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# Essay

## Family at the Birth of American Constitutional Order

Mark E. Brandon\*

### I. Family in American Constitutional Law

In recent years, a number of observers of American politics, law, and society have decried what seem to be fundamental shifts in the structure and function of the family. According to some, these shifts, perhaps reinforced by libertarian rulings from the nation's highest court, now threaten the stability and maybe the survival of the political order.<sup>1</sup>

One of the most visible signs of libertarianism from the Supreme Court, at least in the realm of the family, was *Griswold v. Connecticut*,<sup>2</sup> which addressed the constitutionality of a state's policy prohibiting use of

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1. For strange bedfellows, see ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 133-39 (1996) (decrying the rise of radical egalitarianism and radical individualism as undermining American culture and threatening its collapse) and MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 121-30 (1991) (suggesting that modern trends in family operation are eroding the American democratic system). For earlier commentators who expressed similar worries, albeit without explicit concerns about libertarian rulings of the Court, see CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977) (arguing that the deterioration of the American family and its devastating effects on the social order spring from corporate capitalism and bourgeois society, which have intruded upon the autonomy of the nuclear family) and DANIEL P. MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5 (1965) (reporting an overall deterioration in the structure of the African-American family and arguing for greater legal reforms to assist African-American families).

2. 381 U.S. 479 (1965).

certain contraceptives.<sup>3</sup> In the climactic paragraph of his opinion for the Court in *Griswold*, Justice Douglas located a right to contraception in a specific institution—the marital family:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>4</sup>

Even putting aside the irony that Douglas partook of the enduring sacrament with four different women,<sup>5</sup> this was curious rhetoric; at least it has seemed so to me.

The curiosity that interests me here is not that there is a constitutional right to privacy, nor that the right might include some sort of control over reproduction, nor even that the right levitates in a jarring invocation of the sacred. The curiosity in which I am presently interested concerns instead the owner of the right. It would have seemed much cleaner—not to mention more congenial to Douglas's libertarian leanings<sup>6</sup>—to locate the right in the individual. But Douglas shied away from an individualist rationale for this aspect of the right to privacy.

Other justices have not been so shy. In *Eisenstadt v. Baird*,<sup>7</sup> for example, the Court hurdled questions of standing and outran the facts of the case in order to extend the right to contraception to anyone, married or not.<sup>8</sup> Douglas resisted this move, claiming that the narrower and proper

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3. *Id.* at 480. In another major case, Justice Douglas, writing for the Court, constructed a right of substantive equal protection with respect to interests touching upon marriage and procreation. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (holding that an Oklahoma statute allowing for the sterilization of certain criminals did not withstand strict scrutiny).

4. *Griswold*, 381 U.S. at 486.

5. See OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 235 (Kermit L. Hall ed., 1992) [hereinafter OXFORD COMPANION].

6. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 241-43 (1972) (Douglas, J., dissenting in part) (arguing that "mature" children have a right to participate in decisions about their education, notwithstanding their parents' objections); *Gillette v. United States*, 401 U.S. 437, 463 (1971) (Douglas, J., dissenting) (urging that a nonreligious conscientious objector may not be "required to kill" through military service in time of war); *Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting) (contending that the First Amendment bars punishment for obscene speech); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 174 (1951) (Douglas, J., concurring) (arguing that an organization has standing under the Fourteenth Amendment to object to being labelled "subversive" by the Attorney General). For a self-description of and justification for Douglas's libertarianism, see WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* (1980).

7. 405 U.S. 438 (1972).

8. *Id.* at 453.

ground for decision was the First Amendment. The case, he said, concerned the right to speak and teach about birth control.<sup>9</sup>

Nonetheless, as the Supreme Court has crafted the right to privacy the individualist rationale has prevailed, at least with respect to reproduction. In *Roe v. Wade*,<sup>10</sup> the Court staked out a constitutional right of a woman, married or not, to terminate a pregnancy by aborting the fetus.<sup>11</sup> When the decision was handed down, the extent of its individualist implications was not clear. For one thing, the right itself appeared to be jointly owned by the woman and her physician.<sup>12</sup> Moreover, as the progeny of *Roe* has demonstrated, the precise boundaries of the right—and its fundamentality—remained open to negotiation.<sup>13</sup> But it seems clear now that the right,

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9. *Id.* at 459 (Douglas, J., concurring). Mr. Baird had delivered a lecture at Boston University on birth control and population. At the end of his talk, he distributed a sample of contraceptive foam to a woman in the audience, for which he was arrested. *Id.* at 440. Handing out contraceptive foam, said Douglas, did not diminish the relevance of the First Amendment. Distribution, he argued, was not conduct but simply an effective communicative adjunct to Baird's lecture. Baird, after all, did not actually use the device or incite another to do so. *Id.* at 455-60 (Douglas, J., concurring).

