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FEDERALISM'S FALLACY: THE EARLY TRADITION OF FEDERAL FAMILY LAW AND THE INVENTION OF STATES' RIGHTS

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*1762 Introduction

The Supreme Court's decision in Nevada Department of Human Resources v. Hibbs [1] appeared to mark a pause in the Court's fifteen-year-long string of cases that have generally bolstered states' rights and, specifically, have cabined the federal government's authority to enforce federal laws against the states. [2] In Hibbs, the Court held that states do not have immunity from damages suits filed by state employees under the Family Medical Leave Act (FMLA), [3] reasoning that, with respect to forms of discrimination given heightened scrutiny under the Equal Protection Clause, such as gender discrimination, courts must give greater deference to Congress's authority to enact remedial legislation under the Fourteenth Amendment's enforcement provision. [4]

Viewed narrowly, the Hibbs opinion did not deviate from the Court's relatively recent Eleventh Amendment decisions, such as Kimel v. Florida Board of Regents [5] and Board of Trustees of the University of Alabama v. Garrett, [6] which emboldened the states' immunity from suit while also signaling that such immunity has constitutional limitations. [7] However, if we consider what was at stake in Hibbs--as Chief Justice Rehnquist put it in his majority opinion, "the pervasive sex-role stereotype that caring for family members is woman's work" [8] --then the Court's decision appears to mark a significant departure from what has become a widely declared tenet of federalism: Law and policy relating ***1763** to domestic relations, or family law, falls under the exclusive authority of the states.

From this perspective, it is significant that one of the few federalism decisions of recent years to have upheld Congress's authority to abrogate state sovereign immunity involves an area of law that bears directly on family relations--in this case, the gendered allocation of care-giving roles within a family. In 1991, Chief Justice Rehnquist took a very different stance when he announced that certain provisions in a proposed version of the Violence Against Women Act (VAWA) [9] violated a basic principle of federalism because they "could involve the federal courts in a whole host of domestic relations disputes." [10] He articulated that theory as law in the majority opinion in United States v. Morrison, [11] which invalidated VAWA's civil rights remedy for "gender motivated violence" as an unconstitutional exercise of congressional authority. Rehnquist reasoned that the provision blurred the distinction between what is "truly local" and "truly national" [12] in part because it "may . . . be applied equally as well to family law and other areas of traditional state regulation." [13]

In this respect, Hibbs and Morrison appear to embody alternative visions of federal authority over family law and policy. Hibbs affirmed the national legislature's authority to enforce FMLA against the states in part because the Equal Protection Clause does not allow states to perpetuate gendered allocations of care-giving responsibility within families, while Morrison reasoned that the national legislature exceeded Commerce Clause authority when it enacted VAWA's civil rights remedy in part because that provision could potentially impact domestic relations. That the Court--and the Chief Justice himself--seems to have endorsed incompatible visions of the relationship between the national government and the states in the specific area of domestic relations is reason enough to revisit the platitude that the regulation of domestic relations is, and always has been, a matter of "truly local" concern.

Defenders of the notion that federal regulatory and adjudicative powers do not reach domestic relations--what I will call the state sovereignty paradigm of domestic relations--tend to employ two distinctive, but not incompatible, defenses or explanations of the states' purported special sovereignty over domestic relations. The first ***1764** justification invokes the rhetoric and logic of history. [14] In this mode, jurists contend that federal involvement in domestic relations is improper because, by tradition, the states possess special sovereignty over the family. [15] The second justification is that domestic relations are, by definition, local in nature. This essentialist mode of reasoning about jurisdiction and domestic relations has been identified and described by Judith Resnik, who argues that, "[b]y essentializing both categories of law and the proper spheres of governance of state and federal courts, such claims reduce each to a caricature." [16] These two types of reasoning about federalism--historical and essentialist-- work together to render federal regulation of the family abnormal and invasive.

In this article, I examine the empirical grounding of both the historical and the essentialist justifications of the state sovereignty paradigm of domestic relations. First, with special focus on the first half of the nineteenth century, I reconsider the standard perception that there is a long-standing tradition of federal non-involvement in domestic relations law and policy. I do not make an originalist ***1765** argument for a specific understanding of the federal government's authority over matters relating to the family. [17] Rather, I dig deeper into historical sources of the pre-Civil War era, from the 1790s to the 1850s, to examine how national-level actors of that period exercised their authority to regulate and adjudicate matters involving domestic relations.

By examining the history of the federal government's role in the regulation of the family, this article joins the work of others who in recent years have begun to piece together the history of the federal government's role in crafting domestic relations law and policy.[18] Much of this attention has focused on federal involvement in domestic relations in the late nineteenth and early twentieth centuries, with relatively less consideration given to the pre-Civil War period. Though recent contributions to this field have helped to cure this imbalance,[19] there remains a strong sense, especially among lawyers and judges, that ***1766** prior to the general expansion of federal authority and administrative capacity during the Reconstruction and New Deal eras, federal actors played no role in the development of the law and policy of domestic relations.

Because proponents of stronger state sovereignty tend to embrace the pre-Civil War period as an authentic and persuasive model for current practice,[20] the relative under-examination of federal involvement in domestic relations during that period has significant jurisprudential consequences. In Morrison, for example, while Chief Justice Rehnquist admitted that a return to pre-New Deal Commerce Clause jurisprudence was implausible, he turned to "the founders"' understanding of what was "truly local" to determine the kinds of activities Congress may not reach using its commerce powers.[21] With more sustained analysis, legal ***1767** scholars have drawn on a similar historical vision in arguing that "[t]he era of dual federalism witnessed universal agreement that government regulation of the family fell within the constitutionally protected sphere of state sovereignty,"[22] and that "[f]rom the earliest days of the Republic until the recent past, family law has unquestionably belonged to the states."[23] The relative under-examination of federal regulation of the family during the pre-Civil War period has allowed these claims to shape modern jurists' reasoning about federalism without ascertaining their empirical accuracy.

The historical sources reveal two important things about the early history of federal regulations concerning domestic relations. First, as I demonstrate in Part III, during the pre-Civil War era all three branches of the federal government were actively engaged in creating and enforcing laws and policies that bore directly on families, whether it was the creation and administration of widows and orphans' war pensions, the regulation of married women's citizenship, or--perhaps most surprisingly--the resolution of an array of domestic relations issues in federal court, often pursuant to uniform federal standards. These sources evidence the fact of federal actors' involvement in domestic relations, and also show that federal actors brought national norms and values to bear on such issues. Specifically, federal

lawmakers and jurists recognized the important connection between republicanism (as they understood that concept) and domestic relations.[24] Thus, contrary to the contention that the task of regulating ***1768** domestic relations was intentionally and exclusively delegated to the state governments in order to protect local values and to secure a liberal polity, historical sources demonstrate that national jurists and lawmakers played a role in the process, slow and halting as it was, of examining and sometimes even displacing the hierarchical principles that were part and parcel of the common law of domestic relations.

My second task in this article is to evaluate the accuracy of the claim that, as a matter of theory or principle, state sovereignty over domestic relations is fundamental to American federalism. I do so by demonstrating that, in fact, the state sovereignty paradigm is not a fixed federalism principle, but has evolved over time in the context of heated debates over various proposed federal regulations that, in some respect, touched on domestic relations. As I explain in Part IV, the scope of the federal government's authority over domestic relations has always been a disputed issue--although one that received limited attention until the late nineteenth century. At that point, the woman suffrage campaign, polygamy, liberalized divorce laws, and interracial marriage attracted national attention as threats to the traditional family. In the course of debates over proposed regulatory responses, the proper place for the family in the national republic emerged as a heavily contested issue, and the notion that domestic relations fall under the exclusive authority of the states took shape and gained force as a theory of federalism. Thus, the history of the state sovereignty paradigm reveals that it is not an organic, transhistorical principle of American federalism. Rather, it developed as a theory of convenience, strategically invoked and easily dismissed or ignored.

The contingent and expedient nature of the state sovereignty paradigm helps explain the inconsistencies in our current federalism jurisprudence--such as the dissonance between Hibbs and Morrison--as a continuation of the indeterminacy that has typified this area of law for decades. Given that the historical sources are replete with evidence of ideological and ends-justified invocations of the state sovereignty paradigm, history counsels that we should be skeptical of reliance on the state sovereignty paradigm as a basis for invalidating otherwise legitimate exercises of federal power. This is not because the state sovereignty paradigm is necessarily associated with a specific ideological agenda,[25] but because its history demonstrates it to be a ***1769** theory of convenience, rather than a meaningful or principled limit on federal power.

In Part I, I describe the inconsistency with which the state sovereignty paradigm is invoked in modern federal adjudicative and legislative processes. In Part II, I provide a brief introduction to the status-based common law of domestic relations that Americans inherited from England-- important background for understanding the nature of federal involvement in domestic relations during the pre-Civil War era. In Part III, I examine the federal government's significant involvement in domestic relations during the pre-Civil War era, specifically through the creation and administration of pensions for war widows and orphans, the regulation of domestic relations though citizenship law (and vice versa), and the federal courts' adjudication of a wide variety of disputes concerning domestic relations. In Part IV, I provide a broad overview of the emergence of the state sovereignty paradigm as a generally applicable theory of federalism in the context of several perceived crises in American family law in the late nineteenth century. I close with some considerations of the implications of these historical findings for current federalism debates.

I. Making, Breaking, and Ignoring Federalism Rules

The view that the individual states possess special and exclusive regulatory authority over domestic relations is announced as a firm principle of law, resolute and clearly defined: "[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." [26] With the arrival of new federalism in the last few decades, this pronouncement has been used to preclude or limit federal adjudicative and regulatory involvement in matters touching on domestic relations in a number of contexts, even when federal regulatory involvement is otherwise authorized. Certainly, the state sovereignty paradigm informed the Court's recent Commerce Clause jurisprudence, [27] Congress's overhaul of federal welfare programs in the 1990s, [28] and, in the 1970s, opposition to the proposed Equal Rights Amendment. [29] It is ***1770** the animating concept behind the "domestic relations exception" to federal diversity jurisdiction, [30] and is routinely invoked by federal judges as a principle of statutory interpretation. [31] Most recently, in Elk Grove United School District v. Newdow, the state sovereignty paradigm animated the creation of a "prudential" limit on Article III standing [32] (over the somewhat surprising objection of Chief Justice Rehnquist). [33]

The state sovereignty paradigm of domestic relations is informed by a type of reasoning that underlies much of the Supreme Court's recent federalism

jurisprudence: categories or bright lines are used to enforce a boundary between distinctive federal and state spheres of power. Strict demarcation of state and federal authority purportedly leads to greater accountability in government, increases predictability in judicial enforcement of federalism, and preserves the states' important role in the republic.[34] The practice of identifying a certain type of law ***1771** as an area of "traditional state concern," and, hence, off-limits to federal regulation, presents an attractive means of achieving these goals: one need only determine, as an empirical matter, which areas of law were historically under the states' exclusive control and then ban federal regulatory and adjudicative activities in those areas. Although this method of policing federalism famously collapsed in the Court's pre-New Deal era jurisprudence and, more recently, in its Tenth Amendment jurisprudence,[35] it has been revived in the Court's Commerce Clause jurisprudence in United States v. Lopez and in Morrison, and is alive in modern abstention jurisprudence as well.[36]

Despite the appeal of the strict formalist approach to federalism, its critics are numerous. Justice Breyer has called attention to the random outcomes that accompany "[c]omplex Commerce Clause rules," noting in Morrison that such formalist rules in federalism jurisprudence "create fine distinctions that achieve only random results [and] do little to further the important federalism interests that called them into being."[37] Others have articulated concern that bright line rules in federalism are, in fact, easily manipulated by federal judges, who tend to "selectively invoke[]" federalism rules "only when ideologically convenient."[38]

***1772** The legislation and litigation histories of VAWA and FMLA suggest that these concerns are indeed warranted with respect to the state sovereignty paradigm of domestic relations. The civil rights remedy declared unconstitutional in Morrison did not specifically target domestic relations, and was crafted so as to limit federal judicial involvement in any family law litigation that was factually related to a claim brought pursuant to VAWA.[39] Moreover, although Congress did consider data regarding domestic violence while drafting the Act, especially during the beginning of the legislative process,[40] the legislators considered domestic violence as a subset of violence perpetrated against women in various settings (work, school, and on the streets) where such violence was likely to affect women's ability to participate in the economy.[41] As such, VAWA is easily understood as an anti-harassment and anti-discrimination provision that, after enactment, joined the ranks of dozens of federal civil rights laws passed pursuant to Congress's commerce powers. Nevertheless, criticism of VAWA focused on its

tendency to embroil the federal government, and specifically the federal courts, in domestic relations matters. [42]

***1773** In stark contrast to VAWA, the Family Medical Leave Act did not set off federalism alarms in the halls of justice. There is no doubt, of course, that FMLA is a regulation about family--a fact Congress made no attempt to obscure in naming the statute or during the legislative debates. Congressional proponents of the bill repeatedly emphasized the importance of FMLA for American families and articulated very clearly that the Act was intended in part to disestablish the gendered social practices that cast women as care-givers and men as breadwinners. [43] Although Congress considered the federalism implications of FMLA, the discussion was cursory and little, if any, attention was given to the fact that the statute directly addressed the relations of family members, hence involving the federal government in a purported enclave of traditional state authority. [44] Moreover, when FMLA was challenged on federalism grounds before the Supreme Court, much attention was given to the fact that FMLA was intended to foster gender equality in the allocation of care-giving responsibilities within families. [45] However, that statutory purpose was not seen as a barrier to congressional regulation; instead, it was cited by the Hibbs ***1774** majority as a basis for upholding the statute against an Eleventh Amendment challenge. Because the Court construed FMLA as a statute that addresses gender discrimination--even where such discrimination necessarily involves private allocations of care-giving responsibility within the family--the Court gave Congress greater latitude to abrogate the states' immunity. [46]

Why the disregard for Congress's intentional foray into an area of law and policy, purportedly reserved to the states, in FMLA? It is likely that FMLA is more easily seen as a labor regulation and, as such, is more readily understood as addressing a "federal" issue. [47] And because the Court understood Congress's Fourteenth Amendment enforcement powers to authorize enactment of FMLA, but not VAWA, the gender discrimination at issue in Hibbs was cognizable as a federal matter, while the gender discrimination targeted by VAWA was not. [48] Of course, these explanations do not answer the logic of exceptionalism that animates the state sovereignty paradigm--which in theory operates as a categorical exclusion of domestic relations from the ambit of otherwise legitimate federal regulatory authority. [49] Rather, the ***1775** dissonance between the legislative and litigation histories of FMLA and VAWA confirms the fears of critics of formalist federalism

by demonstrating the ease with which the state sovereignty paradigm of domestic relations can be--and often is--manipulated or disregarded entirely.

The existence of hundreds of federal statutes and regulations that bear on domestic relations in some fashion means that this inconsistency between federalism theory and federal practice has the potential to destabilize a wide range of federal legislation.[50] Unsurprisingly, recent judicial attention to the state sovereignty paradigm has led to speculation about and challenges to the constitutionality of a host of federal statutes,[51] and has informed debates ***1776** over the propriety of proposed federal regulation, including regulation of same-sex marriage.[52]

One way to understand the lack of clarity regarding the federal government's authority to regulate domestic relations is as a consequence of the growth of federal power in the post-New Deal era, and the concomitant blurring of the boundaries between federal and state spheres of power. That historical narrative animates the call for a "return" of domestic relations to the states: restore, to the greatest extent possible, the sovereignty of the states over "areas of traditional state sovereignty" in order to protect the values of federalism. In the process of restoring these boundaries, some confusion may result, but that is the price to pay for a return to the proper ordering of federal-state authority. ***1777** That account sounds plausible, but the historical sources provide a different explanation for the inconsistency with which the state sovereignty paradigm is applied. Domestic relations matters have never existed as a clear fault line between federal and state power. Rather, as I demonstrate below, federal actors and agencies have always played a role in the creation of laws, policies, and benefits programs that have defined and supported families--even during the era of dual federalism, when the boundaries between federal and state power were most clearly demarcated. The insistence that the federal government's involvement in domestic relations matters abrogates state sovereignty effectively erases that history, and incorrectly portrays federal family regulation as aberrant and invasive.

II. The Inherited Tradition of Domestic Relations Law

Today, the terms "domestic relations law" and "family law" refer to those legal principles that govern family formation (who has membership in a certain family?) and the legal significance attached to family membership (the rights and duties that arise from one's status in a family). Although that description seems straightforward, the body of law it describes is enormous and complex, affecting our rights and liabilities with respect to almost every area of law, including

property, tort, criminal law, citizenship, tax, evidence, and constitutional law. Domestic relations law as it was inherited from England by eighteenth-century Americans was similarly broad in scope.[53] However, because the common law of domestic relations entrenched rigid status hierarchies between husband and wife, father and child, and brother and sister, it was much better suited to an English monarchy than an American republic.[54] The dissonance between status-based domestic relations law and republicanism did not go unnoticed by jurists and lawmakers of the pre-Civil War era, but reform was a gradual process, replete with fits and starts. Given the platitude that domestic relations are, and always have been, a special area of state sovereignty, one might expect that this process of recognition and reform would have been ***1778** solely a state-level endeavor. In this Part, I briefly introduce the basic principles of the common law of domestic relations, which are necessary for understanding the role that federal judges, lawmakers, and administrators, as well as lawyers appearing in federal court, played in examining and sometimes disestablishing the unrepublican aspects of the common law of domestic relations, a topic I turn to in Part III.

Through the late eighteenth and early nineteenth centuries, the disparate components of the common law and equity jurisprudence that bore on the family were gathered together in volumes and chapters labeled as the law of "domestic relations" or "baron and feme."[55] In these tomes, William Blackstone and his American disciples--Tapping Reeve, James Kent, and Nathan Dane--described the various rights, duties, and liabilities that created the legal relationship between husband and wife, parent and child, and master and servant, in the household.[56] Under a principle that resembles the modern doctrine of respondeat superior, the father-husband was the head of the household (or "householder") and had varying degrees of liability for the conduct of dependent members of the household (his wife, children, and servants). In turn, the householder gained certain rights over his dependants with respect to their person and property. This constellation of rights and duties, unequal and hierarchical as it was, provided the legal structure that governed relationships between members of the household (intrafamily relationships), the relation of the dependants to society, and even the status relationships between different families (interfamily relationships).

The rights and duties of marriage provide a useful and well-documented introduction to the hierarchical logic of the household. Under the doctrine of "coverture" (variously referred to as "marital unity" and "merger"), the married couple was a single entity in the eyes of the law.[57] Coverture institutionalized a sort of legal guardianship that ***1779** secured the husband's legal and physical control

over the wife. Under coverture, the wife had a duty to obey the husband in virtually all matters, and enforcement of that duty could be accomplished by the husband through physical "correction." [58] Because of the common law's presumption that the wife was "acting by [her husband's] compulsion," she could not commit any voluntary act: "[A]ll deeds executed, and acts done, by her, during her coverture, are void . . . ." [59] And because a married woman was under her husband's legal "protection," she also was unable to sue for injury to her person or property unless he joined her in the suit. [60] In short, the husband's role as his wife's private governor gave rise to his public authority to act on her behalf and her legal disenfranchisement in nearly every respect.

Other domestic relations (parent-child and master-servant) were similarly structured. The father exercised extraordinary authority over the children and servants in his household. As the head of the household, he had an unquestionable right to punish his children and his servants using corporal punishment, [61] and he had a cause of action for the loss of their services. [62] Wives had no such rights or claims with ***1780** respect to their children. Procedural rules similar to those governing actions of married women and giving husbands authority to sue on their wives' behalf also governed court access of children and, to a lesser degree, servants. [63]

As with the law of persons, the law of property defined the rights and duties of family members vis-à-vis each other and society at large. Most infamously, marriage for a woman resulted in the near-complete abdication of all her property rights. [64] However, although the unrepublican aspect of laws governing married women's property did not go unnoticed, [65] the rules governing inheritance were the aspect of domestic relations property law that most concerned colonists and early citizens of the United States. In England, the intestate descent of real property was governed by the doctrine of primogeniture, which had ensured that real property devolved to the eldest son. [66] Just as "titles of nobility" and "bills of attainder" were, according to Jack Balkin, forms of aristocratic and monarchical status that the Revolutionary generation sought to "dismantl[e] . . . in the name of liberty and equality," [67] primogeniture was understood by many as a perpetuation of the old-world monarchical order. The interfamily hierarchies that resulted from primogeniture--and the inequalities of wealth and influence between eldest and younger sons (as adults)--were viewed by many as an outgrowth of aristocracy that needed to be reformed. [68] Notably, most of ***1781** the colonies (or new states) abolished primogeniture, a move that, in Thomas Jefferson's words, helped to

create "a system by which every fibre would be eradicated of antient [sic] or future aristocracy; and a foundation laid for a government truly republican." [69]

The fairly dramatic reform of inheritance laws during the late colonial and early republican periods was exceptional. American states (and the national government) by and large adopted the canon of domestic relations law wholesale from England, including laws governing married women's property. [70] Together, this web of laws created a hierarchy of reciprocal, but unequal, rights and duties within the family. Domestic relations law also shaped the relationships among the family, its individual members, and the polity. For subordinate members of a household, family membership resulted in an indirect relationship between the individual and the state, one that was mediated by the householder in contract formation, litigation, public service, and sometimes criminal and civil liability. For the householder, family membership increased his participation in public social relationships such as lawsuits, jury service, contract formation, commercial transactions, and other forms of social and political life. Because householders were men, this system of domestic relations law necessarily entrenched a gender-based allocation of political, social, and legal authority throughout the new country.

Though not well sensitized to these tensions, American jurists and lawmakers of the early national period were not blind to the inconsistencies between the common law of domestic relations and various republican ideals, such as participatory citizenship and equality. At different times, pressure built up around certain aspects of domestic relations law, requiring jurists and lawmakers to consider whether this or that practice or legal doctrine could be reconciled with broader tenets of republicanism. Government actors would sometimes ignore the obvious tension, sometimes justify the contradiction, and sometimes propose reform. [71] As I show in the next Part, federal actors, together ***1782** with their state-level counterparts, enforced the status-based domestic relations law that was part of the common law, and also played a part in the gradual process of reconciling or remedying the inconsistencies between that body of laws and republican-inspired theories of fairness and equality.

III. Domestic Relations in the National Republic

What follows in this Part is a discussion of instances during the pre-Civil War era in which the federal government took legislative or adjudicatory action that directly shaped domestic relations law and policy: the creation and implementation of a pension system for war widows and orphans; the determination of citizenship rights

of married women; the adjudication of the rights of nonmarital children; and the determination of the scope and force of what we now call prenuptial agreements. Together, these cases evidence an early tradition of federal involvement in domestic relations, and call into question the contention that the states enjoyed exclusive authority over domestic relations during the nation's early decades. My point is not that jurists of the pre-Civil War period understood the federal government to have broad, unfettered jurisdiction over domestic relations matters. Nor do I ignore the fact that during the pre-Civil War era some jurists urged that domestic relations were a matter of exclusive state concern (a fact I examine more carefully in Part IV.A). Rather, the goal of this Part is to demonstrate that, as a matter of practice, during the pre-Civil War era, the federal government did not operate according to the principle that the states possessed exclusive authority over domestic relations, and, if judged by their conduct, federal actors did not understand federalism to require as much.

A. Widows and Orphans' Revolutionary War Pensions

In the early 1990s, congressional proponents of national welfare reform argued that "returning" welfare to the states--largely by dismantling the federal welfare program known as Aid to Families with Dependent Children (AFDC)--comported with a proper understanding of federalism, and would help remedy the apparent ill-effects of the welfare system: the creation of a welfare-dependent class of families, the concomitant breakdown of family unity, and increased out-of- ***1783** wedlock births. [72] Implicit and explicit in the rhetoric of return that dominated the debates over welfare reform in the 1990s was the notion that, at one point in history, the states rather than the federal government had been responsible for family assistance programs. Representative Joe Scarborough of Florida provided a good example of such rhetoric when, from the House floor, he argued that regulation of welfare benefits by the national government was inconsistent with early understandings of American federalism. He explained that a national government that provides welfare to families "is not the type of government that Thomas Jefferson and James Madison and George Washington and Benjamin Franklin and our Founding Fathers intended for this country":

> It was about individualism. It was about the power of communities and families working together, not looking to Washington to try to figure out every single problem, but to band together, . . . as a community and as a family and as a State. But that was the whole idea of States' rights. That is what the Federalist Papers were all about, about the power of States to conduct a type of welfare reform or conduct a type of health

> care reform that they wanted to conduct instead of having one highly centralized government unit. Is that not what we were trying to get away from when we had a Revolution over 200 years ago, . . . to allow families, individuals and communities to once again decide their own destiny, instead of having the Federal Government that tells us what doctor we want to choose, how we want to protect our family . . . ? [73]

As jingoistic as this invocation of "the founders" is, it nevertheless tracks the common belief that federal regulation of family welfare benefits constitutes a centralized intrusion into a regulatory matter that was the one-time province of state governments. [74] It is also an example of the more general contention--at work in the Supreme Court's decisions in Lopez and Morrison--that law and policy relating to the family is an "area[] of traditional state concern" in which Congress may ***1784** not intervene. [75] In this section, I examine historical sources that record and evidence Congress's creation and implementation of the first national family benefits program, widows and orphans' war pensions: the pension statutes, their legislative histories, and debates concerning individual widows' pension applications. [76] These sources call into question the empirical claim, articulated variously in national legislative debate and federal jurisprudence, that the federal government's involvement in domestic relations is a product of modern expansion of federal power.

Starting with the Continental Congress, the national legislature enacted a series of pension statutes that provided cash benefits to war widows and orphans. Pursuant to these statutes, early national legislators oversaw the review of thousands of widows and orphans' pension petitions--a task that involved federal actors in the review of petitioners' family histories. [77] Congressional debates over the widows and orphans' war pensions also occasioned charged discussions in Congress concerning the relationship between republicanism and domestic relations law: How did women's legal disabilities under coverture affect their eligibility for a pension? If, in a republic, men ***1785** could articulate a claim against the government, could women make similar demands? Did women's service as mothers of future citizens of the republic justify the award of a pension? Although the national pension system gave rise to significant controversy during the early national period--and was frequently the subject of congressional debate--it appears that no one urged that the creation and administration of the war widows and orphans' pension system was improper because it embroiled Congress (and

other federal actors) in domestic relations issues. In Part III.A.1, I provide a general background to the administration and development of a national war pension system. In Part III.A.2, I turn to the specific issues that animated debates concerning widows and orphans' pensions, giving special attention to how republican theories of family and gender equality informed the first federal family cash benefits awards.

1. Republicanism, Equality, and National War Pensions

Had Representative Joe Scarborough been a congressman in the 1790s rather than the 1990s, he would have found that many individuals and families regularly "look[ed] to Washington" for basic welfare assistance. As a Representative during that period, Scarborough would have been aware that over a decade earlier, his predecessors in the Continental Congress had established a pension system that provided for certain war veterans, widows, and orphans. [78] He would have known that thousands of Revolutionary War veterans, war widows, and war orphans petitioned Congress for relief under the pension system. [79] He ***1786** would have been aware that many other veterans and widows who, strictly speaking, were not pension-eligible under the governing statutes petitioned Congress for private relief by submitting to Congress accounts of the hardships they had experienced for their country. [80] Had ***1787** he lived into the early years of the nineteenth century, he would have known that Congress expanded the federal family pension system to provide pensions and awards to the widows and orphans of fallen soldiers and officers of the War of 1812, of frontier battles with Native Americans, and of naval encounters. [81] These various pension statutes ***1788** and awards--and perhaps especially the Revolutionary War pension statutes--were a source of protracted congressional debate, not because they tread into an area of law and policy reserved to the states, but because of deep disagreement over how to craft a pension system that was consistent with republican values. [82]

Indeed, any suggestion that Congress's administration or review of pensions violated state sovereignty would likely have been met with incredulity, not because pensions were a military-related benefit, but because the states had initially been given the responsibility to administer the pension system, and had failed to honor a substantial portion of the claims filed by pension-eligible veterans, widows, and orphans. [83] In 1792, Congress nationalized the administration of the pension system, enlisting federal judges to make initial determinations regarding individuals' pension eligibility, subject to the approval of the Secretary of War and Congress. [84] This plan was rebuffed by federal judges who, soon after the

1792 statute was enacted, opined in Hayburn's Case that the statute violated separation of powers principles implicit in Article III by allowing Congress to review decisions of federal judges.[85] In part as a consequence of that opinion, Congress and its designees assumed significant responsibility for the evaluation of individual pension applications.[86] Significantly, Hayburn's Case did ***1789** not occasion the return of the administration of the pension system to the states, nor does that appear to have been entertained as a viable option for redressing the separation of powers defects identified in the 1792 pension statute. After the 1792 Act and the reforms following Hayburn's Case, direct administration of federal military pensions by national actors was standard procedure.

Nationalizing the administration of the military pensions did not resolve the more fundamental difficulties of the system. The early military pensions were relatively limited in scope and drew what many thought to be arbitrary lines between those who were pension-eligible and those who were not. As historian Laura Jensen has argued, "[b]ecause most of America's original entitlement programs were very selective, distributing benefits to relatively small subsets of the American people, they gave rise to debates both in and out of Congress about the meaning of distributive justice[,] redistributive obligation" and, ultimately, of the nature of citizenship in a republican government.[87] Congress frequently received petitions from veterans seeking more substantial pension awards, longer periods of eligibility, and pensions for those not provided for by existing statutes.[88] Despite patriotic support for veterans, there was significant principled and practical resistance to service-based pensions (as contrasted with disability pensions, which were generally unobjectionable).[89] To overcome the resistance to expanded pensions, veterans and their supporters invoked battlefield valor and sacrifice as a basis for veterans' ***1790** claim on the national coffers. Veterans urged congressmen, and pro-pension congressmen concurred, that in a republic veterans should be compensated for their service to the nation: "It was for the nation at large that these men fought and bled; it was for the country they encountered all their hardships, and it is from the national Treasury that they ought to be reimbursed."[90] In the words of one Representative, veterans "have not wasted their time in the pleasures of the ball room, and in the amusements of fashionable circles," but rather

> foregoing the endearments of domestic life, [they] have sought the tented fields. They have met your enemy, trodden the bloody arena, sustained your eagles, and achieved victory in the jaws of death. They have borne from the plain of battle the laurels of conquest; but have returned,

> seamed with scars, disfigured by frightful wounds, or deprived of their limbs. . . . In these they exhibit the mournful, yet proud, monuments of their valor and devotion to their country.[91] Because of veterans' battlefield service, republican governments had a "duty" to ensure that they did not die in penury. Using the language of republicanism, a national magazine admonished the national government for failing to fulfill that duty:
>
> Are republics necessarily framed to be, in all respects, ungrateful? Will they bestow on their champions and benefactors neither riches nor honours, gratification nor fame? Must their warriors fight in the character of amateurs, purely for the sake of killing and dying and when they fall must Oblivion receive them to her blighting embrace? . . . [P]osterity must never be allowed to blush for their forefathers, from finding unperformed a task which primarily and peculiarly belongs to those of the present day.[92]

By and large, veterans were fairly successful in their efforts to extend and expand pension benefits. In 1818, the class of pension-eligible Revolutionary War veterans was enlarged to include any veteran--officer or soldier--who was, "by reason of his reduced circumstance in life, . . . in need of assistance from his country for support,"[93] thus introducing the first needs-based test for benefits into federal law. By the end of the pre-Civil War period, the federal government was spending, on average, approximately $958,000 per ***1791** year on military pensions (which, inflation adjusted, is equivalent to about $19 million per year).[94] While these numbers were later dwarfed by the pension system created for Civil War veterans, they represented a handsome portion of federal spending: between 1819 and the mid-1830s, military pension payments accounted for twelve to twenty percent of the annual federal budget.[95]

2. Equal Pensions for Widows

Widows and orphans' pensions were, from the beginning, a standard component of the military pension system. But, like veterans' pensions, the size and scope of family pension entitlements were a source of disagreement. During the 1790s and 1800s, Congress received thousands of applications from war widows seeking

pensions, and various congressmen adopted the cause of expanding statutory coverage for widows.[96] Like veterans, widows and their advocates met with resistance from those who believed that a pension system was inconsistent with republican values, such as equality and self-sufficiency, and those who simply thought that the public fisc was better spent on other matters.[97] The process of seeking votes for expanded pensions for widows required advocates to invoke a different model of republican citizenship than the heroic-soldier ideal that typified advocacy for expanded veterans' pensions--a model of citizenship that accommodated the legal restrictions that domestic relations law imposed on women. Accordingly, in their effort to justify a claim on the public coffers, as I show below, widows could not allude to valorous deeds in battle or courageous conduct in the face of grievous wounds, but they could, and did, invoke their service to the nation as mothers.

On a more basic level, Congress's involvement in the administration of the pension system also consistently involved ***1792** national-level actors in the details of family pensions, and hence domestic relations law and policy. Widows seeking war pensions were required to provide Congress with documentation demonstrating a valid marriage to a properly ranked veteran, a sworn statement that they had not remarried, and details regarding any children they had born.[98] That information was frequently directed to the Department of War, which would make a recommendation regarding the proper disposition of the application to the House of Representatives.[99] The House Committee on Claims would typically review the recommendation and application, and then present the matter for a vote by the House.[100] This process of review, along with the process of debating the proper scope of widows' pension statutes, brought congressmen into the world of domestic relations law, and brought domestic relations law into the national legislative and administrative systems.

One widow's petition for private relief aptly demonstrates how family pension statutes involved congressmen in domestic relations matters, and tracks the larger debate regarding widows' pensions. The petitioning woman was the widow of Captain William White, who was killed in battle during the Revolutionary War.[101] Because Captain White had been an officer in the Continental Line, the legislators did not question that his widow was due seven years' half-pay under the pension scheme established in 1780.[102] However, owing to either the petitioner's own misfeasance or the government's misadministration, her pension application had not been processed until after the expiration ***1793** of the statute of limitations. Statutes of limitations were easily waived, but Widow White's claim was further

clouded by the fact that she had remarried after her seven years of pension eligibility ended.[103] Under the 1780 pension statute, remarriage immediately terminated a widow's pension benefits.[104] In Widow White's case, Congress faced a novel question: if Congress waived the statute of limitations, could it treat the widow's pension application as if it had been received while she was unmarried, and thus pension-eligible, or did waiver of the limitations period simply allow the widow to apply for the pension in her current status as a feme covert?

