishing those aspects of family which are properly left to the states from those which ought to be exceptionalized and treated on a federal level has not been done rationally—that is to say, has not been done in such a way as to provide any predictive value for future litigants. The exceptions may serve the rhetorical function of preserving family's mythical place in the state domain, but they also endlessly fragment jurisdiction over the family and betray the incoherence of the underlying first principle, that the family is a "haven in a heartless world."[10]

The Lopez decision reaffirms that family's proper place under federalism is with the states. In the aftermath of Lopez, federal courts have been and will continue to be faced with controversies regarding which types of family matters may be accorded federal attention.[11] This article seeks to shed some light on these controversies and aid reformers in advocating reforms that advance the interests of families under our federalist system.

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[10] Lasch, *supra* note 9. This is hardly the first article to note the difficulties raised by the private family ideal. *See, e.g.*, Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983). What I hope is new about this article, however, is identification of the parallel structures of federal/state and public/private *with respect to family*. My thesis is not simply that the public/private distinction lies in yet another corner of the law, but rather that even when we think we have the public/private distinction licked, another, equally vexing, parallel distinction bubbles up to the surface. In the context of family, the dichotomies are so close as to make the federal/state distinction indescribable without reference to the public/private distinction. That is why I rely on it so heavily here.

[11] *See infra* Part V (discussing the Child Support Recovery Act and the Violence Against Women Act).

To be clear, I do not mean to suggest that this article demonstrates the incoherence of federalism; it does not. The argument presented here is that the axiom that family law is consistently allocated to the states is both empirically untrue and theoretically impossible.

The article proceeds as follows: Part II introduces the rhetoric of federal incongruity with family and uses the issue of same-sex marriage to test the usefulness of this general rule.

Part III identifies family-shaping rules in such wide-ranging areas of federal law as tax, bankruptcy, housing, and the whole gamut of benefits programs.[12] This part also examines the history of early assistance programs designed to aid poor, female-headed families. During the 1920s and 30s, when these programs were being founded, progressive legal thinkers formulated a profoundly influential critique of the public/private distinction as it was used to justify *laissez-faire* treatment of the wage-labor market. While subverting this distinction for purposes of the wage-labor market, however, reformers of the period re-enacted the distinction on a new axis: the market/family axis.

Part IV reviews the historical exclusion of family matters from federal court jurisdiction. It argues that the common law development of this exclusion reveals an ideological reliance on the public/private distinction along with a strategy of marshalling exceptions to preserve the rule of state governance of family.

Part V jumps into the present to examine controversies surrounding two federal statutes, criminalizing failure to pay child support and acts of domestic violence, respectively. It argues that the rhetoric offered by supporters of these statutes further entrenches the ideology of the private, state-controlled family.

Finally, part VI concludes that examples discussed throughout the article demonstrate the impossibility of confining family to the state sphere. As a result, proponents of the general rule against federal governance of family have been forced to deploy multiple exceptions—that is, to advocate federal governance of exceptional aspects of family, as a strategy for sustaining the rule.

Understanding the relationship between federalism and family has the potential to free feminist law reform efforts from the confines of the ideal of the private/state-governed family. This understanding suggests that the mere fact that a dispute or policy raises issues for family, as a substantive area of law, cannot provide any real guidance in the decision to allocate the dispute or policy to federal or state governance, and that reformers and lawmakers ought to remove that consideration from the center of the allocational decision-making process. Reformers should overcome the distractions presented by the many tests that purport to distinguish between typical family

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[12] Resnik, *supra* note 5, at 1699.

matters which are appropriate to the state domain and exceptional family matters which properly garner federal attention, because none of the tests provides a neutral framework for allocating substantive legal questions.

## II. THE IDEAL OF THE STATE CONTROLLED FAMILY

The Lopez Court was not the first to position family exclusively within the state domain. Courts making decisions on a surprising range of matters have made similar assertions and assumptions.

In United States v. Yazell, for example, the federal government sought judicial enforcement of a debt against Ethel Mae Yazell, a married woman who, in the aftermath of a flood that damaged much of the merchandise in her children's clothing store, took out a disaster loan from the Small Business Administration.[13] When Mrs. Yazell signed for the loan, coverture—the incapacity of married women to contract—was still on the books in Texas, where she resided.[14] The central issue, the Court determined, was whether the federal government, which sought enforcement of the debt, had an interest more consequential than that of other creditors sufficient to warrant "overriding a state law dealing with the intensely local interests of family property and the protection . . . of married women."[15] The Supreme Court concluded that no such interest existed.[16]

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. . . . We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States, despite our personal distaste for coverture provisions . . . .[17]

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[13] 382 U.S. 341, 342-45 (1966).

[14] *Id.* at 343. (Texas repealed its coverture law by the time this case reached the Supreme Court. *See id.* at 342 n.1.)

[15] *Id.* at 348-49.

[16] *See id.* at 358.

[17] *Id.* at 352-53.

What, according to the Court, might warrant an intrusion into state territory? "This Court's decisions applying 'federal law' to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation . . . [such as] commercial paper."[18]

In Franz v. United States, a non-custodial father sued the United States Attorney General for making arrangements for his child pursuant to the federal Witness Protection Program that interfered with his state court ordered visitation plan.[19] The father claimed that the broad power exercised by the Attorney General threatened to "'federalize' domestic relations law."[20] Concluding that the circumstances were exceptional and did not substantially interfere with state power, the court labeled the father's argument "a false alarm,"—but an alarm nonetheless.[21]

Federal case law in areas ranging from gun control to debt collection provides a wealth of indicia that family law, as a rule, should be left to the states.[22] The wisdom and fairness of this rule has been taken up by a number of legal thinkers concerned with the impact of law on families.

### A. Feminist Opposition to the Rule

One protestation that has appeared in the law reviews in recent years I will refer to as the *feminist position*.[23] The central critique of the feminist position is that federal reluctance to address family litigation betrays a gendered stratification of legal issues in which federal judicial attention is reserved for matters of national significance.[24] According to this position,

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[18] *Id.* at 354.

[19] 712 F.2d 1428, 1429 (D.C. Cir. 1983).

[20] *Id.*

[21] *Id.* at 1432.

[22] *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 431 (1984); Santosky v. Kramer, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting); Moore v. Sims, 442 U.S. 415, 435 (1979); Flood v. Braaten, 727 F.2d 303, 306-07 (3d Cir. 1984) for additional examples of judicial statements that family law lies within the province of the states.

[23] *See, e.g.*, Naomi R. Cahn, Family Law, Federalism, and the Federal Courts, 79 Iowa L. Rev. 1073 (1994); Resnik, *supra* note 5.

[24] *See, e.g.*, Cahn, *supra* note 23, at 1098-1101; Resnik, *supra* note 5, at 1693.

federal judges do not see family matters as important.[25] In short, this is because judges see family concerns as women's concerns.[26] For the federal judiciary to retain its masculine character as the forum for handling the important legal business of the nation, matters of a feminine nature must be relegated to the state courts.[27] Federal courts are no place for family squabbles.

The feminist position is less interested in whether federal attention to family matters would provide any concrete benefits to families or women in litigation, than it is in the trivializing message of the exclusion.[28] Federal courts should hear family matters because to exclude them is to assume and promote the idea that family, and women's concerns generally, lack national import.[29] This position comes close to, but does not entirely confront, what this article argues is the dominant paradigm underlying federal reluctance to address family matters: federalist mirroring of the private family ideal.

### B. Liberal Support for the Rule

In support of the exclusion of family matters from federal cognition is what I will refer to as the *liberal position,* a thoughtful proponent of which is Anne Dailey.[30] In this view, state law is not considered subordinate to federal law, but merely suited to different purposes. The liberal position views family as the paradigmatic object of state lawmaking under federalism.[31]

Dailey's position is, I believe, embraced at some level of consciousness by the many judges, commentators, and reformers discussed throughout this article. Her distinguishing accomplishment in this area,

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[25] *See* Resnik, *supra* note 5, at 1688 (citing William H. Rehnquist, Chief Justice's 1991 Year-End Report on the Federal Judiciary, 24 The Third Branch 1, 2 (1992), stating that federal judicial resources should be "reserved for issues where important national interests predominate").

[26] *See* Cahn, *supra* note 23, at 1076; Resnik, *supra* note 5, at 1698.

[27] *See* Cahn, *supra* note 23, at 1098.

[28] *See id.* at 1075-76, 1097.

[29] *See* Resnik, *supra* note 5, at 1749.

[30] *See* Dailey, *supra* note 1.

[31] *See id.* at 1789-90, 1816.

however, is that she has articulated the rule most explicitly and provided the most comprehensive justification for it:

> This Article defends state sovereignty over family . . . . States enjoy exclusive authority over family law . . . because of the fundamental role of localism under federal design. The theory of localism presented here rests on the view that the law of domestic relations necessarily promotes a shared moral vision of the good family life . . . . Legal decision-makers confront fundamental questions concerning the meaning of parenthood, the best custodial placements for children, the rights and obligations of marriage, the financial terms of divorce, and the standards governing foster care and adoption. In answering these questions, state legislatures and courts draw upon community values and norms on the meaning of the good life for families and children.[32]

Dailey's central argument rests on the premise that governance of family is profoundly rooted in community values.[33] Governing bodies, making decisions about such questions as "the meaning of parenthood [and] the rights and obligations of marriage," necessarily draw on these values.[34]

Not unmindful of the critique that the "private family" ideal is untenable, Dailey argues that the family is fundamentally a public concern, due to its child-rearing, and hence citizen-rearing, function.[35] It is difficult, if not impossible, Dailey admits, to imagine a liberal society in which law does not have a hand in regulating the obligations flowing among family members; the choice to be made, therefore, is not *whether* some legal entity will govern family matters, but *which* legal entity.[36] Because of the family's peculiar nature as a subject for moral dialogue, and because such dialogue can take place most effectively in the smaller of the two communities contemplated

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[32] *Id.* at 1790.

[33] *See id.*

[34] *Id.*

[35] *See id.* at 1826-59.

[36] *See id.*

under federalist design, Dailey asserts that the state is better situated to govern family matters.[37]

Does Dailey see any role for the federal government in family? Yes.

> Although the states possess exclusive authority for regulating the core domain of family life, state authority cannot be wholly without boundaries. Communitarian decision-making in the area of family life raises serious concerns regarding the preservation of individual liberty . . . . The federal government . . . has a vital role to play in ensuring that state regulation of family life does not undermine fundamental rights essential to the development of civic character in maturing children . . . .[38]

> [State authority over family should be] subject only to constitutional limitations relating to the rights of equality, privacy, and parental authority.[39]

Dailey provides us with a rule and an exception. Family disputes are best resolved by reference to community values and therefore, as a general rule, are properly excluded from federal cognition. Federal law, however, is the guardian of our individual rights, which occasionally make an appearance in family matters. When family matters raise questions of rights, therefore, Dailey makes an exception.

While the relegation of family to the states looks to the feminist like disenfranchisement, to the liberal it looks like a rational allocation under a system that contemplates distinct, though not necessarily hierarchical, substantive spheres. While the feminist sees in the exclusion federal disdain for matters traditionally associated with women, the liberal argues that there exists a rational, nonsexist basis for federal deference to state control over

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[37] *See id.* at 1871-80. Dailey also addresses the question of why, given her argument in favor of reliance on community values in governing family, she does not favor governance of family on the municipal, rather than state, level. Dailey's choice of state over municipal governance rests on recognition of state authority in the Constitution, fear of disrupting the system that is already in place for governing family matters, and the need for "some degree of uniformity in family law." *Id.* at 1877.

[38] *Id.* at 1880.

[39] *Id.* Dailey also mentions federal authority over such areas as taxation, immigration, and bankruptcy, which have incidental effects on family life. *See id.* at 1880-81. I address federal regulatory authority over family in Part III, *infra*.

family: governance of family requires a communal dialogue on questions of morality and, under federalism, the state is the superior entity to host this dialogue. The state, however, is not fully equipped to handle all of the legal issues raised by the family. Sometimes individual rights will rear their heads, and when they do, federal law comes to the rescue.

### C. DOMA: Introducing the Strategy of Exceptionalism

This section introduces the critique of the liberal position by testing it against the subject of an old debate made current by the Supreme Court of Hawaii.[40] When that court signaled the likelihood that same-sex marriage would be legalized in Hawaii, the potential consequences for federal law, as well as for the law of the other forty-nine states (due to the Full Faith and Credit Clause) loomed perilously over the heads of our federal and state leaders, calling for swift and certain preventative action.[41]

The Defense of Marriage Act (DOMA), signed into law by President Clinton in 1996, contains two central provisions, one designed to thwart the hazard posed to federal law by the Hawaii court's decision, and one designed to circumvent the apparent requirements of the Full Faith and Credit Clause.[42] The first defines marriage for purposes of federal law to exclude same-sex

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[40] *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (indicating the possibility that denying marriage to same-sex partners could violate the Equal Protection Clause of the Hawaii constitution). The case was set back by the amendment of Hawaii's Constitution, which now contains the provision, "The legislature shall have the power to reserve marriage to opposite-sex couples." H.I. Const. art. I, § 23. The plaintiff couples are awaiting a determination from the court on whether their case can go forward. Evan Wolfson, In Freedom-to-Marry Battle: 'Look, Some State Has to Go First' (last modified Feb. 18, 1999) <http://lambdalegal.org/cgi-bin/pages/documents/record?record=367>.

[41] The Attorney General for Nebraska, for example, got right on it, issuing an opinion which warned that Nebraska statutory law could be interpreted by the Nebraska Supreme Court to require that full faith and credit be accorded to same-sex marriages and "strongly recommend[ing] that the legislature act yet this session if it wishes to prevent same-sex couples 'married' in another state from having that arrangement legally recognized in Nebraska." Neb. Atty. Gen. Op. No. 96025 (1996).