10. 410 U.S. 113 (1973).

11. *Id.* at 164.

12. *Id.* at 163, 156, 163-64 (holding that, up to a certain stage in the pregnancy, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated").

13. See *Doe v. Bolton*, 410 U.S. 179, 189 (1973) (citing *Roe* as holding that a woman's right to an abortion is not absolute); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (finding that the precise limits to the right of privacy announced in *Roe* are unsettled, but that individuals plainly have a right to make certain personal decisions free from unjustified governmental interference); *Beal v. Doe*, 432 U.S. 438, 447 (1977); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (both upholding a state's refusal to provide Medicaid coverage for nontherapeutic abortions); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (finding no constitutional violation when a city provides hospital services for childbirth but not abortion); *Colauti v. Franklin*, 439 U.S. 379, 381, 401 (1979) (striking down a Pennsylvania statute as unconstitutionally vague because it imposed criminal liability on doctors that perform abortions), *overturned in part* by *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (finding constitutional state and federal refusals to fund medically necessary abortions); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) (stating that "the States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies" and thus invalidating Pennsylvania's "informed consent" requirements), *overruled by Casey*, 505 U.S. at 833; *Webster*, 492 U.S. at 507 (upholding a Missouri statute preventing the use of public employees and facilities for the performance of nontherapeutic abortions); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 506-07 (1990) (upholding an Ohio law requiring parental notice and allowing judicial bypass for minors seeking an abortion); *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (upholding Department of Health and Human Services's regulations prohibiting programs funded under Title X from counseling patients regarding abortion or referring patients to abortion providers); *Casey*, 505 U.S. at 833 ("reaffirming" the "essential holding" of *Roe v. Wade*). The imprecision of the right to abortion was due partly to the fluidity of the technology presupposed by *Roe*'s trimester test, and partly to changes in the Court's own makeup and therefore in its normative and institutional commitments. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 61 (1976) (affirming that a woman and her physician have a right to make a decision about abortion without interference from state regulation only during an early stage of the woman's pregnancy); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 494 (1983) (invalidating the portion of a Missouri law which required that second-trimester abortions be performed in a hospital, but upholding a requirement of parental or judicial consent, a requirement of a pathology report for all abortions, and

whatever its scope may be, is undeniably owned by the individual woman.<sup>14</sup>

In other doctrinal areas, however, the family has persisted as the institutional location for a range of rights and privileges.<sup>15</sup> Thus, even if who the family is and who may say so have frequently been subjects of contention,<sup>16</sup> the family's importance as a constitutional institution seems

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a requirement of two physicians for abortions performed after viability); *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (upholding a Virginia law requiring that second-trimester abortions be performed in licensed outpatient clinics); Donald E. Batterson, *A Trend Ephemeral? Eternal? Neither?: A Durational Look at the New Judicial Federalism*, 42 EMORY L.J. 209, 252 (1993) (arguing that a change in the Supreme Court's composition led to an increase in concerns regarding federalism, with the Court giving more power to the states, especially in cases involving privacy); Kristine E. Luongo, *The Big Chill: Davis v. Davis and the Protection of "Potential Life"?*, 29 NEW ENG. L. REV. 1011, 1043-48 (1995) (arguing that technological advancements made the trimester test unworkable in many cases and led to an erosion of women's right to abortion).