The requirement that only unmarried widows could receive a pension was common to virtually all pre-Civil War family pension statutes.[105] If a widow with no children remarried--or "intermarried," to use the statutory language-- the pension simply terminated.[106] If a widow with children remarried, the pension was paid to the officer's children rather than the widow. Under this rule, the War Claims Commission recommended that Congress deny Widow White's application for payment of the pension to her directly, and instead recommended that Congress award the pension to her children.[107] Although this result complied with the governing statute, Widow White petitioned Congress to reject the Commission's recommendation. Her supporters urged that her petition be granted on the basis that "the widow of a deceased officer, even in case of intermarrying, was . . . still entitled to that part of the half-pay annuity which had accrued previous to the marriage; more especially [because] . . . she had in the interim incurred some expense for the maintenance of the orphan children."[108]

***1794** Widow White's petition created significant confusion among congressmen, and their debates serve to highlight the ways in which married women's legal and financial dependency confounded their legal rights and their relationship with the polity. Some members of Congress argued that Widow White had an "indisputable title" to the pension--an ostensibly liberated view of her right to a pension. Thus, Representative Livermore observed that as Widow White had not remarried during the seven years for which she was entitled to the half-pay, "her claim must still hold good; it was a right given to her for her own use--not to pay her husband's debts."[109] Because of the operation of coverture, however, others argued that Captain White's orphans should receive the pension, as the widow was now under the care of a new husband. Under this model, the widow was simply the beneficiary of a debt owed to her late husband--a debt that was better paid directly to the deceased officer's children once the widow acquired an alternative source of support.[110] One representative took a fairly rigid position regarding Widow White's claim:

> [T]he only right acquired by the widow, on the death of her husband, was the right of applying for the provision; instead of making the application, she had intermarried; and that intermarriage operate[s] as a renunciation of the provision . . . . As to any expense by her incurred for the maintenance of the children; if the children receive an estate from the public, that estate becomes chargeable with their maintenance; and the widow will come in like every other creditor. [111] According to other legislators, the logic of coverture also counseled redirection of the pension to the deceased officer's children on the basis that, by operation of coverture, any money Widow White received was the property of her new husband. Recognizing this fact, Representative Williamson and others warned that "if it now be given to her new husband, [the children] will be excluded from all participation in it." [112]

Widow White's case illustrates the practical and theoretical difficulties created by the tension between republican conceptions of ***1795** citizenship and the status-based household. On the one hand, at least some of the legislators seemed to recognize that Widow White had an independent claim for a pension, as it was a right given to her "for her own use." On the other hand, they also knew that once remarried, widows lost ownership of all chattel property and cash. In the end, the congressmen effectively dodged the issue by deciding that Widow White's predicament was better left for a court of law, as it was a "question of property between the widow and the orphans." [113]

The conceptual conundrum caused by widows' pensions was not so easily evaded, however, and was writ large in debates over various legislative proposals to expand family pensions: extending the duration of widows and orphans' pensions, [114] extending the statute of limitations for widows' claims, [115] or broadening the category of widows and orphans who could receive a pension. [116] Widow White's claim in 1791 that she personally should be awarded the widow's pension because of the costs she encountered raising her children presaged arguments that would become standard during the heated congressional pension debates of the 1810s: that widows deserved more generous pensions as compensation for their service to the republic in raising the next generation of republican citizens. This understanding of women's role in the republic challenged, albeit gently, the

traditional understanding of women as subjects of the household, and promoted a model of national citizenship based on women's service to the republic.

For example, in 1818, while supporting a bill to provide an additional "five years' half-pay to the widows and children of officers ***1796** and soldiers" of the War of 1812, [117] Representative Southard of New Jersey maintained that "the needy families of those who lost their lives in the conflict [are] entitled to the attention of the Government," in part because by providing such support the government would reward the widowed mothers for tutoring a new generation of republican citizens:

> [I]n monarchical and despotic Governments, injustice and oppression may answer; but in a Republic, a different line of conduct must be pursued. The interest of despots is to lay upon the body of their subjects the iron hand of poverty, and by oppression to extort obedience and command their services. But our interest is to be just and liberal to that class of citizens on whom the liberty and independence of their country so much depend. Do ample justice to surviving widows, and they will teach their sons to revere the Government that has nourished them in their feeble infancy-- that country which became their protector when deprived of a father's guardian care.
>
> . . . .
>
> Let tyrants oppress their slaves, and compel them to fight in the battles of their oppressors: but such a system of policy will not suit the genius of a Republic. . . . Regard the widow of the fallen soldier; feed and nourish his orphan children; let the Government become their guardians; impress these ideas on the public mind; let them realize your bounty; and your liberties will be secure. [118]

Republican government--and a republican conception of citizenship--required Congress to nurture the allegiance of its people, and such nurturing started at home with the widows of fallen soldiers. Representative Harrison of Ohio used a similar

rhetorical tactic, adding that women were uniquely qualified to undertake the tasks of republican education that would protect Americans' "liberties":

> The pious and patriotic mothers to whom [the pension] will be given will employ it in the education of their sons, and they will never cease to remind them of the obligations they owe to their country. "Emulate the patriotism of your father," will be the reiterated lesson ***1797** from childhood to manhood. To have such lessons taught to every youth in the country, I . . . should be willing to give the yearly balances which may remain in the Treasury for fifty years to come. There is something in the female character admirably calculated to gain an ascendancy over the minds of those violent but generous youths, who are formed by nature to act a splendid part upon the theatre of the world; and who, when a proper direction is given to their passions, become the friends and benefactors of mankind. They listen with more attention to the mild admonitions of the mother, than to the rougher mandates of an imperious father. [119] Under this theory, the American mother--like the soldier-- played a direct role in the creation of the republican polity, and through that role she earned her right to a pension. As articulated by one Representative, "[t]hey are the widows and orphans of the great American family--they belong to the Republic, and it is our solemn duty to provide for them." [120]

The view of motherhood that animated the various attempts to enlarge widows' pensions represented, at least rhetorically, a recognition of women as participants in the construction of a republican nation--a departure from the legal theories underpinning the common law household, theories in which women were cast in the role of legal and political dependants with no place in the political realm and no direct relationship with the state. [121] In the rhetoric used to promote increased benefits, congressmen transmogrified a widow's claim to a pension from an indirect claim (based on their relationship of dependency to their fallen soldier-husbands) to a direct claim based on her personal service as a mother. Just as soldiers had earned their pensions on the battlefield, widows earned theirs through their work as the educators and care-givers of the next generation of soldiers and citizens. This model of female citizen is what Linda Kerber has called "Republican Motherhood": a woman who, as a type, "integrated political values into her domestic life . . . [by] nurtur[ing] public-spirited male citizens [and] guarantee[ing] the steady infusion of virtue into the Republic." [122] The ideology of republican motherhood--hard at work in ***1798** debates over widows' pensions--offered a model of citizenship to

women, and made the woman's role as mother a subject of national importance and national legislation.

Of course, not all mothers of future citizens and soldiers were awarded pensions--only war widows, and then only certain among them, benefited from the system. [123] Consequently, family pensions, like veterans' pensions, posed a quandary: in a republic, how do legislators justify special treatment of some families over others? Because the pension statutes drew divisions between groups of widows and families, debates over the scope of widows' pensions were deeply preoccupied with the republican concept of equality.

The problem of the pension system's unequal treatment of families gained early recognition in the 1790s, when both the Senate and the House considered bills that would have expanded the national pension system to include the families of state militia officers. [124] The debate emerged more fully in the 1810s, when opponents of a proposed increase in family pensions contended that the system was already too generous and risked entrenching unrepublican class-based privileges. Responding to this well-worn criticism, Representative Harrison turned the logic of republicanism on his opponents, developing a theory of republican equality that would allow, or even require, more generous family pensions. In a republic, Harrison observed, "[t]he public burdens are to fall equally upon all in proportion to their means. No individual, and no family are to furnish more than their just share, either of money or of personal service, without an equivalent." [125] To illustrate a ***1799** republican government's duty to compensate families, Harrison imagined a republican world elsewhere:

> Let us suppose, then, that one hundred families were settled upon an island in the Pacific ocean, at such a distance from every civilized State as to make it necessary to form one of themselves--their situation would make it purely republican. All possessing equal right, and all bound to defend their little community against every aggression. The savages of a neighboring island attempt to dispossess them; a battle ensues, in which our little community is victorious, with the loss of five of their number killed and five wounded. The situation in which they would find themselves is one for which they have not provided. The wounded men would say to the others, as we have been rendered unequal to the maintenance of our families by wounds received for the benefit of all, it is just that we should receive assistance from you to cultivate our farms. The claim would be readily admitted. As would, in the first instance, the claims of the widows and orphans of those who had fallen--but, at

> the end of five years, before the children of the widows have reached that age when they could labor for themselves and their mothers, they are told that they can receive no further aid while the wounded men are provided for life. If this principle is admitted in our Government, our militia laws are most unjust and oppressive. They require the same personal service to be rendered by all, the rich and the poor. But the rich married man is allowed to furnish a substitute--the poor married man, unable to hire one, is obliged when called upon to serve in person. As the poor, then, fight all your battles . . . it is just and right the consequences of their services should fall as lightly as possible on their families. [126] In the context of family pensions, the logic of republicanism required that the nation compensate families in a manner proportionate to their service and their need, and ensure some level of equal treatment to the families of all veterans.

On a certain level, the equality principle also applied to notions of just compensation for the work of mothering and the work of soldiering. Representative Harrison urged that widows' pension be equal to those awarded to disabled veterans, on the basis that widows' sufferings and losses were at least equal to that of wounded soldiers. Harrison described "two kinds of suffering, . . . in the public service, which are recognized by our laws as giving a claim to the public bounty"--"[t]he one in the case of disability," and "[t]he other, an indirect suffering, as in the case of widows or children, who had lost their husbands or parents in that way." [127]

> ***1800** The claims of the first are not questioned. It is admitted by all that the man who has lost a leg or an arm serving the nation, as it lessens his ability to maintain himself, should be provided for during the continuance of his disability. But what appears to me . . . to be a singular inconsistency; to the woman who has lost her husband who supported her, the child its parent, on whose exertions alone it depended for maintenance and education, our laws allow a limited assistance, leaving the sufferers often in a worse situation than it found them. [128] In a different session, Representative Johnson of Kentucky articulated a similar concern that widows and soldiers receive equal benefits from the government:

> I have asserted that [widows] have claims upon our justice; justice requires that equal claims or sacrifices should meet with equal rewards. . . . Compare the claims of the wounded soldier and helpless widow; who can deny their equal claim? Who can estimate, in money, the loss of limbs, or the loss of a bosom friend to the female character? [129]
>
> Years later, in 1848, a new generation of congressmen employed similar rhetoric in support of a bill to expand the class of pension-eligible widows. In a lengthy speech on the House floor, Representative Silvester of New York reminded his colleagues that the Revolutionary War victory was not only attributable to men on the battlefield:
>
> We all, whenever we speak of the Revolution . . . or if we mention its officers and men, are extravagant in our commendations of them. We are too forgetful of the past; we are too ready only to speak of the noble achievements and deeds of patriotic daring which had been accomplished by our revolutionary army. Must we let our admiration go no further? Must it stop here? . . . Have the sons of this day forgotten their revolutionary mothers, and ceased to remember that it was to their smiles and to their cheering counsels that much of our success in that stormy conflict was indebted [?] [130]

Keeping in mind that congressmen's speeches regarding the equal treatment due soldiers and widows were rhetorically charged advocacy statements, congressional debates concerning the proper scope of family pensions nevertheless evidence national legislators' understanding that ***1801** principles of republicanism reached the home. In their efforts to reform the pension system, congressmen recognized equality as a republican value that applied to the claims of widows, and recognized the importance of widows' service to the republic. [131]

Widows' pension petitions are also evidence of women's political participation at a time when women had very little political or legal agency. [132] Through the petitioning process, widows brought their problems-- which nearly always concerned their inability to support themselves and their children--to the attention of Congress with the expectation that the welfare of their families deserved the attention of national legislators. And, indeed, in their responses to the petitions,

national legislators became actively engaged in policymaking and lawmaking that directly involved domestic relations. Congressmen decided which families would be provided for, which members of families qualified as dependants and thus were pension-eligible, the worth of a widow's service in raising the next generation's patriots, and the impact of a widow's current marital status on her pension eligibility. Although the national pension statutes did not "nationalize" marriage laws, they did generate national norms concerning which familial relations created legal dependency and the extent to which those dependent relationships would be recognized under a benefits scheme. While the few historians to have given any consideration to widows' pensions are correct to assert that the relief offered widows was limited and was based solely on their status as a widow (rather than, say, their individual contribution outside of the family), [133] this fact makes clear that familial relations were integral to early national pension statutes, and that domestic relations were part of the national legislative agenda.

The skeptic will argue that although the pension system may have involved Congress in the creation of a family benefits program and certain aspects of family policy, this is not evidence that Congress directly legislated new marriage laws or child custody codes, and hence ***1802** the pension system did not qualify as federal family law. It is true that the creation and administration of the war pension system did not occasion a redefinition of marital status or of the legal relationship between parent and child. However, it did involve Congress in the business of evaluating the operation of domestic relations law in the context of a benefits program, engaging federal lawmakers in policy matters that bore directly on family welfare: what constitutes "need," what class of individuals is most "deserving," nascent notions of gender equality, and children's welfare. Moreover, the objection that family pensions did not constitute a form of family regulation betrays a misapprehension of the state sovereignty paradigm of domestic relations, which in its strongest form draws a wide parameter around regulatory and adjudicative activities that touch on domestic relations law, and designates them as state-law matters. [134] Application of this theory during the early national period could have limited the federal government's authority to provide for the welfare of war widows and orphans, notwithstanding its explicit authority over spending and the military. [135]

Even during fierce debates over the expansion of widows' pensions, however, opponents of widows' pensions do not appear to have argued that such expansion was improper because matters relating to the family fell within the exclusive province of the states, or that administration of the pensions brought federal actors into a world of issues that were local in nature. The theory that congressional involvement in domestic relations constituted an intervention into a special sphere

reserved to the states simply did not inform the perception, or exercise, of legislative authority in the context of the creation and administration of a federal family war pension system.

This historical evidence challenges the grand narrative--relied upon in modern federalism jurisprudence--that represents federal involvement in domestic relations, and specifically congressional involvement in such matters, as a radical departure from past practices. Undoubtedly, with the general expansion of federal power, congressional involvement in domestic relations grew substantially and took new forms during the Reconstruction and New Deal eras. But, as the history of widows and orphans' pensions demonstrates, the view that present-day federal involvement in domestic relations is a categorical departure from the early practices of the federal government is ill informed. In fact, family welfare and domestic relations policy ***1803** constituted part of congressional legislative activities from the very beginning, and republican values of equality, emanating from Congress, directly informed how the national legislators crafted the pension system to ensure just compensation for war widows and their children.

B. Shanks v. Dupont and Married Women's National Citizenship

In 1830, while Congress was still debating the substantive dimensions of women's citizenship in the pension debates, the United States Supreme Court was wrestling with what might be considered a more technical aspect of women's citizenship rights in Shanks v. Dupont.[136] At issue in Shanks was a dispute over the estate of Thomas Scott, a South Carolina-born revolutionary who died in 1782 leaving two daughters, Ann and Sarah.[137] Marriage divided the sisters during the Revolutionary War. Ann married a British officer in 1781, and in 1782 she went with her husband to England, where she raised a family.[138] Sarah married an American and stayed in South Carolina, where she too had a family.[139] The American-born children of Sarah brought suit in a South Carolina state court, claiming ownership of Ann Shanks's portion of their grandfather's estate.[140] Because of South Carolina's restrictions on noncitizens' ownership of real property, the resolution of this property dispute turned on whether Ann Shanks was a British citizen when the Treaty of Peace was signed in 1783.[141] If she was, then ownership of the property in question was protected by the Jay Treaty.[142] Shanks is often understood as a case about the intersection of citizenship law and coverture.[143] As I explain below, Shanks is also, and perhaps primarily, a case about federalism: the central debate between the majority and dissenting justices concerned which

sovereign, state or federal, had the power to determine the citizenship of a married woman. Notwithstanding the direct impact of the Shanks decision on domestic relations law, the majority insisted that such power rested in the hands of the federal government.

***1804** In Part III.B.1, I briefly examine how domestic relations law came into play in citizenship determinations of married women during the early national period. In Part III.B.2, I demonstrate how the centrality of domestic relations to the resolution of Shanks--and citizenship law in general--posed no barrier to the Supreme Court's conclusion that federal government was empowered to determine married women's citizenship, and that local domestic relations law had no bearing on that determination. Shanks and related citizenship law of the early nineteenth century thus provide another example of how the federal government played a role in defining the rights, duties, and benefits that flowed from an individual's familial status.

Modern-day proponents of the state sovereignty paradigm will likely resist this analysis and argue that the federal government's foray into domestic relations in the context of citizenship law is a special case, and does not defeat the general rule that domestic relations is traditionally reserved to the states. Citizenship law itself is a matter firmly and exclusively entrusted to the federal government, they will contend, and therefore the involvement of federal courts and Congress in domestic relations in the context of citizenship law is an appropriate exception to the more general rule that family law is state law. This argument is based on a false premise. As I discuss below, during the early national period, citizenship was not understood by all to be a purely federal matter. There was significant disagreement at the time concerning the role that state law played in individual citizenship determinations.[144] Republicans tended to support a certain degree of state control over national citizenship, or, at the very least, contended that regulation of citizenship was a joint federal-state endeavor.[145] Federalists tended to view national citizenship as a creature of federal law.[146] Accordingly, the federal government's involvement in domestic relations in the context of citizenship during the pre-Civil War period cannot be dismissed as exceptional on the basis that regulation of citizenship was an exclusive federal endeavor, as federal control over citizenship had yet to be fully established. Rather, it is further evidence that, contrary to modern-day federalists' contention that domestic relations has traditionally been a sacrosanct domain of the states, federal power did not historically yield to the states simply because a certain matter involved federal courts and legislators in domestic relations.

***1805** 1. Coverture and Citizenship Prior to Shanks

During and after the Revolutionary War, the common law operating in many states prevented noncitizens from owning real property, and many states also passed quasicriminal laws that subjected British loyalists' property to forfeiture. Thus, the issue of citizenship was litigated frequently in the early national period in part because the validity of transfers of real property within families--through inheritance or assignment--often hinged on the citizenship or political allegiance of the transferor or transferee.[147] For certain individuals, notably married women, determinations of citizenship and related property rights were especially difficult. Under the common law doctrine of coverture, it was not entirely clear whether a married woman could have citizenship status different from that of her husband.[148] Thus, courts were repeatedly called upon to consider whether a married woman's relationship to the government, and hence her citizenship, was completely derivative in nature (and therefore followed that of her husband), or whether she had a citizenship of her own. Such questions required courts to consider the very nature--and limits--of the marital ***1806** bond. Did a woman's civic identity completely merge with that of her husband, or did she maintain some modicum of independent legal status?

The quandary posed by married women's citizenship was not novel by the time Shanks was decided in 1830. Historian Linda Kerber has examined how "the political implications of coverture"[149] bore on married women's citizenship status in the early republic,[150] and has demonstrated the tension between coverture and republican conceptions of citizenship through an analysis of the 1805 Massachusetts Supreme Court opinion Martin v. Massachusetts.[151] Martin concerned James Martin's right to inherit certain real property from his mother, Anna Martin. Anna's real property was escheated by the state of Massachusetts when, at the outbreak of the Revolutionary War, she fled from Massachusetts to Nova Scotia with her loyalist husband.[152] Like many other states, Massachusetts had passed a forfeiture statute that empowered the government to confiscate the property of any "member" of the state who fled during the war with Britain.[153]

As Kerber explains, the critical issue in Martin was whether, as a feme covert, Anna could have acted voluntarily (and thus culpably) when she left the state with her husband, therefore justifying application of the forfeiture statute.[154] James's attorney claimed that Anna could not have acted voluntarily because a feme covert had no independent will and, under the law of coverture, was required to follow

her husband--thus she herself could not be classified as a loyalist whose property was subject to forfeiture. [155] He further argued that because of a married woman's lack of free will, the common law prevented her from having a direct political relationship with the state in any event: "Upon the strict principles of law, a feme covert is not a member; has no political relation to the state any more than an alien . . . ." [156]

***1807** In an attempt to justify the state's confiscation of a married woman's property, counsel for the state of Massachusetts proposed a republicanized vision of domestic relations law and maintained that married women had the "power of remaining or withdrawing, as they pleased." [157] Kerber observes that "[t]his element of choice . . . had traditionally been absent from the repertory of the married woman; to introduce it was a challenge to traditional practice." [158] And, in fact, the departure proposed by the state's attorney was too radical for the Massachusetts Supreme Court, which opted for tradition over revolution and held that a married woman could not be penalized under the forfeiture statute: "[W]e are called upon . . . to say whether a feme-covert, for any of these acts, performed with her husband, is within the intention of the statute; and I think that she is not." [159] A married woman's "duty of obedience" (which unquestionably included moving with her husband wherever he went) meant that her departure with him could not be taken as a voluntarily disavowal of her allegiance to the polity, and therefore could not be punished as disloyalty. [160]

Martin was an influential articulation of the relationship between coverture and women's citizenship with which various state and federal courts around the United States would engage, directly and indirectly, for decades to come. Married women's citizenship, like widows' pensions, raised important questions regarding whether in a republic women had a direct relationship to the polity. If this were the case, then taken to its logical extreme, republicanism posed a challenge to the traditional common law of domestic relations. The Martin Court resolved, at least with respect to married women's citizenship, that republicanism did not disturb the traditional gender-status relations of the household.

But even if the holding and analysis of Martin had binding authority outside Massachusetts, the case left many questions unanswered. Some jurists seeking to understand (and extend) the reasoning of Martin in subsequent cases took Martin's integration of coverture and citizenship law to its logical, if extreme, conclusion. Marriage, they argued, not only limited women's relationship with the government, but also provided a jurisdictional barrier to enforcement of forfeiture

laws against femes covert. [161] Under this interpretation, the ***1808** household was literally a little commonwealth: a married woman was subject to her husband's authority within that domain, and therefore the laws of forfeiture simply could not be enforced against her. [162] Because of disagreement over which sovereign--state or federal-- controlled citizenship, [163] the holding of Martin also left open an important federalism issue: What would happen if the application of state law resulted in a different citizenship determination for a married woman than the application of federal law? Would federal or state law govern the outcome of the case? The United States Supreme Court turned to this issue in Shanks v. Dupont.

2. Federal Power and Women's Citizenship in Shanks

Shanks, like Martin, required a court to determine a married woman's citizenship status in order to resolve a dispute over the descent of real property. The outcome in Shanks turned on whether Ann Shanks's marriage to a foreigner, or the subsequent act of moving with her husband to England, resulted in the termination of her American citizenship. If Shanks became a British subject (through marriage or relocation), her property rights--and those of her heirs--were protected by the Jay Treaty, which insulated the property claims of "British subjects" from the force of state laws. [164] If Ann Shanks retained her American citizenship when she moved to England, then her grandchildren, as noncitizens, would have no protection under the Jay Treaty and no right to inherit real property in South Carolina. [165]

At the time Shanks was being decided, American jurists were debating whether one could "elect" citizenship--either by affirmative oaths or conduct. [166] Thus, one of the questions presented in Shanks ***1809** was whether, assuming that election of citizenship was possible in a republic, a feme covert had the requisite legal capacity to make such an election. Before resolving that issue, however, the Supreme Court was required to decide which sovereign, state or federal, had the authority to determine a married woman's citizenship. The South Carolina Supreme Court had found that South Carolina law governed Shanks's citizenship, that under that law "Mrs. Shanks was an American citizen" in 1783, that she did not have the protection of the Jay Treaty, and that, consequently, the American cousins took all. [167] Overruling the state court, the Supreme Court found that South Carolina law did not control Shanks's citizenship, and that under federal law Shanks was a British citizen in 1783. In so doing, the Supreme Court opted for federal supremacy in the determination of a married woman's citizenship, notwithstanding direct implications for domestic relations law.

The federalist Justice Story showed little patience for the proposition that South Carolina bore at all on the determination of national citizenship--even for married women. Though Story agreed with the conclusion that a woman is "sub potestate viri," and has "no right to make an election [of citizenship]," [168] he insisted that federal law trumped state law in citizenship determinations. Articulating the strong federalist view on this point, he reasoned that national citizenship was a matter of the "law of nations," and was not subject to the "mere doctrines of municipal law" that limited women's "civil rights" in marriage:

> It does not appear to us that her situation as a feme covert disabled her from a change of allegiance. . . . The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. [169]

In announcing the "federal" nature of married women's citizenship, Story sub silentio unraveled a major aspect of Martin's logic: that local domestic relations law and citizenship law were integrally connected. [170] By disaggregating Martin's connection of local ***1810** law and citizenship, Story was able to explain why, notwithstanding her inability to make legally binding choices, Shanks's move to England resulted in a change in her citizenship: coverture prevented a feme covert from choosing her domicile and her citizenship, but coverture did not prevent the national polity from determining a feme covert's citizenship. Thus, in part because of Shanks's incapacity under coverture, "[t]he governments [of America and England], and not herself, finally settled her national character . . . they did not treat her as capable by herself of changing or absolving her allegiance." [171] Story did not challenge coverture, but he reasoned that coverture did not create a barrier between married women and national government or the law of nations.

In a lengthy dissenting opinion, Justice William Johnson presented a very different view of the national government's authority to determine married women's citizenship. Justice Johnson was a native of South Carolina and had been appointed to the Supreme Court in 1804 as part of Jefferson's attempt to de-Federalize the Court. [172] In Shanks, Johnson concurred with Story's view that married women lacked free will, and that therefore it was impossible to construe Shanks's departure

to England with her British husband as a voluntary election of citizenship.[173] Johnson reasoned that "[i]t never entered into the minds of [the South Carolina court] that the very innocent act of marrying a British officer, was to be tortured into 'taking a part in the present war;' nor that following that officer to England and residing there under coverture, was to be imputed to her a cause of forfeiture."[174]

***1811** But the junior justice did not agree that the national government had authority to assign legal significance to a married woman's habitation outside the United States. According to Johnson, citizenship determinations of this sort were governed fully and completely by state law, not federal law.[175] South Carolina had a "superior claim" with respect to the resolution of Ann Shanks's citizenship, "[f]or although before the revolution a subordinate state, yet it possessed every attribute of a distinct state; and upon principles of national law, the members of a state or political entity continue members of the state notwithstanding a change of government."[176] In short, the critical legal and ideological schism between Story and Johnson in Shanks was whether the federal government had the power to determine the impact of marriage on a woman's citizenship status, not whether a married woman had the legal capacity to make choices or act in a manner that would bear on her citizenship status.

Johnson's reasoning about the division of authority between federal and state governments is instructive because, even in the context of deciding whether the federal government had the authority to determine a legal implication of marriage, Johnson did not object that domestic relations were a subject of special state sovereignty. This is especially striking because Johnson reasoned about federalism in a formalistic fashion, and insisted that any proper understanding of states' rights was derived from pre-Constitutional understandings of federal-state authority. For example, Johnson argued that "[u]ntil the adoption of the federal constitution, titles to land, and the laws of allegiance, were exclusively subjects of state cognizance,"[177] and that thus in 1782, when Shanks's father died, "the state of South Carolina was supreme and uncontrollable on the subject now before us."[178] Although Johnson conceded that the adoption of the United States Constitution somewhat "restrained" the states' power to determine "who cannot inherit," he was adamant that South Carolina's "power [was] still supreme in determining who can inherit."[179] In his defense of South Carolina's ***1812** right to determine Shanks's citizenship and inheritance rights, Johnson defended his home state's authority against the federal government:

> I consider it as altogether set at rest by the [South Carolina Supreme Court's] decision itself; it is established by paramount authority; and this court can no more say that it is not the law of South Carolina, than they could deny the validity of a statute of the state passed in 1780, declaring that to be her character, and those her privileges. [180]

Johnson also explicitly recognized the significance of domestic relations law for the determination of married women's citizenship. With respect to citizenship, Johnson noted that South Carolina followed the well-established common law rule that individuals (both male and female) had no right of election regarding their citizenship, [181] and hence nothing Shanks could have done would have altered her citizenship status. Furthermore, Johnson reasoned that if South Carolina maintained the common law rule against elective expatriation for all of its citizens, such a rule was especially applicable to married women, who lacked the legal volition to choose a sovereign. To support this proposition, Johnson noted that even if one endorsed a contractual type of relationship between citizen and state in which one could disavow American citizenship by an act of affirmative assent--which South Carolina did not-- "[w]omen . . . are necessarily excluded from the right of assent, and yet arbitrarily subjected." [182] In sum, South Carolina possessed exclusive authority over Shanks's citizenship, and under that state's law individuals, and especially married women, did not have the ability to "elect" their allegiance. In this instance, South Carolina had chosen not to recognize Shanks's marriage or her removal to England as an indication of a change in her citizenship status. [183]

In his Shanks dissent, Johnson argued that certain areas of law--such as citizenship law, real property law, and aspects of the law of descent--fell under the exclusive authority of the individual states. ***1813** Notably, although Johnson claimed that aspects of the law of descent derived from state law, he also recognized that, in contrast to the laws of citizenship and real property, descent was an area of law over which the federal government legitimately exercised some regulatory authority. But despite the significance of domestic relations law to the outcome of Shanks--and of Shanks to the legal significance of marriage--Johnson registered no special complaint that the majority erred because it allowed the federal government to determine the legal significance of marriage, or that Justice Story's opinion allowed the federal government to trammel local law governing the rights and duties of marriage. Had those been cognizable arguments at the time, one might expect that Johnson would have articulated them in his lengthy dissent.

Of course, Shanks is most significant for the central principle of Story's majority opinion: the federal government has the authority to make determinations regarding married women's citizenship, and state law does not bear on that determination. Although Justice Story's vision of women's citizenship as controlled by the national powers-that-be did not register a progressive understanding of women's legal personhood, the assertion that women's citizenship fell within the purview of federal power was not insubstantial, in terms of either outcome or legal principle. Even as Story's opinion explicitly affirmed married women's disability under coverture, it also established that at least certain aspects of married women's legal status and rights were governed by the national polity. [184] This aspect of the Shanks opinion was not lost on contemporary jurists, and courts later extrapolated from Shanks a challenge to the basic principles of coverture. In 1838, for example, the New York Court of Appeals cited Shanks as evidence that "[i]t will not be denied, that congress possess[es] the power to naturalize femes covert, even against the consent of their husbands . . . ." [185] In 1852, an Alabama state court extended the logic of Shanks to determinations of domicile within the United States, citing the case in support of its then-progressive holding that "[a] married woman abused and maltreated by her husband may have her residence (or domicil) in one State, . . . whilst her husband's residence or domicil is in another." [186]

Shanks's holding is also significant because it was part of a larger trend of disaggregating citizenship law and local domestic relations law. ***1814** However, as the national legislature and federal judges began to shape women's marital rights through citizenship laws, Shanks did not guarantee that women's citizenship would be consistently subject to what we might now consider to be enlightened adjudication and policymaking. In 1855, for example, Congress passed a law that encoded in statute the link between coverture and citizenship by establishing that an alien woman's citizenship would follow that of her American husband upon marriage, with no further procedure required. [187] Congressmen debating the merits of the 1855 Act explicitly understood the relationship between the proposed statute and domestic relations law. "[B]y the act of marriage itself the political character of the wife shall at once conform to the political character of the husband," urged one congressman in support of the 1855 Act. [188] "There can be no objection to it," he added, "because women possess no political rights." [189] As historian Nancy Cott has observed, the Act was remarkable because it "in effect rais[ed] the doctrine of coverture to the level of national identity," even though by that time many states had begun the process of unwinding coverture through changes to laws governing marital property. [190] In other words, Congress developed its

own principles of domestic relations law within the context of citizenship, and those principles sometimes ran contrary to the general trend within state domestic relations laws.

Federal judges played a part in this process as well. For example, in 1883, in Pequignot v. Detroit, a Federal Circuit Court found that the principle of coverture animating the 1855 Act also applied (in reverse) to American women: upon marriage to a foreigner, an American woman immediately lost her American citizenship. [191] In 1907, Congress ratified Pequignot's holding in the Expatriation Act, which resolved that "any American woman who marries a foreigner shall take the nationality of her husband." [192] It was not until 1922, after woman suffrage was constitutionally secured, that feminist organizations were able to successfully advocate for the repeal of the Expatriation Act. [193] In short, despite the fact that the Shanks decision protected Ann Shanks's individual property rights, it did not portend the consistent ***1815** enactment of federal citizenship laws that challenged the gender status hierarchy produced and perpetuated by coverture.

What the Shanks opinion did establish was that federal actors would not shy from asserting, or even creating, federal citizenship laws and regulations that directly impacted the scope and effect of domestic relations law and policy. Accordingly, the Shanks opinion, like the family pension debates, challenges the modern-day belief that early understandings of federalism resulted in categorical deference to the states in matters touching on domestic relations. Shanks required the Court to upend the South Carolina Supreme Court's determination that Ann Shanks remained an American citizen--a determination that, if not mandated by local domestic relations laws, was certainly consistent with the principles of coverture enshrined in those laws. In trumping the state supreme court's determination of a married woman's citizenship, the Shanks majority offered no apology for intervening in domestic relations law, and the dissenting Justice Johnson raised no objection on that basis. This is likely because in 1830, the notion that domestic relations were exclusively a state law matter, or that federal involvement in such issues constituted improper intervention, had not taken hold as a generally applicable principle of American federalism.