[42] Pub. L. No. 104-199 (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C); *see also* U.S. Const. art. IV, § 1.

unions.[43] The other releases states from the obligation to recognize same-sex marriages performed in other jurisdictions.[44]

Eligibility for marriage (including such things as the minimum age at which a person may consent to marry and the requirements for obtaining a marriage license) is generally understood to be a matter of state law.[45] Couples who marry validly under the laws of any state are married for purposes of federal law as well as for purposes of the law of other states into which they might travel or move.[46] Federal law, however, has on occasion been invoked to ensure that our small, intimate communities making moral decisions at the state level do not run amok and violate any rights. In Loving v. Virginia, for example, the Supreme Court declared Virginia's anti-miscegenation law unconstitutional.[47]

The liberal position, again, is that the bulk of family matters present questions which are moral in nature and are therefore appropriate to state governance, while the exceptional facets of family raise questions of rights and therefore require federal, counter-majoritarian intervention, as seen in Loving. If this theory is to be of use in making the decision to allocate the

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[43] This section actually follows (rather than precedes) the full faith and credit provision in the text of the statute, though I deal with the provisions in reverse order. The section reads as follows: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Pub. L. No. 104-199, § 3.

[44] This provision reads as follows: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." Pub. L. No. 104-199, § 2.

[45] *See, e.g.,* Mass. Gen. L. ch. 207 (1996). Sections 1 and 2 of this chapter, for example, establish the rules against consanguinity, section 4 prohibits polygamy, and section 7 requires parental consent for minors wishing to marry.

[46] *See, e.g.,* Ram v. Ramharack, 571 N.Y.S.2d 190 (1991) (recognizing a common law marriage, despite the rejection of common law marriage under New York law, because the marriage was entered into validly in Washington, D.C.).

[47] 388 U.S. 1 (1967); *see infra* note 120 (describing the basis on which family law cases which raise issues of individual liberties [as Loving obviously does] are exceptionalized from the totality of family law and accorded federal attention).

issue of same-sex marriage to either federal or state governance, it must meet the following challenge: How do we know whether same-sex marriage is a moral question or a question of rights?

Under the liberal analysis, one's answer to this preliminary question leads one either to the conclusion that the issue of same-sex marriage is better suited to state or, alternatively, to federal lawmaking. The problem is that this preliminary question is not so preliminary. Whether one sees same-sex marriage principally as a question of rights or morality is likely to have been driven by one's view of whether same-sex marriage is a good or an evil.[48] The *hidden* preliminary question is whether one supports or opposes same-sex marriage.

The proposed analytical process leaves us without a first step. It has not provided us with any guidelines for determining which family matters fall under the rule and which fall under the exception. The analysis winds up at the same place it began. It is a moral question whether same-sex marriage is a moral question.

Despite DOMA's character as a federal law in an area generally thought to be reserved to the states, DOMA has not (at this writing) been subject to constitutional challenge as compromising principles of federalism, comity, or full faith and credit. It is not certain, therefore, how courts would respond to this particular intrusion into this traditionally state area, or even if they would notice.

DOMA presents a complicated blend of an exception to, and a reaffirmation of, the rule. It presents an exception to the usual view that the law of marriage belongs to the states just by *being* a federal law. This is DOMA-the-exception. At the same time, DOMA affirms the rule by reasserting state control over the law of marriage. States may continue to define marriage and establish its prerequisites as their majoritarian constituencies see fit; no pesky federal constitutional requirement will require states to recognize a same-sex marriage performed in Hawaii. DOMA-the-exception affirms the rule.

The blend of jurisdictional elements present in DOMA sends a unified substantive message. By leaving the issue for each jurisdiction (federal and each state) to decide for itself, federal lawmakers have also indicated their

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[48] It is true that one could support same-sex marriage on moral grounds, and maybe even oppose it using some kind of rights-based argument. The morality/rights dichotomy may be even more unstable than I have portrayed it here. I use the terms, however, in accordance with their more common discursive associations; *i.e.*, those who oppose same-sex marriage more often than not describe their positions as based on morality, while those who support same-sex marriage generally speak of equal rights.

view that same-sex marriage is a question best left to community morality and that whatever the community's decision, it will not rise to the level of intolerable for purposes of protecting rights. The jurisdictional question appears to be incipient, but upon closer scrutiny, the question of values (what do we think about same-sex marriage) comes first—and Congress answered it.

The first element of the critique of the liberal position then, is that the analysis has no real starting point; that is, it is not evident how we determine whether a question more fundamentally regards morality or rights. The liberal proposal offered by Dailey is an example of what I will refer to as the strategy of *exceptionalism*; that is, Dailey uses an exception (federal intervention to protect individual rights) to protect the rule (in favor of state sovereignty over family). The problem with exceptionalism is that the line separating the exception from the rule moves with the decision-maker's values regarding the substantive question (*e.g.*, whether Congress supports or opposes same-sex marriage).

Furthermore, the strategy of exceptionalism is bound closely to an effort to preserve the ideal of the private family. While Dailey disassociates her position from the notion of the private family, her vision of the family under federalism reincarnates this ideal. She concedes that complete government nonintervention in family is impossible.[49] Concession of the impossibility of nonintervention, however, is not the end of the private family. The ideal of the private family also includes the notion that the family is a refuge from individualism, where values, rather than bare self-interest, predominate. Dailey's idea that governance of family is uniquely rooted in "community values" prompts Dailey to place family squarely in the state domain.

When the family raises questions of individual rights, however, Dailey must modify her position. The state is ill-equipped for this enterprise, rendering federal intervention appropriate. Truly exclusive state control over family could endanger Dailey's position, because, as Dailey herself suggests, sometimes counter-majoritarian action is necessary to protect individual rights from the will of a small, intimate community.

This is the strategy of exceptionalism, or creation of an exception to sustain the rule. While Dailey asserts that she has averted the critique of the public/private distinction by conceding the public nature of child rearing, she has actually reproduced the distinction. By exceptionalizing those aspects of family which give rise to claims of individual rights, Dailey reveals her

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[49] *See* Dailey, *supra* note 1 at 1828; *see also infra* note 119.

reliance on a classic dichotomy. The bulk of family is best suited to state governance—this is the private family. Family's exceptional (public) facets, however, are better suited to federal governance.

A skeptic might ask, "what is so terrible about exceptions?" Law, after all, is about line drawing and balancing. Why permit a rule to be applied in an overbroad manner when we can rescue it by creating appropriate exceptions? The problem is that we have no guidelines for deciding what comes under the purview of the rule and what should be excepted—and that means we really do not have a rule at all.

The next several parts of this article use other examples in an attempt to further unpack the strategy of exceptionalism and expose its similarity to and reliance on the public/private divide. Part III begins with a few discrete items of federal legislation and regulation.

## III. LEGISLATION, REGULATION AND THE FAMILY

This part demonstrates that family law appears throughout federal statutory and regulatory law, cast not as family, but as the proper subject of an enumerated federal power. For insight into how this subset of family law came to be regarded as properly federal, it then explores the history of federal assistance to poor, female-headed families and concludes that federal legislative and regulatory control over family through public assistance has been exceptionalized from the totality of family law to prevent more serious transgression of the public/private divide.

### A. Families at the Center

#### *1. The Marriage Penalty*

"Under current [federal] tax law, many married couples who file jointly are pushed into higher tax brackets because of their combined income and wind up paying higher taxes than if they filed individually."[50] The "marriage penalty" has aroused the ire of such congressional Republicans as Representative Jerry Weller of Illinois, who believes that "[t]he marriage tax

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[50] Jerry Gray, House G.O.P. Sophomores Open New Effort on Taxes, N.Y. Times, Sept. 10, 1997, at A20. *See also* 26 U.S.C. § 6013; Wendy C. Gerzog, The Marriage Penalty: The Working Couple's Dilemma, 47 Fordham L. Rev. 27 (1978).

is not only unfair, it is immoral and wrong."[51] A movement is afoot on Capital Hill to eliminate the marriage penalty as well as effect a number of other tax "reforms."[52] The usual suspects (Americans for Tax Reform and the Taxpayers Union) are lobbying for elimination of the marriage penalty, and so is the Christian Coalition.[53]

Opposition to elimination of the marriage penalty stems from the fact that it brings in a lot of money, about $30 billion annually, by Congressional Budget Office estimates.[54] The opposition does not seem too concerned over whether Congress has the authority to make adjustments to the tax laws to reward or penalize two-income couples for marrying. The marriage penalty is a tax matter and congressional authority to tax is undisputed.[55] I suspect, however, that the Christian Coalition has not joined the tax reform lobby out of sheer commitment to lower taxes. The marriage penalty, as Congressman Weller argues, is a moral issue—and it is also a family matter.

Federal actors working (or campaigning for positions) in the executive and legislative branches unabashedly assert their family values platforms, especially as they relate to taxation and welfare.[56] No one on Capital Hill seems worried about whether regulating family through the tax code constitutes an intrusion into an area traditionally reserved to the states. In fact, rules providing incentives and disincentives to form various family structures can be found in a plethora of statutory and regulatory codes governing such diverse subject areas as veterans' benefits, unemployment compensation, Social Security, bankruptcy, pensions, housing, immigration, as well as

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[51] Gray, *supra* note 50, N.Y. Times, Sept. 10, 1997, at A20.

[52] *Id.*

[53] *See id.*

[54] *See id.*

[55] *See* U.S. Const. art. I, § 8, cl. 1.

[56] For example, former Vice President Dan Quayle, while contemplating a run in the 1996 Republican presidential primaries, attributed the social ills associated with welfare to the influence of poor family values. *See* Susan Page, He's B-a-a-ck!; Quayle says he was right about Murphy, Newsday, Sept. 9, 1994, at A8.

taxation.[57] Federal regulation of the family gets cast as tax law, housing law, and so on, permitting the legislative and executive branches to regulate family unencumbered by Lopez-style angst over the survival of federalism.

### *2. The Cooperation Requirement*

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the Act"), another example of congressional attention to family matters, replaced Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF).[58] Otherwise known as "federal welfare reform," the Act rests on the following principles, listed therein as congressional findings:

> (1) Marriage is the foundation of a successful society.
> (2) Marriage is an essential institution of a successful society which promotes the interests of children.
> (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children.[59]

My purpose here is not to criticize this goal or the means to it, but rather to establish that the Act and the regulations designed to implement the Act, as set

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[57] *See, e.g.*, 11 U.S.C. § 302 (1998) (permitting the commencement of joint filing for bankruptcy under chapter 11); 26 U.S.C. § 6013 (1998) (regarding joint filing of federal tax returns); 8 U.S.C. §§ 1153, 1157 (1998) (allocating immigration visas and emergency refugee status, respectively, based on family status); 42 U.S.C. § 426 (1998) (regarding who may receive Social Security survivors' benefits); 42 U.S.C. § 1766 (1998) (calculating eligibility for a school lunch program based on family income); 38 C.F.R. § 3.204 (defining "dependent" for purposes of Veterans' benefits). Similar federal statutory and regulatory provisions awarding and calculating financial and other benefits based on family relationships, and organizing bankruptcy and other filings around family, are almost limitless. I have provided only a very small sampling.

Furthermore, I am not the first person to have noticed the centrality of family relationships to a host of federal schemes. *See, e.g.*, Dailey, *supra* note 1 at 1792; Martha Minow, Introduction to Family Matters at xiii (Martha Minow ed., 1993); Resnik, *supra* note 5, at 1699, 1721-29, 1752.

[58] *See* Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601 *et seq.* (1998)).

[59] *See* Pub. L. No. 104-193, § 101.

forth by two federal bodies (Congress and the United States Department of Health and Human Services), contain family law.[60]

Under both the AFDC and TANF regimes, welfare recipients, predominantly single mothers, are required to "cooperate" with the state agency responsible for establishing the paternity of, and collecting child support from, the non-custodial parents of their children.[61] The old federal regulations designed to implement AFDC required recipients to provide information regarding the identity and location of non-custodial parents, as well as to appear for genetic marker tests and judicial or administrative hearings to establish the paternity of children born to unmarried parents.[62] Recipients whose cooperation led to the collection of at least $50 per month in child support received that first $50 in the form of a "pass-through," or incentive payment, supplementing the amount of their welfare grant.[63] Failure to cooperate, conversely, led to ineligibility to receive the grant.[64]

Although states ostensibly gained greater leeway under the TANF regime to define "cooperation," welfare recipients still must comply with the same basic federal rules, now phrased as the requirement that they "cooperat[e] in good faith with the State in establishing . . . paternity [and

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[60] *See* Martha Albertson Fineman, The Neutered Mother, The Sexual Family 112-18 (1995); Vicki Turetsky, Pointing the Finger at Moms: Child Support Cooperation Provisions in the Conference Welfare Bill, Center for Law and Social Policy (1996), for critiques of the types of goals and means embodied in welfare reform. *See also* Lucy Williams, The Ideology of Division: Behavior Modification Welfare Reform Proposals, 102 Yale L.J. 719 (1992), for a general critique of behavior modification through welfare policy.

[61] *See* 42 U.S.C. § 602(a)(26) (1997) (amended by Pub. L. No. 104-193).

[62] *See* 45 C.F.R. § 232.12(b) (1996). The regulations implementing AFDC are no longer in force. The United States Department of Health and Human Services has proposed new regulations to implement TANF and has solicited public comments (62 Fed. Reg. 62,124 (1997)), but at this writing, has not promulgated the final version. Proposed 45 C.F.R. § 274.30 requires aid recipients to cooperate in paternity establishment and child support collection efforts and requires the state child support agency to refer persons who fail to cooperate to the state welfare agency for monetary sanction. Although some respective responsibilities of the two state agencies shift under the proposed rules, the responsibilities of the recipient remain pretty much the same.