14. The Supreme Court has ruled that the husband-father may not restrict the exercise of the right. See *Casey*, 505 U.S. at 895; *Danforth*, 428 U.S. at 70. The most palpable limitation on the individualist approach concerns the conditions under which minors may exercise the right to abortion, independent from their parents. See *Casey*, 505 U.S. at 899-900 (holding that a one-parent consent requirement and judicial bypass procedure are constitutional); *Akron Ctr. for Reprod. Health*, 497 U.S. at 519-20 (holding constitutional an Ohio statute that requires a physician to give notice to one of a minor's parents prior to performing an abortion); *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990) (invalidating a Minnesota law requiring parental consent from both parents for minors seeking an abortion); *Ashcroft*, 462 U.S. at 490-93 (holding that under the Missouri statute, a court could not deny a minor's petition for abortion "for good cause" unless it had previously concluded that the minor was not mature enough to make her own decisions); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 (1983) (striking down portions of a city ordinance which required that first-trimester abortions be performed in a hospital, mandated parental consent for every minor under the age of fifteen, imposed a waiting period, and instituted vague procedures for disposal of fetal remains), *overruled by Casey*, 505 U.S. at 870; *H.L. v. Matheson*, 450 U.S. 398, 409 (1981) (holding that a Utah law requiring parental consent for abortion does not violate the constitutional rights of "an immature, dependent minor"); *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (striking down a Massachusetts law requiring parental notification for every minor seeking an abortion, because the law did not incorporate a judicial bypass procedure); *Danforth*, 428 U.S. at 72-75 (holding unconstitutional a statute that required parental consent for a minor's abortion).

15. See *Michael H. v. Gerald D.*, 491 U.S. 110, 125-27 (1989) (plurality opinion) (finding that a California law which presumes that all children born in a marriage are children of the marriage reinforces the integrity and privacy of the family unit); *Zablocki v. Redhail*, 434 U.S. 374, 388-91 (1978) (recognizing an individual's right to marry without unjustified interference from the state); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (recognizing the constitutional significance of familial relations beyond the traditional nuclear family); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (restating the right to marry regardless of race); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing the right of parents to direct the upbringing and education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 400-03 (1923) (respecting the right of individuals to teach foreign languages as well as the right of parents to permit it); see also *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (respecting the religious right of Amish families to educate their children according to their way of life).

16. See *Michael H.*, 491 U.S. at 125 (plurality opinion) (addressing whether a natural father has paternal rights to a child born during the mother's marriage to another man); *Zablocki*, 434 U.S. at 388-91 (recognizing an individual's right to marry free from unjustified interference from the state); *Moore*, 431 U.S. at 506 (holding that a city ordinance may not confine the definition of "family" to parents and their own children); see also, e.g., *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (holding

to be fairly well established. But, again, it is not clear why this should be so.

This Essay—which is part of a larger work in progress concerning the constitutional status of the family—offers a preliminary and partial explanation and justification for the family's constitutional significance. The Essay focuses on the family at the founding of the American constitutional polity. With respect to the family, my aim is less to show the actual condition of the family as a social institution than to reflect on its character as a political idea. With respect to the founding, my aim is not to uncover the intentions of the Framers in order to nail down a particular constitutional meaning, but to understand some of the assumptions and choices that animated the American order and hence to begin to come to terms with certain persistent problems of constitutionalism.

My claims are essentially these: First, conceptions of the family played an important role in imagining and establishing political authority in England and in her colonies in North America.<sup>17</sup> Second, subtle shifts in the character and function of the institution of the family engendered basic changes in New World political ideology, especially with respect to authority.<sup>18</sup> Third, these changes in turn precipitated the separation of the colonies from the mother country and eventually the establishment of substantially new political institutions. Sometimes explicitly and sometimes not, assumptions about the character and function of the family were important to both colonial secession and the eventual establishment of constitutional order. In short, the roots of radical political change resided

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unconstitutional Pennsylvania's statute placing a statute of limitations on the establishment of paternity); *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (overturning a decree modifying custody, when the sole basis for modification was the father's objection to the mother's interracial marriage); *Pickett v. Brown*, 462 U.S. 1, 18 (1983) (holding unconstitutional Tennessee's statute placing a statute of limitations on paternity suits); *Mills v. Habluetzel*, 456 U.S. 91, 101 (1982) (asserting that Texas's statute of limitations on paternity suits denied illegitimate children equal protection); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (overturning a statute granting unwed mothers, but not unwed fathers, the right to block the adoption of their children); *Parham v. Hughes*, 441 U.S. 347, 356 (1979) (upholding Georgia's statute denying illegitimate fathers the right to sue for a child's wrongful death); *Lalli v. Lalli*, 439 U.S. 259, 273-76 (1978) (upholding New York's law barring an illegitimate child's right to inherit when paternity was not established prior to death); *Trimble v. Gordon*, 430 U.S. 762, 775-76 (1977) (invalidating the Illinois law of intestate succession that allowed illegitimate children to inherit only from their mothers); *Mathews v. Lucas*, 427 U.S. 495, 507 (1976) (upholding a statute conditioning inheritance upon dependency at the time of death); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (holding that Louisiana may not subordinate claims of unacknowledged, dependent, illegitimate children to claims of legitimate children under its workers' compensation laws); *Labine v. Vincent*, 401 U.S. 532, 539 (1971) (upholding a law subordinating the rights of an acknowledged illegitimate child to inherit intestate); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (concluding that barring a dependent illegitimate child's claim for wrongful death constituted invidious discrimination); *Loving*, 388 U.S. at 12 (recognizing the freedom to marry as a basic civil right).