C. Domestic Relations in the Federal Courts: Common Law and Equity

> It is [a case] that has attracted a larger share of public attention, and inspired a stronger feeling of interest, than any other . . . in . . . the

> American courts; and this interest is one of a sort permanently to affect society. [194]

So claimed an anonymous commentator in 1854 regarding the Gaines Case, a legal battle of epic proportions involving the allegedly suppressed will of Daniel Clark (the first representative of the Louisiana Territory in the United States Congress), Clark's various sexual liaisons, his secret and potentially bigamous marriage, and, most important, the legitimacy of his daughter Myra Clark Whitney (later Myra Clark Gaines). The Gaines Case was a cause célèbre that occupied the attention of the nation from the 1830s to the 1890s and generated tidy revenue for what Justice David Davis called "the ablest talent of the ***1816** American bar." [195] The Supreme Court heard the Gaines Case at least seventeen times [196] and, practically speaking, reviewed the most significant lower court decisions under a de novo standard, mining "nearly eight thousand closely printed pages" of evidence relating to bastardy, marriage, bigamy, and divorce. [197] In short, the Gaines Case put the Supreme Court and the Federal Circuit Court of Louisiana in the middle of a protracted dispute that involved nearly every aspect of domestic relations law. Although Justice James Wayne anticipated that, at some point in the future, when an "American lawyer [retires] to write the history of his country's jurisprudence [this case] will be registered ***1817** by him as the most remarkable in the records of its courts," [198] until very recently little attention has been given to the Gaines Case in modern scholarship. [199]

The Gaines Case will seem extraordinary to modern-day students of what is known as the domestic relations exception to federal diversity jurisdiction, perhaps the most thoroughly enshrined incarnation of the state sovereignty paradigm of domestic relations. As articulated by the Supreme Court in the 1992 opinion Ankenbrandt v. Richards, the domestic relations exception should be narrowly construed to preclude a federal court from issuing "divorce, alimony, and child custody decrees" when resolving a case filed in diversity jurisdiction. [200] But the application of the domestic relations exception has been anything but narrow. It is applied as a limit on federal question jurisdiction, and as a modern-day canon of federal statutory interpretation. [201] Most recently, it has been invoked by the Supreme Court as a "prudent" limitation on Article III standing in Elk Grove Unified School District v. Newdow. [202] In applying the domestic relations exception and expanding it beyond the narrow boundaries set forth in

Ankenbrandt, federal courts routinely rely on the tradition and history of state sovereignty over domestic relations as a basis for deference to state law and state courts in any case that touches on family matters.[203] The Gaines Case and the hundreds (if not thousands) of federal cases involving domestic relations during the pre-Civil War era demonstrate that such deference in cases involving domestic relations is premised on an invented tradition rather than an essential or transhistorical principle of federalism.[204]

Even more surprising than the fact that pre-Civil War federal courts routinely handled domestic relations matters is that prior to 1938--the year of the Erie v. Tompkins decision and of the merger of law and equity in the Federal Rules of Civil Procedure[205]--federal ***1818** equity principles, not state law, governed the outcomes of the many domestic relations cases brought in federal court. Prior to 1938, the federal court docket officially had two "sides": law and equity. Under the interpretation given to the Judiciary Act of 1789 during much of the pre-Civil War period, state law generally governed disputes brought on the legal side of the federal docket.[206] Thus, federal judges generally applied state law when resolving the various legal issues that arose in domestic relations cases before them: the construction and validity of wills,[207] intestate inheritance,[208] dower[209] and curtesy,[210] validity of ***1819** marriage,[211] illegitimacy,[212] conveyance of property by femes covert,[213] husbands' marital property rights and duties,[214] child custody,[215] and ***1820** numerous procedural issues directly affected by domestic relations law (such as statute of limitations[216] and evidence[217]). Thus, domestic relations issues that were "legal" in nature were subject to the same treatment as all other disputes in law under the 1789 Judiciary Act.[218]

During the same period, equitable claims filed in federal courts-- including claims involving domestic relations--were generally decided ***1821** pursuant to a national uniform body of equity principles.[219] The Process Act provided that cases filed in equity were to be resolved "according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law."[220] This rule was ***1822** interpreted to require that federal courts apply a uniform body of equity procedure and remedies in all cases filed in equity. And the application of equitable procedures and remedies required application of a considerable body of equity jurisprudence that had developed to ameliorate the harsh consequences of the common law and that was often outcome determinative. Thus, federal courts applied equity principles even--or especially--when application of those principles resulted in a different outcome than would have been reached

by a forum state court.[221] Accordingly, because many cases involving domestic relations could be (and were) filed on the equity side of the federal courts' docket, federal courts frequently decided those cases pursuant to federal equity principles rather than state law.[222]

***1823** In any given domestic relations case filed in equity, the role of federal principles equity could be profound. As a source of "exceptional" remedies, equity was instrumental in domestic relations disputes where the court needed to "undo" a conveyance of property when common law rights had been violated, such as wrongful denial of dower,[223] fraudulent suppression of a will,[224] or undue influence of an heir.[225] Most notoriously, using their equity powers, federal judges enforced married women's separate estates--establishing trusts for femes covert that enabled women to maintain possession and control of their property during marriage in contravention of the common law's rules regarding married women's property.[226] Although there is much disagreement among historians over the precise impact of equity on ***1824** married women's wealth and status,[227] it is uncontroverted that by enforcing the establishment of separate trusts--marriage settlements (or prenuptial agreements)[228]--equity enabled at least some married women to achieve a level of financial independence that was otherwise unattainable under the common law.[229] Use of such equitable devices was, in essence, a private law response to coverture.

This Section analyzes two pre-Civil War Supreme Court cases involving domestic relations: the Gaines Case and Neves v. Scott.[230] The outcomes of both of these cases turned on whether federal equity jurisprudence or state law would apply in an equity suit filed in federal court. The first important feature of these cases is that, using federal equity principles, the Supreme Court upheld the privately negotiated resolutions to injustice created by local law or local bias. In the Gaines Case, the Court enforced an alleged nonmarital child's right to her father's estate as purportedly promised in a missing will. In Neves, the Court enforced the terms of a marriage settlement that had allowed the couple to share their property equally, and gave the surviving spouse a survivorship interest in the deceased spouse's estate. Private law offered ways around some of the inegalitarian aspects of the default rules of domestic relations law, and by enforcing these arrangements in equity, the federal courts helped to disestablish the status-based hierarchies of traditional family law on a case-by-case basis.

The second notable aspect of both cases is that, despite the fierce dispute concerning the use of federal equity principles in place of state ***1825** law, neither the parties nor the judges involved argued that state law should govern because the suits involved domestic relations. Even at the end of the pre-Civil War period, when, as I discuss below, the notion that states had special authority over domestic relations had become part of the flourishing states' rights rhetoric of the time, the state sovereignty paradigm had not developed as a generally applicable principle of American federalism that bore on contemporary understandings of the powers of the federal courts. [231]

The Gaines Case and Neves, and the hundreds of other pre-Civil War federal cases involving domestic relations, call into question the historical foundation of the state sovereignty paradigm and, more specifically, the modern domestic relations exception.

1. A Short History of Equity in America

To understand the Gaines Case and Neves, and the dispute over federal equity jurisprudence during the pre-Civil War era, one must understand a bit about America's historical ambivalence toward equity. Defined narrowly, "equity" referred to a set of extraordinary remedies and procedures that were available to ameliorate defects in the application of positive law, such as in the case of fraud, mistake, and forgery, [232] and to equitable instruments that required the ongoing supervision of a court, such as trusts and guardianships. [233] The term "equity," or "equity of the statute," was also used more broadly to describe a form of statutory interpretation that authorized judges to follow a restrictive or expansive interpretation of a statute in order to "prevent a failure of justice." [234]

Equity was a standard feature of English jurisprudence and was enforced in a separate chancery court. But the reception of equity in many parts of America was tepid at best, and sometimes even hostile. In regions settled by those colonists who inherited a distrust of the ***1826** Crown, such as New England, chancery courts were suspicious because of their associations with the monarch's (and his colonial governors') unfettered use of equity to vitiate the common law, and with it the common law rights of Englishmen. [235] This attitude was part of the intellectual inheritance of the founders: opponents of equity maintained that the "roguish" body of jurisprudence allowed the judiciary to reign supreme over positive laws that bore the stamp of the elected representatives of the people ("[i]n republics, the very nature of the constitution requires the judges to follow the letter of the

law" [236]) and over the time-honored common law rights that protected property. As a consequence of this history, the reception of equity within the legal systems of the individual states varied regionally. Southern and mid-Atlantic states, founded as royal colonies, tended to embrace equity jurisprudence. [237] In New England, where the highest concentration of dissenters had settled, several states lacked developed equity jurisprudence or chancery courts into the nineteenth century. [238] As a civil law state, Louisiana never adopted equity jurisprudence. [239]

In the area of domestic relations, the role of equity was especially offensive to some because it provided exceptions to the enforcement of the common law's merger doctrine. Critics of equity contended that equitable instruments such as marriage settlements resulted in the ***1827** dislocation of the husband's common law property rights (his "private rights"). Consequently, they maintained, equity jurisprudence disrupted the domestic harmony secured by the merger doctrine and the attendant marital property laws. [240] For example, in 1804 a Connecticut lawyer opposing the expansion of married women's equitable trusts maintained that the unity of a married couple's property interests was a crucial factor in ensuring marital stability:

> And are we . . . to take, at once, the last step, which corruption has there introduced, and bury in oblivion the principle, that a feme covert has no separate existence? . . . We happily have never heard of forming certain exceptions to the marriage contract, when framed, that the wife need not lose her independence; nor of relations giving property to married women, to their separate use. But the idea has here been, that lines of separation were not to be drawn between husband and wife; and the generosity of our females has not allowed them to wish to keep their property from those, to whom they have not refused their persons. Our customs, therefore, do not require the introduction of these new principles. . . . Upon principles of policy, what good consequences can result from pin-money, and separate establishments? While husband and wife have but one interest, you may calculate upon the most perfect harmony; but create separate interests, and you destroy domestic tranquility. . . . [241]

While naysayers understood equitable trusts as an abrogation of the common law's marital regime, others argued that trusts were a necessary corrective to the abuses

that stemmed from married women's inability to control property, a view adopted by Chancellor Kent:

> These marriage settlements are benignly intended to secure to the wife a certain support in every event, and to guard her against being overwhelmed by the misfortunes, or unkindness, or vices of her husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created. A court of equity will carry the intention of these settlements into effect, and not permit the intention to be defeated.[242] ***1828** Thus, equitable trusts enabled families, usually through a third-party trustee, to effectively negotiate around the default rules of marital property distribution (and the values those laws protected), just as wills enabled individuals to circumnavigate the default rules of intestacy distribution. As historian Carole Shammas has demonstrated, the most common use of the trust was by fathers seeking to protect their daughters from spendthrift or tyrannical husbands.[243] As the trust became more common in America--and the restrictions on its formalities loosened--it also became an instrument used by couples themselves to redistribute authority within the relationship. For example, couples entered prenuptial marriage settlements stipulating that once married, the couple would exercise equal authority over all property,[244] or the wife would maintain control over her property.[245] Thus, despite the prohibition on contracts executed between husband and wife (a direct consequence of their legal "merger"), within certain families, marriage settlements enabled couples to re-negotiate authority before and even after they married.[246]

In Lewis v. Baird, for example, a federal court in Ohio evaluated a trust between a former Continental Line officer, his wife, and a group of third-party trustees, "[t]he principal object of [which] was, to procure a reconciliation between Lawson and his wife, and preserve harmony in the family."[247] Lawson was an abusive husband, and the trust was designed to incentivize his reform through a covenant with the trustees that he would not "offer any personal violence or injury to his wife, and that he would abstain from the intemperate use of every kind of spirituous liquors."[248] If he violated these restrictions, the trust required that the trustees

provide his wife with 150 acres of land. [249] Depending on one's perspective, then, the use of equitable trusts to distribute property according to private negotiations could be understood either as a victory for the republican values of freedom of property and some degree of gender equality, or as a most unrepublican, tyrannical form of judicial overreaching into the laws that secured the harmony of marital relations and the "private rights" secured for husbands by the common law of domestic relations.

Outside the context of married women's separate estates, equitable instruments and remedies also embroiled the courts in domestic ***1829** relations cases where a private arrangement for allocation of property within a family--such as by will or trust--was thwarted by the fraudulent conduct of another, such as the exploitation of a child-heir by his parents, or embezzlement by the executors of an estate. Equitable principles and remedies enabled courts to ensure that the intended arrangements were not sabotaged. Because these private law instruments allowed individuals to trump certain default rules of intestacy established under the common law, such instruments frequently involved the courts in the case-by-case re-definition of the priorities established by the rules of descent.

If equity jurisprudence was controversial, it should come as no surprise that defenders of state sovereignty especially resented federal equity jurisprudence. At the Constitutional Convention, Article III's mandate that "Judicial Power shall extend to all Cases, in Law and Equity" [250] prompted resistance by Anti-Federalists who believed that federal equity powers would effectively license federal judges to abrogate state positive law. [251] The Anti-Federalists' campaign to take "equity" out of the Constitution was unsuccessful, and in 1789 Congress accommodated the federal court's equity powers by passing a temporary Process Act, which provided that "the forms and modes of proceedings in causes of equity . . . shall be according to the course of the civil law." [252] Three years later, the Second Congress replaced this provision with the Process Act, which required federal courts to apply federal equity principles in all suits arising "in equity," and granted the Supreme Court power to prescribe procedural rules for cases brought in equity. [253]

Resistance to federal equity jurisprudence continued, and the issue of whether a uniform body of federal equity jurisprudence applied in federal courts was litigated on numerous occasions from the 1810s through the 1830s. [254] To some proponents of state sovereignty, federal equity jurisprudence was considered "foreign law." [255] Much to their ***1830** dismay, however, throughout the pre-Civil War period the

Supreme Court repeatedly interpreted Article III's "law and equity" provision and the Process Act to require that federal courts apply a distinct, uniform body of federal equity principles and procedures when deciding equitable claims. [256]

The Supreme Court remained adamant on that point, regardless of the subject matter of the lawsuit. In both the Gaines Case and Neves, the Supreme Court interpreted federal equity jurisprudence to enforce certain distributions of property within families, even though those distributions arguably infringed the private rights of family members or third parties: the designation of a putative bastard child as the heir of a large fortune in the Gaines Case, and the equal distribution of property between spouses in Neves. The Gaines Case and Neves were a victory for federal courts, and for the use of privately negotiated arrangements--enforced through equity--as a tool for disestablishing certain inegalitarian norms of domestic relations law.

2. The Gaines Case

Despite the unambiguous Supreme Court precedent requiring the application of federal equity jurisprudence in federal court, when Myra Clark Whitney (through her first husband) filed suit in federal district court of the Eastern District of Louisiana charging that her father's last will and testament of 1813 had been fraudulently suppressed, the federal judges of Louisiana dismissed the suit, refusing to apply federal equity principles that would have allowed them to take a closer look at the executors' conduct. [257] It is not entirely surprising that the federal judges ***1831** sitting in Louisiana were hesitant to dig into the facts underlying the Gaines Case. The allegedly suppressed will of 1813 reputedly contained Daniel Clark's declaration of Myra's legitimacy and named her as the heir of his vast fortune. If Myra's legitimacy was to be evaluated, the lower court would have to permit a full investigation of Clark's personal affairs and those of some of the most prominent citizens of New Orleans. [258] Clark and his alleged wife, Zulime (who, the Supreme Court reporter informs us, was "proved to have been remarkable for beauty" [259]), stood at the epicenter of the dispute. Zulime allegedly became Clark's paramour in 1801, while her husband, a Frenchman named Geronimo Des Grange, was on an extended trip in Europe. Zulime bore one or two children by Clark, including Myra. [260] Myra's status--and, hence, her right to inherit under Louisiana law--was the primary substantive legal issue in the Gaines Case. [261] If federal equity applied and the federal judge found that Myra was Clark's ***1832** legitimate heir, then the court could rescind many of the property transfers that had subsequently occurred using the equitable remedy of the implied trust. [262] If federal equity did not apply,

then pursuant to Louisiana law, under which trusts did not exist, arguably the federal judge had no means of remedying the fraud against Myra, and she would remain forever a notorious bastard with no claim to her father's estate. The legal drama being played out as the case bounced back and forth from state to federal courts, and within the federal court system, was as much about federal power as it was about the intimate affairs of Myra's parents.

As a case about federal power, the Gaines Case required the Court to determine whether Louisiana had the sovereign power to reserve exclusive jurisdiction over some portion of its positive laws, notwithstanding the grant of equity power to the federal judiciary in Article III and the Process Act. [263] In one appearance before the Court, counsel for the executors of Clark's estate were quick to point out that the state of Louisiana did not recognize trusts because, as a civil law jurisdiction, equity had never taken hold there. Thus, they maintained, the issue on appeal in the Supreme Court was whether the "foreign law" of federal equity jurisprudence was applicable in a state that had no equity jurisprudence of its own. [264] The executors reasoned that federal equity jurisprudence ran roughshod over the substantive probate law of Louisiana ("Can this court fasten upon the people of Louisiana all the doctrine of uses and trusts, against their positive law?"), enabling federal courts to usurp the authority of Louisiana courts, [265] and giving out-of-state litigants such as Myra special rights. [266] They further contended that, regardless of whether others viewed Louisiana law as a "mongrel system," the federal courts simply lacked authority to dictate in-state policy. [267] And despite unequivocal Supreme Court case law to ***1833** the contrary, the executors maintained that the "law and equity" clause of Article III, while providing for federal court jurisdiction over equity cases, did not allow for the development of a distinctive federal equity jurisprudence. [268] Under this theory, if a state lacked equity jurisprudence altogether (as in Louisiana), then equity was not available to litigants in federal court. The executors further insisted that there were certain areas of law over which states have special authority: "The sovereignty of a state over its domestic policy [i.e., internal affairs] is complete, and especially over its land laws." [269]

Myra's various counsel presented a more capacious view of federal equity power, one that was derived from the then-standard interpretation of the "law and equity" clause of Article III. [270] Myra's attorney Johnson proposed that Article III effectively gave federal courts power to use equity jurisprudence to reach any case where local prejudice would otherwise operate an injustice:

> It is asked how we are to reach the Court of Probate. The answer is found in the Constitution of the United States. If it is a case [in equity] all state power falls. It was intended to protect the people from state prejudice; the framers of the instrument knew that local prejudices would exist, and saved the people from their operation. [271]

Countering the argument that federal equity allowed federal courts to "destroy[] all state regulations," Johnson maintained, first, that the federal courts were simply enforcing the rights secured by Louisiana law ("Louisiana has recognized the right to transfer property by will, and this right was exercised in the present case" [272]) and that, in any event, "state power cannot limit the Constitution of the United States and the jurisdiction of this court under it." [273] The "equity" provision in Article III was a grant of jurisdiction to federal courts that required them to apply federal law regardless of the underlying legal subject matter. On this point, Myra's counsel dismissed the executors' categorical understanding of the federal courts' equity jurisdiction:

> ***1834** It is said that a state court here claims exclusive jurisdiction. If a state can say that its courts shall have exclusive jurisdiction, it can, by extending the range of subjects, shut out the courts of the United States from all jurisdiction whatever. The only question is, is it a case of equity? If so, no matter how far the claim of exclusiveness of jurisdiction in the state courts may be pressed, the Constitution of the United States comes in with paramount authority. [274]

For the various justices who wrote opinions, the Gaines Case was an easy case in terms of the rule governing application of federal equity. Myra's attorneys were correct that Article III and the Process Act required that the federal courts sitting in Louisiana apply uniform federal procedure and principles in cases filed in equity. On this point, the Gaines Case was made difficult only by the lower court's recalcitrant refusal to apply the Supreme Court's clear precedent. On the first appeal to the Supreme Court in 1839, the justices simply issued a summary reversal. [275] By the second appeal, in 1841, the justices were exasperated: "These questions having been so repeatedly decided by this court," wrote Justice Thompson, "and the ground upon which they rest so fully stated

and published in the reports, that it is unnecessary, if not unfit, now to treat this as an open question." [276] With this justification, the Court's pronouncement was unbending. Federal equity jurisprudence provided a uniform corpus of principles and procedures to be applied in every state of the union: "[T]he Circuit Court of the United States, exercising jurisdiction in Louisiana, as in every other state, preserves distinct the common law and chancery powers." [277]

Thus, although the Court doubted its authority to give force to the unprobated will of 1813, [278] it authorized the use of equitable discovery tools to acquire evidence to be used in any proceeding (federal or state), ***1835** and recognized the power of a federal court sitting in equity to evaluate Myra's legitimacy and, if appropriate, deem her to be Clark's legal heir, notwithstanding the terms of the 1811 will. [279] Largely due to the lower federal court's recalcitrance, the Supreme Court itself assumed the task of evaluating Myra's legitimacy. Using its equitable powers--including the various evidentiary presumptions equity provided--the Supreme Court reviewed the entire mass of evidence concerning land transfers, stolen wills, secret weddings, illicit liaisons, and bigamists. [280]

The justices examined reams of testimony, including that submitted by Clark's trusted friend Mrs. Harper (whose testimony it deemed to be especially trustworthy because she "suckled" Myra along with her own infant son). [281] Harper testified that in Clark's final will, written in 1813, Clark acknowledged Myra "as his legitimate daughter," designated her as his heir, and provided what he characterized as a personal "charter of her rights."

> About four weeks before his death, Mr. Clark brought this will to my house; as he came in, he said, 'Now my will is finished,' my estate is secured to Myra beyond human contingency, 'now if I die to-morrow, she will go forth to society, to my relations, to my mother, acknowledged by me, in my last will, as my legitimate daughter, and will be educated according to my minutest wishes, . . .here is the charter of her rights, it is now completely finished, and I have brought it to you to read . . . .' [282] This, along with the testimonies of Zulime's sister and numerous others privy to Clark's private affairs, was sufficient in 1848 to convince the justices that Clark had, in fact, married Zulime in a secret ceremony in Philadelphia in 1803, that Zulime's own marriage to Des Granges was bigamous and thus void, and therefore that Myra was Clark's legitimate daughter. [283]

The evidence was hotly contested, however, and in the end the case turned in part on the federal equitable evidentiary presumptions employed by the justices. Despite a wealth of evidence suggesting that the Zulime-Clark wedding ceremony was pure fabrication, [284] and ***1836** competing evidence suggesting that Clark sought to do away with the "stain of her birth" with the 1813 will (an aspiration that, if believed, betrayed her illicit status), [285] the rules of equity led the Supreme Court to honor one man's purported private declarations of filiation:

> [W]e cannot permit it to prevail over the legitimacy of his child, established, as we think ourselves obliged to say it has been, in conformity with those rules of evidence which long experience and the wisdom of those who have gone before us in courts of equity have deemed the best to ascertain, in cases of doubt, the affinity and blood-relationship of social life. [286]

This finding (entered in 1848 against one purchaser of a portion of Clark's estate) should have provided the basis for Myra's claim, as Clark's legal heir, to four-fifths of Clark's entire estate. [287] But the other defendants in the Gaines Case continued to defend against Myra's claims on the basis that she could not inherit as an illegitimate child. And their efforts were almost successful. In 1851 the Supreme Court was once again faced with the monumental task of determining Myra's legitimacy. With new evidence presented by a different set of defendants, the justices reached a different conclusion regarding Myra's status (and her claim), lamenting that "[t]he harshness of judicial duty requires that we should deal with witnesses and evidences, and with men's rights, as we find them; and it is done so here." [288]

Undeterred, and ever resourceful, Myra successfully had the missing will of 1813 probated in a Louisiana court in 1856. [289] The defendants continued to contest Myra's right to inherit in federal court, and the issue of Myra's legitimacy once again came before the Supreme Court. [290] Over the defendants' continued objection that Myra was an ***1837** "adulterine bastard" [291] who could not inherit (even under a will), the Court in 1860, and again 1867, revisited all of the evidence and once again declared Myra to be "the legitimate and only child of the said Daniel Clark:" [292]

> [A]s she was declared legitimate by her father in his last will and testament, common justice, not to speak of legal rules, would require that such a declaration should only be overborne by the strongest proof; and yet detached portions of evidence, scattered through the record here and there, are invoked to destroy the dying declarations of an intelligent man, that a beloved child was capable of inheriting his property. [293]

The outcome in the Gaines Case was not a result of the channeled discretion purportedly allowed by equitable remedies, but of a much broader and substantive understanding of federal equity as protector of the individual against the injustice of local bias. Despite claims by defense counsel throughout the litigation that the states had special sovereignty over matters involving land and probate, the Gaines Court understood its powers in equity to be wide-ranging. The fact that the case required the federal courts to evaluate and determine Myra's legitimacy did not give rise to the objection that the federal courts should defer to state law or state courts because the case involved the parent-child relationship or, more generally, domestic relations--a significant omission given the insistence in modern-day jurisprudence that the domestic relations exception has deep historical roots.

3. Prenuptial Agreements in Federal Court

Lest any doubts remain that the Supreme Court understood that federal equity powers extend to what we now label "domestic relations," including marriage law, a brief examination of Neves v. Scott will dispel such misconceptions. [294] At issue in Neves was the degree to which a federal court would enforce a prenuptial agreement, or marriage settlement, that abrogated common law marital property rules and effectively created a community property arrangement between John Neves and Catharine Jewell. The marriage settlement executed by the couple in 1810 provided that the property of both John and Catharine ***1838** "shall remain in common between them" during their natural lives, "and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, . . . [and] should the said John become the longest liver, the property to remain in the manner and form as above." [295] In other words, upon the death of one spouse, the other would retain all of the couple's property as a life estate. When the "longest liver" in the couple died, the property would be divided equally between their heirs. [296]

Although under more traditional equity rules a marriage settlement of this sort was binding only if executed through a third-party trustee, in the early nineteenth century bilateral marriage settlements--those executed between the couple without the use of a trustee--were gradually gaining recognition and enforcement. [297] The degree to which courts enforced bilateral settlements varied. Courts generally enforced such trusts as to the rights of the parties and their consanguineous relations under contract theory, but some courts refused to enforce bilateral trusts as to the rights of third parties such as creditors. [298] In practical terms, this meant that bilateral trusts would not always protect the widow's assets from claims against her husband's creditors who had a claim on property that the common law designated as "his." When John and Catharine's marriage settlement was contested soon after John's death in 1828, challengers raised exactly this issue.

The strength of Catharine's legal position was severely undermined by John's execution of a will that arguably disregarded the survivorship rule of the marriage settlement. In that will, John ordered his entire estate to be divided between Catharine and George Rowell. [299] Catharine successfully procured an injunction in a Georgia court barring the execution of the will as against their entire estate (although the Court required her to post a bond for the payment of John's debts). [300] Catharine then married a second husband, William Scott, who used part of Catharine's (and arguably John's heirs') estate to pay his own debts. [301]

When Catharine died in 1844, John's heirs (his brother and nephew) sued Scott for their portion of the couple's original marital estate. John's heirs argued that the original Neves-Jewell agreement was a trust that could determine the rights of third parties (such as themselves), so that when Catharine died they were due to inherit their ***1839** portion of the estate under the terms of the marriage settlement, and Scott was answerable to them for waste. [302] Scott argued that the original marriage settlement was simply a covenant between the parties that could not benefit non-consanguineous relations (such as John's heirs) or otherwise impact the rights of third parties. [303]

With hindsight, the distinction between covenants given for consideration and settlements executed as trusts seems a fairly pedantic point of equity jurisprudence. But Neves is significant because it required the Supreme Court to evaluate the extent to which the law would allow private ordering of domestic relations, even at the expense of a state's common law doctrine of marital property distribution, the principles of coverture, and the rights of third parties. The position taken by John's heirs represented a more progressive view of marriage settlements: the Court

should honor fully the couple's ability to negotiate around the rules of coverture, thus allowing women to claim larger (and more legally significant) portions of the couple's collective property. In contrast, Scott's position counseled a narrower more traditional, view of couples' ability to contract around the entrenched common law of marital property, which did not contemplate joint ownership of the couple's real property, nor women's ability to control their husband's property after his death. [304] As in the Gaines Case, the Neves Court insisted that it was within the power and jurisdiction of the federal courts to determine the scope of federal equity. The fact that the case involved domestic relations law, and (if equity's critics were to be believed) therefore required a federal court to make a determination that drove at the heart of marital harmony, did not even emerge as an issue in the case, much less a decisive one.

Initially, the lower federal court in Georgia had resorted to a restrictive view of marriage settlements, finding that John and Catharine "were the only parties to [the marriage settlement], . . . [that] it was founded exclusively on the consideration of marriage," and that "[t]he consideration of such an agreement extends only to the husband and wife and their issue." [305] On the first appeal to the Supreme Court, the justices reversed the lower court's order, holding that federal equity principles gave greater scope to individuals to alter the distribution of property within their marriage (and to affect the rights of third parties by such an agreement). The Court maintained that the primary factor when interpreting a marriage settlement was the "manifest intent [and] ***1840** the leading design, of the parties entering into it," [306] and that in this agreement the couple clearly intended to determine the rights of the couple's heirs.

The tension between the Supreme Court's ruling and the Circuit Court's ruling became palpable when, on reargument, the parties alerted the justices that the highest court in Georgia had issued a decision in a case involving "other persons claiming a separate interest" in the Neves-Jewell marriage settlement." [307] The Georgia court had provided a very narrow interpretation of bilateral marriage settlements, proclaiming that "no persons are within the marriage consideration but the husband and wife and their issues; . . . . all others are volunteers" who may not enforce their claimed rights in equity [308] --thus showing limited regard for couples' ability to privately negotiate around the common law's marital property rules. Scott's counsel argued that, under binding Georgia law, John's heirs could not seek enforcement of the marriage settlement in equity. [309] In the second appeal of Neves, the Supreme Court was required to choose between the broader federal equity rule and the explicitly narrower rule required under Georgia's equity

jurisprudence. As in the Gaines Case (which had been heard by the Supreme Court on five different occasions by the second time Neves was heard by the Court), the decision turned on the justices' understanding of federal power:

> [W]e do not consider this court bound by the decision of the Supreme Court of Georgia. The Constitution provides, that the judicial power of the United States shall extend to all cases in equity arising between citizens of different States. Congress has duly conferred this power upon all Circuit Courts, and among others upon that of the District of Georgia, in which this bill was filed, and the same power is granted by the Constitution to this court as an appellate tribunal. [310] As in the Gaines Case, the Supreme Court was unbending in its insistence that federal equity jurisprudence trumped state positive law and state equity principles in those states that had their own equity jurisprudence (such as Georgia):
>
> Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto. These principles may make part of the law ***1841** of a State, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States, the equity law, recognized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court. [311]

In short, the supremacy of federal principles in equity cases filed in federal courts was unyielding, even when the case departed from then-settled domestic relations law of an individual state. Even in 1852, only six years before the Court's dictum in a case called Barber v. Barber suggested that it would shy away from disputes concerning domestic relations, the Neves Court did not question whether applying federal equity jurisprudence in a dispute over a marriage settlement was proper. [312]

Richard Chused has argued that marriage settlements of the sort John Neves and Catharine Jewell executed paved the way for married women's property acts passed by state legislatures in the mid-nineteenth century. [313] If that is the case, federal courts may have played a significant role in propagating liberalized understandings of married women's property throughout the Union. Thus, in that instance, federal equity would have provided a model for state domestic relations law--much as today federal constitutional jurisprudence and federal statutes provide models for state constitutional interpretation and state legislation.

But regardless of the degree to which the federal courts' embrace of equity principles shaped the states' application of equity in domestic relations cases, it is undoubted that equity gave individuals a means to circumnavigate the common law's strict regulation of family and marital property transmission, and federal courts gave those who satisfied the requirements of diversity jurisdiction the ability to have those arrangements enforced even when state courts would not do so. And while proponents of state sovereignty viewed the federal courts' equity powers as an abrogation of state sovereignty, even during the most vitriolic debates over the propriety of federal equity jurisprudence, critics of federal equity failed to articulate the argument that cases involving domestic relations occupied a special area of state authority. ***1842** The ideas that federal courts were ill-suited to consider such cases, or that state courts enjoyed special sovereignty over domestic relations disputes, or that federal involvement in domestic relations was somehow destructive of marital privacy or of the republic itself, had yet to take hold as authoritative, general principles of American federalism.

D. Early Traditions Summarized

The historical sources reveal that the most common of commonplaces about federalism--that domestic relations is traditionally a special enclave of state power--does not reflect the actual practice of federalism in the United States during the pre-Civil War period. Rather, during the early decades, the federal government was actively involved in regulating and adjudicating various matters involving domestic relations.

The national legislature crafted and enforced a war pension system for widows and orphans, involving Congressmen in the details and administration of a national family benefits program, and a sustained consideration of the place of the family in the republic. [314] In Shanks, the Court established that the federal government possessed authority to determine married women's citizenship status, even when

exercise of that authority limited a state's power to determine the full legal consequences of marriage for an individual's legal status.[315] Throughout the nineteenth century, Congress used that authority to create a body of citizenship laws that had immediate and striking consequences for the familial rights and responsibilities of certain individuals, including citizens who married noncitizens, noncitizens who married citizens, and anyone born abroad to U.S. parents.[316] Perhaps most surprisingly from a modern vantage point, federal courts of the pre-Civil War era routinely adjudicated cases involving domestic relations and frequently applied federal, rather than state, adjudicative principles and procedures in the process of doing so.[317]

In contemporary debates over, and adjudication of, these issues--family pensions, citizenship, and domestic relations matters--no one involved appears to have argued that Congress or the federal courts lacked authority because the matter at hand involved family law. In other words, domestic relations matters were not generally cordoned off as a special enclave of state law during the pre-Civil War era, and were instead governed by a complex constellation of state and federal ***1843** statutes, common law, and equity principles, interpreted and applied and modified by state and federal actors.

In reaching this conclusion, I do not suggest that the federal government was a pervasive force in the regulation of family law issues during the pre-Civil War period. As with almost all areas of substantive law, the states were undoubtedly responsible for creating and enforcing most of the law that governed familial relations. Federal adjudicative and regulatory involvement in domestic relations often functioned in tandem with, or as a complement to, state practices and laws. Nor am I suggesting that the federal government's early regulatory involvement in domestic relations was similar in range or scope to the type of regulation that is permissible under our modern constitutional regime, or that is possible with the help of a modern federal administrative apparatus. My point is, rather, that even under a constitutional interpretative regime that generally assumed a more limited conception of federal power, the early federal government was not precluded from exercising its legitimate regulatory powers in ways that bore directly on domestic relations--even in ways that conflicted with the laws of the states.

IV. Inventing States' Rights

If the state sovereignty paradigm of domestic relations is not a transhistoric principle of American federalism, the question remains: How did the theory

that domestic relations are uniquely excluded from federal jurisdiction come into being? Although it is beyond the scope of this article to give full consideration to this question, even a preliminary review of the historical sources suggests that the state sovereignty paradigm of domestic relations developed in response to several discrete, inflammatory issues, and was only gradually understood as a transcontextual, generally applicable theory of federalism that restricted the exercise of the federal government's otherwise legitimate powers.

In this Part, I provide a general overview of the genealogy of the state sovereignty paradigm, which began to take shape during the pre-Civil War era in the context of efforts to block federal regulation of slavery and polygamy. It developed into an influential, generally applicable theory of federalism at the end of the nineteenth century when the apparent threat of divorce, interracial marriage, polygamy, and woman suffrage occasioned an explosion of interest in the regulation of domestic relations. Within these debates, the role of the proper allocation of power between federal and state authorities was a primary concern, and the state sovereignty paradigm of domestic relations emerged as one competing (and influential) theory. Even as it gained ***1844** influence as a model of federalism, however, the state sovereignty paradigm always existed alongside--and in tension with--the actual practices of federal actors, who continued to legislate and adjudicate matters directly and indirectly bearing on domestic relations. The genealogy of the state sovereignty paradigm shows that the notion that domestic relations occupied a special regulatory sphere beyond the reach of federal power was born out of specific historical events, and the social mores, human predilections, ideological commitments, and political strategies that developed in response to those events. It was not, and has never become, a universally accepted, inherent principle of federalism.

A. Early Articulations of the State Sovereignty Paradigm

As a matter of practice, we know that national legislators, federal judges, and federal officials in the executive branch were involved in the creation, administration, and adjudication of domestic relations law and policy during the pre-Civil War period. As shown above, federal regulation and adjudication of domestic relations often went unnoted as such, but certain federal efforts to regulate domestic relations--or what were understood at the time to be domestic relations--drew heavy criticism from defenders of states' rights and slavery.