[63] Before the 1996 Act, this provision could be found at 42 U.S.C. § 602(a)(8)(A)(vi).

[64] Before the 1996 Act, this provision could be found at 42 U.S.C. § 602(a)(26).

collecting] child support . . . ."[65] Federal law still mandates that, at a minimum, state laws require recipients to provide information and appear for paternity-related tests and proceedings.[66] The Act eliminated the $50 incentive payment, moving to a purely punitive model.[67] Federal regulations provide that failure on the part of the recipient to cooperate results in a monetary sanction of at least 25% of the welfare grant—though states may impose a higher penalty, even denying a family the entire amount of its grant, if they choose.[68]

The cooperation requirement is an example of federal family law. Since it is not entirely clear what one means to include when one speaks of "family law," it is necessary to furnish some semblance of family law's contours.[69] For this I turn to three sources: a handful of family law textbooks and the writers discussed in part II, *supra*, who provided, respectively, the feminist and liberal positions regarding the merits of excluding family matters from federal cognition (*i.e.*, which matters did they mean?). While I believe that "family law," like "family" itself, defies precise definition, these relatively uncontroversial materials provide guidance in sketching the outlines of family law and establishing the place of the federal cooperation requirement within them.

*a. A Little Bundle of Rights and Duties*

Much (though by no means all) of the material covered in family law textbooks can be fairly characterized as the law of rights and duties flowing among family members.[70] Division of property, authority to make decisions

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[65] 42 U.S.C. § 654(a)(29)(A) (1998).

[66] *See* 42 U.S.C. § 654(a)(29)(B) and (C) (1998).

[67] *See* 42 U.S.C. § 654(5) (1999).

[68] *See* 42 U.S.C. § 608(a)(2)(A), (B) (1998); *see also* 62 Fed. Reg. 62,124 1997 (Proposed Rule 45 C.F.R. § 274.30(c)(1), (2)).

[69] *See* Judith Areen, Cases and Materials on Family Law v (3rd ed. 1992); Homer H. Clark, Jr. & Carol Glowinsky, Cases and Problems on Domestic Relations 1 (5th ed. 1995).

[70] *See* Caleb Foote *et. al.*, Cases and Materials on Family Law 1 (3rd ed. 1985). *See also* Clark & Glowinsky, *supra* note 69; Areen, *supra* note 69, for general introductions to those subject areas commonly understood to constitute the law of family.

Whether the rights and duties referred to in this section arise out of status or contract

regarding the education, health care and religion of children, visitation rights, the obligation to provide support—all share at least one common trait: they are all about the allocation of rights to one family member against another or, stated conversely, the duties of one to another.[71]

Most evidently, the law of cooperation governs the duties that welfare recipients owe to the state. To remain eligible for the full amount of her grant, a welfare recipient must provide information and appear for scheduled proceedings and appointments. Also implicit in the cooperation requirement, however, is the obligation of the non-custodial father. The cooperation requirement is a rejection of the state's obligation to support its poor children. The law "rights" the "wrong" inherent in welfare receipt by requiring the mother to maximize the chances that the father's relationship to the child be established. Massachusetts law is clear on this point:

> It is the public policy of the commonwealth that dependent children shall be maintained, as completely as possible, from the resources of their parents, thereby relieving or avoiding, at least in part, the burden borne by the citizens of the commonwealth.[72]

Review of a collection of mainstream family law casebooks gives the impression that family law typically sets forth the obligations flowing among family members. While the most manifest effect of the cooperation requirement is to obligate the welfare recipient to the state, the linking of welfare receipt to the recipient's cooperation in bringing the father into the child support system, creating a three-way relationship among the state, the recipient (and dependent child) and the father, also sets forth duties within the family. This is typical of family law.

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has been the subject of a great deal of interesting discussion. *See, e.g.*, Clare Dalton, Deconstructing Contract Doctrine, 94 Yale L.J. 997, 1096-1113 (1985). The source of familial duty is not material here. The point is only that the family, for purposes of law, consists, in large part, of a cluster of rights and duties flowing among family members. Even this rather broad explanation of family law, however, does not cover the full breadth of the subject area. Family law may be seen to include, for example, the law of contraception. Clark & Glowinsky, *supra* note 69, at 2.

[71] *See* Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied to Judicial Reasoning, 23 Yale L.J. 16 (1913). This essay demonstrates the correlative relationship between rights and duties.

[72] Mass. Gen. L. ch. 119A, § 1 (1996).

*b. Reflections on the Status of Women*

The feminist argument discussed earlier, criticizing the rule against federal attention to family matters, provides another distinguishing trait useful in identifying family law. From this perspective, family law is associated with women and therefore reflects on the status of women, particularly in the context of intimate relationships.[73]

Critiquing poverty discourse in popular and political culture, Martha Albertson Fineman argues that the decision to link child support to welfare receipt betrays some troubling assumptions about the respective roles of fathers and mothers.[74]

> On an ideological level . . . it is ominous that a major policy thrust is tied up with paternity actions and child support provisions. These "remedies" for female and child poverty reflect the domination of and are derivative and dependent upon the traditional male-headed family model. State-established fatherhood is offered as a panacea for the economic needs of children. Even more disturbing on a symbolic as well as policy level is the fact that the fatherhood solution is presented as foundational. Fathers are essential to the resolution of problems encompassed by and extending beyond child poverty. Fathers are economic providers and disciplinarians in patriarchal nuclear families—it is to a semblance of this institution that we must revert.[75]

The allocation of family matters to the states under federalism was criticized by feminist writers on the grounds that it prioritizes "masculine" over "feminine" legal matters and thereby trivializes women's concerns. The law's treatment of family, according to this position, reflects on the status of women.

Similarly, the cooperation requirement, with its legal and conceptual tying of welfare receipt to paternity and child support, reveals some troubling images of female dependency, not only on the state, but on men. Invocation of the traditional, heterosexual family structure as the solution to child poverty recalls the patriarchal relationship between the sexes, reflecting a larger

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[73] *See infra* section II.A.

[74] *See* Fineman *supra* note 60, at 106-18.

[75] *Id.* at 113.

failure to transform our expectations from the old, sexist division of labor within families to some improved, less hierarchical vision.[76] Federal statutes and regulations requiring cooperation provide us with some indication of the status of women, an attribute common to much of family law.[77]

*c. Family Value(s)*

The liberal argument for exclusion of family matters from federal cognition provides yet a third trait helpful in locating the contours of family law—that it necessarily draws on community values regarding such things as "the meaning of parenthood [and] the rights and obligations of marriage."[78] We have already seen some expression of values in the congressional finding that "[p]romotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children," as well as in the Massachusetts policy "that dependent children shall be maintained, as completely as possible, from the resources of their parents."[79] In these proclamations, legislators forcefully reject state responsibility for poor children and embrace an ethic known in popular discourse on poverty as "personal responsibility."[80]

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[76] Again, my purpose here is to establish that the cooperation requirement is family law. As can be implied from the feminist position outlined in section II.A, implications for the status of women are one common characteristic of family law. I do not believe that Fineman's reading of these implications is definitive. In fact, another viable reading of the connection between welfare receipt and child support is that it shifts some of the burden of the welfare debate off of the backs of women (the usual objects of blame and disdain) and onto the backs of men, who often seem to escape the discussion unscathed. *See, e.g.,* Fineman *supra* note 60, at 114 (discussing the contributions of such political thinkers as Charles Murray, who blames single mothers for being a drain on community resources and advocates denying them any public support).

[77] Obviously, not only family law reflects on the status of women. Laws setting forth the elements for a claim of gender discrimination in employment, for example, also reflect on the status of women. This trait is not (at least on its own) definitional, but rather contributes a few rough lines to the map I am sketching of family law's territory.

[78] *See* Dailey, *supra* note 1, at 1790; *infra* section II.B and accompanying notes.

[79] *See* Pub. L. No. 104-193, § 101; Mass. Gen. L. ch. 119A, § 1 (1996); *supra* notes 59 and 72.

[80] The federal welfare reform law signed by President Clinton, for example, is entitled, "The Personal Responsibility and Work Opportunity Reconciliation Act of 1996."

But Fineman uncovers another set of values underlying the cooperation requirement. Implicit in the cooperation requirement is the idealization of a family structure she calls "The Sexual Family."[81]

> The dominant components of the metanarrative—that the family is sexual—mean that the family is experienced as an institution of primarily "horizontal" intimacy, founded on the romantic sexual affiliation between one man and one woman. Intergenerational relationships—vertical lines of intimacy—may be temporarily accommodated . . . such as when an ill, elderly parent has to be fitted into the sexual family. The dominant paradigm, however, privileges the couple as foundational and fundamental.[82]

The cooperation requirement reflects the privileged position of the sexual family under an ethical system that ties welfare receipt to child support by coercing, to the extent possible, a relationship between the father and the mother and child.

> Although many commentators prefer sanctified mother/father relationships, the coupling of the single mother and the financially-endowed male anticipated by [the welfare-child support connection,] need not be accomplished through the formation of a marital bond. The objective . . . is the creation of a legal tie between the male, who is presumed to be economically viable, and the dependent single mother and child. Through this legal tie, child support obligations can be established and enforced. Neither the mother's nor the father's wishes regarding the establishment of the legal tie are considered relevant.[83]

The wishes of the mother and father in this "family" are subsumed to the relevant communal values that idealize a horizontal family structure. The policy link between welfare receipt and participation in the child support system may not succeed in forging emotional ties between unwilling parents, but it approximates as closely as possible the imposition of the idealized family structure on the poor.

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[81] Fineman *supra* note 60, at 145.

[82] *Id.*

[83] *Id.* at 106.

> [T]he core . . . problem facing [poor, single] mothers . . . is identified as the missing male. It follows, therefore, that the solution to the problem...lies in the legally coerced (re)establishment of a paternal presence, physically outside of, but metaphysically completing, the family structure.[84]

This coercion is justified on moral grounds, including both the ethic of "personal responsibility" and wholesale faith in the naturalness and rightness of the horizontal family structure and the primacy of sexual affiliation.

The cooperation requirement imposes a particular family structure on the poor and answers questions about the meaning of parenthood and marriage. In this respect, too, therefore, the cooperation requirement looks like family law.[85]

*d. The Emerging Family*

At least three characteristics common to much of family law can be gleaned from a handful of family law textbooks and from the writings of feminists and liberals concerned about family: 1) it sets forth rights and duties flowing among family members; 2) it reflects on the status of women; and 3) it raises questions that can only be settled by reference to community values. Although family law may defy precise definition, the contours of this area of law begin to emerge.

The definition on which my argument relies is that family law is law which regulates one or more among a cluster of relationships (whether existing or past), including marriage, non-marital intimate partnerships, and parenthood.[86] This definition inheres in each of the three sources consulted.

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[84] *Id.* at 102.

[85] Perhaps the starkest example of "family values" finding their expression in federal welfare reform is the provision offering twenty-million dollar bonuses to the five states that see the greatest decrease in their out-of-wedlock birth rates without increasing their abortion rates. *See* 42 U.S.C. § 603(a)(2) (1999).

[86] Other relationships may be regulated by law properly considered "family law." Siblings, aunts, uncles, cousins, and others may have intestate inheritance rights or rights to make decisions for incompetents, for example. That seems like family law. For my purposes, however, it is not necessary to ensure that every possible law that might properly be considered family law is included in my definition, but only that there is no requisite aspect of family law excluded; in other words, as long as my definition is not too broad, it is all right for it to be too narrow. This is because my goal is to establish that the cooperation requirement is family law.

First, the rights and duties discussed in the family casebooks predominantly flow between spouses; ex-spouses; lovers; ex-lovers; and biological, adoptive, and foster parents (as well as parental figures, in the psychological sense) and their children. Second, that the status of women can be gleaned from examining women's place in family law, relies largely on a vision in which men and women have competing (or at least divergent) interests and the interests of women are either prevailing or suffering. Heterosexual couplehood is implicit in this vision (*i.e.*, how will men and women fare in relation to each other with regard to property, child custody, *etc.*, and what image of women, as compared to that of men, appears in the law?). Finally, the liberal argument for exclusion of family matters from federal cognition—that family law necessarily draws on community values regarding such things as "the meaning of parenthood [and] the rights and obligations of marriage"—explicitly assumes a definition consistent with my own, *i.e.*, that family law is law which regulates one or more among a cluster of relationships, existing or past, including marriage, non-marital intimate partnerships, and parenthood.

Although other areas of law, such as those regulating relations between grandparents and grandchildren, may also fall within the boundaries around family law, what is important is that my definition be unassailable on grounds of *over*-inclusiveness. Is there some other attribute that a law must have to qualify as family law? None of the sources I have consulted present any.[87]

I hope that this definition is not controversial. I mean to articulate a conventional, if not oft spoken, understanding of the domain of family law. Furthermore, the purpose of providing a definition is *not* to demonstrate that the cooperation requirement is family law *rather* than welfare law, but to point out that it is *both*, and that the fact that the cooperation requirement is family law does not seem to interfere with its suitability for federal regulation.

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If my definition were too broad my argument that the cooperation requirement is family law would fail. If my definition is too narrow, however, my argument that the cooperation requirement is family law would be no less convincing—it might even be more convincing (*i.e.*, the cooperation requirement qualifies as family law even according to a narrow definition).

[87] The one attribute that some might argue must be present before a law can properly be considered family law, is that it be state law. Since it is fundamental to the thesis of this article that the state law attribute is coextensive with nothing in particular, that it is a nonsensical way to distinguish family law from non-family law, I will set this objection aside on the grounds that it is circular, (*i.e.*, that in the context of this article, the objection would be tantamount to arguing that federal law cannot be family law because family law is state law).