17. See *infra* subpart II(A).

18. See *infra* subpart II(B).

with the family.<sup>19</sup> Fourth, however, there is evidence that the makers of the Constitution imagined that family would play an important role in preserving the republican forms of politics that the Constitution entrenched.<sup>20</sup> Fifth, and I can be but suggestive on this point, both the transformative function revealed in the Revolution and the preservationist function imagined for the new constitutional order are crucial to constitutionalism.<sup>21</sup> Hence, the recent worry that changes in the family augur substantial change in the political order may be justified.<sup>22</sup>

## II. Philosophical and Social Roots

### A. *Seventeenth-Century English Political Thought*

Almost all battles over the meaning of the American Revolution focus on the problem of liberty. In one camp are proponents of modern liberty. They claim that the colonial revolutionaries sowed the seeds of individual liberty—seeds that antebellum Americans (especially abolitionists) cultivated, that sprouted on the heels of civil war, and that eventually flourished by the middle of the twentieth century.<sup>23</sup> In the other camp are proponents of ancient liberty. They claim that the Revolution was predominately about the capacity of people—with common experiences, ambitions, and needs—to govern themselves.<sup>24</sup> Predictably, the Declaration of

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part V.

22. As addressed below in Part V, “transformative” refers to a tendency or inclination to abandon or to alter fundamentally the principles, norms, or institutional arrangements of an existing constitution or constitutional order. “Preservationist,” in contrast, refers to a tendency or inclination to conserve or maintain those principles, norms, or institutional arrangements.

23. Proponents of this view tend to focus on the first sentence of the first paragraph of the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” See, e.g., DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 16-17* (1978) (explaining that the liberal ideology of the American Revolution focused new criticism on slavery in America); HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 28-37* (1973) (discussing themes of liberty and slavery in the Lincoln-Douglas debates); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO: 1550-1812*, at 342, 374 (1968) (focusing on the principles of liberty and equality as related to slavery following the American Revolution); Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 *AM. J. JURIS.* 1, 19-20 (1987) (calling the Declaration of Independence the “founding document of the American republic, committing the new nation to a radical political philosophy” of personhood).

24. See, e.g., MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 195-96* (1998) (arguing that the revolutionaries’ “claims were primarily about self-government and the proper nature of representation under the British Constitution”); DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION: 1770-1823*, at 256 (1975) (stating that the American Revolution was fought for self-determination); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 132, 3-17 (1969) (noting the claim of “Jefferson and others” that “the formation of new governments was the whole object of the Revolution”).

Independence has figured prominently in these battles, but because it can point toward either camp, it has not decided the conflict. Today the modern libertarians may outnumber their opponents, but the war continues. Conceding the importance of this conflict and its indirect relevance to the concerns of this Essay, I want for now to consider an alternative theme of the Revolution: the character and status of the family.

To set the stage, we should look first to seventeenth-century England, where one familiar model for politics was distinctly familial. Specifically, it was patriarchal. As Professor Schochet notes, explicitly patriarchal conceptions were present, if not pervasive, in English political thought by the end of the sixteenth century, with the accession of James I.<sup>25</sup> But the systematic perfection of the political theory of patriarchy appeared in Robert Filmer's defense of absolute monarchy.<sup>26</sup> Filmer's strategy was to ground political authority in tradition and nature and hence to protect it from assault by upstart Parliamentarians, social contractarians, and libertarians.<sup>27</sup> What could be more traditional or natural than to link politics to the all-but-ubiquitous institution of family? Drawing on the Bible—another traditional and seemingly natural source for justification—Filmer claimed that “[i]f we compare the natural duties of a father with those of a king, we find them to be all one, without any difference at all but only in the latitude and extent of them.”<sup>28</sup>