Attempts by the federal government to determine the rights associated with an individual's status within a family (such as husband or wife) carried an ominous

threat for slave owners: if the federal government could regulate domestic relations of any sort, then by implication it had authority to regulate the relation of master and slave. As Jill Hasday has explained, "slave owners contended . . . that the master-slave relationship was best understood as a familial connection operating along the same tenets of hierarchy, dependency, and intimacy that governed ties amongst white relatives." [318] From that proposition, states' rights advocates reasoned that because the master-slave relationship was a "domestic relation," the federal government had no authority to regulate that peculiar institution. [319] Thus, Southern ***1845** congressmen drew a connection between the master-slave relationship and other forms of domestic relations--such as the relationship between husband and wife--warning their anti-slavery colleagues that federal "intervention" in slavery would inevitably lead to disruption of the marital relationship, and even to claims for women's enfranchisement. [320]

Slave owners' trepidation regarding federal regulation of slavery informed the response of Southern congressmen and their constituents to other attempts by the federal government to regulate domestic relations, including anti-polygamy legislation proposed on the eve of the Civil War. During debates over the proposal of Representative Justin Morrill to criminalize polygamy, many Southern congressmen articulated their belief that passage of the bill would open the doors to federal regulation or abolition of slavery, and urged that the federal government lacked authority to pass such legislation because polygamy involved domestic relations. [321] Typical of such arguments, in 1860, Representative Emerson Etheridge of Tennessee urged that enactment of federal anti-polygamy legislation would "concede[] the power of Congress to legislate against a domestic regulation," including slavery. [322] Notwithstanding sustained criticism on these grounds (and with the help of Southerners' departure from Congress), in 1862 Congress passed the Morrill Act, the first federal statute criminalizing polygamy. ***1846** [323] As I discuss below, debates over the propriety of federal anti-polygamy efforts continued and intensified during the later half of the nineteenth century, as did Congress's legislative efforts to end polygamy. [324]

Unsurprisingly, modern-day jurists do not generally reference slave debates or opposition to federal anti-polygamy efforts as evidence of the historical pedigree of the state sovereignty paradigm of domestic relations. Instead, the most frequently cited evidence of early support for the notion that the states have special sovereignty over domestic relations is Barber v. Barber, a case decided by the Supreme Court in 1858, during the tense period between the Dred Scott decision

and the outbreak of the Civil War.[325] In Barber, a divorced woman sought to have a New York state court alimony decree enforced in a Wisconsin federal court. A majority of the Supreme Court affirmed the lower court's holding that federal courts were authorized to enforce alimony decrees entered in other states, but in dictum gave a nod to the basic ***1847** theory of a domestic relations exception to federal jurisdiction by "disclaim[ing] altogether any jurisdiction in the Courts of the United States upon the subject of divorce, or for the allowance of alimony."[326]

In a lengthy dissenting opinion, states' rights defender Justice Daniels (joined by Justice Taney) ignored the principles announced in Shanks, and opined that the lower court lacked jurisdiction altogether because the federal government could not recognize a married woman's independent state citizenship for purposes of satisfying the requirements of diversity jurisdiction. Invoking the then-declining doctrine of coverture, Daniels reasoned that "husband and wife can[not] be regarded as citizens of different States."[327] The Barber dissenters sought to bring the logic of coverture to bear on jurisdictional considerations, just as coverture had long informed procedural rules regarding joinder.[328] Justice Daniels also urged that federal involvement in domestic relations would violate the common understanding of family as a private sphere, and announced that the federal government lacked the power to "regulate the domestic relations of society," and should not "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 and antipathies of the members of every household."[329]

Today Barber is considered to be the origin of the domestic relations exception to federal jurisdiction, even though, as Judith Resnik and Libby Adler have observed, the Barber Court actually affirmed the use of federal power in certain domestic relations cases.[330] Because of Barber's affirmative holding--and despite modern-day federalists' reliance on Barber as one of the early foundations of the state sovereignty paradigm--during the decades immediately following the Barber decision, the opinion had the net effect of facilitating rather than limiting federal involvement in divorce disputes. To be certain, Barber was cited by some lower federal courts as a basis for rejecting bills of divorce filed in federal court.[331] But Barber was more frequently cited ***1848** by federal courts for the force of its actual holding: federal courts are authorized to consider and rule upon the enforcement of divorce, alimony, and child custody decrees entered in states other than the forum state.[332] For example, in Cheever v. Wilson, decided eleven years after Barber, the

Supreme Court entertained an appeal from a challenge to a divorce and alimony decree awarded by an Indiana court. The Court rejected the challenge, noting that in Barber, it had "recognized ***1849** the validity of the original [alimony] decree, sustained the jurisdiction [of the federal court], and affirmed the decree of the court below." [333]

Furthermore, Barber certainly did not arise as a barrier to federal courts' routine consideration of cases filed in law and equity involving important domestic relations matters, such as dower, marriage settlements, and inheritance. [334] The dictum in Barber, and certainly Justice Daniel's dissent, seem to have received remarkably little attention in the courts at the time the opinion was issued. And, taken literally, both dictum and dissent were in tension with contemporary practices of the federal courts. [335]

In short, the notion that domestic relations were a special enclave of state regulatory authority attracted selective attention during the pre-Civil War era, but did not gain broad purchase in the legislature or in the federal courts. As shown in Part III, the notion that domestic relations was a special arena of state power did not arise as an objection to many instances of federal regulatory and adjudicatory involvement in domestic relations. And even when that objection was raised by Southern congressmen and states' rights justices in the context of polygamy and divorce, by enacting anti-polygamy legislation and affirming the role of federal courts in the enforcement of divorce and alimony decrees, Congress and the Supreme Court took steps that were viewed by critics as interfering with state authority over domestic relations. Thus, although some jurists of the pre-Civil War period certainly articulated the view that domestic relations were to be regulated by the states, that view does not appear to have been ***1850** understood--or enforced--as a generally applicable principle of federalism that precluded the federal government from exercising its otherwise legitimate regulatory and adjudicatory powers.

B. The State Sovereignty Paradigm of Domestic Relations Emerges

Following the Civil War, the federal courts continued to adjudicate domestic relations cases, including, famously, the Gaines Case. [336] Congress had a new set of war widows and orphans to provide for, triggering extensive pension legislation and an expanded federal administrative apparatus to process and review pension claims. [337] By 1893 the war pension system had expanded such that pension

payments represented forty percent of the federal budget.[338] As historian Nancy Cott has observed, the federal pension system of the post-war period "reach[ed] far into the ranks of the very poor, Indians, African Americans, and recent immigrants[,] . . . reinforced the standard that the husband and the father was the provider and family members his dependents," and--much like today's welfare laws--encouraged monogamy of pensioners through its various restrictions and requirements.[339] Similarly, through the Freeman's Bureau and the Indian Bureau, the Reconstruction Congress and federal regulators began to implement policies that would encourage (or coerce) African Americans and Native Americans to conform to national standards of domestic relations: monogamy, legally condoned and conducted marriage ceremonies, and family compositions that conformed to the traditional household.[340] During this period, national legislators also actively regulated the family through citizenship law, establishing ***1851** dramatic consequences through the Expatriation Act for brides who chose to marry across national boundaries,[341] and imposing important regulations governing the citizenship of offspring born to American citizens living overseas.[342]

What appears to have changed most after the Civil War was not the fact of the federal government's involvement in domestic relations, but the explosion of interest and debate over the proper place of the family in the federal system. Several social and legal transformations in the late nineteenth century were viewed as threats to the (white) American family: the persistence of legalized polygamy in Utah, the rising rates of divorce throughout the country, the perceived increase in the incident of interracial marriage, and the organized campaign for woman suffrage.

In the context of debates concerning proposals for national legislation and constitutional amendments intended to address these issues, the federal government's power to regulate domestic relations emerged as a significant point of contention. Some urged that federal regulation of domestic relations violated state sovereignty--even when the proposed "regulation" was an amendment to the Constitution itself. For example, opponents of woman suffrage routinely invoked the notion that domestic relations law is a state-level concern--beyond the reach of federal authority--as a firm principle of federalism. At the same time, however, this purported principle was routinely ignored by those pressing national measures to restrict divorce, ban interracial marriage, or outlaw polygamy.

In the context of the heightened attention to the place of the family in the federal system at the end of the nineteenth century, the state sovereignty paradigm took

shape and gathered authority as a generalized, transcontextual theory of American federalism. It did so, however, as a contested theory, and one that failed to accurately describe the allocation of power between federal and state governments with respect to domestic relations.

1. Women's Disenfranchisement as a Domestic Relations Matter

Although woman suffrage is not viewed today as concerning family law or familial relationships, when the suffragists began advocating for a federal suffrage amendment in 1869, it was certainly perceived by advocates and opponents alike as a challenge to the legal, social, and cultural ordering of the traditional household. As Reva Siegel has demonstrated, opponents of woman suffrage were adamant ***1852** that "enfranchising women threatened the unity of the marriage relation, in which there could be only one will--that of the male head of household." [343] Anti-suffragists portrayed women's enfranchisement as an intervention into the household and a radical disruption of the gendered order that the common law of domestic relations protected. [344] According to its opponents, woman suffrage would introduce "the bedlam of political debate" into the home, causing marital discord and, ultimately, divorce. [345] Moreover, they argued, women were unfit to vote because of their "delicate" nature and because participation in public life would distract them from their duties at home:

> While the man is contending with the sterner duties of life [such as military service, jury service, and participation in commerce], the whole of time of the noble, affectionate, and true woman is required in the discharge of the delicate and difficult duties assigned to her in the family circle, in her church relations, and in the society where her lot is cast . . . . [346]

From the premise that one could not disaggregate the ordering of the household from the ordering of political authority, anti-suffragists analogized the disruptive effect of woman suffrage on the household with the anticipated disruption that a federal woman suffrage amendment would visit on the allocation of power between federal and state government. [347] In 1882, a minority report of the Senate Committee on Woman Suffrage conveyed objections to the proposed amendment, and in so doing provided a sustained articulation of the state sovereignty paradigm of domestic relations:

> [The question of woman suffrage] involves considerations . . . intimately pertaining to all the relations of social and private life--the family circle--the status of women as wives, mothers, daughters, and companions to the functions in private and public life which they ought to perform, and their ability and willingness to perform ***1853** them--the harmony and stability of marriage, and the division of labors and cares of that union. . . . Among the powers which have hitherto been esteemed as most essential to the public welfare is the power of the States to regulate, each for itself, their domestic institutions in their own way; and among those institutions none have been preserved by the States with greater jealousy than their absolute control over marriage and the relation between the sexes. [348]

This understanding of state sovereignty haunted suffragists for the entire half century during which they advocated ratification of the woman suffrage amendment. Determined to thwart constitutional change, the anti-suffragists argued that state sovereignty over the family prevented anti-suffragists even from amending the Constitution to enfranchise women. [349] In 1918 opponents of woman suffrage contended that by calling for federal action, the "militant suffragettes" threatened "a direct and lawless invasion by the Congress of the United States of the rights of those States which have refused to confer upon their women the privilege of voting." [350] And upon the enactment of the Nineteenth Amendment in 1919, Senator Underwood explained that:

> [W]hen it comes to those powers of government which invade the family home and the fireside, that welcome the infant into life and carry old age to the cemetery, those laws of our intimate life and living, if we want just government, must be determined by the local people who live under them. That is the only way we can accomplish the desired result. [351]

Recognizing that his view had not prevailed, and that women were to be guaranteed the right to vote under the federal constitution, he lamented that "the disintegration of this great Republic has begun and the hour of downfall is only a question of time." [352]

2. Polygamy, Divorce, and Interracial Marriage

At the end of the nineteenth century, woman suffrage was only one of several issues to give rise to political organization and advocacy for reform of laws relating to domestic relations and, concomitantly, to sustained consideration of the proper role of the federal government in such matters. The liberalization of divorce laws, the continued struggle ***1854** to eradicate polygamy in Utah, and the apparent increase in interracial marriages captivated the nation. Congress was called on to remedy these perceived evils, leading some national legislators to reason about the federal government's role in domestic relations in a very different fashion from their anti-suffragist colleagues.

For example, as a number of states began to liberalize divorce laws, divorce rates rose rapidly, and other areas of domestic relations law, such as alimony, marriage settlements, and child custody, were proven inadequate. "Family savers" decried the decay of the American family due to the increase in divorce, and some turned to federal legislators for help.[353] Similarly, enemies of the "female slavery" known as polygamy successfully lobbied Congress to pass several more statutes punishing polygamy and continued to seek congressional assistance in putting an end to the practice.[354] Finally, though interracial marriage was rare even in the states where it was permitted, proponents of "racial purity" petitioned Congress for a federal constitutional amendment that would prohibit interracial marriage throughout the country.[355] The frenzy of congressional activity in response to these purported threats to the traditional family is itself remarkable. As Edward Stein has recently demonstrated, not including the proposed woman suffrage amendments, 120 constitutional amendments concerning domestic relations law were proposed between 1880 and 1929.[356] (Since 1929, only eighteen amendments concerning marriage or family law have been proposed, and seven of those were introduced within the last four years in an effort to ban same-sex marriage.)[357]

***1855** While recognizing the apparent limits on federal power described by the anti-suffragists, various reformers and social conservatives rallied behind federal efforts to restrict the availability of divorce, and to ban polygamy and interracial marriage. Flipping the anti-suffragists' logic on its head, those who supported federal legislative action with respect to divorce, polygamy, and interracial marriage argued that precisely because of the importance of family to the stability of the polity, the federal government should assume control of marriage laws in order to protect the republic from inevitable decay and dissolution. In a 1905

message to Congress, President Roosevelt endorsed national action with respect to divorce on the basis that:

> The institution of marriage is, of course, at the very foundation of our social organization, and all influences that affect that institution are of vital concern to the people of the whole country. There is a widespread conviction that the divorce laws are dangerously lax and indifferently administered in some of the States, resulting in a diminishing regard for the sanctity of the marriage relation.[358] As Stein has shown, this sentiment was articulated in debates concerning polygamy legislation and proposed marriage amendments as well. Thus, a strong federal remedy to polygamy was purportedly necessary because "the family is the foundation of human governments,"[359] and "republican institutions cannot rest on polygamist aristocracy."[360] Similarly, a constitutional amendment banning ***1856** interracial marriage was necessary to declare such unions "prohibited by the fundamental law of the Republic,"[361] and to protect the "social body of this Republic" from interracial marriage.[362]

At the turn of the twentieth century, the issue of whether the federal government should preempt the states in the regulation of divorce and other domestic relations matters remained an "open question," according to one New York newspaper.[363] But it is fair to say that public debates over polygamy, woman suffrage, interracial marriage, and divorce gave rise to heightened and unprecedented awareness of, and disagreement concerning, the proper role of the federal government in the regulation of the family and, concomitantly, the place of the family in the national republic. Opponents of woman suffrage portrayed domestic relations as too important to be entrusted to the "imperial power" of the federal government, thus advocating insulation of the family against the corrupting influences of federal power.[364] Meanwhile, many social conservatives, and others frustrated by the difficulties inherent in a polyglot system of marriage and divorce laws, viewed federal involvement as necessary precisely because of the importance of family in a republic.[365]

With respect to the federalism question, no one side could claim victory in this dispute--polygamy regulation and woman suffrage prevailed, while Congress did very little to address divorce and interracial marriage.[366] But it was in the context

of the debates over these issues that the theory that domestic relations were a special enclave of state sovereignty was formulated as a generally applicable principle of federalism.

***1857** 3. The State Sovereignty Paradigm in the Federal Courts

It comes as little surprise that as reformers and congressmen were debating the propriety of federal regulation of domestic relations at the end of the nineteenth century, the topic also arose in the adjudicative context. In 1890, the Supreme Court weighed in on the role of the federal government in domestic relations in the case Ex parte Burrus. [367] Perhaps because of different institutional concerns of the federal courts, the Supreme Court took a position on federal involvement in domestic relations that varied from the view embraced by those who urged Congress to assume complete control of the regulation of domestic relations.

In Burrus the Court addressed a father's attempt to secure his child's release from his custodial grandparents using the federal habeas corpus statute. [368] The Supreme Court used its opinion in Burrus to announce the principle that "[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 laws of the United States." [369]

> As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of congress, or any treaty of the United States or its constitution. [370]

Burrus introduced into judicial discourse an expansive rendition of the state sovereignty paradigm of domestic relations. And, in contrast to the limited impact of Barber, it cannot be gainsaid that Burrus had a profound impact on the federal courts' role in domestic relations matters. Although Burrus did not involve divorce per se, it was soon interpreted by the Court to bar federal courts from entertaining divorce suits and related matters, such as child custody suits. [371]

***1858** Notably, however, even in the face of Burrus's broad proscription of federal power, the federal judiciary continued to adjudicate various domestic relations

disputes,[372] and influenced the development of divorce law by determining the extent to which state courts would be permitted, and required, to give full faith and credit to divorce and alimony decrees entered by sister state courts.[373] Thus, while Burrus powerfully limited the federal courts' involvement in domestic relations cases, it did not put an end to the federal judiciary's role in domestic relations matters altogether, and certainly did little to explain what kind of domestic relations disputes fell outside federal court jurisdiction. But like the anti-suffragists' insistence that the woman suffrage amendment was an invasion into a sphere of state sovereignty, Burrus presented a sustained and authoritative vision of domestic relations law as a special creature of state law, one that--perhaps even more so than Barber--is cited today as the origin of a limitation on federal courts' authority in cases that touch on domestic relations.[374]

***1859** There is a tendency within modern federalism jurisprudence to present specific allocations of authority between state and federal governments as stable, fixed principles that are divorced from the historical contingencies of ideology and political expediency.[375] But even this broad overview of the genealogy of the state sovereignty paradigm shows that state sovereignty over domestic relations is not--as is often claimed--a transhistoric feature of American federalism. For the first decades of the nation's history, most federal involvement in domestic relations went completely unnoted as such, and the notion that family law was a special enclave of state authority was articulated in specific contexts only, as in the debates over federal authority to regulate slavery and polygamy.

In the latter half of the nineteenth century, as domestic relations law and attendant regulation of women's political participation went through a period of rapid transition, the state sovereignty paradigm was embraced by some in order to stymie federal "intervention" into the home. Opponents of the woman suffrage amendment marshaled the state sovereignty paradigm in an effort to protect the traditional gender order of the household. Around the same time, the Supreme Court employed similar logic--albeit without endorsing a preference for tradition or transition--when it announced a strict limitation on federal authority over "[t]he whole subject of domestic relations of husband and wife, parent and child."[376] By the turn of the century, the state sovereignty paradigm of domestic relations had taken shape in political and legal discourse as a general theory of federalism, applicable as a restraint on federal judicial and legislative action across multiple regulatory contexts.

That the state sovereignty paradigm evolved as a generally applicable theory of federalism does not mean that it was a universally accepted theory, or even a particularly cogent theory. Even as some congressmen argued that a woman suffrage amendment would abrogate state sovereignty over domestic relations, others urged that federal regulation of the family could provide the only solution to the perceived destruction of the traditional household caused by divorce, polygamy, and interracial marriage. This selective invocation of the state ***1860** sovereignty paradigm should come as little surprise, given the federal government's continued involvement in all manner of domestic relations matters in the late nineteenth century. The federal courts continued to resolve domestic relations cases of various sorts, even as Burrus circumscribed their authority in such matters. [377] Through citizenship laws, Civil War pension statutes, and a variety of other programs, Congress continued to regulate certain aspects of domestic relations. [378] And by 1920, whatever influence the state sovereignty paradigm exerted in the debates over woman suffrage had given way to the Nineteenth Amendment. [379] In short, even as the state sovereignty paradigm took shape as a generally applicable theory of federalism, it was selectively invoked, inconsistently applied, and always contested.

Conclusion: Indeterminacy, Federalism, and Domestic Relations

In today's jurisprudence, domestic relations law is identified as an "area of traditional state regulation," [380] and many jurists have attempted to neatly package matters involving, or even related to, family as falling under the exclusive control of the individual states. [381] The state sovereignty paradigm of domestic relations--the result of this process of categorizing and packaging--has been presented as having hallowed roots in the founding era, and as being part of the inherent design of our constitutional order. It ends up, however, that the state sovereignty paradigm is neither historically predetermined, nor an essential feature of our federalism.

The historical sources tell us that even during the era of dual federalism, contemporaries did not translate the general principle of enumerated federal powers into an exclusion of the federal government from matters relating to domestic relations. National legislators of the pre-Civil War period spent considerable effort tending to widows' pension petitions and related legislation. Individual citizenship determinations involved a host of considerations that turned on domestic relations law, and those issues were addressed by Congress and the federal courts, even sometimes at the expense of the states' power to determine the rights, benefits, and consequences of marriage. The federal courts resolved a

wide range of domestic relations issues that arose in federal cases, such as disputes concerning dower, illegitimacy, and marriage settlements. And when such issues arose as ***1861** equitable claims, federal judges followed federal equity principles rather than state law. When viewed together with mounting evidence of the federal government's late-nineteenth and early-twentieth century promulgation of laws and policies relating to the family, [382] evidence of federal involvement in domestic relations during the pre-Civil War era shows that there has never been a point in American history when the states exercised exclusive authority over family law and policy.

The historical sources also tell us that the notion that domestic relations are a special enclave of state regulation did not begin as an uncontested, inherent principle of American federalism. With few exceptions, during the pre-Civil War era, federal involvement in domestic relations generally did not meet with the kinds of federalism objections that it does today. It was later, as debates over polygamy, divorce, interracial marriage, and woman suffrage escalated, that the state sovereignty paradigm developed as a generally applicable federalism theory, and was selectively invoked and ignored to achieve specific regulatory goals. Understood in light of this historical evidence, the state sovereignty paradigm appears to have always functioned as a prescription for federalism, rather than as a description of the actual allocation of federal and state authority.

How might current dialogue concerning federalism and family law be altered by recognition of this revised understanding of the history and basis of the state sovereignty paradigm? Does it matter, and should it matter, that federal lawmakers and judges have always played a role--however varied--in the regulation and adjudication of domestic relations matters? Does the history of federal involvement in domestic relations provide any insight into the values that should inform modern federal family regulation? And does the fact that the state sovereignty paradigm has always been a contested and inconsistently applied theory of federalism shed light on the wisdom of relying on it to resolve current debates regarding the proper allocation of power between state and federal governments?

The most obvious implication of the evidence of an early tradition of federal regulation of domestic relations is that it liberates us from the bold claims to historical precedent that are common in current advocacy discourse and federalism jurisprudence--especially those claims that marshal the legitimacy and importance of the founding and early national periods as their reference point. Some will contend that a revised historical understanding is of minimal significance because, in general, history should have little weight in the project of discerning or creating

a modern federalism doctrine. The fact is, however, that for better or worse, the historical pedigree of the state sovereignty paradigm ***1862** has become a mantra repeated in all manner of discussions, debates, hearings, and judicial opinions concerning federal involvement in domestic relations. Thus, assuming--as I believe it is safe to do--that a substantial number of jurists, legislators, and commentators will continue to look to history for answers to questions regarding the proper allocation of authority between state and federal actors, historical inquiry remains a relevant endeavor. Of course, recognizing that the state sovereignty paradigm finds little support in the historical sources does not help us with the much more difficult task of determining how federal and state powers may be best marshaled--independently or in collaboration--to develop laws and policies that address the needs and problems of modern families. Rather, acknowledging the tradition of federal family regulation opens a space for that important work to take place or, at the very least, requires modern-day federalists to provide a principled defense of the continued vitality of the state sovereignty paradigm.

By arguing that the early historical sources do not provide support for the state sovereignty paradigm, I do not mean to suggest that history should play no role whatsoever in an analysis of the proper allocation of authority between state and federal governments with respect to the family. Indeed, one of the benefits of reclaiming the history of early federal involvement in the family is that we can begin to understand the various ways that federal actors participated in the recognition and gradual disestablishment of status hierarchies enshrined in domestic relations laws and policies. In debates over family pensions, for example, early federal legislators recognized that women's marital status--their status within families and the status of their families-- implicated important republican values, and that those values (as understood at the time) were to shape Congress's creation and administration of federal family war pensions. Likewise, the relatively broad enforcement of married women's separate estates by federal courts challenged the hierarchies and inequalities created by the common law rules governing marital property, and may have very well helped encourage the disestablishment of those rules by state legislators through enactment of the married women's property acts.

Obviously, these examples do not provide any specific direction for the resolution of modern disagreement concerning the proper or optimal role of the federal government in current family law and policy. And, of course, we should not to be too sanguine about the progressive influence of republicanism (or liberalism, or any other political theory) on married women's status, or that of other family dependents, during the pre-Civil War period. [383] Nevertheless, early federal family ***1863** regulation provides an alternative to the commonplace vision of family law

as a site of "truly local" values and norms. In this alternative model of federalism, the federal government plays a part in the ongoing process of evaluating how laws and policies relating to family are sometimes in tension with basic liberal values. Thus, for example, to the extent that VAWA and FMLA concerned domestic relations, both fit comfortably within this tradition as laws that were intended to redress gender discrimination that, at least in part, grew out of social practices and laws relating to domestic relations: in the case of VAWA, interspousal immunity with respect to domestic violence, and in the case of FMLA, gender-based allocation of care-giving responsibilities within families. [384]

Just as important, acknowledging the fact that the state sovereignty paradigm of domestic relations is an invented theory of federalism that developed as an expedient tool in the context of political debate helps us to identify--and perhaps avoid--some of the potential pitfalls of formalist federalism. First, we can understand the indeterminate application of the state sovereignty paradigm--as evidenced by the protean nature of the domestic relations exception, [385] and the inchoate limits on Congress's authority to pass legislation that bears on domestic relations [386] --to be a consequence of the paradigm's improvised character. For example, seen as part of a longer contest over the proper place of domestic relations in our federal system, the dissonance between Hibbs and Morrison, described at the outset of this article, appears as part of a pattern of incongruence between the federal government's long-standing involvement in domestic relations, and the simultaneous insistence that such involvement interferes with the states' special sovereignty. While this explanation offers no solution to the indeterminacy that typifies this area of federalism jurisprudence, it offers a counternarrative to any suggestion that current indeterminacy is simply a result of the expansion of federal regulatory power into "areas of traditional state sovereignty," such as domestic relations.

Second, because the localist vision of the family developed as an ad hoc response to dramatic changes in the legal and social norms governing domestic relations--and was never formulated as a rational, ***1864** principled doctrine--there is no reason to expect that present or future application of the state sovereignty paradigm will adhere to predictable rules or standards. Inconsistency and indeterminacy in the application of the state sovereignty paradigm are troublesome for litigants and lawmakers, who are left without guidance as to the proper scope of federal judicial and legislative authority in matters relating to domestic relations. Such indeterminacy is also worrisome because of its tendency to give the Supreme Court, and, to a lesser extent, lower federal courts, standardless discretion in determining the metes and bounds of federalism. For example, in deciding Hibbs and Morrison,

the Court was unrestrained by any precedent that consciously differentiates between proper and improper applications of the state sovereignty paradigm. As a consequence, the justices were free to invoke or ignore the purported tradition of deference to the states without offering any explanation as to why Congress may sometimes enact laws bearing on domestic relations, but is in other instances precluded from doing so.

Of course, we could develop a theory to explain why certain federal forays into family law and policy are deemed acceptable, and others are not (and there have been some laudable attempts to do just that).[387] However, given that the application of the state sovereignty paradigm has proven very difficult to control, it would be naive to think that any theory would actually have a moderating influence.[388] Moreover, and perhaps more important, any explanatory theory would provide a post hoc explanation for differentiated assessment of the propriety of federal domestic relations regulation that the Court itself has been unwilling to embrace as a limitation on its own authority to circumscribe the powers of Congress and the lower federal courts. In other words, by maintaining a broad and indeterminate conception of the state sovereignty paradigm, the Court has preserved its own discretion and power at the expense of predictability, transparency, and accountability.

Paradoxically, then, the state sovereignty paradigm undermines many of the principles of governance touted by proponents of formalist federalism. This state of affairs does not promote deference to state governments. Rather, it promotes creative gerrymandering of categories and rhetorical grandstanding by federal actors. These considerations should give us pause before we embrace the state sovereignty paradigm of domestic relations as a standard by which federal lawmaking and adjudicative actions are judged or, especially, invalidated. Certainly, the state sovereignty paradigm should not be ***1865** used to erase a history of federal regulatory and adjudicative practices that helped to dismantle--if incrementally--exclusionary practices and status-based hierarchies that, for many decades, emanated from local domestic relations laws and policies, and, by many accounts, still do.

Footnotes

a1 J.D., Yale Law School, 2000. I am grateful to Emily Bazelon, John Langbein, Judith Resnik, Robert Knapp, Jed Shugerman, and especially Reva Siegel for reading and commenting on drafts of this article at various stages. I also thank my colleagues at Emery Celli Brinckerhoff & Abady for their supportiveness while I completed this project. Ayla Ercin, Mark Jefferis, and Allison Rosendahl provided valuable research assistance.

1 538 U.S. 721 (2003).

2 See, e.g., Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank of Fla., 527 U.S. 627 (1999) (holding that Section 5 of the Fourteenth Amendment does not empower Congress to abrogate state sovereign immunity from claims under patent infringement statute); Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that Congress may not use its Article I, Section 8 powers to override state sovereign immunity from private suits in state court); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress exceeded its powers under Section 5 of the Fourteenth Amendment in passing the Religious Freedom Restoration Act); Printz v. United States, 521 U.S. 898, 929 (1997) (observing that Congress may not use its Commerce Clause authority to "commandeer" state executives); New York v. United States, 505 U.S. 144, 175-76 (1992) (announcing that Congress may not use its Commerce Clause authority to "commandeer" state legislatures to enact or enforce a federal program).

3 29 U.S.C. §§ 2612(a)(1)(C), 2617(a)(2) (2000); see also Hibbs, 538 U.S. at 725.

4 See U.S. Const. amend. XIV, § 5; Hibbs, 538 U.S. at 736 ("Because the standard for demonstrating constitutionality of a gender-based classification is more difficult to meet than a rational-basis test...it was easier for Congress to show a pattern of state constitutional violations.") (citations omitted).

5 528 U.S. 62 (2000) (holding that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from damages suits by private individuals for violations of the Age Discrimination Act).

6 531 U.S. 356, 374 (2001) (holding that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from damages suits for violations of the Americans with Disabilities Act).

7 See Kimel, 528 U.S. at 80-81; Garrett, 531 U.S. at 364.

8 Hibbs, 538 U.S. at 731.

9 See Violence Against Women Act of 1994, P.L. 103-322, §§ 40001-40703, 108 Stat. 1796, 1903-53 (1994) (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

10 William H. Rehnquist, Chief Justice's 1991 Year-End Report on the Federal Judiciary, 24 Third Branch 2 (1992).

11 529 U.S. 598 (2000).

12 Id. at 617-18.

13 Id. at 615.

14 Jill Hasday has provided a searching analysis of the role of history as a primary justification of what she terms the "localist" vision of domestic relations. See Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. Rev. 1297 (1998). As she argues:
Localists do not simply rely on history for additional support; they absolutely depend on it to establish family law as uniquely, inherently, and exclusively local, one arena that the federal government categorically may not enter in an age in which the boundaries of federal jurisdiction are otherwise ambiguous and subject to change.
Id. at 1301.

15 See sources cited in infra notes 21-23, 52; see also Hemon v. Office of Pub. Guardian, 878 F.2d 13, 14 (1st Cir. 1989) ("[G]iven 'the long history of state predominance and federal deferral in family law matters,' the federal government lack[s] a substantive interest in child custody matters sufficient to justify an assertion of federal supremacy in that area.") (citations omitted); Rollins v. Metro. Life Ins. Co., 863 F.2d 1346, 1350 (7th Cir. 1988) ("By long tradition, family law is almost exclusively the domain of the individual states; there is, for all practical purposes, no federal domestic relations law. These facts militate in favor of looking to state law rather than fashioning a uniform federal law in the present situation."); Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1112 (1st Cir. 1978) ("[T]here is a long history of state predominance

and federal deferral in family law matters."); Bromley v. Bromley, 30 F. Supp. 2d 857, 862 (E.D. Pa. 1998) (finding "no reason to deviate from this history [of federal abstention] and move domestic litigation to federal court" where British petitioner sought certain parental rights relating to his American children pursuant to an international treaty); Dibbs v. Gonsalves, 921 F. Supp. 44, 52 (D.P.R. 1996) ("To continue this action would also be contrary to the tradition followed by federal courts in abstaining from exercising jurisdiction over domestic relation controversies."); In re Greene, No. 98-35663DWS, 1999 WL 138905, at *8 (Bankr. E.D. Pa. Mar. 5, 1999) ("Matters of family law are by tradition within the domain of the states, and federal courts are generally adverse to taking on these issues: alimony, maintenance, or support are not standard debtor/creditor situations, but involve important issues of family law.").

16 Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 1006 (2000) [hereinafter Resnik, Trial as Error]; see also Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 Yale L.J. 619, passim (2001) [hereinafter Resnik, Categorical Federalism]; Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682, 1717-30 (1991) [hereinafter Resnik, Naturally].

17 Although proponents of the state sovereignty paradigm often employ originalist rhetoric, there is little evidence that the framers of the Constitution understood domestic relations to occupy a special place in the structure of the federal system as compared with any other area of substantive law. Thus, while Alexander Hamilton referred to "the law of descent" as an example of an area of substantive law that would remain under the control of the states, see The Federalist No. 33, at 204 (Alexander Hamilton); see also The Federalist No. 29, at 183 (Alexander Hamilton), there appears to be little in the constitutional debates that would distinguish the law of descent or any other aspect of domestic relations law from other areas of substantive law. See Hasday, supra note 14, at 1320-24 & n.95. Hasday has observed that

> the Founding's great discourse on federal-state relations hardly speaks to family law and the arguments identifying it as particularly local....Family law may have been firmly local at the nation's inception, but the Framers did little to distinguish family law [from other areas of law]....Instead, the men who participated in the original constitutional debates left most subjects to the states and devoted scant attention to the family.

Id. at 1320. Sylvia Law similarly concludes that "[s]ilence, absolute and deafening, is the central theme of the original founders' discussion of women and families....Virtually nothing in the original constitutional debates directly addresses the situation of women and families, or illuminates the difficult issues we confront today." Sylvia A. Law, The Founders on Families, 39 U. Fla. L. Rev. 583, 586 (1987).

18 See, e.g., Nancy F. Cott, Public Vows: A History of Marriage and the Nation (2000); Hendrik Hartog, Man and Wife in America: A History 258-77 (2000) (analyzing the role of federal full faith and credit jurisprudence in the development of divorce law); Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 998-1003 (2002) (analyzing late-nineteenth and early-twentieth century arguments made in opposition to a federal woman suffrage amendment on the basis that a federal amendment would violate state sovereignty over domestic relations); Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of African American Marriages, 11 Yale J.L. & Human. 251 (1999) (examining the role of Reconstruction-era federal officials in the enforcement of marriage laws and norms of monogamy among recently emancipated freedmen); Hasday, supra note 14, at 1355-70 (analyzing Reconstruction-era federal regulation of polygamy and freedmen's family rights); Resnik, Naturally, supra note 16, at 1746-51 (analyzing the role of gender in federal courts jurisprudence of the late nineteenth century).

19 Nancy Cott's thoroughgoing analysis of the ways in which national law and policy has shaped marriage as an institution, including during the pre-Civil War period, is especially notable in this respect. See Cott, supra note 18, at 56-76.

20 In other words, though most agree that the Reconstruction Amendments "sanctioned intrusions by Congress into...spheres of autonomy previously reserved to the States," Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Rehnquist, J.), new federalists continue to look to the founding era and the early national period to determine the proper allocation between federal and state authority. See Richard H. Fallon, Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1143-45 (1988); cf. Vicki C. Jackson, Holistic Interpretation: Fitzpatrick v. Bitzer

and Our Bifurcated Constitution, 53 Stan. L. Rev. 1259, 1273-75 (2001). Indeed, Norman Spaulding has argued that the recent federalism decisions have perilously erased the history of the Reconstruction era and the structural changes brought about by the Reconstruction Amendments. See Norman W. Spaulding, Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory, 103 Colum. L. Rev. 1992, 2006 (2003) ("I contend that federalism, in the strong sense the Court has endorsed, is viable only as an expression of monumental historical consciousness--that is to say, only as the result of memory work predicated on forgetting the structural significance of the Civil War and Reconstruction Amendments."). Because of the significance assigned to history in the modern evaluation of the federal government's role in the regulation of domestic relations, for purposes of this article I put aside the important issue of whether history should inform present allocations of authority in our federalist system. For critical analyses of the role of history in legal reasoning, see Laura Kalman, The Strange Career of Legal Liberalism (1996); Robert Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017 (1981); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980).