This is similarly true for the marriage penalty.[88] Congress casts such laws, and courts perceive them, however, not as family law, but as welfare and tax law, respectively. The point is that family law can be found hidden in a range of federal laws, cast as something else. The reason that family law can so often be found cast as something else is that it so often *is* something else. The family is not an isolated enterprise that can be governed by a discrete set of rules or a single governmental entity—it touches too many other things. Many areas of law considered appropriate to federal governance (such as welfare and taxation) rely on federal authority to regulate family. Federal tax law without federal family law is unimaginable.

Federal and state lawmaking bodies must share dominion over family, or federal authority in a multitude of substantive areas would be utterly disabled. Casting federal family laws as welfare, tax, or some other area of law generally understood to fall within the purview of federal lawmaking, has both the practical effect of enabling Congress to act pursuant to its spending power, commerce power, authority to tax, and so on, and the discursive effect of perpetuating the myth that family law lies exclusively within the state domain.[89] This discursive effect is one example of what I mean by exceptionalism.

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[88] The marriage penalty assumes that spouses will share their incomes (thereby constructively speaking to marital duties), rewards single-income couples (thereby reflecting a preference for female dependency), and deals with questions best answered by reference to community values (again, the obligations of marriage). Finally, the marriage penalty satisfies my definition of family law in that it regulates one of the relationships in the cluster set forth in the text of the preceding section—namely, marriage.

This analysis could apply to many, many provisions of federal law, including any federal entitlement (*e.g.*, to income, housing, resident alien status, *etc.*) stemming from a familial tie to another person, such as any survivor's benefit or spousal benefit. It is important to notice that this analysis illuminates the legal treatment of not only relationships which are recognized by the entitlement, but also those which are excluded.

[89] *See*, for example, Bowen v. Gilliard, 483 U.S. 587 (1987), in which the court rejects a constitutional challenge brought by a recipient of AFDC against the mandatory inclusion of a child receiving child support in the family's AFDC filing unit. The child support received by one member of the household adversely affected the rest of the family's eligibility for benefits. The recipient argued that the requirement provided a disincentive to the maintenance of a financial tie between the sole member of the household who was receiving support and that member's father. The court was not concerned, however, about this incidental effect, explaining that when Congress acts pursuant to its spending powers, it is owed substantial deference by the courts. *See also* U.S. Const., art. I, §§ 8-9.

## B. Families on the Margin

Expunging all reference to family relationships from such areas of law as welfare and taxation is inconceivable. Family provides statutory and regulatory distributive schemes such as those described above with their organizational structures. Confronted with what turns out to be massive regulation of the family throughout the profusion of federal statutory and regulatory schemes, it is difficult to imagine how the Lopez majority came to regard family law as an object of exclusively state control.[90] The Social Security Act alone, which encompasses TANF as well as Medicaid and a wide range of other public benefits, is the source of a nearly endless supply of federal family laws.[91] For insight into how the kind of rhetoric found in Lopez has persisted in the face of such widespread federal regulation of the family, this section examines the rationales undergirding a handful of early family assistance programs (precursors to the Social Security Act) and to the sources of political support for such programs found in various sectors of the (once) nascent industrial economy.

Prior to passage of the Social Security Act in 1935, law reformers introduced early family assistance programs designed to remedy growing poverty associated with the rise of industry.[92] Worker deaths as well as desertion and nonsupport by husbands and fathers were on the rise, leaving widows and other single mothers and their children to take their places in the new industrial economy: working long hours in poor conditions for low wages, suffering the same injuries, illnesses, and fatigue as their adult male counterparts.[93] The exhausting and time-consuming demands of the not-yet-reformed workplace resulted in maternal neglect, leading to the removal of poor children from their homes and placement of these children in orphanages.[94]

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[90] *See infra* Part I.

[91] 42 U.S.C. §§ 301 *et seq.* (1999).

[92] *See generally* Richard K. Caputo, Welfare and Freedom American Style: The Role of the Federal Government, 1900-1940 (1990); Theda Skocpol, Protecting Soldiers and Mothers (1992); Walter I. Trattner, From Poor Law to Welfare State: A History of Social Welfare Law in America (5th ed. 1994).

[93] *See* Skocpol, *supra* note 92, at 430, 443.

[94] *See* Skocpol, *supra* note 92, at 424-25.

Reformers, and women's groups in particular, advocated financial assistance, cast not as charity, but rather as payment to mothers for their service to the country.[95] "A mother caring for her children, [reformers argued,] contributed more to society than if she engaged in some other employment."[96] Just as soldiers received pecuniary recognition for their contribution to the national interest, the argument went, so mothers, shouldering the burden of raising the nation's citizens, should be able to stay at home and be compensated for their labors rather than forced into the dangerous world of industry.[97] Assistance programs arose on the theory that mothering should not be a risky business, but a secure enterprise, the national importance of which is appreciated.[98]

An early example of such assistance was the "Widow's Scholarship."[99] Advocates of compulsory schooling and child labor laws knew that widows would be reluctant to lose the wages brought home by their children and that fear of further impoverishing single-mother families would obstruct passage of such reforms.[100] Privately funded "scholarships" served to replace the wages children would have earned in the factory and facilitated passage of (and compliance with) compulsory schooling and child labor laws.[101]

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[95] *See* Caputo, *supra* note 92, at 48, 51; Skocpol, *supra* note 92, at 450-52; Trattner, *supra* note 92, at 225.

[96] Caputo, *supra* note 92, at 51. Current discourse indicates that there has been a dramatic shift in attitude away from the preference that poor, single mothers be encouraged to stay at home and raise their children rather than be forced into the workplace. In a cover memorandum to its proposed regulations for implementing TANF, HHS states: "Most of the resources in the AFDC program went to support mothers raising their children alone. In the early years, the expectation was that these mothers would stay home and care for their children; in fact, in a number of ways, program rules discouraged work. Over time, as social and economic conditions changed, and more women entered the work force, the expectations changed." 62 Fed. Reg. 62,124, 62,125 (1997).

[97] *See* Caputo, *supra* note 92, at 48-51; Skocpol, *supra* note 92, at 450-52.

[98] *See* Skocpol, *supra* note 92, at 443.

[99] Caputo, *supra* note 92, at 45; Skocpol, *supra* note 92, at 443; Trattner, *supra* note 92, at 224.

[100] *See* Skocpol, *supra* note 92, at 443.

[101] Skocpol, *supra* note 92, at 443-4.

State funded "Mothers' Pensions" followed.[102] States which had enacted strict child labor laws were most likely to pass Mothers' Pensions, as well, to keep children out of the factories and in the classrooms.[103] Reformist supporters of the Mothers' Pension argued also that it would reduce maternal neglect and therefore reduce the need for orphanages by keeping children at home with their mothers.[104] In addition, organized labor supported the Mothers' Pension because it reduced the need for single mothers, who would work for extremely low wages, to enter the wage labor market, making jobs scarcer for men and driving wages down.[105] Finally, although big business and other conservative forces generally opposed the provision of public assistance, they declined to wage a vigorous battle against reformist efforts because: 1) the pensions may actually have saved money to the extent that they prevented institutionalization of poor children, and 2) pensions satisfied the moral imperative of assisting the poor without hampering employers' "freedom of contract" as minimum wage and maximum hour laws would have done.[106]

Each of these sources of support for (or, in the case of big business, wary inaction against) the Mothers' Pensions stemmed from an impulse to regulate the relationship between female-headed households and the "public" sphere. (Progressive law reformers sought to curtail the dangers posed to women and children by hazardous industrial workplaces as well as to reduce the need for orphanages; organized labor was motivated by its interest in increasing the demand for adult male workers; capital hoped to avert the advent of labor reforms.) Intrusion by female-headed families on the industrial economy was experienced by each camp as a threat. As a result, a confluence of unusually aligned forces supported efforts to insulate the market sphere from encroachment by female-headed families.[107]

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[102] Caputo, *supra* note 92, at 44; Skocpol, *supra* note 92, at 443.

[103] *See* Skocpol, *supra* note 92, at 462-64.

[104] *See id.* at 424; Trattner, *supra* note 92, at 224, 226-27.

[105] *See* Skocpol, *supra* note 92, at 430-32; *cf.* Trattner, *supra* note 92, at 225.

[106] Skocpol, *supra* note 92, at 425, 427; *cf.* Trattner, *supra* note 92, at 225.

[107] *See also* Wisconsin v. Yoder, 406 U.S. 205, 229 (1972) (explaining that since "employment of Amish children on the family farm does not present the undesirable economic aspects of eliminating jobs that might otherwise be held by adults," Wisconsin's compulsory

The line policed by these supporters of early family assistance programs plainly relied on a particular incarnation of the public/private distinction. In this incarnation, the market (or public sphere) was insulated from the female-headed family (which belonged in the private sphere).

Congress began to federalize family assistance programs rooted in the same ideals with passage of the Sheppard-Towner Act in the early 1920s.[108] The Sheppard-Towner Act, also known as the "Federal Act for the Promotion of the Welfare and Hygiene of Maternity and Infancy," provided funds for the federal Children's Bureau to administer through cooperating states much like the current model of federal-state cooperation employed by TANF and its immediate predecessor, AFDC.[109] Although the Sheppard-Towner Act was weakened and ultimately de-funded in the latter half of the 1920s and the early 1930s by conservative forces, states' rights advocates, and the American Medical Association (which feared the prospect of compulsory health insurance), the Depression was underway and led finally to passage of the Social Security Act in 1935.[110] Aid to Dependent Children (ADC), the immediate precursor to AFDC, was initially administered by the Children's Bureau, before it was eventually moved to the Social Security Board.[111]

The purpose of this historical account is to raise the profile of an ideology undergirding early family assistance programs, which were not federal, and suggest that subsequent federal programs, including the Sheppard-Towner Act, ADC, AFDC, and the current TANF, grew out of the same ideology. During the period in which family assistance programs were created and eventually federalized, a range of political forces were invested in insulating the public sphere from encroachment by women and children. Financial assistance to poor, female-headed families strategically opened the

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schooling law should not be applied to Amish children over the age of fourteen). The Supreme Court's view of the purpose of the protective legislation at issue in Yoder was that it was designed to protect the market, not just the children.

Note also that the reformers sought not only to protect the public sphere from further intrusion by the family, but also to protect the family from more serious intrusion by the state, *e.g.*, enabling children to remain in their parents care rather than be placed in orphanages.

[108] *See* Caputo, *supra* note 92, at 53; Skocpol, *supra* note 92, at 482, 500.

[109] *See* Skocpol, *supra* note 92, at 481.

[110] *See* Caputo, *supra* note 92, at 55; Skocpol, *supra* note 92, at 497-523; and Trattner, *supra* note 92, at 221.

[111] *See* Skocpol, *supra* note 92, at 535.

door of the public sphere, but only a crack. The door was only open *to* the family as far as was necessary to insulate the public sphere *from* the family. To maintain the rule, family assistance programs were carved out as an exception to it.[112]

The Sheppard-Towner Act and its eventual successor, the Social Security Act, were modeled, practically and ideologically, on the old scholarships and pensions, even appropriating some of the local offices to administer the new federal programs.[113] When family assistance was federalized in the early part of the twentieth century, the public/private distinction was federalized along with it.

Ironically, progressives of the same era were in the process of exposing the incoherence of the public/private distinction as it was used to insulate contractual enterprise (the private sphere) from state regulation (the public sphere).[114] Fran Olsen identifies two parallel incarnations of the

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[112] Opposition to the early public assistance programs often rested on the fear that the breach of the public/private divide would be fatal to the private sphere by supplanting the generosity of charities, churches, and relatives. *See* Caputo, *supra* note 92, at 45; Trattner, *supra* note 92, at 228.

[113] *See* Caputo, *supra* note 92, at 97; Trattner, *supra* note 92, at 226, 291.

[114] The legal realist Robert Hale, for example, argued in 1923 that "the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom." Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, in American Legal Realism 101 (William W. Fisher *et. al.* eds., 1993), originally appearing at 38 Pol. Sci. Q. 470 (1923). Hardly a coherent policy of nonintervention, *laissez-faire* requires the constant presence of law. "What is the government doing when it 'protects a property right'?" Hale asks. *Id.* at 102. "It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to enjoy the thing owned." *Id.* at 102-03. Hale demonstrates his point in the context of the employer-employee relationship, one which advocates of *laissez-faire* believe should be governed privately and without government intervention.

> In the case of labor, what would be the consequence of refusal to comply with the owner's terms? It would be either absence of wages, or obedience to the terms of some other employer. If the worker has no money of his own, the threat of any particular employer to withhold any particular amount of money would be effective in securing the worker's obedience. . . . Suppose, now, the worker were to refuse to yield to the coercion of any employer . . . . He must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community—and that law is the law of property . . . . [T]he law compels him to starve if he has no wages, and compels him to go

public/private dichotomy. "[O]n the one hand, a dichotomy between the market, considered public, and the family, considered private; on the other hand, a dichotomy between the state, considered public, and civil society [including the market], considered private."[115] Conspicuously, however, the critique of the public/private distinction used to undermine the premises of *laissez-faire* treatment of the wage-labor market was not extended contemporaneously to the relegation of the family to the private sphere.[116]

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> without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation . . . .

*Id.* at 103-04.

The law lends its coercive power to the employer under a *laissez-faire* regime by declining to intervene in the employer's exercise of power while at the same time, enforcing the rules of property as they operate to deprive the worker of necessities unless the worker submits to the will of the employer. When courts enforce property rights, they cannot maintain fidelity to a policy of nonintervention; such a policy is untenable. "Private" bargaining has an unavoidably "public" component, and "freedom of contract" involves no small degree of government coercion.

[115] Olsen, *supra* note 10, at 1501.