Moreover, said Filmer, political authority was essentially genealogical in character; in fact, it grew out of a lineage running ultimately to Adam.<sup>29</sup> Filmer described the relationship as follows: “[K]ings are either fathers of their people, . . . or usurpers of the right[s] of such fathers . . . .”<sup>30</sup> Later in the same discussion he explained:

It may seem absurd to maintain that kings now are the fathers of their people since experience shows the contrary. It is true, all Kings be not the natural parents of their subjects, yet they all either are, or are to be reputed, as the next heirs [of] those progenitors who were at first the natural parents of the whole people.<sup>31</sup>

What this entailed for the scope and character of the king's authority was axiomatic, precisely because the scope and character of paternal

25. See GORDON J. SCHOCHET, *THE AUTHORITARIAN FAMILY AND POLITICAL ATTITUDES IN 17TH-CENTURY ENGLAND: PATRIARCHALISM IN POLITICAL THOUGHT* 86-98 (2d ed. 1988).

26. See *id.* at 115-58.

27. ROBERT FILMER, *PATRIARCHA*, in *PATRIARCHA AND OTHER WRITINGS* 1, 4-6 (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1648).

28. *Id.* at 12.

29. It did not seem to bother Filmer that all persons, according to one story of Creation, might trace their roots to Adam.

30. FILMER, *supra* note 27, at 2.

31. *Id.* at 10.



authority in the family seemed so self-evident. Kings “in their right succeed to the exercise of supreme jurisdiction. And such heirs are not only lords of their own children, but also of their brethren, and all others that were subject to their fathers.”<sup>32</sup> Lest there be any question on the matter, Filmer insisted that the king—whether he rose to his station as the “true heir” of the father of the people, by usurpation, or by election—possessed

the only right and natural authority of a supreme father. There is, and always shall be continued to the end of the world, a natural right of a supreme father over every multitude, although, by the secret will of God, many at first do most unjustly obtain the exercise of it.<sup>33</sup>

Thus, if kings were obliged “to preserve the lands, goods, liberties and lives of all their subjects,” it was not because the laws of the realm command it, but because it was “the natural law of a Father” that kings “ratify the acts of their forefathers and predecessors in things necessary for the public good of their subjects.”<sup>34</sup> This obligation might have been burdensome from the standpoint of the king, but for the fact that he was the sole judge of the public good. Nor were there other limits on his discretion. He was not constrained by his oath at coronation. Common law did not bind him, as he was the “author, interpreter, and corrector of the common law.”<sup>35</sup> An act of Parliament could not direct him, as any authority of Parliament derived from the will of the king; thus, “[t]he King alone makes laws in Parliament.”<sup>36</sup> In all judicial cases, he was the ultimate judge. Two notions followed from these claims. First, the king was the source of all authority—executive, legislative, and judicial—in the realm. Second, the king was not obliged to obey the law.

John Locke directly challenged Filmer’s thesis on several fronts.<sup>37</sup> As is now well known, Locke relocated the natural law, grounding it not in a familiar social practice but in a hypothetical state of nature.<sup>38</sup> This

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32. *Id.*

33. *Id.* at 11.

34. *Id.* at 42.

35. *Id.* at 34.

36. *Id.* at 35.

37. In his *First Treatise of Government*, Locke pressed a systematic critique of Filmer’s patriarchy. See generally JOHN LOCKE, *FIRST TREATISE OF GOVERNMENT*, in *TWO TREATISES OF GOVERNMENT* §§ 1-5, 141-43 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). For purposes of this Essay, I am more concerned with Locke’s own positive account of political authority (and of family). See generally JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, in *TWO TREATISES OF GOVERNMENT*, *supra*, § 1-3, at 267, 267-68 [hereinafter LOCKE, *SECOND TREATISE*].