21 See United States v. Morrison, 529 U.S. 598, 617-18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local. In recognizing that fact we preserve one of the few principles that has been consistent since the Clause was adopted.") (citations omitted). The turn to history is not always a turn to originalism, however, and it is often simply articulated as a need for the "return" of domestic relations matters to the states and a declaration of the inherent value of "tradition"-- phrases that sound with a nostalgia for a bygone understanding of federalism. The opening sentence of the Fourth Circuit's en banc opinion in the Morrison litigation provides a good example of such nostalgia: "We the People, distrustful of power, and believing that government limited and dispersed protects freedom best...." Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 825-26 (4th Cir. 1999) (en banc), aff'd sub nom, United States v. Morrison, 529 U.S. 598 (2000); see id. at 826 ("[W]e are constrained to conclude [that VAWA] simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded."). A district court considering the constitutionality of VAWA prior to Morrison expressed a similar view, even as it affirmed VAWA's constitutionality under Commerce Clause jurisprudence. The court stated:

While there is no doubt that violence against women is a serious matter in our society, this particular remedy created by Congress, because of its extreme overbreadth, opens the doors of the federal courts to parties seeking leverage in settlements, rather than true justice. The framers of the Constitution did not intend for the federal courts to play host to domestic disputes and invade the well-established authority of the sovereign states.

Seaton v. Seaton, 971 F. Supp. 1188, 1190-91 (E.D. Tenn. 1997).

22 Anne C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1821 (1995); see also id. at 1825 ("[S]tate authority over family law is an essential feature of our liberal constitutional order. Implicit in the design of the Constitution is the understanding that the states have responsibility for developing a shared moral vision of the good family life."). Dailey does not support the complete exclusion of the federal government from domestic relations, see id. at 1880-88, but her historical characterization has been used as support for a very strong version of the state sovereignty paradigm, see Motion for Leave to File Amicus Brief and Amicus Brief of the Center for Marriage Law in Support of Respondent at 21, Lawrence v. Texas, 539 U.S. 558 (2003) (citing Dailey, supra).

23 Dailey, supra note 22, at 1821. Bruce Hafen has offered a similar analysis: "[T]he Founders consciously accepted the regulation of family life embodied in the civil legislation...[and] did not view individual rights arising from family relationships--though there were many--as political liberties needing protection by the Bill of Rights." Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 571 (1983).

24 Throughout this article, I use the term "republicanism" broadly to refer to the concept of government founded on consent--as opposed to a monarchy or aristocracy--and the often divergent views regarding the qualities essential to a republican polity. As Rogers Smith explains, "[r]epublicanism became in America the key term announcing one's allegiance to 'popular' government founded on consent and to the Revolution, as opposed to aristocracy and monarchy founded on natural allegiance and the mixed British constitution." Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History 82 (1997).

25 Critics of exclusive state authority over family law have correctly observed that the history of localism is rife with egregious abuses of power and have noted that the state sovereignty paradigm of domestic relations has been invoked in debates concerning a host of federal legislative initiatives, such as opposition to the Missouri Compromise, opposition to freedmen's right to marry, and opposition to woman suffrage. See Siegel, supra note 18, at 1031; Hasday, supra note 14, at 1400; Resnik, Naturally, supra note 16, at 1751; see also infra Part IV.

26 Ankenbrandt v. Richards, 504 U.S. 689, 692 (1992) (quoting Ex parte Burrus, 136 U.S. 586, 593-94 (1890)).

27 See infra notes 37-42 and accompanying text.

28 See infra notes 72-74 and accompanying text.

29 See U.S. Comm'n on Civil Rights, The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution 22-23 (Clearinghouse Pub. No. 68, June 1981) (defending the proposed Equal Rights Amendment against the charge that it would interfere with the states' historic power to regulate domestic relations); Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearing on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 95th Cong. 179 (1978) (letter of Phyllis Schlafly) (arguing that the "ERA is the centerpiece of the women's lib movement for more Federal control over our lives, lesbian privileges to teach in the schools and have child custody, government-funded abortions, and Federal child-care to replace mother-care").

30 See infra notes 200-02, 325-30, 367-74 and accompanying text.

31 See, e.g., Thompson v. Thompson, 484 U.S. 174, 185 (1988) (holding that the Parental Kidnapping Prevention Act does not create a private federal cause of action, observing that domestic relations have "traditionally been the province of the States"); Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1326 (5th Cir. 1994) (observing in the context of ERISA preemption analysis that "[f]ederal respect for state domestic relations law has a long and venerable history" and that "[w]hen courts face a potential conflict between state domestic relations law and federal law, the strong presumption is that the state law should be given precedence" because "the law of family relations has been a sacrosanct enclave carefully protected against federal intrusion"); Rollins v. Metro. Life Ins. Co., 863 F.2d 1346, 1350 (7th Cir. 1988) (in the course of interpreting ERISA provision, observing that "[b]y long tradition, family law is almost exclusively the domain of the individual states; there is, for all practical purposes, no federal domestic relations law. These facts militate in favor of looking to state law rather than fashioning a uniform federal [rule]"). The domestic relations exception has also been invoked as a basis for abstention in cases that otherwise fall under the courts' federal question jurisdiction. See, e.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981); Bergstrom v. Bergstrom, 623 F.2d 517, 520 (8th Cir. 1980); Huynh Thi Anh v. Levi, 586 F.2d 625, 632-34 (6th Cir. 1978); Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2d Cir. 1967).

32 See 542 U.S. 1, 26 (2004) ("When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.") (citing Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)).

33 Although the Chief Justice has repeatedly endorsed a broad application of the state sovereignty paradigm of domestic relations in the context of federal court jurisdiction, in a concurring opinion in Elk Grove, 542 U.S. at 32-35 (Rehnquist, C.J., concurring), he took a narrow view of Ankenbrandt and related case law.

34 See, e.g., New York v. United States, 505 U.S. 144, 168 (1992) ("[W]here the federal government compels States to regulate, the accountability of both state and federal officials is diminished."); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992) ("Federalism serves to assign political responsibility, not to obscure it."); Deborah J. Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 61 (1988) ("[I]f the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens.").

35 See Morrison, 529 U.S. at 641-45, 648 & n.8 (Souter, J., dissenting) (discussing the rise and fall of the categorical approach to federalism in pre-New Deal Commerce Clause jurisprudence and modern Tenth Amendment jurisprudence).

36 See id. at 615-16 (reasoning that even if violence against women has an economic impact, federal regulation of such violence is not permissible under the Commerce Clause); United States v. Lopez, 514 U.S. 549, 577 (1995) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."); Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (finding a judge-made exception to the federal diversity jurisdiction statute that "divests the federal courts of power to issue divorce, alimony, and child custody decrees").

37 Morrison, 529 U.S. at 659 (Breyer, J., dissenting). In Morrison, Breyer concludes that under the majority's approach, "substantive limitations will apply randomly in terms of the interests the majority seeks to protect." Id.

38 Frank B. Cross, Realism About Federalism, 74 N.Y.U. L. Rev. 1304, 1306 (1999). Cross argues that "[r]eferencing the concept of federalism pays lip service to tradition and...can be used selectively to advance favored ideological policies." Id. at 1324. In addition to the Supreme Court justices who dissented in Morrison, Judith Resnik is likely the most vocal critic of what Justice Souter labeled "categorical formalism," Morrison, 529 U.S. at 644 (Souter, J., dissenting); id. at 640 (observing that "categorical exclusions [in federalism jurisprudence] have proven as unworkable in practice as they are unsupportable in theory"), and what Resnik calls "categorical federalism." Resnik argues that categorical federalism

> is inaccurate as a description of current practices,...undermines the ability to hold actors politically accountable,...disserves federations to assume that any single level of government is a consistent source of certain sorts of social change...[and] does special harm to those seeking to alter gender relations.

Resnik, Categorical Federalism, supra note 16, at 625; see also Resnik, Trial as Error, supra note 16, at 1003-11; Resnik, Naturally, supra note 16, at 1740-50. For an empirical analysis of the ideological application of federalism by the Court, see Sue Davis, Rehnquist and State Courts: Federalism Revisited, 45 W. Pol. Q. 773 (1992).

39 As originally introduced, VAWA's civil rights remedy would have applied to a broader range of violence against women. However, partially in response to federalism-based criticisms of the bill, Congress limited the remedy to those cases of violence where plaintiffs could show that the violence was "due...to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1) (2000). Congress also prohibited concurrent jurisdiction over any state law claims involving alimony, divorce, or child custody, see id. § 13981(d), (e)(4), and prohibited any VAWA actions brought in state court from being removed to federal court, 28 U.S.C. § 1445(d) (2000). For discussions of the legislators' efforts to address criticism that early forms of VAWA would improperly involve the federal government in domestic relations matters, see Victoria F. Nourse, Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy, 11 Wis. Women's L.J. 1 (1996); Brief of Law Professors as Amici Curiae in Support of Petitioners at 1-3, United States v. Morrison, 529 U.S. 598 (2000).

40 See, e.g., Hearing on Domestic Violence: Hearing Before the Sen. Comm. on the Judiciary, 103d Cong. (1993); Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Sen. Comm. on Labor and Human Resources, 101st Cong. (1990); Women and Violence: Hearing Before the Sen. Comm. on the Judiciary, 101st Cong. (1990); see also Morrison, 529 U.S. at 629-31 & nn. 2-8 (Souter, J., dissenting) (listing Congress's findings relating to domestic violence and violence against women generally).

41 See, e.g., Hearing on Domestic Violence: The Need to Concentrate the Fight Against an Escalating Blight of Violence Against Women: Hearing Before the Sen. Comm. on the Judiciary, 103d Cong. 16 (1993) (statement of James Hardeman, Manager, Counseling Department, Polaroid Corp.); Violence Against Women: Fighting the Fear, Examining the Rise of Violence Against Women in the State of Maine and in Other Rural Areas: Hearing Before the Sen. Comm. on the Judiciary, 103d Cong. 13-17 (1993) (testimony of Lisa); Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong. 55-58 (1992) (testimony of Jane Doe of New York City); Violence Against Women: Victims of the

System: Hearing on S. 15 Before the Sen. Comm. on the Judiciary, 102d Cong. 239-41 (1991) (statement of Elizabeth Athanasakos, National President, National Federation of Business and Professional Women, Inc.); S. Rep. No. 102-197, at 53 (1991) (noting studies reporting that almost 50 percent of rape victims lose their jobs or must quit because of the severity of the crime).

42 For discussions of federalism-based criticism of VAWA, see Siegel, supra note 18, at 1025-30; Resnik, Categorical Federalism, supra note 16, at 626-29; Nourse, supra note 39, at 13-18; Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2196-201 (1996) [hereinafter Siegel, Rule of Love].

43 See, e.g., 29 U.S.C. § 2601(a)(2) (2000) (finding that "it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members...."); see id. § 2601(a)(5) (finding that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women...."); id. §2601(b)(1) (listing among the purposes of FMLA, "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity...."); Parental and Medical Leave Act of 1987: Hearings on S. 249 Before Subcomm. on Children, Family, Drugs and Alcoholism of the Sen. Comm. on Labor and Human Relations, 100th Cong. 440 (1987) (hearing testimony that employers generally award family leave to women, hence "rob[bing] the baby of a father's nurturing influence,... [and] perpetuat[ing] the stereotype that it is the mother's sole responsibility to raise the child.") [hereinafter Hearings on S. 249].

44 Although federalism emerged as a basis of opposition to FMLA during congressional debates, the fact that the proposed legislation would involve Congress and the federal government in domestic relations appears to have received little if any consideration. For example, an Assistant Attorney General from the Office of Legal Policy testifying in opposition to an early version of FMLA provided a substantial discussion of federalism implications of the bill, but did not at any point suggest that the proposed legislation was inappropriate because it involved Congress in domestic relations. See Hearings on S. 249, supra note 43, at 524-30 (testimony of Stephan J. Markman, Assistant Attorney General, United States Department of Justice, discussing objections to the Parental and Medical Leave Act based on the Tenth, Eleventh, and Fourteenth Amendments).

45 See Brief for the Petitioner at 10-14, Nevada Dep't of Human Res. Servs. v. Hibbs, 538 U.S. 721 (2003) (reciting Congress's focus on the "family-care crisis" as one of the primary purposes of FMLA); Brief for United States at 22, Nevada Dep't of Human Res. Servs. v. Hibbs, 538 U.S. 721 (2003) (noting that FMLA was enacted in part as a response to "stereotypes presuming a lack of domestic, family-care responsibilities for male employees"); Brief for the National Women's Law Center at 5, Nevada Dep't of Human Res. Servs. v. Hibbs, 538 U.S. 721 (2003) (noting that the workplace discrimination targeted by FMLA thwarted "the ability of men to serve a caretaking function").

46 See Hibbs, 538 U.S. at 736 (noting that because FMLA redresses gender discrimination with respect to the award of family leave, "it was easier for Congress to show a pattern of state constitutional violations").

47 The Brief for the United States at 20-21, Nevada Dep't of Human Res. Servs. v. Hibbs, 538 U.S. 721 (2003), articulates this position:
The FMLA's family-care provision...targets lingering and hard to root out effects of manifold state statutes and practices that have limited women's opportunities to participate in the workforce on equal terms, and that perpetuated the stereotypical employer view of women as workers as less reliable employees because they are presumed to be the family care givers.

48 See Hibbs, 538 U.S. at 727-36; United States v. Morrison, 529 U.S. 598, 619-27 (2000). The fact that the Court found FMLA to be a permissible exercise of Congress's Fourteenth Amendment enforcement powers, and found that VAWA was not, has superficial appeal as an explanation for why FMLA's family-policy dimensions did not give rise to the same sorts of federalism criticism as VAWA. Given that constitutional sex equality principles are often used to redress gender stereotypes that derive from women's historically circumscribed roles as wives and mothers, the argument goes, Congress may very well enact laws concerning domestic relations when enforcing

the sex equality commitments of the Fourteenth Amendment. This explanation for the disparate treatment of FMLA and VAWA in terms of family and federalism is ultimately unconvincing. First, notwithstanding the fact that constitutional equality and due process protections are frequently applied in ways that limit the states' authority to regulate the family, not everyone agrees that the state sovereignty paradigm is inapplicable in all instances where constitutional rights are at stake. See, e.g., Nicholson v. Scopetta, 344 F.3d 154, 168 (2d Cir. 2003) (certifying questions to the New York Court of Appeals in federal constitutional challenge to the practices of state child welfare agency, noting the need to "defer to state primacy in areas of traditional state concern, such as family law"). Second, it is not at all clear why Congress's Article I powers--such as its commerce powers--should not be informed by the commitments to gender equality embodied in the Fourteenth Amendment. See Jackson, supra note 20, at 1259. Third, the Court's failure to understand the enactment of VAWA as a legitimate exercise of Congress's Fourteenth Amendment enforcement powers is itself a subject of concern. See Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 Yale L.J. 441, 474-86 (2000).

49 See sources cited in supra notes 26-36 and accompanying text.

50 According to a report prepared by the House Committee on the Judiciary in 1996, "[t]he word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times." H.R Rep. No. 104-664, at 10 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2914; see, e.g., Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6-10 94 Stat. 3569 (1980) (codified in pertinent part at 28 U.S.C. § 1738A (2000)) (extending full faith and credit standard to child custody determinations); Child Support Enforcement Act, 42 U.S.C. §§ 651-69b (2000) (establishing national program to work with states in developing and implementing child support enforcement policies and procedures); Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-07 (2000) (establishing comprehensive federal program directed toward the prevention and treatment of child abuse and neglect); Safe Homes for Women Act of 1994, 18 U.S.C. §§ 2261-66 (2000) (making domestic abuse a federal crime when the perpetrator crosses state lines).

51 For recent opinions in which federal judges have entertained Commerce Clause challenges to a federal statute on the basis that it involves the federal government in domestic relations, see United States v. Cummings, 281 F.3d 1046 (9th Cir. 2002) (rejecting a Morrison-based constitutional challenge to the International Parental Kidnapping Crime Act); United States v. Monts, 311 F.3d 993 (10th Cir. 2002) (rejecting a Morrison-based constitutional challenge to the Child Support Protection Act (CSRA)); United States v. Lewko, 269 F.3d 64 (1st Cir. 2001) (same); United States v. Faasse, 227 F.3d 660, 672 (6th Cir. 2000), rev'd en banc, 265 F.3d 475 (6th Cir. 2001) (invalidating the CSRA as unconstitutional under logic of Morrison); United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997) (rejecting a Lopez-based constitutional challenge to the CSRA); United States v. Holbrook, No. 2:01CR10023, 2001 WL 672058 (W.D. Va. Jun. 15, 2001) (rejecting defendant's argument that under Morrison and Lopez, federal law criminalizing false statements made to firearms dealer violated Commerce Clause where false statement concerned conviction for misdemeanor domestic violence conviction); United States v. Kegel, 916 F. Supp. 1233, 1235 (M.D. Fla. 1996) (upholding the CSRA against a challenge based on the Tenth Amendment and Commerce Clause); United States v. Schroeder, 894 F. Supp. 360 (D. Ariz. 1995), rev'd sub nom, United States v. Mussari, 95 F.3d 787 (9th Cir. 1996) (finding CSRA unconstitutional, citing the states' traditional sovereignty over domestic relations). See also Brief of the States of Washington, Arkansas, Colorado, Massachusetts, Montana, Oklahoma, Utah, Vermont, and West Virginia, as Amicus Curiae in Support of Respondents at 5 n.1, Egelhoff v. Egelhoff, 532 U.S. 141 (2001) (citing Morrison in support of a narrower construction of ERISA's preemption provision). For examples of scholarly consideration of the impact of Morrison on federal statutes that arguably address domestic relations, see Daniel R. Zmijewski, The Child Support Recovery Act and Its Constitutionality After U.S. v. Morrison, 12 Kan. J.L. & Pub. Pol'y 289 (2003); Elizabeth S. Saylor, Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers, 25 Harv. Women's L.J. 57 (2002); David B. Kopel & Glenn H. Reynolds, Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act, 30 Conn. L. Rev. 59 (1997); Joanna S. Liebman, The Underage, the "Unborn," and the Unconstitutional: An Analysis of the Child Custody Protection Act, 11 Colum. J. Gender & L. 407 (2002); Diane McGimsey, Comment, The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole, 90 Cal. L. Rev. 1675

(2002); Ronald Curtis, Note, Does the Commerce Clause Provide Constitutional Refuge for the Child Support Recovery Act of 1992?: United States v. Faasse, 46 How. L.J. 147 (2002).

52 For example, during congressional debates leading to the enactment of the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2000) & 28 U.S.C. § 1738C (2000)), both proponents and critics of DOMA relied on the notion that states have traditionally enjoyed special sovereignty over family regulation to support their respective positions. In support of DOMA, Professor Lynn Wardle provided the following historical explanation:

Since 1789 the broad authority of the states to regulate family relations, and the concomitant absence of virtually any authority of the federal government to directly regulate family relations, has been one of the clearest boundary lines of our federalism. The regulation of family relations historically has been, and as a matter of constitutional law still remains, primarily a matter of state law.

Concerning S. 1740: A More Perfect Union--Federalism in American Marriage Law: Hearing Before Sen. Judiciary Comm., 104th Cong. 28 (1996) (written statement of Professor Lynn D. Wardle). Similarly, Gary Bauer, the President of the Family Research Council, testified in support of DOMA, stating: "We cannot afford to let judges usurp any more power and tyrannize an already besieged moral code." Id. at 23 (statement of Gary L. Bauer, President, Family Research Council). While also relying on a purported history of deference to states in matters relating to domestic relations, Rabbi David Saperstein took an opposing position on DOMA:

As a doctrinal matter, while the proponents purports [sic] to be protecting states' rights and interests, they are, in fact, diluting those rights and interests....[W]ithout exception, domestic relations has been a matter of state, not federal, concern and control since the founding of the Republic.

Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. 205 (1996) (statement of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism). Representative Abercrombie also reasoned from history while urging his colleagues to vote against the pending bill:

If there is any area of law to which States can lay a claim to exclusive authority, it is the field of family relations. How can someone reconcile being for States' rights while at the same time taking away a basic, constitutional right given to States by the Framers of our Constitution?

142 Cong. Rec. H7449 (July 11, 1996) (statement of Rep. Abercrombie). In papers filed in Lawrence v. Texas, defenders of the states' right to criminalize sodomy also invoked the states' traditional sovereignty over domestic relations. See Motion for Leave to File Amicus Brief and Amicus Brief of the Center for Marriage Law in Support of Respondent at 23, Lawrence v. Texas, 539 U.S. 558 (2003) (citing Morrison to support the proposition that state sovereignty over domestic relations protects the states' right to criminalize same-sex sodomy).

53 See Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 3-4 (1985) (describing the wide range of sources for domestic relations law in early-nineteenth century America).

54 As historian Linda Kerber has explained, the founders "radically transgressed inherited understandings of the relationship between kings and men, fathers and sons,...[but] refused to destabilize the law governing relations between husbands and wives, mothers and children." Linda K. Kerber, The Paradox of Women's Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805, 97 Am. Hist. Rev. 349, 351 (1992) [hereinafter Kerber, Paradox]. See generally Linda K. Kerber, Women of the Republic: Intellect and Ideology in Revolutionary America (1980) [hereinafter Kerber, Women of the Republic].

55 See Grossberg, supra note 53, at 3, 15-16 (discussing early-nineteenth-century treatise writing on the subject of domestic relations).

56 See 1 William Blackstone, Commentaries *421-73 (chapters entitled "Husband and Wife," "Parent and Child," "Guardian and Ward"); 2 James Kent, Commentaries on American Law 129-229 (Boston, Little, Brown & Co. 12th ed. 1873) (1827) (chapters entitled "Of Husband and Wife," "Of Parent and Child," "Of Guardian and Ward"); 4 Nathan Dane, A General Abridgement and Digest of American Law 289-311, 363-83, 513-24 (Boston, Cummings, Hillard, & Co. 1824) (chapters entitled "Marriage," "Parent and Child," "Case on Torts: Bastard Children"); Tapping Reeve, The Law of Baron and Femme (New Haven, Oliver Steele 1816). For a discussion of the early American chroniclers' departure from and criticism of Blackstone's articulation of the common law,

see Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York 43-54 (1982).

57 William Blackstone provided the classic articulation of the doctrine of "marital unity":
By marriage, the husband and wife are one person in law: that is, the very being, or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called...a feme-covert...her husband, [is called] her baron, or lord; and her condition during marriage is called her coverture.
1 Blackstone, supra note 56, at *430. As explained by James Kent, "the legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union." 2 Kent, supra note 56, at 129.

58 In discussing the husband's power over his wife, Blackstone explained that because the husband was required to "answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement...." 1 Blackstone, supra note 56, at *444-45; see also Reeve, supra note 56, at 65. For a comprehensive discussion of the husband's right to "correct" his wife through physical "chastisement" in nineteenth-century America, see Siegel, Rule of Love, supra note 42, at 2123-42, 2154-57.

59 1 Blackstone, supra note 56, at *444. Similarly, a married woman could not devise any property to her husband, "for at the time of making [her will] she is supposed to be under his coercion." Id.

60 See 2 Kent, supra note 56, at 155 (noting the exception to the rule that a feme sole may not bring suit without her husband when "the husband was banished, or had abjured the realm, it was an ancient and another necessary exception to the general rule of a wife's disability to...sue and be sued, as a feme sole"). As Linda Kerber has demonstrated, in the late eighteenth century, a married woman risked dismissal of her suit if she proceeded on her own--even when her husband was unavailable to join her in court. See Kerber, Women of the Republic, supra note 54, at 151 & n.27.

61 Reeve explained that "moderate corporal correction...for disobedience..., negligence in his business, or for insolent behavior" was acceptable for "apprentices and menial servants, who are members of his family." Reeve, supra note 56, at 374; see also 1 Blackstone, supra note 56, at *452 (discussing the father's right to "correct his child"); 2 Kent, supra note 56, at 204-05 (observing the father's "right of inflicting moderate correction [on his child], under the exercise of sound discretion"); id. at 261 (noting that a master may give "moderate corporal correction to his servant, while employed in his service"); Timothy Walker, Introduction to American Law 233, 285 (Philadelphia, Nicklin & Johnson 1837) ("The power of the master over the person of the apprentice is similar to that of the parent or guardian. If necessary, he may correct him with moderation, but nothing more.").

62 See James Schouler, A Treatise on the Law of Domestic Relations 345 (Boston, Little, Brown & Co. 1870).

63 See Reeve, supra note 56, at 265. The master could sue third parties for injury to his servant, or for any action that "deprive[d] him of the services of his servant." Charles M. Smith, A Treatise on the law of Master and Servant 78 (Philadelphia, T. & J.W. Johnson 1852). The "familial" nature of the master-servant relationship was recognized in the procedural rule that the master could help his servant bring suit without encountering problems of collusivity ("the crime of maintenance"). See Reeve, supra note 56, at 378.

64 As described by Marylynn Salmon in her study of the women and property law in early America, this common law rule remained in full force in the American states after independence:
After marriage, all of the personal property owned by a wife came under the exclusive control of her husband. He could spend her money, including her wages, sell her slaves or stocks, and appropriate her clothing and jewelry. With regard to real property his rights were almost as extensive. He made all managerial decisions concerning her lands and tenements and controlled the rents and profits.
Marylynn Salmon, Women and the Law of Property in Early America 15 (1986); see also Carole Shammas et al., Inheritance in America from Colonial Times to the Present 36 (1987). Laws governing married women's property

rights, and the various ways that wives-to-be (and usually their fathers) used the law of trusts to escape them, are examined in Part III.C infra.

65 See Kerber, Women of the Republic, supra note 54, at 139-56; Basch, supra note 56, at 43-54.

66 See Shammas, supra note 64, at 27; Stanley N. Katz, Republicanism and the Law of Inheritance in the American Revolutionary Era, 76 Mich. L. Rev. 1, 10 (1977).

67 Jack M. Balkin, The Constitution of Status, 106 Yale L.J. 2313, 2351 (1997).

68 See Stanley N. Katz, Thomas Jefferson and the Right to Property in Revolutionary America, 19 J.L. & Econ. 467, 471-72 (1976); Katz, supra note 66, at 11-17. The preambles of various statutes dismantling primogeniture suggests that concern for equality of inheritance was a common impetus for reform of property and inheritance laws. See, e.g., 1 The Public Acts of the General Assembly of North Carolina ch. 22 (James Iredell ed., F.X. Martin Rev. 1804) (declaring that abolition of primogeniture "will tend to promote that equality of property which is of the spirit and principle of a genuine republic"); Act of Jan. 29, 1794, 2 Del. Laws 1172 (1797) (noting that "it is the duty and policy of every republican government to preserve equality amongst its citizens, by maintaining the balance of property as far as is consistent with the rights of individuals"). But see Shammas, supra note 64, at 66 (questioning the influence of "republican sentiment" on the transformation of American intestacy laws). For a comparison of the views of James Madison and Thomas Jefferson on the subject of republicanizing property laws in America, see Jennifer Nedelsky, Private Property and the Limits of Constitutionalism: The Madisonian Framework and Its Legacy 31-34 (1990).

69 Thomas Jefferson, Writings 44 (Merill D. Peterson ed., 1984).

70 See Basch, supra note 56, at 43-54.

71 See Grossberg, supra note 53, at 3-30 (describing the gradual republicanization of American domestic relations law); Kerber, Women of the Republic, supra note 54, at 139-55 (discussing contemporary recognition of the apparent tension between republican values and coverture).

72 See Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey and the House Republicans to Change the Nation 65-77 (Ed Gillespie & Bob Schellhas eds., 1994) (proposing dramatic changes to Aid to Families with Dependent Children (AFDC) in order "[t]o reverse skyrocketing out-of-wedlock births that are ripping apart our nation's social fabric"). The effort to reform AFDC culminated in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. §§ 601-17 (2000)).

73 141 Cong. Rec. H377-01, H377-01 (Jan. 19, 1995) (statement of Rep. Scarborough).

74 Theda Skocpol explains this common perception of the history of federal welfare policy:
Above all, we have been taught that the U.S. federal government did virtually nothing about public social provision until the Great Depression and the New Deal of the 1930s. Then at last, in a 'big bang' of social reforms that accompanied many extensions of federal power into the country's economic and social life, the United States enacted nationwide social insurance and public assistance policies.
Skocpol, supra note 18, at 3-4.

75 United States v. Lopez, 514 U.S. 549, 577 (1995); id. at 564 (identifying family as an area of traditional state concern); see United States v. Morrison, 529 U.S. 598, 615, 615-16 (2000) ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in Lopez, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce and childrearing on the national economy is undoubtedly significant."); sources cited in supra notes 39-42 (describing federalism objections to VAWA as articulated in legislative debates); see also sources cited in supra note 52 (describing federalism objections to DOMA as articulated in legislative debates).

76 William Glasson's work on military pensions contains the best available overview of the pre-Civil War pension statutes. See William Henry Glasson, History of Military Pension Legislation in the United States (1900). Laura

Jensen's ground-breaking book on pre-Civil War pensions provides a sustained analysis of the early military pension system, and argues that the pension statutes "establish[ed] a vital new source of national-level income assistance for thousands of citizens and a new partner for state and local entities charged with caring for the poor." Laura Jensen, Patriots, Settlers, and the Origins of American Social Policy 3 (2003). John Resch provides a sustained analysis of the imagery and rhetoric that motivated early pension reform in Suffering Soldiers: Revolutionary War Veterans, Moral Sentiment, and Political Culture in the Early Republic (1999). Theda Skocpol's work on Civil War pensions remains the definitive work on early military pensions, but does not focus on the pensions of the pre-Civil War era. See Skocpol, supra note 18, at 105. Linda Kerber has also addressed federal and state Revolutionary War widows' pensions in Women of the Republic, supra note 54, at 87-99.

77 In her review of Revolutionary War widows' pension applications, historian Constance Schulz provides a view into the kind of information regarding widows' marital and childbearing histories that was submitted in support of widows' pension applications. See Constance B. Schulz, Daughters of Liberty: The History of Women in the Revolutionary War Pension Records, 16 Prologue 139, 141, 149 (1984) (observing that widows' pension applications" "shed[] light upon the courtship patterns of poor women, many of them frontier residents either at the time of their marriage or after the peace" and contain important information about "poor women's child bearing experience"); see also text accompanying infra notes 101-13 (examining Congress's consideration of the pension petition of the widow of Captain William White).

78 In 1776, the Continental Congress resolved
[t]hat every commissioned officer, non-commissioned officer, and private soldier, who shall lose a limb in any engagement, or be so disabled in the service of the United States of America as to render him incapable afterwards of getting a livelihood, shall receive, during his life, or the continuance of such disability, the one half of his monthly pay from and after the time that his pay as an officer or soldier ceases.
5 J. Cont. Cong. 702-705 (1776) (Res. of Aug. 26, 1776). In 1780, the Continental Congress also awarded officers a lifetime half-pay service pension. See 18 J. Cont. Cong. 960-62 (Res. of Oct. 10, 1780). The same year, the Continental Congress awarded a seven-year half-pay pension to the widows and orphans of officers. See 17 J. Cont. Cong. 773 (1780) (Res. of Aug. 24, 1780) (resolving to award a seven-year half-pay pension "to the widows of those officers who have died, or shall hereafter die in the service").

79 See National Genealogical Society, Index of Revolutionary War Pension Applications in the National Archives (1976) (cataloging veterans' and widows' Revolutionary War pension applications) [hereinafter Index]. John Resch estimates that the Revolutionary War pension files in the National Archives contain approximately 88,000 applications for pensions and bounty lands, including 23,000 widows' pension applications. See Resch, supra note 76, app. A., at 203. For examples of congressional consideration of veterans' and family pension applications, see American State Papers: Documents, Legislative and Executive, of the Congress of the United States: CLAIMS 5, at No. 1 (report to Congress concerning the petition of Revolutionary War widow Ruth Roberts) (1790) (Wash. D.C., Gales & Seaton, 1834) [hereinafter Am. State Papers: Claims]; Am. State Papers: Claims 30, at No. 1 (1791) (report to Congress on the petitions of the widows and orphans of eight Revolutionary War officers); H.R.J. 2d Cong., 1st Sess. 440 (Oct. 27, 1791) (considering petitions of widows or orphans of six Revolutionary War officers); H.R.J. 2d Cong., 1st Sess. 500 (Jan. 31, 1792) (considering petitions of a number of veterans, widows, and orphans of the Revolutionary War); H.R.J. 26th Cong., 1st Sess. 281-87 (Feb. 5, 1840) (considering petitions of a number of veterans, widows and orphans of the Revolutionary War); H.R.J. 27th Cong., 2d. Sess. 519 (Mar. 12, 1842) (granting approximately thirty-five petitions of veterans, widows, and orphans of the Revolutionary War); see also sources cited in infra note 80.