[116] The analysis was adapted to family years later. For example, Fran Olsen demonstrates that "[n]either 'intervention' nor 'nonintervention' is an accurate description of any particular set of policies, and [that] the terms obscure rather than clarify the policy choices that society makes." Frances Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. Ref. 835, 836-37 (1985). Interrogating a noninterventionist policy toward the family, she speculates on how it might be applied in the case of spousal abuse:

> [I]t would be up to [the abused spouse] to deal with the problem; the state would not "intervene." If she dealt with the problem by shooting her husband, the state would be expected to continue its policy of "nonintervention." If the person were indicted for murder, it would be a sufficient defense to prove that the defendant and the victim were members of the same family. *Id.* at 855.
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> As long as [courts] do not ratify and enforce *all* assertions of authority by a husband or parent—for example, they prosecute intrafamily murder—courts must decide which behavior they will sanction and which they will not. These decisions require courts to take a stand on complex issues of intergenerational conflict and gender politics. *Id.*

Professed fidelity to a policy of nonintervention turns out to be a false ideal. The law draws and polices boundaries around private family behavior by making choices about what sorts of private family behaviors rise to the level of intolerable. "For example, strong battery laws are likely to help wives and children; weakened self-defense doctrines limit their ability to protect

Instead, public assistance was exceptionalized to preserve the family's place in the private sphere.

### C. Analysis

While the critique of the public/private dichotomy has been used to undermine the policies of both *laissez-faire* economics and nonintervention in the private family by demonstrating the inevitability of government regulation, this critique does not apparently require the conclusion that any particular governmental entity is doing the regulating. Proponents of the rule against federal cognition of family matters may view their position as entirely unruffled by the legal realists and their successors. Dailey, for example, averts the charge that she relies on the public/private distinction by acknowledging that government regulation of family is unavoidable; she grants that the family serves the distinctly public function of raising good citizens.[117] Her argument, she asserts, is therefore not reliant upon the public/private distinction—some governmental entity must regulate family—Dailey's contention is only that as between the options contemplated under federalism, the state is the better suited.[118]

Recognition of the fallacy of nonintervention, however, is not the end of the difficulties raised by the public/private distinction. We can glimpse the endurance of the dichotomy by examining the historical moment at which early family assistance programs were being federalized. Just as progressive legal thinkers were exposing the incoherence of the public/private distinction as it dichotomized state regulation and private contracts, reformers relied on another public/private axis—the market/family axis—to launch early family

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themselves, and would seem to help husbands." *Id.* at 857. If the choice the state makes is to decline to intervene in the abuse perpetrated by one spouse, but to prosecute the other spouse for killing her abuser, the law is lending its coercive power to the abusive spouse. This is not nonintervention, but rather state enforcement of intra-familiar power exercised by the abusive party. Private family relations have an unavoidably public component.

Olsen's argument recalls the legal realist critique of *laissez-faire*. "Both *laissez faire* and nonintervention are false ideals." *Id.* at 836-7. Champions of *laissez-faire*, or nonintervention, whether in the context of the wage-labor market or the family, advocate a policy which obscures the choices government makes. The analyses parallel one another, though the legal realist critique expounded by Robert Hale in 1923 was not extended to the family for another sixty years.

[117] *See* Dailey, *supra* note 1 at 1850.

[118] *See id.* at 1860-80.

assistance programs. When the Sheppard-Towner Act and, eventually, the Social Security Act, federalized family assistance, they also federalized the underlying market/family distinction. The early 1900s was a period of both subversion and reproduction of the dichotomy, bringing formerly private contractual enterprise into the public sphere, but leaving family on the margins.

One might argue that the position propounded by Dailey favors *state* regulation of family, while the family assistance legislation of the 1920s and 30s *federalized* regulation of family. This is true; but the federalization of family assistance did not federalize *all* of family law. It created an opening wide enough to permit entry only to those aspects of family that posed a threat to the stability of the public/private divide, leaving the remainder to the states. Federalization of family assistance created an *exception* to the general rule that family law resides with the states, but did not eliminate the rule altogether. On the contrary, by exceptionalizing family assistance from the total body of family law, the general rule that family law resides with the states was sustained. The exception was imperative to protect the market sphere from intrusion by the family. The creation of the exception preserves the rule; opening the door just a little is a strategy for preventing it from crashing down.

Dailey's argument for state control over families rests on a homologous distinction.[119] While Dailey contends that states are better suited to govern the family due to their superior proximity to community values, she creates an exception to this general rule; the federal government is better suited to protect individual rights from being infringed by community

[119] One can also discern a rhetorical similarity between the two positions. Dailey posits that her vision of the family does not confine family to the private sphere because she recognizes family's crucial public function of rearing the nation's citizens. Promoters of early family assistance programs likewise deployed the rhetoric that mothers were akin to soldiers, in that they made a significant contribution to the nation by performing the critical function of rearing the nation's citizens. Both are slight concessions to the public nature of family that avoid more serious ones. *See infra* sections II.B; III.B.

values.[120] Dailey, like the reformers of 1920s and 30s, preserves her rule by breaking it.

The dominant rule to which the reformers and Dailey both adhere is that family law is state law. The reformers demonstrated their fidelity to the rule by creating an exception, the federalization of family assistance programs, that served to forestall more serious transgression of the public/private divide. Dailey likewise advances the rule not only through persuasive advocacy of its correctness, but also through creation of an exception, permitting federal bodies to trump the will of intra-state majorities to safeguard individual rights. The strategy deployed by both the reformers and Dailey serves the same function as the perforations cut into the fabric of a banner, allowing the wind to blow through, rather than tear the banner down entirely.

## IV. ADJUDICATION AND THE FAMILY: THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL COURT JURISDICTION

This part sketches the history of the Supreme Court's exclusion of family from federal court jurisdiction.[121] Together, the cases examined in this

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[120] An example of federal intervention in the family to protect a constitutionally guaranteed right can be found in Michael H. v. Gerald D., in which the relative rights of putative and presumed fathers are settled. 491 U.S. 110 (1989). Individual rights, including the rights to due process and equal protection, are no doubt raised by this case, making the case suitable for federal jurisdiction. When two men make competing claims of paternal rights to the same child, an exception to the altruistic character of intra-familiar matters surfaces. Individualist norms govern this dispute, placing it in the public sphere. To sustain the vision of the family as the refuge from individualism, therefore, Michael H. would presumably be cast as a case about constitutional rights, permitting the case to garner the attention of the Supreme Court after the state court has made an initial ruling. The fact that this case raises a question of individual rights would, I presume, place it in Dailey's exceptional, federal sphere. It is worth pausing over the increasingly foggy boundary between the kinds of disputes regarded as between individuals with rights (and therefore public and federal) and disputes regarded as intra-familial (and therefore private and state).

[121] Numerous writers have taken up this subject, often critiquing the domestic relations exception on practical, technical, or historical grounds, none of which I discuss in this article. *See, e.g.*, Barbara Ann Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L.J. 571 (1984); Cahn, *supra* note 23; Linda A. Ouellette, Note, The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation, 24 B.C. L. Rev. 661 (1983); Anthony B. Ullman, Note, The Domestic Relations Exception to Diversity Jurisdiction, 83 Colum. L. Rev. 1824 (1983).

Practical considerations include fear of flooding federal dockets and lack of federal expertise. *See, e.g.*, Cahn, *supra* note 23 at 1091; Resnik, *supra* note 2 at 1713-14; Ouellette at 670; Ullman at 1847-51.

part provide another example of the rhetoric of the family as the paradigmatic object of state control, as well as providing additional exceptions to this general principle.

Federal courts have long expressed distaste for the "messy" problems that families bring to the judicial system.[122] This distaste found one of its earliest expressions in the case Barber v. Barber—a case that contains not only the first statement of the rule, but also its first exception.[123]

Huldah and Hiram Barber were married and divorced in the State of New York.[124] The divorce, however, was not absolute, but rather a divorce "from bed and board," permitting the parties to live separately, but forbidding each from remarrying before the death of the other.[125] After issuance of the divorce decree, including an order for alimony, Hiram left New York for Wisconsin, where he hoped to evade enforcement of the New York order.[126]

Huldah brought suit in federal district court in Wisconsin under diversity seeking enforcement of the past-due alimony obligation.[127] Hiram moved to dismiss Huldah's complaint on the grounds that under the terms of their divorce from bed and board, they remained husband and wife, which, in

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By technical arguments, I mean to include such arguments as whether a domestic matter inherently defies assessment of a pecuniary value, thus defeating the amount in controversy requirement, *see, e.g.*, Ouelette at 669-70, and whether abstention or jurisdiction provides the correct terms for determining the appropriateness of federal cognition of family, *see, e.g.*, Atwood at 604-18.

Finally, historical arguments concern whether the division of labor under American federalism originates in the common law division between English ecclesiastical courts (which some argue had sole jurisdiction over family matters) and courts of chancery. *See, e.g.*, Atwood at 584-589; Cahn, *supra* note 23 at 1089-90; Ouelette at 669; Ullman at 1834-1842.

*See also* Kandoian, *supra* note 1, at 1832, on the awkwardness of substantially conflicting marriage laws among the states in an era of mobility and litigiousness.

This by no means exhausts the arguments surrounding the domestic relations exception, but suffices to demonstrate that the larger debate is not limited to the arguments on which this article focuses.

[122] *See* Cahn, *supra* note 23 at 1097; *cf.* Resnik, *supra* note 5, at 1751-54.

[123] 62 U.S. (21 How.) 582 (1858).

[124] *See id.* at 584-85.

[125] *See id.* at 585.

[126] *See id.* at 588.

[127] *See id.* at 584.

1858, would preclude her from maintaining a separate domicile from him and defeat diversity jurisdiction.[128] The Supreme Court found that "when parties are already living under a judicial separation, the domicil [sic] of the wife does not follow that of the husband."[129] Huldah, therefore, could maintain her own domicile and, though married, sue her husband (through a next friend) in federal district court under diversity.[130]

Before championing the reformation of the legal status of married women, however, the Barber court began with this disclaimer:

> Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The [federal] court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.
>
> We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo, or to one from bed and board.[131]

This article is not the first to note that the Court issued this disclaimer with neither citation nor rationale.[132] Further, the question of federal jurisdiction to issue a divorce decree or an order for alimony was not before the court.[133] Barber, nonetheless, has come to stand for the proposition that there is an exception to federal court jurisdiction under diversity for family matters, known as the "domestic relations exception."[134]

The dissent in Barber agreed with the general rule expressed by the majority that federal court was not the proper forum for matters concerning

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[128] *See id.* at 592-93.

[129] *Id.* at 594.

[130] *See id.* at 595.

[131] *Id.* at 584.

[132] *See, e.g.*, Cahn, *supra* note 23, at 1077.

[133] *See* Barber, 62 U.S. at 584.

[134] Resnik, *supra* note 5, at 1740-42.

divorce or alimony.[135] The dissent was baffled, however, that this rule did not operate to preclude Huldah from bringing her suit in federal district court. Because the dissenting opinion amply demonstrates the thinking behind the general rule, I quote from it here at length:

> It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household. If such functions are to be exercised by the Federal tribunals, it is important to inquire by what rule or system of proceeding, or according to what standard, either of ethics or police, they are to be enforced. Within the range subjected to the political, general, and uniform control of the Federal Constitution, there are numerous commonwealths, and within these are ordinances much more numerous and diversified, for the definition and enforcement of the duties of their respective members . . . . The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.[136]

The dissent (which, like the majority, offers its thoughts without citation) unambivalently embraces the private family ideal and bespeaks the patent incongruity of federal power with regulation of the private family. The states, in the dissent's view, are communities, that is, sites of peculiar customs and values. They are closer than the federal government to the families that compose them. Maintenance of order relies on the power of the states to establish the norms governing these resident families. Federal enforcement of Huldah's order for alimony, therefore, infringes on a basic state power.

If the majority and dissent agreed as to the impropriety of federal interference in the family, how is it that Huldah was permitted to proceed in

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[135] *See* Barber, 62 U.S. at 600 (Daniel, J., dissenting).

[136] *Id.* at 602 (Daniel, J., dissenting).

federal court? Relying on the power of English courts of equity to enforce orders issued by the ecclesiastical courts, the Barber majority explains:

> [W]hen a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, [federal] courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony.[137]

Because Hiram left New York, making it difficult for the New York court to enforce its own order, the intervention of the federal court is justified, *but* only to the extent that the federal court is being asked to enforce an outstanding debt. Although the underlying domestic matter falls exclusively to the state, the federal court may enforce the debt arising out of the family relationship. Herein we find an early statement of the rule (family matters are adjudicated at the state level) and just as early an exception (except when the federal court is called upon merely to enforce the debt arising out of the family relationship).

The Supreme Court developed the rule favoring state jurisdiction in three subsequent cases. In re Burrus was the first.[138] Burrus was not brought in federal court pursuant to diversity, but rather on a petition for habeas corpus; it did not concern divorce or alimony, but child custody.[139] A child's grandfather sought release from jail, where he was being held for violating a federal district court order to turn his grandchild over to the custody of the child's father.[140] The Burrus Court ordered the grandfather's release on the grounds that the district court lacked jurisdiction over the underlying custody matter, and that, in fact, "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the

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[137] *Id.* at 591 (citations omitted).

[138] 136 U.S. 586 (1890).

[139] *See id.*

[140] *See id.* at 587-89.

laws of the United States."[141] As in Barber, the Burrus court's proclamation is unaccompanied by citation or rationale.