38. See LOCKE, *SECOND TREATISE*, *supra* note 37, §§ 4-15. Locke left open the possibility that the state of nature was not hypothetical, but real. As evidence for its reality, he cited relations among

relocation permitted him to imagine nature as a domain of reason and a source of limits. Reason and limits were captured in his conception of natural law and natural rights.<sup>39</sup> Locke's state of nature was a state of perfect freedom and equality,<sup>40</sup> but it was not a perfect state. For one thing, the rights and limits of nature were insecure, in part because some people failed to respect them.<sup>41</sup> These failures were not always intentional, however, for one thing that nature lacked was "an established, settled, known law" capable of governing the particularities of human relations.<sup>42</sup> But whether violations were unknowing or intentional, another thing nature lacked was "a known and indifferent Judge" with power to enforce norms.<sup>43</sup> Indifference was crucial because self-enforcement could lead to excessive punishments.<sup>44</sup> Power was essential because individuals in nature frequently lacked the capacity to carry out punishments.<sup>45</sup> To remedy these deficiencies in nature, people consented by contract to the creation of government, thus giving up their natural legislative and executive authority, but not abandoning limits *per se*.<sup>46</sup>

As with Filmer, family was central to Locke's conception of politics, authority, and limits. But family as metaphor (and as institution) worked differently for Locke than for Filmer. For example, in contrast with Filmer's invocation of Adam as first father, Locke cited nature as "the common Mother of all."<sup>47</sup> Filmer had claimed that political authority mapped neatly onto authority in the family (or vice versa).<sup>48</sup> In a sense, Locke agreed, but the conclusion he drew from the mapping—that both political and familial authority were *limited*—was plainly not what Filmer had in mind. An unlimited parent, an arbitrary parent, was no parent.<sup>49</sup>

Similarly, the sources and implications of Locke's principle of limits were radically different from those of Filmer's absolutism. For one thing, said Locke, it was a mistake to think of familial authority strictly as

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nations, *see id.* § 14, the writings of Richard Hooker, *see id.* § 15, and the indigenous peoples of the Americas, *see id.* § 49, ("Thus in the beginning all the World was *America* . . ."). The state of nature was also revealed in civil societies living under absolute monarchs who claimed to be above the law. *See id.* §§ 93-94.

39. *See id.* §§ 6-8, 87. These connections are especially vivid in Locke's discussion of property. *See id.* §§ 25-51.

40. *See id.* §§ 4, 87.

41. *See id.* §§ 7-8, 123, 128.

42. *Id.* § 124.

43. *Id.* §§ 125, 91, 125-26.

44. *See id.* §§ 13, 125.

45. *See id.* §§ 123, 126.

46. *See id.* §§ 87-90, 92-93, 95, 127-31.

47. *Id.* § 28.

48. *See supra* notes 26-36 and accompanying text.

49. *See LOCKE, SECOND TREATISE, supra* note 37, §§ 53, 64.

“paternal”; better to call it “[p]arental,” for the mother “hath an equal [t]itle.”<sup>50</sup> Thus, authority to rule was divided and shared, not unitary or strictly patriarchal.<sup>51</sup> For another, and this may be the most important point for Locke, parental and political authority had fundamentally different ends: “*Political Power . . . I take to be a Right of making Laws with Penalties of Death, and consequently all less Penalties.*”<sup>52</sup> In contrast, familial power aimed not at punishing but at nurturing. Its functions were to protect the child, to provide for him, and to educate him intellectually and morally.<sup>53</sup> Thus, the family’s function was to bring the child into the exercise of reason—a kind of self-limitation—and therefore to enable him to live under law, which in turn would enable the child to be free, for Lockean liberty was liberty under law.<sup>54</sup> Related to these observations, the authority of parents and potentates differed also in that they acted upon different subjects. Parental authority pertained to an uncomprehending child not fully capable of participating in reason and therefore not able to enjoy liberty.<sup>55</sup> Political authority, in contrast, pertained to a comprehending adult who was capable of participating comprehensively in reason and liberty.<sup>56</sup>

As these claims suggested, the fundamental purposes for the marital relation itself were procreation and the rearing of children.<sup>57</sup> The “natural” duration of that relation was the time required for “the continuation of the species”—that is, the time it took to prepare children to care for themselves.<sup>58</sup> Once the children flew the nest, however, the natural imperative for the marital relation was at an end, and the marriage was terminable “either by consent, or at a certain time, or upon certain Conditions.”<sup>59</sup> In short, the marriage became contractual, for whether it

50. *Id.* § 52. Nonetheless, Locke persisted in referring to “paternal” authority. *See, e.g., id.* §§ 65, 69, 71.

51. *See id.* § 52. He observed, moreover, that when mother and father disagree, the ultimate decision “naturally falls to the man’s share, as the abler and the stronger.” *Id.* § 82. He also employed Aristotle’s hierarchy, which placed the family’s members in rank order: “*Master of a Family[,] . . . Wife, Children, Servants and Slaves, united under the Domestick Rule of a Family.*” *Id.* § 86 (emphasis in original).