80 See, e.g., Am. State Papers: Claims 9, at No. 4 (1790) (report by the Secretary of War recommending denial of claims by artillery artificers for a pension of the amount awarded to Army officers); Am. State Papers: Claims 22, at No. 11 (1790) (report by the Secretary of War recommending against a pension for officers in the service of state troops); H.R.J. 2d Cong., 1st Sess. 500 (Jan. 31, 1792) (considering the petition of Temperance Holmes, widow of David Holmes, "late a Physician and Surgeon in the Connecticut Line, praying that the allowance granted to the widows of those who died in service, may be extended to her"); H.R.J. 2d Cong., 1st Sess. 537 (Mar. 16, 1792) (considering the petition of Ann Gibson, widow of a colonel "who died of his wounds received in the late action against the Indians...praying that the allowance granted to the widows and orphans of officers who

died in the service of the United States, during the late war, may be extended to herself and children"); H.R.J. 2d Cong., 2d Sess. 662 (Jan. 5, 1793) (passing and referring to the Senate "[a]n engrossed bill to make compensation to the widows and orphans of certain persons, who were killed by Indians, under the sanction of flags of truce"); Am. State Papers: Claims 70-71, at No. 35 (1793) (report by the Secretary of War recommending that Congress grant the petitions of several widows of the Battle of Bunker's Hill, even though their husbands were not in the service of the Continental Line at the time of death); Am. State Papers: Claims 192, at No. 77 (1797) (committee report recommending denial of petitions by the heirs and representatives for award of land grants promised in 1776 to officers and soldiers of the Revolutionary War); 1 American State Papers: Documents, Legislative and Executive, of the Congress of the U.S.: Indian Affairs 621, at No. 73 (1797) (Wash. D.C., Gales & Seaton, 1832-1834) (report of the Committee on Claims regarding the petition of the widow of Scolacuttaw, a Cherokee chief killed by frontier settlers); Am. State Papers: Claims 196-97, at No. 85 (1797) (report of the Committee on Claims, recommending denial of the petition of Anna Welsh, widow of a Navy captain); Am. State Papers: Claims 222, at No. 108 (1800) (report of the Committee on Claims, recommending denial of the petition of Susannah Fowle, widow of a deceased Army officer); Am. State Papers: Claims 282, at No. 140 (1803) (report of the Committee on Claims, recommending denial of the petition of Ann Elliot, widow of an Army contractor who was slain by a party of Indians on the basis that "[t]he provision made by law for the relief of widows and orphans is not sufficiently broad to embrace cases of this description"); Am. State Papers: Claims 508, at No. 341 (1817) (Committee on Claims recommendation to grant the petition of the widow and orphans of Arnold Henry Dohrman, a merchant who rendered services to the United States during the Revolutionary War); H.R.J. 16th Cong., 2d Sess. 236-37 (Feb. 15, 1821) (considering the pension petition of Catharine Gale, wife of lieutenant colonel of the Navy who had been dismissed due to "mental derangement"); H.R.J. 19th Cong., 2d Sess. 108 (Jan. 3, 1825) (considering the petition of Deborah Davis, "representing that her husband was a pensioner under the law of 1818; that, after the passage of the law of 1820, his name was stricken from the role of pensioners; that he is now very old and infirm, and subject to mental derangement; she prays that his name may be again inscribed on the pension role"); 3 American State Papers: Documents, Legislative and Executive, of the Congress of the United States: Naval Affairs 24, at No. 332 (1827) (Wash. D.C., Gales & Seaton, 1834-1861) (recommendation by the Committee on Naval Affairs to grant the pension application of a widow whose husband had died as a prisoner of war during the War of 1812, rejecting determination of Navy Department) [hereinafter Am. State Papers: Naval Affairs]; H.R.J. 20th Cong., 2d Sess. 211-12 (Jan. 27, 1829) (considering the pension petition of the widow of John Paulding, one of the captors of Major Andre, a British accomplice of Benedict Arnold); 4 American State Papers: Documents, Legislative and Executive, of the Congress of the United States: Military Affairs 282, at No. 436 (1830) (Wash. D.C., Gales & Seaton, 1832-1861) (recommending denial of petition of the widow of a murdered superintendent of the United States armory at Harper's Ferry) [hereinafter Am. State Papers: Military Affairs]; 4 Am. State Papers: Naval Affairs 93, at No. 472 (1832) (recommending expansion of the Navy pension fund to extend to certain widows not contemplated under then-current statutes); 7 Am. State Papers: Military Affairs 926-27, at No. 777 (1838) (recommendation that Congress grant the application for pension enhancement submitted by the widow of a deceased Army officer). For analyses of the early national petition system, see Gregory A. Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Fordham L. Rev. 2153 (1998); Stephen A. Higginson, Note, A Short History of the Right to Petition for the Redress of Grievances, 96 Yale L.J. 142 (1986).

81 See, e.g., Act of Mar. 16, 1802, ch. 9, § 15, 2 Stat. 132, 135 (1802) (providing a five-year pension to the widows and orphans of any commissioned officer in "the military peace establishment of the United States," and further providing that "in the case of death or intermarriage of such widow before the expiration of the said term of five years, the half pay...shall go to the child or children of such deceased officer"); Act of Apr. 10, 1812, ch. 54, § 2, 2 Stat. 704 (1812) (providing a five-year pension for the widows and orphans of the officers and soldiers, "volunteers or militia," who were killed "in the late campaign on the Wabash against the hostile Indians," and further providing that "in the case of the death or intermarriage of such widow, before the expiration of the term of five years, the half pay, for the remainder of the term, shall go to the child or children of such deceased officer or soldier...."); Act of Jan. 20, 1813, ch. 10, 2 Stat. 790, 790-91 (1813) (providing a five-year pension for the widows or orphans of officers of the Navy who die in service, and further providing that "in the case of the death or intermarriage of such widow, before the expiration of the term of five years, the half pay for the remainder shall go to the child or children of such deceased officer"); Act of Aug. 2, 1813, ch. 40, 3 Stat. 73, 74 (1813)

(providing a five-year pension to "the widows and orphans of militia slain...in the service of the Unites States," and further providing that "in the case of the death or intermarriage of such widow, before the expiration of the term of five years, the half pay for the remainder shall go to the child or children of such deceased officer"); Act of Mar. 4, 1814, ch. 20, § 1, 3 Stat. 103 (1814) (providing a five-year pension to the widows or orphans of "any officer, seaman or marine serving on board any private armed ship or vessel bearing a commission of letter of marque," or in the Navy, who die in service, and further providing that "in the case of the death or intermarriage of such widow before the expiration of the term of five years, the half-pay for the remainder of the term shall go to the child or children of the deceased"); Act of Apr. 16, 1816, ch. 55, § 1, 3 Stat. 285, 285-86 (1816) (providing a five-year pension to widows and orphans of soldiers who died in the War of 1812, and further providing that "in the case of death or intermarriage of such widow before the expiration of said five years, the half pay for the remainder of the time shall go to the child or children of said decedent"); Act of Mar. 3, 1817, ch. 60, 3 Stat. 373, 373-74 (1817) (providing a five-year pension to widows and orphans of Navy seamen or officers who died as a consequence of injuries sustained in the line of duty, and further providing that "in the case of the death or intermarriage of such widow, before the expiration of the said term of five years, the half pay for the remainder of the term, shall go to the child or children of the deceased"); Act of June 30, 1834, § 1, ch. 134, 4 Stat. 714 (1834) (extending the term of a previously enacted pension for the widows of naval officers and seamen, "provided that every pension hereby granted shall cease on the death or marriage of such widow"); Act of July 4, 1836, ch. 362, § 3, 5 Stat. 127, 128 (1836) (providing a five-year pension to widows of officers and soldiers who died in the service of the United States prior to April 20, 1818).

82 As the recent works of Jensen and Resch have ably demonstrated, attitudes toward military pensions varied significantly during the first three decades of the nation's existence. Many were concerned that any pension system was an unrepublican class-based benefits program, while others believed that republican values mandated pensions and that the existing system was miserly and discriminatory. See Jensen, supra note 76, at 65 (observing that many identified military service pensions with a standing army, and viewed both as an affront to republican values); id. at 72-79 (describing shifts in attitudes toward military pensions); Resch, supra note 76, at 5, 65-92 (describing the image of the "suffering soldier" as a trope in pro-pension rhetoric, and arguing that it was "the catalyst for legitimizing the Continental Army as a republican institution, and for reversing the Founders' policy against service pensions").

83 Under the early design of the Revolutionary War pension system, claims were evaluated by the states and pensions paid out of state coffers, to be reimbursed by the national treasury upon application to Congress (an early form of "cooperative federalism," to be certain). See Glasson, supra note 76, at 15; Index, supra note 79, at xi-xii.

84 See Act of Mar. 23, 1792, ch. 11, §§ 2-4, 1 Stat. 243, 243-44 (1792). In 1789, and then again in 1792, Congress officially obligated the federal government to honor the pensions promised by the Continental Congress. See id. § 1; Act of Sep. 29, 1789, ch. 24, 1 Stat. 95, 95 (1789). Officers and soldiers who were "disabled in actual service" received a half-pay pension for life, while widows of officers who died in service received a seven-year half-pay pension under the terms established in 1780. See 17 J. Cont. Cong. 773 (1780) (Res. of Aug. 24, 1780); § 1, 1 Stat. at 243-44; see also sources cited in supra note 78 and accompanying discussion.

85 See Hayburn's Case, 2 U.S. (1 Dall.) 408 (1792).

86 Responding to Hayburn's Case, Congress modified the administration of the pension system in 1793. See Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793). Under the 1793 Act the federal judiciary was still required to assist in the administration of pension claims by taking the oaths of individual claimants living in their judicial district. See id. § 1. That evidence was transmitted to the Secretary of War, who then presented the evidence to Congress for final decision making. See id. § 2. Congress slightly revised the process of reviewing Revolutionary War pension applications in 1803, but retained the basic framework of the 1793 Act. See Act of Mar. 3, 1803, ch. 37, 2 Stat. 242, 243 (1803). In the 1803 Act, Congress gave the Secretary of War final decision making with respect to Revolutionary War invalid pensions, see id. § 2, but Congress retained final decision-making authority with respect to many other military pensions, see, e.g., Act of Apr. 10, 1806, ch. 25, §§ 1-5, 2 Stat. 376, 377 (1806); Act

of Mar. 3, 1815, ch. 80, 6 Stat. 153 (1815) (directing the Secretary of War to place approximately thirty-seven veterans on the pension roles); see also sources cited in supra note 80.

87 Jensen, supra note 76, at 11; see id. at 54 ("Arguments over the provision [of federal service pensions] were thus an integral part of the American people's attempt to construct the meaning of citizenship in the new nation."); see also Resch, supra note 76, at 5 (observing that the image of the "suffering soldier" prevalent in debates over military pensions "helped to shape national identity during the congressional and public debate over the pension bill [of 1818][and]...reinforced the elevation of the common man and the spread of democracy....Yet, it also retained the republican ideal of civic virtue").

88 See, e.g., sources cited in supra notes 79-80.

89 See Jensen, supra note 76, at 50 (observing that service pensions, as contrasted with disability pensions, were believed to be a prelude to a standing army); id. at 53-54, 57-58, 76 (examining objections to proposed pension legislation on the basis that expansion of the pension system would create unjust inequality); Resch, supra note 76, at 4 (observing that "the Revolutionary generation's ideological distrust of a standing army" informed the resistance to service pensions). Congressmen also complained that expanding the pension system would bankrupt the national government. See, e.g., 3 Annals of Cong. 216 (1791) ("If every man who had suffered in the cause of America was to be relieved in proportion to his losses and distresses, the whole revenue of the United States would be drained before one half of the claimants could taste the bounty of Congress, &c.").

90 31 Annals of Cong. 196 (1818) (statement of Sen. Goldsborough); see Resch, supra note 76, at 85-89, 93-95 (examining the rhetoric of republicanism and gratitude that typified pro-pension advocacy by and for the veterans of the Revolutionary War).

91 31 Annals of Cong. 538 (1818) (statement of Rep. Comstock) (advocating invalid pensions for the officers of the Army wounded in the War of 1812).

92 Oliver Oldschool, To Readers and Correspondents, 4 Port Folio 340 (Sept. 1814) (3d series).

93 Act of Mar. 18, 1818, ch. 19, §1, 3 Stat. 410, 410 (1818). For a discussion of the legislative debates leading to the enactment of the Pension Act of 1818, and the important ideological shift in the reasoning behind military pensions that Act represented, see Resch, supra note 76, at 99-118.

94 See Glasson, supra note 76, at 70 (calculating that on the eve of the Civil War, "[t]he aggregate annual value of [federal military pensions] was $958,000, and the actual expenditure during the fiscal year ending June 30, 1861, was $1,072,000"). I calculated the inflation-adjusted figure using a widely available inflation calculator at http://www.westegg.com/inflation. Because the U.S. government did not begin collecting data currently used to calculate inflation until 1913, the calculation of the inflation-adjusted value of money prior to 1913 is necessarily somewhat speculative.

95 See Jensen, supra note 76, fig. 3.9, at 118.

96 See sources cited in supra notes 79-80.

97 See, e.g., 33 Annals of Cong. 396 (1818) (statement of Rep. Simkins) (arguing against a five-year extension of the pension granted to widows and orphans of the War of 1812 militia on the basis that, inter alia, it would "weaken the spirit of industry and enterprise"); id. at 408 (statement of Rep. Butler) (arguing against a five-year extension of the pension granted to widows and orphans of the War of 1812 militia on the basis that the extension would result in "discrimination between the families of the militia and of the regulars").

98 The Index of Revolutionary War Pension Applications in the National Archives provides the following description of the pension application process for widows:
Generally the process required an applicant to appear before a court of record in the State of his or her residence to describe under oath the service for which a pension was claimed. A widow of a veteran was required to provide information concerning the date and place of her marriage. The application statement or "declaration," as it was

usually called, with such supporting papers as property schedules, marriage records, and affidavits of witnesses, was certified by the court and forwarded to the official....
Index, supra note 79, at xii; cf. Schulz, supra note 77, at 141, 149 (noting that women often submitted depositions in order to prove their marriage to a deceased Revolutionary War soldier or officer, and that widows' pension applications generally contained information regarding the widow's childbearing history).

99 See, e.g., Act of Feb. 28, 1793, ch. 17, §2, 1 Stat. 324 (1793); Am. State Papers: Claims 70-71, at No. 35 (1793) (report by the Secretary of War recommending that Congress grant the petitions of several widows of the Battle of Bunker's Hill, even though their husbands were not in the service of the Continental Line at the time of death).

100 See, e.g., Am. State Papers: Claims 196-97, at No. 85 (1797) (report of the Committee on Claims, recommending denial of the petition of Anna Welsh, widow of a captain of the marines); Am. State Papers: Claims 222, at No. 108 (1800) (report by the Committee on Claims, recommending denial of the petition of Susannah Fowle, widow of a deceased Army officer); House Comm. on Claims, 11th Cong., Report on the Petition of Elizabeth Hamilton 3 (Comm. Print 1810); see also sources cited in supra note 80.

101 See 3 Annals of Cong. 213 (1791).

102 See id.; Am. State Papers: Claims 25, at No. 15 (1791) (discussing the petition of the Widow of Captain William White).

103 See 3 Annals of Cong. 213 (1791).

104 See 17 J. Cont. Cong. 773 (1780) (Res. of Aug. 24, 1780) (noting that "in case of her death or intermarriage, the said half pay [pension] be given to the orphan children of the officer dying as aforesaid, if he shall have any left").

105 See sources cited in supra note 81. This rule appears to have been modified slightly only once. In 1837, Congress provided that a Revolutionary War widow would not be deprived of a pension under the Act of July 4, 1836, ch. 362, § 3, 5 Stat. 127 (1836), "in consequence of her having married after the decease of the husband for whose services she may claim...: Provided, That she was a widow at the time [that the Act of July 4, 1836] was passed." Act of Mar. 3, 1837, ch. 42, § 1, 5 Stat. 187, 187 (1837). Thus, after 1837, re-widowed Revolutionary War widows were pension-eligible.

106 See 17 J. Cont. Cong. 773 (1780) (Res. of Aug. 24, 1780); see also sources cited in supra note 81.

107 See Am. State Papers: Claims 25, at No. 15 (1791); 3 Annals of Cong. 213 (1791).

108 3 Annals of Cong. 213 (1791) (statement of Rep. Smith). Similarly, Representative Sedgwick argued:
[T]hat the claim to the annuity accrued to the widow immediately on the death of the officer; that she had a right, from day to day; that, if the contract of Government had been performed, she would have received the whole previous to her marriage. He would therefore move to strike out 'the orphan children,' for the purpose of inserting the name of their mother.
Id. (statement of Rep. Sedgwick).

109 Id. (statement of Rep. Livermore).

110 See id. at 214 (statement of Rep. Williamson) ("[O]n the marriage of the widow she had forfeited her claim, which then devolved to her children; he wished, therefore, the half-pay should go to them."). Representative Bourne similarly explained that:
[B]y the intermarriage (though after the expiration of seven years) the widow had relinquished her claim to the pension: the right she had acquired by the death of her husband, was only what the law calls "chose in action;" it had only accrued to her conditionally; and as she had not reduced it into possession previous to her marriage, she could have no pretensions to it after, as the resolution of Congress expressly says, that if the widow marries, the pension shall go to the children.
Id. at 214 (statement of Rep. Bourne).

111 Id. at 213 (statement of Rep. Ames).

112 Id. (statement of Rep. Williamson).

113 Id. at 215 (statement of Rep. Smith); see also Act of Mar. 27, 1792, ch. 13, 6 Stat. 6 (1792) (awarding the widow and orphans of Captain William White a pension of "seven years' half-pay").

114 Because widows' pensions were awarded for terms of five or seven years, the issue of extension arose frequently. See, e.g., H.R. 37, 15th Cong. (1818) (a bill to extend the duration of pensions awarded to the widows and orphans of the War of 1812 for five years); Act of Jan. 22, 1824, ch. 15, 4 Stat. 4 (1824) (half-pay pensions to widows and orphans of veterans who died in the War of 1812 extended for five additional years); Act of Apr. 9, 1824, ch. 34, 4 Stat. 18 (1824) (five-year pension extension granted to widows and orphans of privateers who died in service to the United States); Act of May 23, 1828, ch. 72, §1, 4 Stat. 288 (1828) (five-year pension extension granted to widows and orphans of naval officers, seamen, and marines who died in the War of 1812); Act of July 7, 1838, ch. 189, 5 Stat. 303 (1838) (granting five-year pension to certain widows of Revolutionary War veterans).

115 See, e.g., Act of Mar. 23, 1792, ch. 11, § 1, 1 Stat. 243 (1792) (extending the statute of limitations on widows and orphans' pensions by two years); Act of May 26, 1824, ch. 190, 4 Stat. 71 (1824) (extending the statute of limitations for pension applications by widows and orphans of privateers who died in service to the United States).

116 See 3 Annals of Cong. 852 (1793) (considering a bill that would expand the class of pension-eligible Revolutionary war widows and orphans); Sen. J., 12th Cong., 1st Sess. 84-85 (Mar. 26, 1812) (considering a bill to expand family pensions to include widows and orphans of "the non-commissioned officers and soldiers of the volunteers or militia" who served in a campaign against the Wabash Indians); Act of Mar. 3, 1837, ch. 42, 5 Stat. 187 (1837) (providing a pension for Revolutionary War widows who had remarried and were re-widowed, but only for the limited period during which they remained unmarried).

117 31 Annals of Cong. 872 (1818); see also H.R. 37, 15th Cong. (1818).

118 Id. at 875-77 (statement of Rep. Southard). Like Representative Southard, Representative Harrison understood that a pension system should reflect the values of republicanism, thus distinguishing American republicanism from European monarchy:

[H]owever true [a principle of economy] may be when applied to monarchies, I deny its correctness when applied to a republic. The strength of a republic consists in the correct principles of its citizens. Money is therefore never misapplied when it is used to disseminate correct principles among the people....Ask [the American ploughman] if he is willing that [the families of fallen soldiers] should be supported from the Treasury, and he will answer, that, although poor, he is just and honest; although not a lettered man, he knows the source of happiness he enjoys; of the immense distance, as to rights, which separates him from the ploughman of Europe--a distance as great as the wide ocean which rolls between them.

33 Annals of Cong. 382 (1818) (statement of Rep. Harrison).

119 Id. at 381.

120 31 Annals of Cong. 873 (1818) (statement of Rep. Johnson) (supporting a bill that would award an additional five-year pension to the widows and orphans of the War of 1812).

121 See sources cited in supra notes 57-70 and accompanying text.

122 Kerber, Women of the Republic, supra note 54, at 11. As Kerber explains:

The woman now claimed a significant political role, though she played it in the home. This new identity had the advantage of appearing to reconcile politics and domesticity; it justified continued political education and political sensibility. But the role remained a severely limited one; it had no collective definition, provided no outlet for women to affect a real political decision. If women were no longer prepolitical, they certainly were not fully political.

Id. at 12.

123 For example, the pension statutes drew distinctions based on whether the widow's husband had served in the militia or the "regular army," and at times excluded families based on the husband's rank, the duration and dates of his service, and whether he died in battle or soon after service. See, e.g., Act of Mar. 23 1792, ch. 11, § 2, 1 Stat. 243, 244 (1792) (recognizing the service pensions for Army officers, but not for soldiers); Act of Mar. 18, 1818, ch. 19, 3 Stat. 410 (1818) (awarding service pensions to veterans who served in the Continental Line only, to the exclusion of the militia); 33 Annals of Cong. 408 (1818) (statement of Rep. Butler) (opposing a bill to extend the pensions awarded to widows of the War of 1812 militiamen without also extending the pensions of widows of "the regulars"); Am. State Papers: Claims 18-19, at No. 8 (1790) (report by the Secretary of War recommending denial of the pension application of a former first deputy quartermaster general for a pension equivalent to that awarded a colonel); Am. State Papers: Claims 70-71, at No. 35 (1793) (report by the Secretary of War recommending that Congress grant the petitions of several widows of the Battle of Bunker's Hill, even though their husbands were not in the service of the Continental Line at the time of death); 33 Annals of Cong. 395 (1818) (statement of Rep. Rich) (proposing modification to pension bill to "destroy the distinction in the amount of pension between [families of] the officers and privates" of the War of 1812); 33 Annals of Cong. 376 (1818) (considering bill "allowing half-pay pensions of five years to the widows and orphans of those soldiers enlisted for twelve months, for eighteen months, and of the militia who died within four months after their return home, of sickness contracted while in service").

124 See 8 Annals of Cong. 1240-41 (1798) (considering a Senate proposal to strike a specific provision in a pending bill that would have extended certain pension benefits to the widows and orphans of militia officers).

125 33 Annals of Cong. 378 (1818) (statement of Rep. Harrison). The particular provision under consideration would, inter alia, extend the pension to militiamen and soldiers who had died within four months after returning home. See id. at 376.

126 Id. at 378-79.

127 Id. at 377.

128 Id. at 377-78. Representative Harrison continued, invoking the image of "1,800 families who have contributed more than their proportion; some of them their all for the public service," and admonishing his colleagues that "[y]ou cannot, indeed, restore the husband to the widow, the parent to the child--but you can supply their places to a considerable degree, and, I think that it is your duty to do it." Id. at 378.

129 31 Annals of Cong. 874 (1818) (statement of Rep. Johnson).

130 Cong. Globe (App.), 30th Cong., 1st Sess. 932 (1848) (statement of Rep. Silvester) (supporting an amendment to a pension bill to give all widows who were married to Revolutionary War soldiers prior to the year 1812 benefit of the service pension awarded veterans in 1828).

131 Of course, we should not be too sanguine about Congress's recognition of the parity of widows' claims. For example, it took Congress until 1836 to remedy a fundamental source of class-based family inequality in the Revolutionary War pension statutes by awarding pensions to widows of soldiers. See Act of July 4, 1836, ch. 362, § 3, 5 Stat. 127, 128 (1836); Glasson, supra note 76, at 49.

132 See Mark, supra note 80 at 2185 ("The most important insight we may glean from considering instances of women petitioning....[Is that] [t]he fact that the women petitioned at all meant that they felt they had a right to appeal to public authority for help.").

133 Both Jensen and Kerber have emphasized the relative exclusion of women from the federal pension system. See Jensen, supra note 76, at 87; Kerber, Women of the Republic, supra note 54, at 87-93. I have a slightly more positive view of the pension system's treatment of widows, in part because I include in my analysis Congress's provision of pensions for war widows other than Revolutionary War widows (who, until 1836, were particularly poorly treated under the system).

134 See sources cited in supra notes 26-42 and accompanying text.

135 See U.S. Const. art. I, § 8, cl. 1 (authorizing Congress "[t]o provide for the...general Welfare of the United States"); U.S. Const. art. I, § 8, cl. 12 (authorizing Congress "[t]o raise and support Armies"); U.S. Const. art. I, § 8, cl. 13 (authorizing Congress "[t]o provide and maintain a Navy").

136 28 U.S. 242 (1830).

137 See id. at 244.

138 See id.

139 See id.

140 See id.

141 See The Definitive Treaty of Peace Between His Britannic Majesty and the United States of America, Sept. 3, 1783, U.S.-Gr. Brit., art. 4 [hereinafter Treaty of Peace].

142 See Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., art. 9, 8 Stat. 116 [hereinafter Jay Treaty]; see also infra note 164 and discussion therein.

143 See, e.g., Linda K. Kerber, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship 35-39 (1998).

144 See Smith, supra note 24, at 155-59, 190-94, 228-29.

145 See id. For example, in Collet v. Collet, 6 F. Cas. 105 (C.C.D. Pa. 1792) (No. 3,001), a federal court understood that "the states, individually, still enjoy a concurrent authority upon this subject [of naturalization]; but that their individual authority cannot be exercised, so as to contravene the rule established by the authority of the Union." Id. at 106.

146 See Smith, supra note 24, at 155-59, 190-94, 228-29. For example, in Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817), Justice Marshall observed that Congress's power over naturalizations defeated the states' authority to naturalize citizens. See id. at 269.

147 See, e.g., McLearn v. Wallace, 35 U.S. (10 Pet.) 625 (1836) (considering the right of noncitizens to inherit real and personal property); Levy v. McCartee, 31 U.S. (6 Pet.) 102 (1832) (determining whether descent is possible through an alien mediate ancestor); Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99 (1830) (evaluating whether the Jay Treaty protected an alleged alien's right to inherit real property); Jackson v. Clarke, 16 U.S. (3 Wheat.) 1, 12 n.3 (1818) (reviewing inheritance cases brought pursuant to the Jay Treaty); Campbell v. Gordon, 10 U.S. (6 Cranch) 176 (1810) (analyzing transmission of citizenship to a child through naturalization of parent for purposes of determining child's right to inherit real property); M'Ilvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1808) (evaluating effect of alleged expatriation on citizenship and right to inherit real property).

148 The citizenship status of a married woman was especially important in determining her dower rights, see discussion in infra note 209, because under the common law noncitizens generally could not acquire property by operation of law (e.g., descent or dower). See Sutliff v. Forgey, 1 Cow. 89 (N.Y. Sup. Ct. 1823) (interpreting a New York statute that permitted aliens to purchase land to enable an alien widow to claim her dower in contravention of the common law that barred noncitizens from owning real property); see also Priest v. Cummings, 16 Wend. 617 (N.Y. Sup. Ct. 1837) (holding that an alien wife who was naturalized during marriage was due her full dower in all properties owned by her husband during marriage); Kelly v. Harrison, 2 Johns. Cas. 29 (N.Y. Sup. Ct. 1800) (holding that pursuant to a New York statute, an alien widow could recover dower of those lands her husband acquired prior to the American Revolution). Some states passed statutes altering the common law rule that aliens could not take land by operation of law--an amendment that generally resolved disputes concerning noncitizen wives' dower. For example, in 1791 the State of Maryland enacted a statute which provided that:

[A]ny foreigner may, by deed or will to be hereafter made, take and hold lands within that part of the said territory which lies within this state, in the same manner as if he was a citizen of this state; and the same lands

may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this state; provided, that no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen.
Act of the State of Maryland, Dec. 19, 1791, § 6, An Act Concerning the Territory of Columbia and the City of Washington.

149 Kerber, Women of the Republic, supra note 54, at 134.

150 Id. at 132-36; see also Kerber, supra note 143, at 3-46. Several others have considered the intersection of coverture and citizenship law. See Candice L. Bredbenner, A Nationality of Her Own: Women, Marriage, and the Law of Citizenship 15-44 (1998); Nancy Isenberg, Sex & Citizenship in Antebellum America 7, 21-24 (1998); Nancy F. Cott, Marriage and Women's Citizenship in the United States, 1830-1943, 103 Am. Hist. Rev. 1440, 1455-57 (1998); Joan R. Gundersen, Independence, Citizenship, and the American Revolution, 13 Signs 59 (1987); Kristin Collins, Note, When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright, 109 Yale L.J. 1669, 1682-93 (2000).

151 See Martin v. Commonwealth, 1 Mass. (1 Will.) 347 (1805).

152 See id. at 348-49.

153 See An Act for Confiscating the Estates of Certain Persons Commonly Called Absentees, Apr. 30, 1779, in Mass. Acts and Laws: In the Year of Our Lord 1779, at ch. 10, 233-36 (1779).

154 See Kerber, Women of the Republic, supra note 54, at 133-35.

155 See Martin, 1 Mass. (1 Will.) at 364 (reporter's account of counsel's argument).

156 Id. at 362 (reporter's account of counsel's argument) (emphasis in original).

157 Id. at 370 (reporter's account of counsel's argument).

158 Kerber, supra note 143, at 27.

159 Martin, 1 Mass. (1 Will.) at 390-91 (emphasis in original).

160 Id. at 391.

161 For example, in the 1809 Supreme Court case Kempe's Lessee v. Kennedy, the facts of which were very similar to Martin, the attorney for Mrs. Kempe's lessee argued that a federal court was authorized to vacate a state forfeiture action against Mrs. Kempe because the state court lacked jurisdiction over a feme covert: A husband's "dominion" over the wife under law was so complete upon marriage that she was simply "not an object of the law, and, consequently, the justice who took the inquisition had not jurisdiction as it regarded her." 9 U.S. (5 Cranch) 173, 177 (1809) (reporter's account of counsel's argument) (emphasis added). Though Chief Justice Marshall agreed with the view that married women lacked the volition to act independently of their husbands, he rejected the notion that their legal disability removed them altogether from the jurisdiction of a state forfeiture proceeding. See id. at 186.

162 See id. at 177 (reporter's account of counsel's argument).

163 See sources cited in supra notes 144-46 and accompanying text; sources cited in infra notes 175-83.

164 Under the Jay Treaty of 1794, the national government allowed noncitizens to retain title to property in America that they had owned prior to 1794:
It is agreed that British subjects who now hold lands in the territories of the United States...shall continue to hold them according to the nature and tenure of their respective estates and titles therein...and that neither they, nor their heirs or assigns shall, so far as may respect the said lands...be regarded as aliens.
Jay Treaty, supra note 142.

165 See Shanks v. Dupont, 28 U.S. 242, 251 (1830) (Johnson, J., dissenting).

166 For a discussion of the debates over election of citizenship, also referred to as the "right of expatriation," see Smith, supra note 24, at 153-59 (discussing debates over the right of expatriation during the 1790s and early 1800s); id. at 228-30 (discussing debates over expatriation during the 1850s). On the same day that the Court decided Shanks, it also decided Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99 (1830), which recognized a period of election between the Declaration of Independence and the Treaty of Peace during which those on either side of the conflict could elect British or American nationality. See id. at 121.

167 See Shanks, 28 U.S. at 244.

168 Id. at 248. For the same reason, he concluded that a married woman should not "be bound by an act of removal under [her husband's] authority or persuasion." Id.

169 Id.

170 Justice Story distinguished Martin on factual grounds, reasoning that in Martin "the question was, whether a feme covert should be deemed to have forfeited her estate for an offence committed with her husband, by withdrawing from the state, &c. under the confiscation action of 1779; and it was held that she was not within the purview of the act." Id. Nancy Cott argues that, in fact, the Martin opinion "diverged" from the then-reigning norm of "separation of marital status from citizenship status," and that Shanks later articulated that norm "at the Supreme Court level." Cott, supra note 150, at 1456 n.44.

171 Shanks, 28 U.S. at 248; see also id. at 247 ("[B]y her removal with her husband, [she] was deemed by the British government to retain her allegiance, and to be, to all intents and purposes, a British subject.") (emphasis added).

172 See 1 The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions 358, 362-65 (Leon Friedman & Fred L. Israel eds., 1969). It should be noted that Johnson did not vote as a rank-and-file Republican during his years on the bench, and sided with Chief Justice Marshall in many important opinions regarding congressional power, to the disappointment of Jefferson. See id. at 366-70.

173 As Justice Johnson noted in his dissent:
If the facts be resorted to, and the court is called upon to fix the period of her transit, it would be obliged to confine itself to the act of her marrying against her allegiance. It is the only free act of her life stated upon the record, for from thence she continued sub potestate viri; and if she or her descendents were now interested in maintaining her original allegiance, we should hear it contended, and be compelled to admit, that no subsequent act of her life could be imputed to her because of her coverture; and even her marriage was probably during her infancy.
Shanks, 28 U.S. at 258 (Johnson, J., dissenting).

174 Id. at 253.

175 On this point, Justice Johnson reasoned as follows:
If we were called upon to settle the claims of the two governments [United States and South Carolina] to her allegiance,...we should be obliged to decide that the superior claim was in South Carolina....[T]he constitution and legislative acts of South Carolina, when asserting her independence, must be looked into to determine whether she may not then have modified the rigour of the common law, and substituted principles of greater liberality.
Id. at 259-60.

176 Id.

177 Id. at 251.

178 Id.

179 Id. at 252 (emphasis added); see also id. ("On this subject her own laws and her own courts furnish the only rule for governing this or any other tribunal.").

180 Id. at 253.

181 On this point, Johnson explained:
It is the doctrine of the American court...that the American states were free and independent on the 4th of July 1776. On that day, Mrs. Shanks was found under allegiance to the state of South Carolina, as a natural born citizen to a community, one of whose fundamental principles was that natural allegiance was unalienable; and this principle was at no time relaxed by that state, by any express provision, while it retained the undivided control over the rights and liabilities of its citizens.
Id. at 263.

182 Id. at 262.

183 Johnson emphasized this point rhetorically:
But when did South Carolina renounce the allegiance of Mrs. Shanks? We have the evidence of the states having acquired it; when did she relinquish it? Or, if it be placed on the footing of an ordinary contract, when did South Carolina agree to the dissolution of this contract? Or when did she withdraw her protection, and thus dissolve the right to claim obedience or subjection?
Id. at 257.

184 Kerber maintains that "Story's decision in Shanks v. Dupont opened the door toward a broader conceptualization of the political capacity of married women. The woman with political capacity was a woman who could choose not only her husband but also her political allegiance." Kerber, supra note 143, at 35-39.

185 Priest v. Cummings, 16 Wend. 617, 627 (N.Y. Sup. Ct. 1837); see also Comitis v. Parkerson, 56 F. 556, 562 (C.C.E.D. La. 1893) (citing Shanks to support the proposition that marriage of a female citizen with an alien does not affect her citizenship status).

186 Harrison & Saunders v. Harrison, 20 Ala. 629, 639 (1852).

187 See Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604 (1855).

188 Cong. Globe, 33d Cong., 1st Sess. 170 (statement of Rep. Cutting).

189 Id.

190 Cott, supra note 150, at 1457; see also Bredbenner, supra note 150, at 15-22; Collins, supra note 150, at 1687-88.

191 16 F. 211, 217 (C.C.E.D. Mich. 1883). Not all federal courts gave the 1855 Act such an expansive reading. See Comitis v. Parkerson, 56 F. 556, 562 (C.C.E.D. La. 1893).

192 Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228, 1228 (1907).

193 See An Act Relative to the Naturalization and Citizenship of Married Women (The Cable Act), ch. 411, §§ 3, 6-7, 42 Stat. 1021, 1021-22 (1922), repealing Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228, 1228 (1907).

194 The Gaines Case, 9 So. Q. Rev. 274 (1854) (commenting on the 1852 decision of the Supreme Court in the Gaines Case); see also Nolan B. Harmon, Jr., The Famous Case of Myra Clark Gaines (1946); Anna Clyde Plunkett, Corridors by Candlelight (1949); Perry Scott Rader, The Romance of American Courts: Gaines vs. New Orleans, 27 La. Hist. Q. 5 (1944); John S. Kendall, The Strange Case of Myra Clark Gaines, 20 La. Hist. Q. 5 (1937).