In the next case, Ohio ex rel. Popovici v. Alger, the wife of a Roumanian vice-consul sued her husband in Ohio state court for divorce and alimony.[142] The vice-consul invoked the constitutional and statutory requirement that all suits against ambassadors and consuls be brought in federal court.[143] Citing Barber and Burrus, Justice Holmes found that jurisdiction was properly with the state court, explaining that the constitutional and statutory language, while "sweeping [in its allocation of actions against consuls to federal courts,] . . . ha[d] to be interpreted in light of the tacit assumptions upon which it is reasonable to suppose that the language was being used."[144] It had, Holmes asserted, gone "unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce."[145]

The Supreme Court's most recent statement regarding the domestic relations exception is found in Ankenbrandt v. Richards.[146] In Ankenbrandt, as in Barber, the question of federal jurisdiction over divorce was not actually before the Court, so discussion of the matter is entirely dicta. The plaintiff sued her ex-husband and his female companion in tort, on behalf of her children, for sexual and physical abuse.[147] She brought her suit in federal district court pursuant to diversity jurisdiction.[148] The respondents moved for dismissal based on the domestic relations exception, prevailing in both the

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[141] *See id.* at 593-94.

[142] 280 U.S. 379 (1930).

[143] *See id.* at 382.

[144] *Id.* at 383.

[145] *Id.* at 383-84.

[146] 504 U.S. 689 (1992).

[147] *See id.* at 691.

[148] *See id.*

district court and the court of appeals.[149] The Supreme Court reversed, holding that the domestic relations exception did not apply.[150]

Justice Stevens submitted a two-paragraph concurrence in which he cautioned that "[a]n easy case is especially likely to make bad law when it is unnecessarily transformed into a hard case," and urged that "[t]his should be an exceedingly easy case .... [W]hatever belief one holds as to the existence, origin, or scope of a 'domestic relations exception,' the exception does not apply here."[151] Stevens's admonition arose in response to majority and concurring opinions dedicating multiple pages to the exclusion of family matters from federal court jurisdiction and to demonstrating that Barber, Burrus, and others constitute a coherent line of case law creating such an exclusion. As a result, though the plaintiff in Ankenbrandt prevailed on her jurisdictional claim, the case reads like a loss.

The tenor of loss emanates from the court's lengthy history, statement, and justification of the rule favoring state jurisdiction over family matters.

> Not only is our conclusion [that the domestic relations exception to federal court jurisdiction exists] rooted in respect for [a] long-held understanding, it is also supported by sound policy considerations. Issuance of decrees [for divorce, alimony, and custody] not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony and child custody decrees.[152]

Despite the Court's self-deprecation regarding its inability to collaborate with social workers to resolve family matters, it decided that the federal district court *did* have jurisdiction to hear the child abuse claim made in Ankenbrandt. It did so by finding that "the domestic relations exception

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[149] *See id.* at 689.

[150] *See id.* at 690.

[151] *Id.* at 717-18 (Stevens, J., concurring).

[152] *Id.* at 703-04.

encompasses only cases involving the issuance of a divorce, alimony or child custody decree."[153]

> This lawsuit in no way seeks such a decree; rather, it alleges that respondents Richards and Kesler committed torts against L.R. and S.R., Ankenbrandt's children by Richards. Federal subject-matter jurisdiction . . . thus is proper in this case.[154]

Ankenbrandt affirms the existence of the domestic relations exception, but limits its application.[155] If the case at bar is a tort, the rule against federal court jurisdiction over family litigation does not apply (despite the potential participation of social workers).

The domestic relations exception to federal jurisdiction began in dicta with the benefit of neither citation nor rationale. Still, from its initial invocation in a diversity case, it grew to encompass petitions for habeas corpus and actions against ambassadors and consuls. The line of cases beginning with Barber and strung together by Ankenbrandt now stands for the principle against federal judicial attention to family matters.[156]

Notice, however, that federal court jurisdiction is found in both Barber and Ankenbrandt, which provide not only the earliest and latest statements of the rule, but also the earliest and latest exceptions. Where the court is asked only to enforce a debt which simply arose from an underlying domestic relationship, the federal court may intervene (Barber). Where the action is brought in tort arising out of an underlying domestic relationship, federal subject-matter jurisdiction is proper (Ankenbrandt).

At this point, it is worthwhile to recount the exceptions used to preserve the general rule that governance of family falls to the states. The first

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[153] *Id.* at 704.

[154] *Id.*

[155] *See also* Stone v. Wall, 135 F.3d 1438 (11th Cir. 1998), in which a father and daughter brought an action in tort against the daughter's maternal grandmother and aunt for interference with the father's custody. The federal district court invoked the doctrine of abstention pursuant to the domestic relations exception, but the court of appeals reversed, holding that under Ankenbrandt, the district court should not have abstained because the action was brought in tort and did not require the district court to inquire into a marital or parent-child relationship. *See id.* at 1441.

[156] For a more detailed account of the history of the domestic relations exception, *see* Cahn, *supra* note 23.

exception comes from the liberal position: federal cognition of family is appropriate where counter-majoritarian action is necessary to vindicate individual rights. The second exception encompasses welfare, taxation, and a host of other federal statutory and regulatory schemes and permits federal regulation of family where such regulation can be cast as something else—something otherwise acceptable as an object of federal governance. Finally, the Supreme Court, during the evolution of the domestic relations exception to federal court jurisdiction, established that federal court jurisdiction over family matters is appropriate where the federal court is asked only to enforce a debt arising out of an underlying domestic relationship, and that where the action is brought in tort and is not a petition for divorce, custody, or alimony, diversity jurisdiction is proper.

The exceptions to the rule are vast and varied. The thesis of this article is that each exception is calculated, but that as a set, the exceptions are incoherent. Each exception is calculated insofar as it serves to sustain the mythical exclusive association of family with state law, and incidentally, with the private side of the public/private structure which federalism has adopted with respect to family. As a set, however, the exceptions share nothing but this purpose. No "meta-rule" guides us in distinguishing between the kind of family matter best suited to state governance and the kind best suited to federal governance.[157] The axiom that family law falls exclusively within the state domain is simply untrue.

A defender of the axiom might grant that not all of family law is state law, but argue that some identifiable subset of family law truly is a matter of state law. The defender might argue, for example, that the law of marriage is still state law; but the defender would have to contend with DOMA, as well as with the cooperation requirement and the marriage penalty. The defender might argue that child custody is still state law; but the defender would have to contend with Palmore v. Sidoti, (in which the Supreme Court reversed a state court custody award because the non-custodial parent lost custody on the basis of her interracial remarriage).[158] The defender might argue that this case is an exception because it raises a constitutional liberty; but the defender would still have to contend with the Parental Kidnapping Prevention Act (requiring states to recognize each other's custody orders).[159] The defender

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[157] *See* Kennedy, *supra* note 9 at 1775 (1976).

[158] *See* 466 U.S. 429 (1984).

[159] *See* 28 U.S.C. § 1738A (1998).

might argue that this statute is an exception because it regulates relations among the states; but the defender would still have to contend with the Adoption and Safe Families Act (establishing federal foster care standards and adoption procedures).[160] The defender might argue that divorce is still state law; but the defender would have to contend with Barber. Can the dispute settled in Barber be distinguished from a dispute resulting in a divorce decree? Absolutely. Each of the exceptions to the rule can be distinguished from some state family law matter with which it might be paired, but not by any particular grand principle.

Each exception requires the defender to draw a new line, one which siphons off some aspect of family and contends that a particular family matter is exceptional on the grounds that it is more properly understood as public than private. But the public/private distinction is incoherent, and as a result, the defender's efforts are futile. No meta-rule authoritatively divides family's fundamentally private center from its exceptional, public periphery or its state center from its federal periphery.[161]

The family, ideally, is a haven from the tumult of individualism. While the public sphere consists of an amalgam of individuals with rights and interests that clash and conflict in the marketplace and the political arena, the family is supposed to be a place of refuge, governed by values rather than interests—altruism rather than rights. For this reason, it is conceived as private—and for the same reason, it is allocated to the states, where discrete communities engage in internal dialogues to determine their values.

As it turns out, however, family is also about rights and interests. Huldah Barber needed a debt enforced against her husband. The children of Ankenbrandt and Richards had a tort claim against their father and his companion. Family law raises questions of individual rights to due process and equal protection, such as the relative rights of putative and presumed fathers or the right of a married woman to decide not to carry a fetus to term over the objections of her husband.[162] Finally, the family touches the market, and the public sphere generally, in innumerable places, so as to make their

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[160] *See* Pub .L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

[161] *See* Duncan Kennedy, A Semiotics of Legal Argument, 42 Syracuse L. Rev. 75, 97-103 (1991) (describing the phenomenon of "nesting," or "the reproduction, within a doctrinal solution to a problem, of the policy conflict the solution was supposed to settle").

[162] *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

disentanglement unfathomable, which is why we find family law in the law of taxation, bankruptcy, welfare, pensions, unemployment, housing and so on.

The axiomatic position of the family under federalism reflects its idealized relegation to the private sphere. The innumerable exceptions to the general rule against federal cognition of the family expose the impossibility of the ideal, private, state-governed family. To sustain the reign of individualism, family is exceptionalized as a refuge and allocated to the domain of state governance by communal values. All of the individualist aspects of family must in turn be exceptionalized to sustain family's role as the anti-individualist refuge. The exceptions take the form of federal family law.

The struggle over the proper allocation of family matters under American federalism is ongoing. The next part explores how this dynamic is operating in the battle to rescue federalism from the most recent threats posed by the family.

## V. SUPPORTING THE PROGENY OF LOPEZ

In its 1995 decision in United States v. Lopez, the Supreme Court invalidated the Gun-Free School Zones Act as beyond the scope of congressional authority under the Commerce Clause.[163] The Court set forth a tripartite test.[164] A congressional act falls within the scope of the Commerce Clause if it: 1) "regulate[s] the use of the channels of interstate commerce," 2) "regulate[s] and protect[s] the instrumentalities of interstate commerce, or persons or things in interstate commerce," or 3) "regulate[s] those activities having a substantial relation to interstate commerce."[165] After summarily disposing of the first two prongs, the court conducted an in-depth analysis of the third and concluded that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[166]

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[163] United States v. Lopez, 514 U.S. 549, 567-68 (1995).

[164] *Id.* at 558-59.

[165] *Id.*

[166] *Id.* at 567.

Explaining the need to impose some limits on the scope of congressional authority under the Commerce Clause, the Lopez majority cited family as the paradigmatic area of state law.[167] If family were regulated by Congress, it would foretell the demise of state sovereignty.

In dissent, Justice Breyer also indicated his fear that federal regulation of family would threaten to unleash federal power from its constitutionally imposed limits when he disputed the majority's claim that holding the Gun-Free School Zones Act constitutional would "'obliterate' the 'distinction between what is national and what is local.'"[168] His argument in support of the statute, he insisted, would stop short of admitting family to the realm of federal lawmaking.[169]

Lopez, and the constricting of congressional authority it seemed to signal, invited constitutional challenges to two federal statutes regulating family: the Child Support Recovery Act of 1992 and the Violence Against Women Act of 1994, criminalizing failure to pay child support and acts of domestic violence, respectively.[170] The constitutionality of these statutes has arisen as the most hotly contested territory in the battle over federalism and family. This part explores challenges to congressional authority to regulate family under the Commerce Clause since Lopez and the arguments deployed to justify upholding federal legislation regulating families.

### A. Commercial Intercourse: The Child Support Recovery Act

Steven Paul Parker and his ex-wife, Wendy Parker, divorced in state court in Pennsylvania, where Steven was ordered to pay $100 each week to Wendy for the support of their two children.[171] Steven moved to Florida.[172] Alleging that Steven failed to make any of his court-ordered payments for at

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[167] *See supra* note 4 and accompanying text.

[168] Lopez, 514 U.S. at 624 (Breyer, J., dissenting).

[169] *See id.* (Breyer, J., dissenting).

[170] Pub. L. Nos. 103-322, 104-201, 104-294; 18 U.S.C. § 228 (1998).

[171] United States v. Parker, 911 F. Supp. 830, 832 (E.D. Pa. 1995).

[172] *See id.*

least five years, the federal government prosecuted Steven for violation of the Child Support Recovery Act (CSRA).[173]

The CSRA criminalizes the "willful[] fail[ure] to pay a past due child support obligation with respect to a child who resides in another State," where the amount past due is greater than $5,000 or has remained unpaid for more than a year.[174] In his motion to dismiss, Steven argued that Congress exceeded its authority under the Commerce Clause when it passed the CSRA.[175] The federal district court agreed.[176]

Applying the test outlined in Lopez, the district court first considered whether the CSRA regulated an activity that "substantially affects [interstate] commerce."[177]

> The failure to make [child support] payments, [the court reasoned,] affects primarily the parents and the children born of or dependent upon the marriage. Arm's-length commercial actors are not involved in any way. The marketplace for goods and services and prices of commodities are not affected at all . . . . The activity at issue, therefore, has simply nothing to do with commerce in the context of the limited power given to the federal government and withheld from the states in the Commerce Clause.[178]

The district court did not fail to consider the aggregate, national effect of non-custodial parents' failure to pay child support, (collectively accruing upwards of $5.1 billion annually), but found that "[u]sing dollar figures to establish the necessary relationship is putting the cart before the horse because it addresses whether an activity's relationship with commerce is *substantial*, and not whether the activity affects '*commerce*' in the first place."[179] The government argued that

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[173] *See id.*

[174] *See* 18 U.S.C. § 228 (1998).

[175] Parker, 911 F. Supp. at 832.

[176] *Id.* at 843.

[177] *Id.* at 834-42.

[178] *Id.* at 835.

[179] *Id.* at 837.