195 Gaines v. New Orleans, 73 U.S. (6 Wall.) 642, 699 (1867).

196 See Ex Parte Whitney, 38 U.S. (13 Pet.) 404 (1839); Gaines v. Relf, 40 U.S. (15 Pet.) 9 (1841); Gaines v. Chew, 43 U.S. (2 How.) 619 (1844); Patterson v. Gaines, 47 U.S. (6 How.) 550 (1848); Gaines v. Relf, 53 U.S. (12 How.) 472 (1851); New Orleans v. Gaines, 63 U.S. (22 How.) 141 (1859); Gaines v. Hennen, 65 U.S. (24 How.) 553

(1860); Gaines v. New Orleans, 73 U.S. (6 Wall.) 642 (1867); Gaines v. De La Croix, 73 U.S. (6 Wall.) 719 (1867); New Orleans v. Gaines, 82 U.S. (15 Wall.) 624 (1872); Gaines v. Fuentes, 92 U.S. 10 (1875); Smith v. Gaines, 93 U.S. 341 (1876); Davis v. Gaines, 104 U.S. 386 (1881); Louisiana Nat'l Bank v. Whitney, 121 U.S. 284 (1887); New Orleans v. Christmas, 131 U.S. 191 (1889); New Orleans v. United States ex rel Christmas, 131 U.S. 220 (1889); New Orleans v. Whitney, 138 U.S. 595 (1891). In 1867, the Supreme Court Reporter expressed his self-consciousness about the extraordinary efforts the Court expended on the Gaines Case:

For more than one-third of a century, in one form and another, [the Gaines Case] had been the subject of judicial decision in this court, and the records now--complicated in the extreme--reached nearly eight thousand closely printed pages. If this court, when the case was last heard before it, spoke of it as 'one which, when hereafter some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, will be registered by him as the most remarkable in the records of its courts,' the present reporter will surely be excused, if, in that haste which a speedy publication of current decisions requires, he shall, from such records as he has described,--and in a matter where as to facts, simply, this high tribunal has been always largely divided on the evidence,--have attained much less than perfect accuracy of detail or even than the truest form of presentation generally. As far as he has himself conceived the case from the huge volumes in which it was imbedded--but deprecating reliance upon his statement in any matter affecting property involved in these issues if, contrary to the hope expressed by this court, further question about property is anywhere to be made--the subject, in its outlines and general effect, seemed thus to present itself.

Gaines v. New Orleans, 73 U.S. at 645-46 (reporter's commentary). In the same opinion, the Court expressed its own view of the protracted nature of the litigation:

We shall not attempt to give the history of the litigation, which, it is to be hoped, will be closed by this decision; for the profession is familiar with it by the repeated adjudications of this court. It is enough to say it has been pursued by the complainant through a third of a century, with a vigor and energy hardly ever surpassed, in defiance of obstacles which would have deterred persons of ordinary mind and character, and has enlisted, on both sides, at different periods, the ablest talent of the American bar.

Id. at 699.

197 Id. at 645 (reporter's commentary). For examples of the Court's exhaustive evaluation of the evidence presented, see Patterson v. Gaines, 47 U.S. at 552-75 (reporter's account of the evidence), and id. at 582-602 (analysis of evidence in text of opinion); Gaines v. New Orleans, 73 U.S. at 646-97 (reporter's account of the evidence), and id. at 698-719 (evaluation of the evidence in the text of opinion).

198 Gaines v. Hennen, 65 U.S. (24 How.) 553, 515 (1860).

199 See Elizabeth Urban Alexander, Notorious Woman: The Celebrated Case of Myra Clark Gaines (2001). Alexander provides a wonderfully rich study of Myra Clark Gaines's life and family, the protracted litigation that occupied her during her entire adult life, and the hosts of attorneys and other public figures involved in the lawsuit.

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

201 See, e.g., sources cited in supra note 31.

202 542 U.S. 1, 26-29 (2004). As Naomi Cahn notes, "[h]istorically, the Court's statements concerning the source and scope of the Domestic Relations Exception have provided little guidance for the lower federal courts." Naomi R. Cahn, Family Law, Federalism, and the Federal Courts, 79 Iowa L. Rev. 1073, 1080 (1994).

203 See, e.g., sources cited in supra note 15.

204 See, e.g., cases listed in infra notes 207-17, 223-30 and accompanying text.

205 See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Fed. R. Civ. P. 2 (1938) ("There shall be one form of action to be known as 'civil action.'"). The application of state law in equity cases may have occurred definitively a few years later, when the Supreme Court explicitly applied the Erie rule to federal equity in Guaranty Trust Co. of New York v. York, 326 U.S. 99, 105 (1945), and contended that "[i]n giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to

deny substantive rights created by State law or to create substantive rights denied by State law." The accuracy of Guaranty Trust's portrayal of the federal court's historic equity powers has been questioned. See, e.g., Richard H. Fallon, Jr., et al., Hart and Wechsler's the Federal Courts and the Federal System 710-11 (4th ed. 1996); Laura Fitzgerald, Is Jurisdiction Jurisdictional?, 95 Nw. U. L. Rev. 1207, 1273 n.306 (2001). In 1948, Congress amended the Rules of Decision Act to specify that state substantive law was to be applied as the rule of decision in all "civil actions," thus requiring that state law be applied in actions seeking equitable relief. See An Act to Revise, Codify, and Enact into Law Title 28 of the United States Code, Entitled "Judicial Code and Judiciary," ch. 646, §1652, 62 Stat. 869, 944 (1948). See generally Stephen N. Subrin, How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909 (1987).

206 See Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 81, 81 (1789) ("[T]he laws of the several states...shall be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply."). For discussions of pre-1842 application of state law in federal court, see Fallon, Jr., et al., supra note 205, at 79-81; William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv. L. Rev. 1513, 1515 (1984) (arguing that the "general common law," rather than state law, was often applied in federal courts in the early national period).

207 Federal courts routinely construed wills after they had been proved in probate court. See, e.g., Beard v. Rowan, 34 U.S. (9 Pet.) 301 (1835) (construing the will of John Campbell); Smith v. Bell, 31 U.S. (6 Pet.) 68 (1832) (construing the will of Britain B. Goodwin); Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99, 127-29 (1830) (applying New York law to construe the will of Catherine Brewerton); Wright v. Denn, 23 U.S. (10 Wheat.) 204 (1825) (construing the devise of James Page to his wife); Taylor v. Mason, 22 U.S. (9 Wheat.) 325 (1824) (construing the will of R.B.); Waldron v. Chasteney, 28 F. Cas. 1364, 1365 (C.C.S.D.N.Y. 1847) (No. 17,058) (interpreting effect of a will to resolve dispute regarding real property); Parkman v. Bowdoin, 18 F. Cas. 1213 (C.C.D. Mass. 1833) (No. 10,763) (construing the will of Sarah Bowdoin); West v. Pine, 29 F. Cas. 714 (C.C.D.N.J. 1827) (No. 17,423) (interpreting the will of Deborah West devising real property to her children); cf. McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192, 202-03 (1825) (finding that a will executed in Pennsylvania devising real property in Ohio was invalid as to real property in Ohio unless and until the will was proved in an Ohio state court).

208 See, e.g., Gardner v. Collins, 27 U.S. (2 Pet.) 58 (1829) (determining the descent of the property of Mary Gardener pursuant to state statute); Cook v. Hammond, 6 F. Cas. 399 (C.C.D. Mass. 1827) (No. 3,159) (applying state law in resolution of intestacy dispute).

209 Dower was a marital property rule recognized in common law and equity that gave the widow the right to one-third of the real property that her husband owned, either at death or at any time during the marriage (or one-half of such real property if the marriage was childless). See Herbert v. Wren, 11 U.S. (7 Cranch) 370, 376-77 (1813) (noting that both courts of law and courts of equity have jurisdiction over claims for dower, and resolving that a widow may not take both her dower and a devise of real property from her husband, but must choose between the two). For additional federal cases involving widows' dower rights, see Johnson v. Vandyke, 13 F. Cas. 888, 893 (C.C.D. Mich. 1855) (No. 7,426) (rejecting the argument by widow that the retroactive application of an 1846 Michigan statute limiting the dower rights of out-of-state widows violated the federal Constitution, but limiting the retroactive effect of the dower statute, thus allowing the out-of-state widow to collect dower); Robison v. Codman, 20 F. Cas. 1056, 1059 (C.C.D. Me. 1831) (No. 11,970) (rejecting wife's claim to dower in lands held by the husband in trust); Hall v. Savage, 11 F. Cas. 252, 253 (C.C.D. Mass. 1826) (No. 5,944) (finding that a wife's dower is not defeated unless the deed contains "words to express such intention" to release dower); Stegall v. Stegall, 22 F. Cas. 1226, 1227 (C.C. Va. 1825) (No. 13,351) (holding that an adulterous wife had no claim to dower in deceased husband's estate, but recognizing her right to a distributive share under Virginia law); Powell v. Monson & Brimfield Manuf'g Co., 19 F. Cas. 1228, 1230 (C.C.D. Mass. 1824) (No. 11,357) (noting that a widow's right to dower includes improvements made to property); Powell v. Monson & Brimfield Manuf'g Co., 19 F. Cas. 1218, 1222 (C.C.D. Mass. 1824) (No. 11,356) (finding that a conveyance of married woman's dower rights must conform to the formalities of the state statute, lest married women, who "are not often sufficiently well acquainted with the practical business of life," be taken advantage of). See also sources cited in infra note 223 and accompanying text.

210 Where the wife predeceased the husband, but first bore a child with him, the doctrine of curtesy gave the husband a life estate in all real property to which his wife had title during coverture. See Reeve, supra note 56, at 89. In other words, while marriage itself gave a husband an absolute claim to his wife's chattel, the husband's property rights in the wife's real property were perfected with the birth of a child. See, e.g., Barr v. Galloway, 2 F. Cas. 903 (C.C. Ohio 1839) (No. 1,037) (finding that entry on wild land is not necessary for husband to claim as tenant by the curtesy); Stoddard v. Gibbs, 23 F. Cas. 126 (C.C.D.R.I. 1832) (No. 13,468) (determining whether a husband is entitled to a life estate, as tenant by the curtesy, of land of which his wife held a fee in reversion pursuant to Rhode Island statute); Cook v. Hammond, 6 F. Cas. 399, 409 (C.C.D. Mass. 1827) (No. 3,159) (Story, J.) (holding that a Massachusetts statute providing for the equal distribution of property among children rather than primogeniture or double share for eldest son applies to remainders, such as dower and curtesy).

211 See, e.g., Jewell v. Jewell, 42 U.S. (1 How.) 219 (1843) (Taney, C.J.) (evaluating the legitimacy of husband's alleged undisclosed first marriage to another woman in order to resolve an action for ejectment brought by the second wife against the children of the husband's alleged first wife); Rose v. Niles, 20 F. Cas. 1188, 1191 (D.C.S.D.N.Y. 1849) (No. 12,050) (finding that a woman purported to be the wife of the defendant must first overcome the presumption of a legal marital relationship before testifying on behalf of the defendant); see also infra Part III.C.2 (discussing the Gaines Case).

212 See McCool v. Smith, 66 U.S. (1 Black) 459 (1861) (rejecting application of statute securing inheritance rights of nonmarital children in light of the relevant common law prohibitions); Gregg v. Tesson, 66 U.S. (1 Black) 150 (1861) (analyzing application of the laws governing the rights of nonmarital children in civil law and common law jurisdictions); Jewell, 42 U.S. (1 How.) at 219; Brewer's Lessee v. Blougher, 39 U.S. (14 Pet.) 178, 200 (1840) (determining that, pursuant to state statute, illegitimate children of incestuous relationship are able to inherit from their mother, in contravention of the common law); see also infra Part III.C.2 (discussing the Gaines Case).

213 As explained by the Pennsylvania Supreme Court, the strict rules regarding a married woman's conveyance of her property rights were intended to protect the wife against the husband's coercions:

> The subordinate and dependent condition of the wife, opens to the husband such an unbounded field to practice on her natural timidity, or to abuse a confidence, never sparingly reposed in return for even occasional and insidious kindness, that there is nothing, however unreasonable or unjust, to which he cannot procure her consent. [Hence,] [t]he policy of the law should be, as far as possible, to narrow, rather than to widen, the field of this controlling influence.

Watson v. Mercer, 6 Serg. & Rawle 49, 50 (Pa. 1820); see also Hepburn v. Dubois, 37 U.S. (12 Pet.) 345, 375 (1838) (refusing to enforce conveyance of real property by feme covert where woman not subject to privy examination by judicial officer, out of husband's presence); Lane v. Dolick, 14 F. Cas. 1077 (C.C.D. Ill. 1854) (No. 8,049) (finding that an affirmation by feme covert that she was conveying dower in husband's real property is insufficient to convey her interest in her own estate under Illinois law); Raverty v. Fridge, 20 F. Cas. 319 (C.C.D. Ohio 1843) (No. 11,587) (stating that the failure of deed to conform to exact statutory requirements for conveyance by feme covert is insufficient to invalidate deed); Manchester v. Hough, 16 F. Cas. 572, 572 (C.C.D.R.I. 1828) (No. 9,005) (noting that the common law of New England gives a feme covert the right to convey her real estate by deed with the assent of her husband); Durant v. Ritchie, 8 F. Cas. 118, 122 (C.C.D. Mass. 1825) (No. 4,190) (recognizing that by the law of Massachusetts, a feme covert may convey her estate by deed executed by herself and her husband); Talbot v. Simpson, 23 F. Cas. 644, 646 (C.C.D. Pa. 1815) (No. 13,730) (finding that the conveyance of the wife's property by the husband to a third party conformed with the statutory requirements of privy examination of the wife by a magistrate).

214 See, e.g., Avery v. Doane, 2 F. Cas. 243, 244-45 (D.C.D. Wis. 1854) (No. 673) (narrowly construing Wisconsin's married women's property act, and finding that "[t]he common law has wisely ordered that property acquired by the wife by purchase, with the consent of her husband, is in his possession and under his control, and the act under consideration does not disturb this provision, so essential to the peace and happiness of families"); Callan v. Kennedy, 4 F. Cas. 1073 (C.C.D.C. 1829) (No. 2,319) (recognizing the common law rule that a husband is bound to pay all of wife's debts accrued during coverture).

215 See Bennett v. Bennett, 3 F. Cas. 212 (D.C.D Or. 1867) (No. 1,318) (using writ of habeas corpus to secure custody of child pursuant to state court child custody decree); United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256) (approving of use of federal habeas corpus to remove daughter from custody of grandfather); cf. Ex parte Des Rocers, 7 F. Cas. 537, 537-38 (C.C.D. Cal. 1856) (No. 3,824) (observing that the writ of habeas corpus has been used to restore a bastard child to his mother and "to bring up an infant who had absconded from its father"). But see Ex parte Everts, 8 F. Cas. 909 (C.C.S.D. Ohio 1858) (No. 4,581) (finding that under federal habeas corpus statute, a federal court has no jurisdiction over an application for habeas corpus by the father of a child for the purpose of enforcing his right to custody); In re Barry, 42 F. 113 (C.C.S.D.N.Y. 1844) (denying writ of habeas corpus for return of child to father).

216 See, e.g., Mercer's Lessee v. Selden, 42 U.S. (1 How.) 37, 52-53 (1843) (explaining that if a wife marries while an infant, then the statute of limitations on a claim begins running after she achieves majority, even while married).

217 See, e.g., Rose v. Niles, 20 F. Cas. 1188, 1191 (D.C.S.D.N.Y. 1849) (No. 12,050) (finding that a woman purported to be the wife of the defendant must first overcome the presumption of a legal marital relationship before testifying on behalf of the defendant); Gilleland v. Martin, 10 F. Cas. 384, 384 (C.C.D. Ohio 1844) (No. 5,433) ("[A]s the wife of the plaintiff, [Mrs. Gilleland] is inadmissible as a witness, and her statement [as to his lunacy] is therefore rejected."); Bank of Alexandria v. Mandeville, 2 F. Cas. 614, 615 (C.C.D.C. 1809) (No. 851) (observing that the wife of one partner may not testify against the other partner, as she "has all of [her husband's legal] disabilities").

218 They were also subject to the same inconsistencies in the application of the rule of decision. For example, Stevenson's Heirs v. Sullivant, 18 U.S. (5 Wheat.) 207 (1820), is a notable instance of the disregard federal judges sometimes displayed for state substantive law, even in the context of domestic relations. In that case, which involved the inheritance rights of nonmarital children under Virginia statutory law, the Supreme Court rejected the claim that Virginia statutory law, as interpreted by the highest court of that state, governed its determination of the legitimacy status of a would-be heir to a sizable estate.

219 Recent analyses of federal equity jurisprudence of the early nineteenth century support this conclusion. See Ann Woolhandler & Michael G. Collins, The Article III Jury, 87 Va. L. Rev. 587, 619 (2001) ("[T]he substantive law that applied in federal equity proceedings was frequently either federal or general law rather than state law."); Fitzgerald, supra note 206, at 1263-70 ("Moreover, the 1789 Act authorized the federal judiciary to develop for itself a uniquely federal law of equity. Although Congress required federal courts to follow state rules of decision in common-law cases, absent controlling federal constitutional or statutory authority, they were not so confined when deciding cases in equity."). This conclusion departs from William Fletcher's contention that during the early national period, "as a routine matter, the federal courts sitting in equity followed local state law." Fletcher, supra note 206, at 1529. I agree with Fletcher's observation that in federal court, in suits brought in law or equity, remedies were derived from federal rather than state practice. See id. at 1529 n.72. However, my research does not support the conclusion that, as a general matter, "questions of rights, both at law and equity, [were] determined according to local state law." Id. First, federal judges of the period recognized that federal equity jurisprudence, as opposed to state equity or state common law or statute, provided a "rule of decision" as to equitable claims. In United States v. Howland, 17 U.S. 108, 115 (1819), Justice Marshall clarified that where the remedy in Chancery...is more complete and adequate...in such cases, ascertained with more certainty and facility; and as the Courts of the Union have a Chancery jurisdiction in every state, and the judiciary act confers the same Chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States.

Perhaps as importantly, then, as now, the strict division between rights and remedies upon which Fletcher appears to rely in his analysis of historic federal equity powers may not adequately capture the function of federal remedies in the context of federal equity. As Holmes would explain at the end of the nineteenth century, "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer this way or that way by judgment of the court;-and so of a legal right." Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897). This was especially true in the context of equity jurisprudence, which applied only when the common law failed to supply an adequate remedy. See Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (1789) (noting that equity is not available "in any case where a plain, adequate and complete

remedy may be had at law"). In A Summary of Equity Pleading, published in 1877, Christopher Columbus Langdell warned against interpreting equity as a system of special remedies only, admonishing that "it must not be supposed that equity in modern times is simply a different system of remedies from those administered in courts of law; for there are many extensive doctrines in equity and some whole branches of law, which are unknown to the common-law courts," such as trusts and equity of redemption. C.C. Langdell, A Summary of Equity Pleading at xxv-xxvi (Cambridge, Mass., C.W. Sever 1877). Thus, equity was, in many respects, a separate body of jurisprudential principles that, when applicable, determined the rights and liabilities of the parties before the court. When application of equity was required in a federal court, federal uniform principles governed.

220 An Act for Regulating the Processes of the Courts of the United States, and Providing Compensation for the Officers of Said Courts, and for Jurors and Witnesses (The Process Act of 1792), ch. 36, § 2, 1 Stat. 275, 276 (1792). The Process Act replaced what has been referred to as the Temporary Process Act of 1789, ch. 21, 1 Stat. 93, 93-94 (1789), which provided that "the forms and modes of proceedings in causes of equity...shall be according to the civil law." The Process Act of 1792 also gave the Supreme Court authority to promulgate rules governing equity practice. See The Process Act of 1792, § 2, 1 Stat. at 276. In 1818, the Court explicitly recognized the distinctive authority of federal equity courts in Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 221-22 (1818), and in 1822 exercised its rule-making authority by promulgating a uniform body of equity rules for all federal courts, see Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) at v (1822). The Court adopted a second edition of the Federal Rules of Equity in 1842. See Rules of Practice for the Courts of Equity of the United States, 44 U.S. (3 How.) at xli (1842). For recent analyses of the significance of the Process Act, see Fitzgerald, supra note 206, at 1264-70, Woolhandler & Collins, supra note 219, at 615-20, and Ann Woolhandler, The Common Law Origins of Constitutionally Compelled Remedies, 107 Yale L.J. 77, 104-05 (1997). John T. Cross traces the evolution of the Process Act and the federal courts' equity powers in The Erie Doctrine in Equity, 60 La. L. Rev. 173, 178-81 (1999). The Process Act also received some attention by an earlier generation of scholars, such as Robert von Moschzisker:

[I]n the national courts, there is a chancery jurisdiction which stands quite free of other juridical powers, and...is accompanied by a body of uniform rules and remedies, not only separate and distinct from those of the various states but entirely independent of, and uncontrolled by, the equity systems there prevailing.

Equity Jurisdiction in the Federal Courts, 75 U. Pa. L. Rev. 287, 287 (1927); Howard Newcomb Morse, The Substantive Equity Historically Applied by the U.S. Courts, 54 Dick. L. Rev. 10 (1949) (reviewing the case law interpreting federal courts' distinctive equity powers); see also Erwin C. Surrency, History of the Federal Courts 156 (1987) ("The procedure in equity was entirely different from that followed in the common law side of the federal courts. Because the federal courts were free to completely regulate practice [in equity], it was uniform throughout the United States.").

221 Application of equity was often outcome determinative because, as section 16 of the Judiciary Act of 1789 required, actions at equity were not available in federal courts "in any case where a plain, adequate and complete remedy may be had at law," Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (1789), a provision that memorialized in federal statute the standard limitation on equity courts' powers, see 1 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America 32 (Boston, Hillard, Gray & Co. 1836). However, equity was not always outcome determinative because, for example, just as an action filed in law could be dismissed, so too a bill filed in equity could be dismissed for failure to properly plead an equitable claim. See 3 Blackstone, supra note 56, at *445-46.

222 This is not to suggest that all issues that arose in a case filed in equity were decided pursuant to federal principles. Many cases filed in equity required the courts to resolve both equitable and legal issues. See, e.g., Walker v. Parker, 38 U.S. (13 Pet.) 166 (1839) (in action at equity, applying Maryland law to interpret will to resolve claims of decedent's widow and infant son); Rinehart v. Harrison, 20 F. Cas. 806 (C.C.D.N.J. 1830) (No. 11,840) (in action in equity, interpreting will of wife who predeceased her husband, and applying the common law rule that the husband is the administrator of his wife's estate); Talbot v. Simpson, 23 F. Cas. 644, 646 (C.C.D. Pa. 1815) (No. 13,730) (in action at equity, finding that the conveyance of the wife's property by the husband to a third party conformed with the statutory requirements of privy examination of the wife by a magistrate, and refusing argument that principles of equity mandated different result). And federal courts sitting in equity would retain jurisdiction over a case even when it became clear that equitable relief was not available. See Cathcart v.

Robinson, 30 U.S. (5 Pet.) 264, 278 (1831) ("It is equally well settled that if the [equity] jurisdiction attaches, the court will go on to do complete justice, although in its progress it may decree on a matter which was cognizable at law."). In cases filed in equity where both legal and equitable issues were at stake, federal courts appear to have applied state legal principles to resolve legal claims--unless principles of equity required departure or modification--and applied federal equity to resolve equitable claims. See Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (1789); see infra Part III.C.2 (discussing the application of equity in the Gaines Case); infra Part III.C.3 (discussing the application of federal equity in the enforcement of a marriage settlement).

223 See, e.g., United States v. Duncan, 25 F. Cas. 926, 927 (C.C.D. Ill. 1846) (No. 15,002) (finding a widow indowable, even though she accepted certain property bequeathed to her in her husband's will); Flagg v. Mann, 9 F. Cas. 202 (C.C.D. Mass. 1837) (No. 4,847) (noting that absence of wife's signature on deed releasing her dower does not necessarily invalidate a conveyance of real property by the husband); see also cases cited in supra note 209.

224 See, for example, Gaines v. Chew, 43 U.S. (2 How.) 619 (1844), which is examined at length in Part III.C.2.

225 See, e.g., Taylor v. Taylor, 49 U.S. (8 How.) 183, 209 (1850) (finding undue influence by father and intended husband to defraud the daughter of her inheritance from an uncle); Jenkins v. Pye, 37 U.S. (12 Pet.) 241, 253-54 (1838) (reversing lower court's finding of undue influence, and rejecting the contention that a parent is "disqualified to take a voluntary deed from his child...on account of their relationship," a proposition that the Court found to be "at war with all filial as well as parental duty and affection"); Pye v. Jenkins, 20 F. Cas. 95, 97 (C.C.D.C. 1835) (No. 11,487) ("Among the relations which a court of equity looks upon with a suspicious eye are those of guardian and ward, parent and child, trustee and cestui que trust, tutor and pupil, attorney and client, master and servant....").

226 A trust enabled a donor, often the woman's father, to provide a separate gift to a feme sole that, upon marriage, would not be available to the husband under the common law rules governing marital property. See 2 Story, supra note 221, at 606-11; see, e.g., Pierce v. Turner, 9 U.S. (5 Cranch) 154, 167 (1809) (where husband was a party to marriage settlement conveying wife's land and slaves to trustees, conveyance protects the property from husband's creditors even though the settlement instrument was not recorded); Neves v. Scott, 18 F. Cas. 22, 24 (C.C.D. Ga. 1846) (No. 10,134) (finding that a bilateral marriage settlement is not enforceable against third parties); Picquet v. Swan, 19 F. Cas. 600, 603 (C.C.D. Mass. 1827) (No. 11,133) (upholding wife's separate estate as valid against attempted attachment by husband's creditors); Robinson v. Cathcart, 20 F. Cas. 985 (C.C.D.C. 1825) (No. 11,946), rev'd in part, 30 U.S. (5 Pet.) 264 (1831) (observing that a postnuptial conveyance "executed by a husband in favor of wife, or children, after marriage, which rests wholly on the moral duty of a husband and parent to provide for his wife and issue, is voluntary and void against purchasers"). For a thorough account of the development of married women's separate estates in nineteenth-century England, see Albert V. Dicey, Lectures on the Relation Between Law & Public Opinion in England During the Nineteenth Century 375-98 (1914).

227 See, e.g., Salmon, supra note 64, at xvi (suggesting that the steady improvements of wives' control over property through the separate estate was the initial step toward the married women's property acts); Elizabeth Bowles Warbasse, The Changing Legal Rights of Married Women, 1800-1861, at 36 (1987) (suggesting that equity's various devices for ameliorating the harshness of the common law's marital property rules created a different law of marital property for rich and poor women); Richard H. Chused, Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1409-12 (1983) (arguing that women's equitable trusts had a liberalizing effect on the common law's treatment of married women's property).

228 A marriage settlement made prior to marriage was essentially a prenuptial agreement. Such agreements would have been unenforceable against third parties under the common law, but were enforceable in equity. See 2 Kent, supra note 56, at 173; Warbasse, supra note 227, at 32-34. For federal cases interpreting marriage settlements, see Ladd v. Ladd, 49 U.S. (8 How.) 10, 27 (1850) (observing that conveyance by feme covert of part of her separate estate will be presumed to have been executed absent marital duress); Marshall v. Beall, 47 U.S. (6 How.) 70, 80 (1848) (finding that upon the wife's death, certain trust assets were subject to the laws of distribution and were therefore the property of the husband); Crane v. Morris's Lessee, 31 U.S. (6 Pet.) 598, 614 (1832) (interpreting rights of husband under separate estate established by wife before marriage); Tilghman v. Tilghman, 23 F. Cas.

1243 (C.C.D. Pa. 1832) (No. 14,045) (interpreting marriage settlement provided by the respective fathers of a husband and wife prior to the couple's marriage); Gallego v. Chevallie, 9 F. Cas. 1102, 1105 (C.C.D. Va. 1826) (No. 5,200) (finding that husband's decision not to claim a portion of wife's legacy defeats claim of the husband's creditors). See also infra Part III.C.3.

229 See Warbasse, supra note 227, at 36.

230 See Neves v. Scott, 54 U.S. (13 How.) 268 (1851); Neves v. Scott, 50 U.S. (9 How.) 196 (1850).

231 See infra Part IV.

232 See Stanley N. Katz, The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century, in 5 Perspectives in American History: Law in American History 259 (Donald Fleming & Bernard Bailyn eds., 1971).

233 See id.

234 Gordon S. Wood, The Creation of the American Republic 1776-1787, at 457 (1969). Many scholars have examined the role of equity principles as interpretive tools. See, e.g., Peter C. Hoffer, The Law's Conscience: Equitable Constitutionalism in America (1990); Gary L. McDowell, Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy (1982); William N. Eskridge, Jr., All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806, 101 Colum. L. Rev. 990, 1040-55 (2001) (discussing the framers' and early jurists' attitudes toward and use of equitable interpretive techniques); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 79-85 (2001) (same).

235 See Calvin Woodard, Joseph Story and American Equity, 45 Wash. & Lee L. Rev. 623, 641 (1988) ("Many colonists in America who favored Parliament instead of the Stuart kings became, if not champions of the common law, detesters of the Crown and everything associated with it, including the chancellor and chancery. For purely political reasons, therefore, equity started off in this country with a black eye."). The history of the Parliamentarian--and, later, republican--distrust of equity jurisprudence and courts of equity is well documented. See Shammas, supra note 64, at 34-35 ("Equity law and chancery courts were viewed with suspicion, for they were associated in many people's minds with the machinations of the Tudor and, especially, the Stuart monarchs to destroy certain common law liberties. The dissenter colonies refused to set up these courts."); Amalia D. Kessler, Our Inquisitorial Tradition: Equity, Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 Cornell L. Rev. (forthcoming 2005) (manuscript at 16-19, on file with Cardozo Law Review); cf. Katz, supra note 232, at 265 (arguing that "[i]n the colonial period, at least, Americans objected to chancery courts rather than to equity law"); Chused, supra note 227, at 1369 (arguing that colonial resistance to equity is better understood as a resistance to the chancery courts than equity jurisprudence per se).

236 Baron de Montesquieu, The Spirit of the Laws 75 (Thomas Nugent trans., 1949) (1748).

237 See Salmon, supra note 64, at 11.

238 See id. at 11-12, 82-84. On this point, Woodard explains:
[I]n those colonies, and later states, that had a powerful class of leaders who identified closely with the mother country--such as Virginia, South Carolina, and to a lesser degree New York--the home system was replicated: a separate court of chancery with traditional English chancery jurisdiction... was established. In colonies in which the dominant classes were strongly hostile to England and things English--such as those in New England--the English chancery model was rejected altogether...and equity...was sought in other, perhaps more appropriate ways.
Woodard, supra note 235, at 641.

239 See Warbasse, supra note 227, at 48; see also infra notes 261-68 and accompanying text.

240 See Salmon, supra note 64, at 8-9 (noting that, in order to ensure marital unity, the puritanical element of New England ideology led regional law makers to limit the use of marriage settlements). By the 1810s,

married women's trusts and property rights still lacked full protection under at least four states' legal systems (Massachusetts, Connecticut, Pennsylvania, and Maine). See Warbasse, supra note 227, at 43-45.

241 Dibble v. Hutton, 1 Day 221, 223 (Conn. 1804) (reporter's account of counsel's argument) (emphasis in original).

242 2 Kent, supra note 56, at 165-66. Justice John Bannister Gibson of the Pennsylvania Supreme Court warned that because his state lacked the full protections of equity, "the interests and estates of married women [are] so entirely at the mercy of their husbands...in Pennsylvania. This...is extenuated by no motive of policy, and is by no means creditable to our jurisprudence." Watson v. Mercer, 6 Serg. & Rawle 49, 50 (Pa. 1820).

243 See Shammas, supra note 64, at 57.

244 See, e.g., Neves v. Scott, 50 U.S. (9 How.) 196 (1850).

245 See, e.g., Ladd v. Ladd, 49 U.S. (8 How.) 10, 27 (1850) (observing that conveyance by feme covert of part of her separate estate will be presumed to have been executed absent marital duress).

246 See Warbasse, supra note 227, at 32-33.

247 Lewis v. Baird, 15 F. Cas. 457, 460 (C.C.D. Ohio 1842) (No. 8,316).

248 Id. at 458.

249 See id.

250 U.S. Const. art. III, § 2.

251 See, e.g., Brutus XI, N.Y.J., Jan. 31, 1788, reprinted in XV The Documentary History of the Ratification of the Constitution 512 (John P. Kaminski & Gaspere J. Saladino eds., 1984) (giving federal courts equity jurisdiction would empower the courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter," and would eventually lead to the expansion of the jurisdiction of federal courts). For a discussion of the constitutional debates concerning equity jurisdiction and the development of equity jurisprudence during the early republican period, see McDowell, supra note 234, at 33-47.

252 See Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93-94 (1789).

253 See The Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792); see also supra notes 219-22 and accompanying text.

254 See sources cited in infra note 256.

255 See infra note 264 and accompanying text. The perception of national equity as "foreign law" took hold even in those states where equity jurisprudence formed part of local law. Thus, even though the southern states had fully adopted equity jurisprudence, a southern reviewer of the second edition of Story's Commentaries on Equity--a tome that did at least as much to nationalize and standardize equity jurisprudence as the federal courts--urged "the South to sustain her own law writers, and her own law schools":

> The permanence and prosperity of the South; her domestic rights; her wealth, her religion, her morals and her education, rest on the construction and enforcement of her laws. What will these be? [H]ow construed and how enforced, if taught in foreign schools, and applied by foreign jurists?

E.H. Britton, Commentaries on Equity Jurisprudence, as Administered in England and America, by Joseph Story, 2 So. Q. Rev. 416, 419-20 (1842) (book review).

256 For the Court's early insistence that federal courts apply a distinctive, uniform body of federal equity jurisprudence, see, for example, Poultney v. City of La Fayette, 37 U.S. (12 Pet.) 472 (1838); Livingston v. Story, 34 U.S. (9 Pet.) 632 (1835); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212 (1818); United States v. Howland, 17 U.S. (4 Wheat) 108 (1819).

257 See Ex Parte Whitney, 38 U.S. (13 Pet.) 404 (1839) (holding that, although the Circuit Court's refusal to apply the Supreme Court's rules of equity was clearly error, the proper remedy is reversal, not mandamus); Gaines v. Relf, 40 U.S. (15 Pet.) 9, 11, 16 (1841) (reversing the Circuit Court's holding that "the mode of proceeding in all civil cases...shall be conformable to the code of practice of Louisiana"). In Gaines v. Relf, the Court expressed the view that

[i]t is a matter of extreme regret, that it appears to be the settled determination of the district judge, not to suffer chancery practice to prevail in the circuit court in Louisiana, in equity causes; in total disregard of the repeated decisions of this court, and the rules of practice established by the supreme court to be observed in chancery cases. Id. at 17.

258 According to the Supreme Court reporter:

[Clark] became early an actor in the events of his day and region, a leader of party there, and connected either by concert or by opposition with many public men of the time. To him more than to almost any one, as it seemed, was to be attributed the acquisition by our country of the State of Louisiana. He had been consul of the United States there before the acquisition, and in 1806-8, represented the Territory in Congress; its first representative in that body. Everywhere his associations were of a marked kind, and with people of social importance.

Gaines v. New Orleans, 73 U.S. (6 Wall.) 642, 647 (1867) (reporter's account).

259 Id. at 648 (reporter's account of the evidence).

260 See id. at 649-53 (reporter's account of circumstances surrounding the births of two children to Zulime: Caroline and Myra). There was considerable disagreement as to whether Zulime's first child, Caroline, was actually Clark's child. See, e.g., id. at 703-05 (analyzing contradictory evidence relating to Caroline's status). Clark nevertheless purportedly provided for Caroline in the suppressed will of 1813. See id. at 662 (reporter's account of testimony that Clark's will of 1813 provided "an annuity of $500 to a young female at the north of the United States, named Caroline Des Granges, till her majority, then it was to cease, and $5000 were to be paid her as a legacy").