> nonpayment of child support causes many custodial parents and their children to be unable to afford sufficient housing, food, medical care and other goods and services, [causing] many women and children to become dependent upon welfare and other programs that are funded by federal money, and [that] this substantially affects interstate commerce.[180]

The district court was not persuaded, however, and likened the government's arguments to two failed arguments in Lopez.[181] These kinds of arguments present a slippery slope, the court thought, which, like the government's case in Lopez, would require the court "to pile inference upon inference," and make it "difficult to perceive any limitation on federal power."[182]

The district court compared the CSRA to two other federal statutes, criminalizing carjacking and loansharking, respectively.[183] Noting that "both . . . involve criminal enterprises that are highly organized, have nationwide contacts and produce handsome profits from illegal transactions," the court contrasted them with nonpayment of child support and handgun possession, observing that neither "involves buying, selling, prices, commercial intercourse, marketplace activity, or any kind of arms-length transaction."[184]

The government also argued that the CSRA satisfied the test set forth in Lopez because it regulated the channels of interstate commerce, as delivery of child support payments necessarily involves the mail, electronic transfer of funds, or some other method of conveying payment.[185] The district court

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[180] *Id.*

[181] *See id.* In Lopez, the government argued that possession of a firearm near a school substantially affected interstate commerce because the costs of violent crime lead to increased insurance costs nationally. *See* 514 U.S. at 563-64. It also argued that the threat of violence posed risks to the learning environment that could result in a less productive citizenry. *See id.* at 564. The majority rejected both of these arguments, reasoning that the relationship between the possession of a firearm and these consequences was too attenuated, making it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.* at 564.

[182] 911 F. Supp. at 838, citing Lopez, 514 U.S. at 564-67.

[183] *See id.* at 840-42.

[184] *Id.* at 841-42.

[185] *See id.* at 842.

rejected this argument, pointing out first, that the CSRA does not regulate the channels, but rather, criminalizes the failure to make the payments at all; and second, that even if unpaid child support were considered a "good," (which the court doubted) delinquent child support obligors were prosecuted under the CSRA for "*not* transferring money across state lines."[186]

The district court dismissed the government's case against Steven.[187] On appeal, the Third Circuit reversed, finding the CSRA to be within the scope of congressional authority under Lopez.[188] "Failure to make required payments gives rise to a debt which implicates economic activity," the court of appeals observed in a cursory opinion, constituting "part of a national problem with a substantial impact upon interstate commerce."[189]

The Court of Appeals for the Fifth Circuit explained its reasoning in greater detail when it reversed a district court's grant of a motion to dismiss for Tennessee resident Keith Douglas Bailey, who allegedly failed to pay court-ordered child support of $500 per month for his four-year old son.[190] The district court had found that Lopez rendered any congressional regulation of family suspect, and had held that the CSRA compromised principles of federalism and comity.[191] Reinstating the charge, the court of appeals cited express congressional intent to combat "growing poverty within single-family homes," and "to strengthen, not to supplant, State enforcement efforts."[192] This court declined to determine whether the CSRA had a substantial effect on interstate commerce, but reasoned instead that the CSRA survived the Lopez test because of the obvious necessity of using the channels of interstate commerce to satisfy an interstate child support obligation and because, in the

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[186] *Id.*

[187] *See id.* at 843. The court did not address the "instrumentalities" part of the Lopez test because the government did not argue for the constitutionality of the CSRA on that basis.

[188] United States v. Parker, 108 F.3d 28, 28-29 (3rd Cir. 1997).

[189] *Id.* at 31.

[190] United States v. Bailey, 115 F.3d 1222, 1224 (5th Cir. 1997).

[191] *See id.* at 1224-25.

[192] *Id.* at 1225

court's view, the child support debt did constitute a "thing" in interstate commerce.[193]

The court so held in spite of a fervent dissent, which argued, in part, that "Congress may regulate only *commercial* intercourse, so its power is confined to the regulation of trade, business transactions, and economic activity."[194] Concerned that the majority's position "would permit Congress to regulate all financial transactions," the dissent went on to explain where it thought the line between commercial and non-commercial transactions should be drawn:

> Child support payments....are unilateral obligations, not bilateral commercial transactions; they do not involve trade; and they do not entail the purchase or sale of goods or services . . . . Consequently, child support payments do not entail a *quid pro quo*, the defining characteristic of a commercial transaction.[195]

The majority, however, viewed payment of child support as fundamentally commercial:

> The payment of support obligations is indeed commercial; it involves the transfer of money from one hand to another. In fact, nothing could be more commercial. That the underlying reason for the obligation relates to a matter of domestic relations does not detract from this position.[196]

The majority's view has prevailed beyond the Fifth Circuit. Since Lopez, ten circuits have held the CSRA to be a valid exercise of congressional authority under the Commerce Clause, with none opposed.[197] Proponents of

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[193] *Id.* at 1227-28.

[194] *Id.* at 1235 (Smith, J., dissenting).

[195] *Id.* at 1235-36 (Smith, J., dissenting).

[196] *Id.* at 1230. It is interesting that these two positions struggle over and bifurcate the meaning of "commerce" as much as they do the meaning of "family." Does commerce require a *quid pro quo*, or is a unilateral obligation sufficient?

[197] United States v. Black, 125 F.3d 454 (7th Cir. 1997); United States v. Williams, 121 F.3d 615 (11th Cir. 1997); United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997); United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997); United States v. Johnson, 114 F.3d 476

the CSRA, however, did survive a few district court scares.[198] Such proponents released a flurry of articles arguing that the CSRA should survive Lopez.[199]

One writer conceded that "almost everything people do has an economic component [so that if commerce were] defined simply as an economic activity, [congressional authority under the Commerce Clause] could be practically limitless."[200] Still, she argued, there was "a principled distinction . . . to be drawn" by defining "'commerce' as all transactions involving the exchange of value for an obligation, whether that obligation arises by status or by contract."[201]

Another writer advocated rescuing the CSRA through a "judicially-imposed 'flight' requirement."[202] If non-custodial parents convicted under the CSRA had to be shown to have fled one state for another for purposes of avoiding their child support obligations, then the CSRA would be constitutional as a regulation of the channels of interstate commerce.[203]

A third writer reasoned that the CSRA was easily distinguishable from the Gun-Free School Zones Act because "the payment of child support

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(4th Cir. 1997); United States v. Parker, 108 F.3d 28 (3rd Cir. 1997); United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997); United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996); United States v. Mussari, 95 F.3d 787 (9th Cir. 1996); United States v. Sage, 92 F.3d 101 (2d Cir. 1996).

[198] United States v. Parker, 911 F. Supp. 830 (E.D. Pa. 1995); United States v. Bailey, 902 F. Supp. 727 (W.D. Tex. 1995); United States v. Mussari, 894 F. Supp. 1360 (D. Ariz. 1995); United States v. Schroeder, 894 F. Supp. 360 (D. Ariz. 1995).

[199] *See, e.g.*, Cindy Boer, The New and "Improved" Commercial Power—Can the Federal Child Support Recovery Act Survive Lopez?, 13 T.M. Cooley L. Rev. 677 (1996); Kathleen A. Burdette, Comment, Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez, 144 U. Pa. L. Rev. 1469 (1996). *Cf.* Julian Epstein, Evolving Spheres of Federalism After United States v. Lopez and Other Cases, 34 Harv. J. on Legis. 525 (1997).

[200] Burdette, *supra* note 199, at 1505.

[201] *Id.* at 1506.

[202] Boer, *supra* note 199, at 712.

[203] *Id.* Legislative history provides support for the proposition that Congress was aiming at just this type of behavior. Earlier drafts of the CSRA did, in fact, contain a flight requirement, but it was abandoned in the final version. *Id.* at 682-86.

is an economic activity, by definition .... [I]t is a monetary obligation across state lines."[204]

While the CSRA appears safe for the time being from the potential effects of the Lopez decision, its constitutionality has been hotly contested and has garnered the attention of ten courts of appeals as well as a fair number of legal writers.[205] Whether the failure to pay child support, indisputably a problem of national dimensions, is an appropriate subject for congressional action, depends on the extent to which supporters of the CSRA can describe child support as a commercial matter. Does the CSRA fail because child support does not involve a contract for goods or services? Does its unilateral nature preclude it from being characterized as "commercial intercourse," or is the mere centrality of money sufficient to render it commercial? The question is whether child support can be portrayed as an exception which would place it in the commercial (read "market" or "public") sphere. If the fact that the CSRA regulates a financial debt is all that rescues it from invalidity under Lopez, then the Violence Against Women Act, another federal statute passed pursuant to congressional authority under the Commerce Clause, may be in trouble.

### B. The Costs of Violence: The Violence Against Women Act

The Violence Against Women Act of 1994 (VAWA) was passed by Congress as part of a larger anti-crime initiative and includes dozens of provisions designed to respond to what Congress understood to be a national epidemic of violence against women.[206] Two of its provisions, providing a civil cause of action for gender-motivated violence as a civil rights violation and criminalizing "interstate domestic violence," respectively, have been challenged as beyond the scope of congressional authority under the Commerce Clause after Lopez.[207] While VAWA has been subject to fewer

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[204] Epstein, *supra* note 199, at 541.

[205] *See supra* notes 197, 199 and accompanying text.

[206] Pub. L. Nos. 103-322, 104-201, 104-294 (codified in scattered sections of the U.S.C.). *See also* The Violence Against Women Act of 1999, which is currently pending in the House of Representatives. H.R. 357, 106th Cong. (1999).

[207] 42 U.S.C. § 13981 (1995) and 18 U.S.C. § 2261(1998), respectively.

constitutional challenges than the CSRA, a trend favoring the validity of VAWA can already be discerned.[208]

The constitutionality of the civil rights provision was first considered in a federal district court in Connecticut. In Doe v. Doe, the court refused to dismiss a wife's action for damages against her husband, who allegedly had abused and enslaved her in violation of VAWA, which protects her right to be free from gender-based violence.[209] The husband argued that Congress lacked authority to enact the civil rights provision of VAWA under the Commerce Clause.[210] Citing congressional findings that "[g]ender-based crimes and fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy," the court held that VAWA regulated a matter that substantially affects interstate commerce, and thus satisfies the test set forth in Lopez.[211]

A district court in Virginia explicitly rejected the Doe court's reasoning, in Brzonkala v. Virginia Polytechnic and State University.[212] In Brzonkala, the victim of an alleged gang-rape on campus sued her assailants under the civil rights provisions of VAWA.[213] Ruling on a motion to dismiss, the court held that gender-motivated violence, like handgun possession, "involve[s] an activity that is too remote from interstate commerce" to be

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[208] *See, e.g.*, United States v. Wright, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 140 L.Ed.2d 254, 118 S.Ct. 1376 (1998); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); United States v. Gluzman, 953 F. Supp. 84 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998).

[209] 929 F. Supp. 608 (D.Conn. 1996).

[210] *See id.* at 610. The husband also claimed that Congress exceeded its powers under the Fourteenth Amendment when it enacted the VAWA. The court declined to reach this claim, since it upheld the statute as a legitimate exercise of congressional authority under the Commerce Clause. *See id.* at 617.

[211] *Id.* at 613. Congress went on to explain that "[g]ender-based violence bars . . . women . . . from full participation in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence." *Id.* (citation omitted.)

[212] 935 F. Supp. 779, 791 (W.D. Va. 1996).

[213] *See id.* at 781. The plaintiff in this case also sued the college under Title IX of the Education Amendment Act, 20 U.S.C. §§ 1681 *et. seq.* (1998). *See id.*

regulated under the Commerce Clause.[214] The flaw in the plaintiff's argument (and the Doe court's analysis) in this court's view, was that it conflated "interstate commerce" with "the national economy."[215]

> Showing that something affects the national economy does not suffice to show that it has a substantial effect on interstate commerce. Plaintiff uses "effects on the national economy" interchangeably with "effects on interstate commerce." This is wrong. Undoubtedly effects on the national economy in turn affect interstate commerce. Such a chain of causation alone, however, is insufficient to bring an act within the purview of the commerce power. If such a chain of causation sufficed, Congress's power would extend to an unbounded extreme.[216]

A decision reversing the district court subsequently issued from the Fourth Circuit applying substantially the same reasoning employed by the Doe court, followed by a second decision (on rehearing) in which the Fourth Circuit reversed itself.[217] Before either appellate decision issued, however, in the midst of the uncertainty left by the conflicting district courts, advocates of the civil rights provision of VAWA responded to the threat to its constitutionality in force.

One writer, acknowledging that her central challenge was to make a believable argument that "there [is] a way to uphold [the provision] without abandoning all limits on Congress's power under the Commerce Clause," focused on the direct link between violence against women and the financial costs such violence imposes on women as employees and on women's employers.[218] The cost of violence led the writer to characterize the conduct

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[214] *Id.* at 791.

[215] *Id.* at 792.

[216] *Id.* Notice again how the meaning of commerce is bifurcated to exceptionalize the aspect best described as the "national economy."

[217] *See* Brzonkala v. Virginia Polytechnic and State University, 132 F.3d 949, 964-74 (4th Cir. 1997); Brzonkala Nos. 96-2316, 96-1814, 1999 WL 111891 (Fourth Cir. (VA) March 5, 1999).

[218] *See* Megan Weinstein, Recent Development, The Violence Against Women Act After United States v. Lopez: Defending the Act from Constitutional Challenge, 12 Berkeley Women's L.J. 119, 123-25 (1997); *see supra* note 211. For additional arguments in favor of

proscribed in VAWA as commercial.[219] She argued that violence against women substantially affects interstate commerce, aggregating the costs of violence and relying on Justice Kennedy's concurrence in Lopez, in which he explains that the Commerce Clause assumes "a single market and a unified purpose to build a stable economy."[220] Finally, this writer disposed of the concern that VAWA might federalize family law by pointing to a provision of VAWA specifically disclaiming federal court "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of property, or child custody decree."[221] Because of the impact of domestic violence on the employment market, domestic violence can be exceptionalized from the totality of family law which, the writer would assure a court, remains with the states in accordance with a plain reading of the statute.

The Fourth Circuit upheld the constitutionality of another provision of VAWA, criminalizing interstate domestic violence. In United States v. Bailey, a defendant convicted of committing particularly egregious acts of violence against his wife, including kidnapping her and transporting her, badly injured, across state lines in the trunk of his car, appealed in part on the grounds that Congress exceeded its authority under the Commerce Clause when it enacted VAWA.[222] Declining even to engage in the analysis set forth

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the constitutionality of the VAWA after Lopez, *see* Carolyn Peri Weiss, Recent Development, Title III of the Violence Against Women Act: Constitutionally Safe and Sound, 75 Wash. U. L.Q. 723 (1997); Kerrie E. Maloney, Note, Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez, 96 Colum. L. Rev. 1876 (1996); Melanie L. Winskie, Note, Can Federalism Save the Violence Against Women Act, 31 Ga. L. Rev. 985 (1997).

[219] *See* Weinstein, *supra* note 218, at 125.

[220] *Id.* at 126-27 (citation omitted).

[221] *Id.* at 130 (citing 42 U.S.C. § 13981(e)(4) (1994)).

[222] 112 F.3d 758 (4th Cir. 1997). This section of VAWA can be found at 18 U.S.C. § 2261(1998). Section (a), which describes the offenses, provides as follows:

(a) Offenses.-
   (1) Crossing a State Line.-A person who travels across a State Line or enters or leaves Indian Country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).

in Lopez, the court upheld VAWA based on two cases that predate Lopez and uphold the Mann Act, otherwise known as the "White Slave Traffic Act of 1910."[223]

At the time of the two cases cited, the Mann Act provided, in relevant part, as follows:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce, entice or compel such woman or girl to become a prostitute, or to give herself up to debauchery, or to engage in any other immoral practice . . . shall be deemed guilty of a felony.[224]

In Caminetti v. U.S., the first case on which the Bailey court relied, the Supreme Court upheld the Mann Act against the claims of a defendant convicted of aiding in the interstate transportation of a woman to be his mistress on the grounds that "under the commerce clause of the Constitution . . . the authority to keep the channels of interstate commerce free from immoral and injurious uses" is unquestioned.[225] Cleveland v. U.S., upon which the Bailey court also relied, upheld the Mann Act against Mormon defendants who had transported "plural wives" across state lines on the

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(2) Causing the crossing of a State Line.-A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian Country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

[223] The cases on which the Bailey court relied in upholding the constitutionality of the Mann Act under the Commerce Clause are Caminetti v. United States, 242 U.S. 470 (1917), and Cleveland v. United States, 329 U.S. 14 (1946).

[224] The text of the Mann Act as it existed at the time of Caminetti and Cleveland could be found at 18 U.S.C. § 398 (1927). The Mann Act is currently codified at 18 U.S.C. § 2421 (1998). It was most recently amended in 1986 and is now written in gender-neutral fashion (*i.e.*, "[w]hoever knowingly transports any individual . . . with the intent that such individual engage in prostitution . . . .").

[225] Bailey, 112 F.3d at 766 (citation omitted).

grounds that Congress could regulate the instrumentalities of interstate commerce.[226] Bailey quotes Cleveland as follows:

> The fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the States. The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have 'the quality of police regulations' is not consequential.[227]

The Bailey court determined that Caminetti and Cleveland were controlling, and held that "[t]he statute requires the crossing of a state line, thus placing the transaction squarely in interstate commerce."[228]

### C. Analysis

Proponents of the constitutionality of the CSRA and VAWA must struggle to separate the regulated activity from its association with family law and identify its connections to commerce. Obviously, the Commerce Clause requires that the link to commerce be made. What is troubling, however, is the extent to which this strategy requires advocates to isolate these issues from the broader subject of family. Advocates, sympathetic courts, and even Congress are forced to ignore the untenability of their vision of the family as they identify more and more exceptions to the principle against federal regulation of families.

Child support and gender-based violence are merely two more aspects of family that can be characterized as exceptions to family's mythically anti-individualist nature. Debts arise out of family relations. Family poverty encumbers the national economy. Violence between spouses gives rise to civil rights issues. Domestic abuse burdens the workplace. The

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[226] *Id.* (citation omitted).

[227] *Id.* (citation omitted).

[228] *Id.* For an insightful discussion of the statutory construction of the Mann Act in Caminetti, Cleveland, and other cases, *see* Edward H. Levi, An Introduction to Legal Reasoning 27-57 (1949). Levi demonstrates how changing ideas regarding the relative victimization/agency of the women in transport affected the Supreme Court's view of the appropriate scope of the statute under the Commerce Clause, *i.e.*, were women "things" in interstate commerce?

ties to interstate commerce and to the public sphere generally, are endless. While law reformers rely on a time-tested strategy by pointing to the links that their causes have to commerce, they also obscure the incoherence of the overall treatment of family under federalism by exceptionalizing only one piece of a larger mosaic and ignoring the inextricability of family from the individualist norms governing the public sphere.

Recall the discussion of Dailey's test as it applies to the case of same-sex marriage. The difficulty with Dailey's theory was the impossibility of stating definitively whether same-sex marriage is principally an issue of morality or rights. If we do not have a reliable method for answering that incipient question, then the second step of the analysis—allocating the issue to federal or state governance—is built on air.

The CSRA and VAWA present an analogous difficulty. The test in this case is not whether child support and gender-based violence are questions of morality or rights, but whether they substantially affect interstate commerce. To know whether we can allocate some responsibility for child support enforcement to the federal domain, we need a reliable answer to the question of whether interstate commerce requires a "bilateral commercial transaction[]," or merely a "transfer of money from one hand to another."[229] To know whether the federal government can take any responsibility for addressing domestic violence, we need criteria for distinguishing a tenuous connection from a strong one when examining the link between violence and commerce.[230] Without reliable guidelines for taking these initial analytical steps, repeated *ad hoc* determinations of constitutionality are a reformer's only recourse.

These determinations seem to be coming out satisfactorily for those seeking federal remedies to the problems of nonpayment of child support and gender-based violence, but these successes have little predictive value for future concerns which may be more marginal—more easily characterized as "unilateral" or "tenuous" in their links to commerce. By conceding the rationality of the tests, feminist law reformers further the long-term problem of

> "withdrawal" of the issue of the allocation of state and federal power from the political discussion of how to deal with [substantive issues. This is] because it appear[s] that federalism [is] just a

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[229] *See infra* section V.A.

[230] *See infra* section V.B.

> neutral framework for the democratic process, rather than a framework shaped by the very interests . . . contending within it . . .[231]

The time-tested strategy, therefore, carries hidden risks. "[T]here are vast leeways in deciding the particular rules of federalism, because terms like . . . 'commerce,' . . . are too vague to preclude setting the rules so as to further the substantive . . . policies [judges] favor."[232] Future agenda items of feminist law reform might not be received so enthusiastically.[233]

## VI. CONCLUSION

This article has argued that the axiom that family law belongs exclusively within the state domain is both empirically untrue and theoretically unsound. Why then does it persist? The answer, I have argued, is that allocation of family matters to the states reflects the same ideals that

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[231] Duncan Kennedy, A Critique of Adjudication 252 (1997).

[232] *Id.*; *see* Robert G. McCloskey, The American Supreme Court 96-100 (2d ed. 1994). McCloskey demonstrates how the Supreme Court, around the (last) turn of the century, made a series of *ad hoc* determinations interpreting the Commerce Clause that served largely to promote its members' *laissez-faire* policy preferences. For example, McCloskey points to Hammer v. Dagenhart, 247 U.S. 251 (1918), in which the Court struck down federal legislation limiting the interstate distribution of goods produced with the benefit of child labor. The Court was disturbed that "[i]f the Congress could exclude from interstate commerce any article it chose to exclude, then it could in effect control production, for most firms were dependent upon interstate commerce for their market." *Id.* at 97. Still, the Court had to distinguish the child labor case from analogous cases in which it had upheld the Mann Act (prohibiting the use of the interstate channels for immoral purposes such as prostitution; *see supra* section V.B) and The Pure Food and Drug Act (prohibiting the interstate transport of adulterated food). The Court invented a new distinction between legitimate congressional regulation of interstate transport of goods which would have *harmful results* (such as prostitution and adulterated food), and illegitimate regulation of interstate transport of goods which were not in and of themselves harmful, but had arose out of some evil which occurred *prior to* the interstate transport (such as goods produced by child labor). *See id.*

[233] Child support, in particular, has been a darling of the left and the right in recent years, perhaps because it transfers money into the pockets of single mothers on the one hand, while sounding the horn of family values on the other. The Child Support Recovery Act, 28 U.S.C. § 228, was amended with bipartisan support last year by the Deadbeat Parents Punishment Act of 1998, H.R. 3811, 105th Cong., 2d Sess. (1998). The new version is not radically different from the version discussed in section V.A *supra*, but it does separate offenses by degree and contemplate the crossing of a state line *for purposes of* evading a child support obligation.

placed family in the private sphere. One myth is mapped on top of the other, and to give up one may be giving up too much.

Under American federalism, the relegation of family to the state law domain is incidental to the mythical position of family in the private sphere. Denial of federal control over family is likewise incidental to denial of family's individualist character, and reveals a certain reliance on the existence of exceptions to sustain the place of individualism as the dominant ethic.

Once confronted with the reality of federal involvement in the family, therefore, we resort to the strategy of exceptionalism. The rhetoric used to justify federal lawmaking in the family sphere without giving away the incoherence of the initial boundary (cordoning off family from the dominant realm), mirrors the rhetoric which excluded family from the dominant realm in the first place.[234] Just as the family was exceptionalized to sustain the ethic of individualism, so the family has been subdivided and recast to sustain its position in the realm of altruism.

Proponents of the liberal model might contend about some family matter which receives federal attention, "it's not family law, it's taxation," or "it's not a domestic relations case, it's a tort," or "it's not like most family litigation, it involves the constitutional right to privacy." These areas of family law are exceptionalized because they implicate rights or the market or some other aspect of the public sphere from which family is supposed to be our refuge. As it turns out, however, this vision of family, which has been demonstrated by others to be incoherent as to the policy of nonintervention, also provides an unsound basis for the rule against federal governance; that is, the ideal is a falsehood, in theory and in reality.

A rule and exceptions grounded in this ideal, therefore, are not likely to provide a principled basis for allocating responsibilities between federal and state lawmaking bodies. Once the exceptions to the rule are noticed, it becomes clear that there is no rule at all—or rather that there are two, which amounts to none.[235]

In addition, this article has made the modernist suggestion that underlying federal denial of the responsibility for family law are subliminal associations of federal law with masculinity, rights, market norms, individualist self-reliance, objectivity, and the public sphere; and state law with femininity, love, values, altruism, subjectivity, and the private sphere.

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[234] *See* Kennedy, *supra* note 161.

[235] *See* Kennedy, *supra* note 9, at 1685.

Family law seems like it belongs in the latter category, while taxation, for example, sounds like it belongs in the former.

This article has succeeded if it has demonstrated that the current distribution of labor within the American federalist system with respect to family is coextensive only with a futile effort to preserve the line separating masculine and feminine, public and private, individualist and altruist. Because we continuously find family (which is, ideally, feminine, private, and altruist) on the federal side of the line, (which is, ideally, masculine, public, and individualist,) or, conversely, because we continuously find individual rights, the market, and other public elements, in the altruist, private family, the addition of more and more lines is necessary to sustain the initial divide.[236]

My hope is that this insight will lend something to feminist criticism of the principle against federal governance of family. The principle has been criticized for its implicit trivializing of legal issues associated with women. Viewed from another angle, however, the impossibility of extricating family law from so many substantive areas of federal law (*e.g.*, taxation, tort, constitutional liberties, *etc.*) leads to the conclusion that family is hardly handled as a trivial matter, but rather that family's importance is obscured when legal actors deny this inextricability. Central to my argument is the observation that there is not such a clear boundary separating the family squabble from the national economy or from individual rights. Federal disdain for family matters is not just insulting; it is also based on a vision of family that is neither empirically true nor theoretically possible.

To bring a legal issue into the purview of federal authority, advocates have to describe the issue as a subject of one of the enumerated federal powers. It has to involve commerce or a constitutionally guaranteed right, or be a dispute between citizens of diverse jurisdictions, for examples. It is not inherent in federalism, however, that describing a matter as "commerce" precludes its also being described as "family." An object of federal governance can be "commerce" as well as "farming," or "commerce" as well as "telecommunications," or "commerce" as well as "art," so why not "commerce" as well as "family"? The only possible answer to this question is that family, unlike farming, telecommunications, and art, is somehow incompatible with federal governance—but this answer would be wrong. Family is not only compatible with federal governance; it is vital to it.

Feminist law reformers, such as those trying to safeguard the Violence Against Women Act from constitutional attack, should recognize the extent to which federal family law has been concealed, recast, and

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[236] *See* Kennedy, *supra* note 161.

exceptionalized by the federalist adoption of the private family ideal. This recognition harbors the potential to free reformers from the impulse to fragment their own agenda. Domestic violence advocates have to demonstrate that their issue is not like child support, and child support advocates have to demonstrate that their issue is not like gay marriage, and gay rights advocates have to demonstrate that their issue is not like child protection. The question of whether a particular dispute or policy is more properly a subject of federal or state law cannot be answered by a determination that the dispute or policy regards the family. Whether a legal issue is an issue of family law, therefore, should not be at the center of the allocational decision-making process.

Feminist law reformers trying to safeguard family law at the federal level should not be distracted by tests (such as morality/rights, bilateral/unilateral-transactions, tenuous-link/close-link, family-obligation/debt-arising-out-of-a-family-obligation, family-litigation/tort) that purport to distinguish between *typical* family matters, which are appropriate to the state domain, and *exceptional* family matters, which properly garner federal attention. These tests can be manipulated to serve the policies judges favor. They do not provide a neutral framework for allocating substantive legal questions between federal and state governance.

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