261 Over the course of the protracted litigation, Myra offered three separate theories under which she was due an inheritance from Clark's estate: (1) If the 1813 will were proven, that document would constitute a recognition of Myra's legitimacy and would, by its terms, entitle Myra to nearly the entire estate of Daniel Clark, see Gaines v. Hennen, 65 U.S. (24 How.) 553, 556 (1860); (2) Even if the will were not proven, if Myra were declared Clark's legitimate child, under Louisiana law she would be entitled to four-fifths of Clark's estate, see Patterson v. Gaines, 47 U.S. (6 How.) 550, 556 (1848) (reporter's account of counsel's argument); La. Civ. Code, art. 22, at 212 (1808); (3) Even if Myra were declared illegitimate, she could claim a portion of her mother's inheritance from Clark, assigned to her by her mother, see Gaines v. Relf, 53 US. (12 How.) 472, 506 (1851). However, if Myra was found to be an "adulterine bastard"--an illegitimate child born from an adulterous relationship--she could not inherit under any theory. See Gaines v. Hennen, 65 U.S. at 619 (Catron, J., dissenting) ("By the laws of Louisiana, as they stood in 1813, the complainant was an adulterous bastard, and could not inherit from her father,... which declare[], that 'bastard, adulterous, or incestuous children, even duly acknowledged, shall not enjoy the right of inheriting their natural father or mother.'") (quoting La. Civ. Code, art. 46, at 156 (1808)).

262 See Gaines v. Chew, 43 U.S. (2 How.) 619, 649-50 (1844) (discussing the availability of the equitable remedy of the implied trust in federal court).

263 See U.S. Const. art. III, § 2; The Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792).

264 See Gaines v. Chew, 43 U.S. at 650 ("Complaint is made that the federal government has imposed a foreign law upon Louisiana. There is no ground for this complaint."); id. ("It is insisted that trusts are abolished by the Louisiana code, and that, consequently, that great branch of equity jurisdiction cannot be exercised in that state."); id. at 630-39 (reporter's summary of counsel's argument concerning the application of federal equity jurisprudence in Louisiana federal courts).

265 Id. at 639 (reporter's account of counsel's argument).

266 See id. (reporter's account of counsel's argument: "How can a citizen of another state claim more rights than a citizen of the state itself [?] The Constitution requires all to be placed upon equal footing, but nothing more").

267 See id. at 637 (reporter's account of counsel's argument: "Our system has been called a mongrel system, but it is good enough for us. It does not follow that laws are unjust because they emanate from a despotic government"). In defense of the Louisiana court system, the executors' attorneys noted that "[t]he district-attorney of the United States has preferred resorting to the state tribunals in a controversy between the government and Bank of the United States, rather than go into the federal court." Id. (reporter's account of counsel's argument). The subject of the relative sophistication of Louisiana's civil law code was also the topic of popular commentary. See B.F. Porter, The Mission of America, 4 Debow's Rev. 108, 119-21 (1847).

268 Counsel for the executors argued:
The position that a state cannot enlarge or restrain the equity power of the Circuit Court of the United States, is laid down too broadly....The clause in the Constitution was inserted, undoubtedly, for the security of impartial justice, but justice administered with uniformity by state and federal tribunals.
Gaines v. Chew, 43 U.S. at 638 (reporter's account of counsel's argument).

269 Id.

270 U.S. Const. art. III, § 2.

271 Gaines v. Chew, 43 U.S. at 633 (reporter's account of counsel's argument).

272 Id. (reporter's account of counsel's argument).

273 Id. (reporter's account of counsel's argument).

274 Id. at 634 (reporter's account of counsel's argument).

275 See Ex Parte Whitney, 38 U.S. (13 Pet.) 404, 408 (1839) ("That it is the duty of the Circuit Court to proceed in this suit according to the rules prescribed by the Supreme Court for proceedings in equity causes at the February term thereof, A. D. 1822, can admit of no doubt.")

276 Gaines v. Relf, 40 U.S. (15 Pet.) 9, 17 (1841). Even Justice McLean, who had been critical of the Court's stand on federal equity jurisprudence early in his career, insisted that Louisiana federal courts come into line:
Complaint is made that the federal government has imposed a foreign law upon Louisiana. There is no ground for this complaint. The courts of the United States have involved no new or foreign principle in Louisiana....Believing that the mode of proceeding there in the state courts, was adequate to all the purposes of justice; and knowing with what pertinacity even forms are adhered to, I was averse to any change of the practice in the federal courts. But I was overruled; and I see in the change only a change of mode, which produces uniformity in the federal courts, throughout the Union.
Gaines v. Chew, 43 U.S. at 650-51.

277 Gaines v. Chew, 43 U.S. at 650.

278 See id. at 646-47 (noting that although probate courts have jurisdiction over the probate and revocation of wills, "it will be a matter for grave consideration, whether the inherent powers of a court of chancery may not afford a remedy where the right [under an unprobated will] is clear").

279 See discussion in supra note 261.

280 The Court conducted a full review of all of the evidence regarding Myra's status in four separate appeals--revisiting and recounting extensive testimony in each opinion. See Patterson v. Gaines, 47 U.S. (6 How.) 550 (1848); Gaines v. Relf, 53 U.S. (12 How.) 472 (1851); Gaines v. Hennen, 65 U.S. (24 How.) 553 (1860); Gaines v. New Orleans, 73 U.S. (6 Wall.) 642 (1867).

281 See Patterson v. Gaines, 47 U.S. at 589-90; Gaines v. New Orleans, 73 U.S. at 702-03 .

282 Gaines v. Chew, 43 U.S. at 625-26 (reporter's account of testimony).

283 See Patterson v. Gaines, 47 U.S. at 559-60 (reporter's account of testimony); id. at 588-59 (assessment of evidence in text of the opinion).

284 See id. at 577-82 (reporter's account of counsel's argument regarding the alleged marriage of Clark and Zulime). Counsel for the executors made a similar argument in Gaines v. Chew, 43 U.S. (2 How.) 619 (1844):
The will of 1811 gave the whole estate to his mother. Where was his wife, if he had one? So the will of 1813 is said to have given his wife nothing, in violation of all duties. The bill itself, therefore, attacks his character. It says also that the complainant was kept in ignorance of her true name until she was nineteen years of age. Her own mother is alleged not to have told her, and yet this mother is said to have been the wife of Clark.
Id. at 636 (reporter's account of counsel's argument).

285 Patterson v. Gaines, 47 U.S. at 578 (reporter's account of testimony).

286 Id. at 597. In Patterson v. Gaines, the Court further explained:
When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is, that the child of the marriage is legitimate, and it will be incumbent upon him who denies it to disprove it, though in doing so he may have to prove a negative.
Id. at 598.

287 See id. at 602.

288 Gaines v. Relf, 53 U.S. (12 How.) 472, 539 (1851).

289 Gaines v. New Orleans, 73 U.S. (6 Wall.) 642, 668-69 (1873) (reporter's account of the probating of the 1813 will in 1856). For a detailed discussion of Myra's extraordinary efforts to have the 1813 will probated, see Alexander, supra note 199, at 214-21.

290 See Gaines v. Hennen, 65 U.S. (24 How.) 553 (1860); Gaines v. New Orleans, 73 U.S. at 669.

291 Gaines v. New Orleans, 73 U.S. at 699; Gaines v. Hennen, 65 U.S. at 590 (noting defendant's arguments "that [Myra's] status of adulterine illegitimacy incapacitates her from taking as legatee under the olographic will of her father, though admitted to probate, as it has been, by the Supreme Court of Louisiana").

292 Gaines v. Hennen, 65 U.S. at 616-17.

293 Gaines v. New Orleans, 73 U.S. at 699.

294 For a discussion of Neves as an example of the Supreme Court's application of federal equity principles to enforce substantive rights, see Fitzgerald, supra note 206, at 1264-66.

295 Neves v. Scott, 50 U.S. (9 How.) 196, 207 (1850).

296 See id. at 210.

297 See Salmon, supra note 64, at 112-15 (discussing the evolution of the enforcement of bilateral or "simple" marriage settlements).

298 See id. at 89-90.

299 See Neves v. Scott, 50 U.S. at 198 (reporter's account of the evidence).

300 See id. (reporter's account of the evidence).

301 See id. (reporter's account of the evidence).

302 See id. (reporter's account of the evidence).

303 See id. at 208.

304 There is some irony in the position taken by Scott's counsel, given that Scott himself had apparently benefited financially from the original Neves-Jewell agreement: Catharine had substantial survivorship rights in the Neves-Jewell estate upon John's death, which she apparently then shared with (or lost to) Scott when she remarried.

305 Neves v. Scott, 18 F. Cas. 22, 24 (C.C.D. Ga. 1846) (No. 10,134).

306 Neves v. Scott, 50 U.S. at 211.

307 Neves v. Scott, 54 U.S. (13 How.) 268, 271 (1851).

308 Id. at 270 (reporter's account of counsel's argument).

309 See id. at 268 (reporter's account of counsel's argument).

310 Id. at 272.

311 Id.

312 See Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858) (noting in dictum that the federal courts "disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony"). This is likely because, as I explain infra, notwithstanding the fact that Barber is frequently cited today as an early iteration of the domestic relations exception, at the time it was issued the case was not understood to stand for a blanket prohibition on federal court resolution of cases involving domestic relations. See infra note 332 and accompanying text.

313 See Chused, supra note 227, at 1409-12.

314 See supra Part III.A.2.

315 See supra Part III.B.2.

316 See id.

317 See supra Part III.C.

318 Hasday, supra note 14, at 1325; see also Cott, supra note 18, at 62-63.

319 Representative McLane of Delaware embraced this type of reasoning, distinguishing between "municipal" and "federal" powers. In his view, domestic relations clearly fell into the former category:
Could we say that property should not descend to all the children equally, or not devisable by will? Could we define the marital rights, or establish certain relations between parent and child, guardian and ward, or master and servant? No one can pretend that we could, and for the plain reason that they are objects of municipal power, of which we are entirely destitute. The relation of master and slave is but a domestic relation....
35 Annals of Cong. 1152 (1820) (statement of Rep. McLane), quoted in Hasday, supra note 14, at 1327 n.110.

320 For example, during an impassioned speech on the Senate floor, Senator William Pinkney alerted his fellow senators to the parallel between federal anti-slavery efforts and the specter of federal intervention in the legal relations between husband and wife. Pinkney conjured up the image of "[s]ome romantic reformer, treading in the footsteps of Mrs. Wolstonecraft," who would "claim for our wives and daughters a full participation in political power, and add to it that domestic power which, in some families...is as absolute and unrepublican as any power can be." 35 Annals of Cong. 413 (1820) (statement of Sen. Pinkney), quoted in Hasday, supra note 14, at 1328.

321 As Sarah Gordon has explained:

Controversy over federal power to legislate the structure of "domestic relations" in the territories tore into Congress in the 1850s. Domestic relations was a legal category that in the nineteenth century included the law of master and servant as well as the law of husband and wife; it described slavery as well as polygamy.
Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America 57 (2002); see also Cott, supra note 18, at 73 ("When Mormon polygamy was discussed, slavery was never far from politicians' minds, and the reverse was also true.").

322 Cong. Globe (App.), 36th Cong., 1st Sess. 199 (1860) (statement of Rep. Etheridge, as quoted in the testimony of Rep. Simms). Representative Etheridge continued:
Now, sir, what are domestic institutions? They consist simply of husband and wife, parent and child, guardian and ward, master and slave....And I ask, if Congress can take jurisdiction of the relation of husband and wife, may it not also exercise jurisdiction in regard to another domestic relation? Now, "forewarned is forearmed."
Id. Representative Simms dismissed this argument, urging that because the proposed anti-polygamy legislation acted to "protect" a domestic relation (marriage), and was not legislation "against" a domestic relation, it fell within the purview of federal power. Id.

323 See An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah (Morrill Act), ch. 126, § 1, 12 Stat. 501, 501 (1862).

324 See infra Part IV.B.2.

325 See 62 U.S. (21 How.) 582 (1858). Though apparently unnoticed by modern commentators, the first reported opinion suggesting that the federal courts would not entertain certain types of domestic relations cases appears to be In re Barry, 42 F. 113 (C.C.S.D.N.Y. 1844), in which a federal district court judge held that the federal habeas corpus statute did not apply in a child custody dispute. Certain antebellum interpretations of the federal habeas statute had supported the notion that, like state habeas corpus procedures, federal habeas could be used to mandate the release of a child from wrongful custody. See United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256) (approving of use of federal habeas corpus to remove daughter from custody of grandfather). And several state courts had recognized the use of a court's habeas powers as a means of resolving custodial disputes. See Grossberg, supra note 53, at 240, 255. But in Barry, Judge Betts of the federal court in Manhattan rebuffed an estranged father's attempt to use the federal statute to claim custody of his child from the maternal grandparents. See In re Barry, 42 F. at 114. In an opinion written in 1844, but which went unpublished for several decades, Betts reasoned that federal courts have no authority under the habeas corpus statute to "assume and exercise this function of parens patriae in relation to infant children held in detention by private individuals, not acting under color of authority from the laws of the United States." See id. at 125. Writing for the Supreme Court, Justice Taney affirmed Betts's decision on the basis that the Supreme Court lacked appellate jurisdiction because the amount in controversy did not satisfy the jurisdictional statute then in effect. Taney mentioned nothing of the district court's theory that federal habeas does not reach child custody disputes. See Barry v. Mercein, 46 U.S. (5 How.) 103, 119-21 (1847). Even after Barry other federal courts expressed different views on the applicability of federal habeas corpus in child custody disputes. Compare Ex parte Des Rochers, 7 F. Cas. 537, 537 (C.C.D. Cal. 1856) (No. 3,824) (observing that the writ of habeas corpus has been used to restore a nonmarital child to his mother and "to bring up an infant who had absconded from its father"), and Bennett v. Bennett, 3 F. Cas. 212 (D.C.D. Or. 1867) (No. 1,318) (using writ of habeas corpus to secure custody of child pursuant to state court child custody decree), with Ex parte Everts, 8 F. Cas. 909 (C.C.S.D. Ohio 1858) (No. 4,581) (holding that a federal court has no jurisdiction over an application for habeas corpus by the father of a child for the purpose of enforcing his right to its custody). For an edifying analysis of the Barry litigation, which was then referred to as the Mercein case, see Hartog, supra note 18, at 193-217.

326 Barber, 62 U.S. at 584.

327 Id. at 600 (Daniels, J., dissenting).

328 See sources cited in supra note 60.

329 Barber, 62 U.S. at 602 (Daniels, J., dissenting).

330 See Resnik, Naturally, supra note 16, at 1741-42 (observing the dissonance between the holding of Barber and the proposition for which its dictum is often cited); Libby S. Adler, Federalism and Family, 8 Colum. J. Gender & L. 197, 232, 237-39 (1999) (same). For examples of modern references to Barber as support for the early origins of federal deference to states in domestic relations matters, see Ankenbrandt v. Richards, 504 U.S. 689, 693 (1992); Solomon v. Solomon, 516 F.2d 1018, 1022 (3d Cir. 1975); Morris v. Morris, 273 F.2d 678, 682 (7th Cir 1960); Tilley v. Anixter Inc., 283 F. Supp. 2d 729, 733 (D. Conn. 2003); Coll v. Coll, 690 F. Supp. 1085, 1086 (D.D.C. 1988). See also Sylvia A. Law, Families and Federalism, 4 Wash. U. J.L. & Pol'y 175, 179 (2000) (noting that Barber's famous dictum "gave birth to the hoary 'domestic relations exception' to federal diversity jurisdiction").

331 See, e.g., Bowman v. Bowman, 30 F. 849, 849 (C.C.N.D. Ill. 1887) (refusing to permit removal of a divorce action from state to federal court, citing Barber); Johnson v. Johnson, 13 F. 193, 194 (C.C.S.D.N.Y. 1882) (remanding suit for divorce to state court pursuant to Barber). A little over a decade after it was decided, Barber was also cited by at least one federal district court in Georgia in an opinion rejecting a federal constitutional challenge to criminal sanctions for interracial marriage and fornication. See In re Hobbs, 12 F. Cas. 262 (C.C.N.D. Ga. 1871) (No. 6,550) (holding that the Fourteenth Amendment does not render criminal sanctions for interracial marriage and fornication unconstitutional, and citing Barber for the proposition that domestic relations law is free from federal interference).

332 For example, in 1867, a district court showed little patience for the theory that it lacked jurisdiction over an application for child custody under the federal habeas statute:

> If it was thought proper and right by the framers of the constitution and congress to give the national courts jurisdiction of a controversy between citizens of different states, where the matter in dispute is mere rights of property--to be measured by mere dollars and cents--why should their jurisdiction not extend to the more important controversy like this, where the matter in dispute is the custody and control of an infant child of the parties. The objection, that the control of the domestic relation belongs properly to the state courts, and that therefore the United States courts ought not to take cognizance of questions concerning them, is merely begging the question.

Bennett v. Bennett, 3 F. Cas. 212 (D.C. Or. 1867) (No. 1,318) (issuing writ of habeas corpus to secure custody of child pursuant to state court child custody decree, citing Barber for authority). For other federal court decisions relying on Barber's affirmative holding, see Barret v. Failing, 111 U.S. 523 (1884) (resolving dispute over ex-wife's right to dower following entrance of divorce decree by state court, citing Barber); Droop v. Ridenour, 11 App. D.C. 224 (C.C.D.C. 1897) (noting that if parties to an alimony decree reside in different states, the decree is enforceable by the federal courts, citing Barber); Hekking v. Pfaff, 82 F. 403 (C.C.D. Mass. 1897) (recognizing federal jurisdiction to consider suit for enforcement of alimony pursuant to Barber, but refusing to award alimony to former wife against husband where wife procured ex parte divorce in South Dakota); Slack v. Perrine, 9 App. D.C. 128 (C.C.D.C. 1896) (citing Barber for analogous support for the holding that a state writ of habeas corpus securing the mother's custodial rights over her children is given full faith and credit in federal court). For post-Barber federal domestic relations cases that do not cite Barber but that effectively disregard the majority's dictum, see Cheely v. Clayton, 110 U.S. 701 (1884) (awarding a wife's claim of dower rights in the marital property, notwithstanding that husband had obtained an ex parte divorce in a territorial court); Sims v. Everhardt, 102 U.S. 300 (1880) (finding that a conveyance by an under-aged feme covert could be disavowed after she reached maturity and following divorce from abusive spouse); Connecticut Mutual Life Ins. v. Schaefer, 94 U.S. 457 (1876) (holding that divorce does not automatically dissolve a wife's claim to her ex-husband's life insurance policy); Jackson v. Jackson, 91 U.S. 122 (1875) (finding that husband has no claim to wife's separate real property in action for divorce); Walker v. Walker's Executor, 76 U.S. (9 Wall.) 743 (1869) (considering the enforceability of a private separation agreement between husband and wife on appeal from the District of Massachusetts); Tolman v. Tolman, 1 App. D.C. 299 (C.C.D.C. 1893) (appeal in action for alimony and divorce); Sharon v. Hill, 26 F. 337 (C.C. Cal. 1885) (awarding bill in equity to pronounce declarations of marriage false and fraudulent); Walker v. Beal, 29 F. Cas. 7 (No. 17,065) (C.C.D. Mass. 1868) (considering wife's claim on husband's estate in light of marriage settlement). See also McNeil v. McNeil, 78 F. 834 (C.C.N.D. Cal. 1897)

(recognizing that federal courts have jurisdiction to entertain bill in equity to declare judgment of divorce void, and distinguishing Barber).

333 Cheever v. Wilson, 76 U.S. (9 Wall.) 108, 124 (1869) (considering challenge to divorce decree, and citing Barber for the proposition that a divorce decree entered in Indiana is enforceable in the District of Columbia).

334 See, e.g., Moore v. Page, 111 U.S. 117 (1884) (evaluating propriety of marriage settlement); Carite v. Trotot, 105 U.S. 751 (1881) (resolving dispute over impact of separation of marital property under Louisiana community property law); Prewitt v. Wilson, 103 U.S. 22 (1880) (evaluating propriety of marriage settlement); Gaines v. New Orleans, 73 U.S. (6 Wall.) 642 (1867) (evaluating the marital status of the deceased in order to determine the legitimacy, and inheritance rights, of a child); Blackburn v. Crawford's Lessee, 70 U.S. (3 Wall.) 175 (1865) (determining the marital status of parents in order to determine the inheritance rights of the children); Rogers v. Weller, 20 F. Cas. 1130 (C.C.N.D. Ill. 1870) (No. 12,022) (same); Sellon v. Reed, 21 F. Cas 1044 (C.C.N.D. Ill. 1870) (No. 12,646) (noting that ex-wife cannot be divested of her right in the family homestead, even when she gave up possession of home as part of private separation agreement).

335 On a related issue, there was certainly support for the proposition that, with respect to choice of law in domestic relations disputes, the law of a married couple's domiciliary state governed their rights and responsibilities in marriage and in any divorce proceeding. See Joel Prentiss Bishop, Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits 580-632 (Boston, Little, Brown & Co., 1852). That, however, was a different issue from the one presented in Barber, which concerned a federal court's jurisdiction to enforce an alimony decree entered by a sister state court, or the larger issue of whether federal courts--even when applying state law and following state choice of law rules--could entertain suits for alimony or divorce.

336 See sources cited in supra note 196.

337 Theda Skocpol's Protecting Soldiers provides the seminal account of the development of Civil War pensions. See Skocpol, supra note 18, at 102-51; see also Megan J. McClintock, Civil War Pensions and the Reconstruction of Union Families, 83 J. Am. Hist. 456, 461-64 (1996); Amy E. Holmes, "Such Is the Price We Pay": American Widows and the Civil War Pension System, in Toward a Social History of the American Civil War 171 (Maris A. Vinovskis ed., 1990).

338 See Holmes, supra note 337, at 171-73.

339 Cott, supra note 18, at 103-04.

340 See id. at 120-23 (discussing federal policies and congressional acts designed to encourage Native American conformity with western norms of monogamy); Franke, supra note 18, at 279-93 (describing the Freedmen Bureau's aggressive campaign to enforce marriage laws among recently emancipated slaves). It is notable that the extension of family civil rights to freedmen was secured in Reconstruction legislation over objections that such rights would effectively disestablish certain aspects of coverture. See William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 158 (1988) (recounting arguments by opponents of the Civil Rights Bill of 1866 that the legislation would improperly extend the right to make and enforce contracts to married women, and would legalize interracial marriage); Amy Dru Stanley, Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation, 75 J. Am. Hist. 471, 479-81 (1988) (same).

341 See sources cited in supra notes 187-92 and accompanying text.

342 For a discussion of Congress's regulation of the citizenship of children born to American parents abroad, see Collins, supra note 150, at 1689-98.

343 See Siegel, supra note 18, at 993.

344 See id. at 977-87.

345 H. Rep. No. 48-1330, at 3 (1884); see also S. Rep. No. 48-399, pt. 2, at 7 (1884) ("[O]ne of the gravest objections to placing the ballot in the hands of the female sex is that it would promote unhappiness and dissensions in the family circle.").

346 S. Rep. No. 48-399, pt. 2, at 2 (1884). Interestingly, pro-suffrage congressmen countered this type of reasoning with arguments that echoed those made in favor of expanded widows' pensions: that women were the educators of the next generation of citizens. See sources cited in supra note 119 and accompanying text. For example, in 1887, Senator Kenneth McKellar of Tennesee reasoned:
Ordinarily in our home life in the United States the mother is the principal teacher. It is absolutely necessary that she should be well informed and well educated. If she takes an interest in politics and is allowed to take part in public affairs, it will but increase her knowledge and education. It will but better fit her to rear and educate her boys, as well as her girls-- knowing that the future of the State depends upon her efforts in a larger degree than ever before.
56 Cong. Rec. 10785 (1887) (statement of Sen. McKellar).

347 See Siegel, supra note 18, at 998-1004.

348 S. Rep. No. 47-686, pt. 2, at 2 (1882), quoted in Siegel, supra note 18, at 1000.

349 Reva Siegel provides a searching analysis of anti-suffragists' contention that states' rights limited federal authority to amend the constitution, including an analysis of the anti-suffragists' post-ratification challenge to the Nineteenth Amendment in federal court in Leser v. Garnett, 258 U.S. 130 (1922). See Siegel, supra note 18, at 1003-07.

350 56 Cong. Rec. 775 (1918) (statement of Sen. Gordon).

351 58 Cong. Rec. 570 (1919) (statement of Sen. Underwood).

352 Id.

353 See Grossberg, supra note 53, at 250-51. For accounts of reformers' turn to the federal government for divorce legislation and constitutional amendments, see Max Rheinstein, Marriage Stability, Divorce, and the Law 45-46 (1972); William L. O'Neill, Divorce in the Progressive Era 238-53 (1967); Nelson Manfred Blake, The Road to Reno: A History of Divorce in the United States 133-137 (1962).

354 See, e.g., An Act to Amend Section Fifty-Three Hundred and Fifty-Two of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes (Edmunds Act), ch. 47, § 1, 22 Stat. 30, 30-31 (1882); An Act to Amend an Act Entitled "An Act to Amend Section Fifty-Three Hundred and Fifty-Two of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes," Approved March Twenty-Second, Eighteen Hundred and Eighty-Two (Edmunds-Tucker Act), ch. 397, § 24, 24 Stat. 635, 639-40 (1887). For a comprehensive discussion of the federal response to Mormon polygamy, see Gordon, supra note 321, passim.

355 See Edward Stein, Past and Present Proposed Amendments to the United States Constitution Regarding Marriage, 82 Wash. L. Rev. Q. 611, 627-31 (2004).

356 See id. at 627, tbl. 1 (table calculating the federal constitutional amendments concerning marriage proposed since the 1870s).

357 See id. The proposed amendments concerning same-sex marriage include the following: H.J. Res. 93, 107th Cong. (May 15, 2002); H.J. Res. 56, 108th Cong. (May 21, 2003); S.J. Res. 26, 108th Cong. (Nov. 25, 2003); S.J. Res. 30, 108th Cong. (Mar. 22, 2004); S.J. Res. 40, 108th Cong. (July 8, 2004); H.J. Res. 106, 108th Cong. (Sept. 23, 2004); S.J. Res. 1, 109th Cong. (Jan. 24, 2005). The wording of the various proposed amendments varies somewhat, but S.J. Res. 1 is typical: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." Given

that one of the primary bases for objection to the Equal Rights Amendment (ERA) was that it would permit the federal government to "control" family law, see sources cited in supra note 29, it is also plausible to consider the ERA as an amendment concerning domestic relations and marriage. Were we to add to Stein's calculation all of the post-1929 resolutions proposing the ERA (or a version thereof), the numbers of proposed constitutional amendments that concerned domestic relations would increase considerably.

358 Letter from President Roosevelt to the Congress (Jan. 30, 1905), reprinted in Bureau of the Census, Marriage and Divorce, 1867-1906, at 4 (1909). Similarly, in 1887, Senator Dolph of Oregon argued:
If it be objected that the adoption of this amendment would tend to the centralization of power in the National Government, I answer that many of the powers already possessed by the Federal Government are less important than that under consideration, and that the propriety or necessity of the exercise of the General Government can not be maintained by stronger arguments than can be adduced in favor of conferring upon it the power in question. The number of subjects concerning which the power of legislation is conferred upon Congress is not as important as the character of the subjects.
19 Cong. Rec. 166 (1887) (statement of Sen. Dolph).

359 Id. at 503-04, quoted in Stein, supra note 355, at 645.

360 Proposed Amendment to the Constitution of the U.S. Prohibiting Polygamy: Hearing on H.J. Res. 203 Before the Comm. on the Judiciary, 56th Cong. 26 (1900) (statement of Rev. William R. Campbell), quoted in Stein, supra note 355, at 644. Similarly, when faced with the objection that a constitutional amendment outlawing polygamy would "be a departure from the genius of our Union, which leaves the control of domestic relations to each State and denies it to the central Government," a House committee report relied on the constitutional guaranty of a "republican form of government" to explain why an anti-polygamy amendment did not itself violate the Constitution: "[C]an there be any departure from the principles of the Constitution in declaring... that [the states'] Government shall not only be republican in form, but that their civilization shall not be based on a polygamous family." H. Rep. No. 49-2568, at 7-8 (1886).

361 49 Cong. Rec. 504 (1912) (statement of Rep. Roddenberry).

362 Id. at 503-04, quoted in Stein, supra note 355, at 646.

363 N.Y. Tribune, Apr. 17, 1901, at 3.

364 56 Cong. Rec. 10779 (1918) (statement of Sen. Hardwick).

365 See Blake, supra note 353, at 133-37; O'Neill, supra note 353, at 238-49.

366 For a discussion of the fate of proposed divorce legislation in Congress, see Blake, supra note 353, at 145-50. For a discussion of Congress's treatment of proposals to amend the Constitution to prohibit interracial marriage, see Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law: An American History 133-36 (2002).

367 136 U.S. 586 (1890).

368 For a discussion of federal courts' differing views on the applicability of federal habeas corpus in child custody disputes prior to Burrus, see supra note 215.

369 Burrus, 136 U.S. at 593-94. The case itself involved a plea by the father for his own release from custody, after having been held in contempt for kidnapping the child from the grandparents.

370 Id. at 594.

371 For example, in Simms v. Simms, 175 U.S. 162, 167 (1899) (citing Burrus, 136 U.S. at 593-94), the Court explained:

It may therefore be assumed as indubitable that the circuit courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court.
See also State of Ohio ex rel Popovici v. Agler, 280 U.S. 379 (1930); Clifford v. Williams, 131 F. 100 (C.C.D.N.D. Wash. 1904); Hastings v. Douglass, 249 F. 378 (D.C.N.D. W. Va. 1918); Popovici v. Popovici, 30 F.2d 185 (D.C.N.D. Ohio 1927).

372 See, e.g., Spreckles v. Wakefield, 286 F. 465 (9th Cir. 1923) (deciding whether a contract between a husband and wife for alimony and child support, in contemplation of dissolution of marriage, was void for public policy); Whitney v. Whitney Elevator & Warehouse Co., 183 F. 678 (2d Cir. 1910) (enforcing a separation agreement giving ex-wife right to alimony even after death of husband); Moore v. Moore, 255 F. 497 (3d Cir. 1919) (deciding whether a contract between a husband and wife for alimony and child support, in contemplation of dissolution of marriage, was void for public policy); Smith v. Smith, 247 F. 461 (8th Cir. 1917) (evaluating whether alimony decree entered by a county court was enforceable as a final judgment); Carter v. Rinker, 174 F. 882 (C.C.D. Kan. 1909) (considering action for breach of promise to marry); Davis v. Pryor, 112 F. 274 (8th Cir. 1901) (reviewing jury award granted in action for breach of promise to marry); Daniels v. Benedict, 97 F. 367 (8th Cir. 1899) (enforcing separation agreement containing release by wife of all claims to husband's estate); Holmes v. Holmes, 283 F. 453 (D.C.E.D. Mich. 1922) (considering ex-wife's challenge to a deed fraudulently entered by then-husband in an effort to deprive her of alimony); Hogg v. Maxwell, 233 F. 290 (S.D.N.Y 1916) (enforcing separation agreement and alimony as final resolution of ex-wife's financial rights). Bankruptcy suits also required federal courts to interpret and apply divorce and alimony decrees. See, e.g., Westmoreland v. Dodd, 2 F.2d 212 (5th Cir. 1924); Turner v. Turner, 108 F. 785, (D.C.D. Ind. 1901); Hawk v. Hawk, 102 F. 679 (D.C.W.D. Ark. 1900).

373 The federal courts were regularly confronted with claims that a particular divorce or alimony decree should not receive full faith and credit because of due process concerns. See, e.g., Bates v. Bodie, 245 U.S. 520 (1918); Pennington v. Fourth Nat'l Bank of Cincinnati, 243 U.S. 269 (1917); Haddock v. Haddock, 201 U.S. 562 (1906); Atherton v. Atherton, 181 U.S. 155 (1901); Bell v. Bell, 181 U.S. 175 (1901); Hekking v. Pfaff, 91 F. 60 (1st Cir. 1898). For a discussion of the development of full faith and credit jurisprudence in the context of divorce and alimony, see Hartog, supra note 18, at 258-77. Hartog concludes that following the Supreme Court's decision in Haddock, 201 U.S. 562 (1906), "[e]ach state no longer had the right to be as strict or as loose as it chose with regard to the recognition of foreign divorces....[T]he federal Constitution now served to discipline apparent state sovereignty." Hartog, supra note 18, at 276. See generally Blake, supra note 353, at 173-88; Neal R. Feigenson, Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century, 34 Am. J. Legal Hist. 119 (1990).

374 See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Ankenbrandt v. Richards, 504 U.S. 689, 702-03 (1992); Rose v. Rose, 481 U.S. 619, 629 (1987); Lehman v. Lycoming County Children's Serv. Agency, 458 U.S. 502, 511 (1982); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982); Solomon v. Solomon, 516 F.2d 1018, 1022-25 (3d Cir. 1975); Hernstadt v. Hernstadt, 373 F.2d 316, 317 (2d Cir. 1967); 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3609 (1984).

375 See Susan Bandes, Erie and the History of the One True Federalism, 110 Yale L.J. 829, 830 (2001) (reviewing Edward A. Purcell, Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America (2000)) ("When federalism is portrayed as an abstract notion, unaffected by changing political conditions or the changing nature of the institutions themselves, that portrayal gives the seductive appearance of advancing the goals of consistency, predictability and reason"); Richard H. Fallon, Jr., Reflections on the Hart and Wechsler Paradigm, 47 Vand. L. Rev. 953 (1994) (enumerating the Process School assumptions that typify federal courts scholarship).

376 Ex parte Burrus, 136 U.S. 586, 593-94 (1890).

377 See sources cited in supra notes 373-74 and accompanying text.

378 See sources cited in supra notes 337-40 and accompanying text.

379 U.S. Const. amend. XIX; see sources cited in supra notes 343-52 and accompanying text.

380 United States v. Morrison, 529 U.S. 598, 615-16 (2000).

381 See sources cited in supra notes 26-36 and accompanying text.

382 See sources cited in supra notes 18-19 and accompanying text.

383 As Linda Kerber cautions:

> Traditional republican theory could not help either Jeffersonians or Federalists think creatively about the place of women in republican society. The answer to the conundrum of why Americans of the revolutionary generation found it so difficult to think about women in revolutionary terms...lies in part in the extent to which American political discourse was embedded in its republican sources.

Making Republicanism Useful, 97 Yale L.J. 1663, 1669 (1988).

384 For an analysis of VAWA's civil rights remedy as a response to the continued vitality of the doctrine of interspousal immunity, see Siegel, Rule of Love, supra note 42, at 2201-02; see also sources cited in supra notes 39-47 and accompanying text.

385 See text accompanying supra notes 200-03.

386 See supra Part I.

387 See, e.g., Dailey, supra note 22, at 1880-87; Barbara Ann Attwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L.J. 571, 604-628 (1984).

388 See supra Part I.

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