52. *Id.* § 3 (emphases in original).

53. *See id.* §§ 56, 58, 65.

54. *See id.* §§ 55-65; *see also supra* note 46 and accompanying text. This notion, of course, cut against that of Thomas Hobbes, an absolutist for whom liberty resided in “the absence of external Impediments” and “the Silence of the Law.” THOMAS HOBBS, *LEVIATHAN* 91, 152 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

55. *See* LOCKE, *SECOND TREATISE*, *supra* note 37, §§ 55, 57-63.

56. *See id.* § 71.

57. *See id.* §§ 77-78, 80.

58. *Id.* § 79. In this regard, Locke took into account the possibility that one couple might produce more than one child during the marriage. *See id.* § 80.

59. *Id.* § 81.

persisted or perished, it did so by consent.<sup>60</sup> Apart from the necessities of natural obligation, then, the ties that bound the family were of two types: As between husband and wife, the tie was basically contractual; as between parent and child, the bond was one of caring and natural affection.

Whatever its duration, the marital family was profoundly implicated in Locke's account of political authority. One of the basic problems of politics, as Locke saw it, was that of sustaining limits to political (or, more precisely, governmental) power.<sup>61</sup> He supplied four solutions to that problem. First, government should not violate the basic purposes for which it was established, namely the protection of life, liberty, and estate—or as Locke called them in aggregate, property.<sup>62</sup> Second, when government acts, it should adhere to basic precepts of what we might call “rule of law.” That is, government should act only through a public, known law, adopted in accordance with the majoritarian principle, framed in general terms applicable to all persons, and aimed at the public good.<sup>63</sup>

Third, drawing on Aristotle,<sup>64</sup> Locke intimated a distinction between public and private domains—those domains inhabited or regulable by government and those that were not. He identified two essentially private domains: property and family.<sup>65</sup> With respect to property at least, its “privacy” was severely restricted, as ownership and use of property were subject to regulation by law.<sup>66</sup> Family, however, was autonomous to an extent that property was not, for governmental jurisdiction over the marital relation was confined to resolving “controversie that may arise between Man and Wife about them.”<sup>67</sup> For example, government might intervene to protect the life or liberty of the wife, including her liberty to exit the relationship.<sup>68</sup> (Protecting her property was apparently *not* within the purview of government.) Where procreation and the rearing of children were concerned, however, the family was almost hermetically autonomous from government.<sup>69</sup>

60. On the emergence of a contractual conception of marriage, see Mary Lyndon Shanley, *Marriage Contract and Social Contract in Seventeenth Century English Political Thought*, 32 W. POL. Q. 79 (1979).

61. See *supra* notes 39-46 and accompanying text.

62. See LOCKE, SECOND TREATISE, *supra* note 37, §§ 123, 131.

63. See *id.* §§ 96-98, 124-25, 131.

64. See 2 ARISTOTLE, *Politics*, in THE COMPLETE WORKS OF ARISTOTLE II.4.1262a25-1264b25, at 1986, 2003-06 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation).

65. By “property” in this context, I intend those things, both real and personal, that persons can, on Locke's terms, come to own. See LOCKE, SECOND TREATISE, *supra* note 37, §§ 25-51. For Locke's treatment of family generally, see *id.* §§ 52-95.

66. See *id.* §§ 89, 120, 131. For Locke's account of the mutation of limits as one moves from the state of nature to civil society to civil government, see *id.* §§ 25-51.

67. *Id.* § 83.

68. See *id.* §§ 81-82.

69. See *id.* §§ 77-80.

Related to the family's exclusive control over its children, the fourth source of limits on governmental power was the distinction between society and state.<sup>70</sup> This distinction was politically potent on Locke's terms, because society possessed two residual powers. One was to establish government anew when the standing government had dissolved, whether by fundamentally altering the legislative power or by breaching its trust to protect life, liberty, or estate.<sup>71</sup> The other was to resist government when it became arbitrary or, again, when it systematically opposed itself to the protection of life, liberty, or estate.<sup>72</sup> But how would people in society know when resistance was justified? The answer was twofold: (1) "manifest evidence;"<sup>73</sup> and (2) a felt popular sense or opinion that the standing government had engaged in a "long train of Abuses, Prevarications, and Artifices" inconsistent with the public welfare or safety.<sup>74</sup> To that end, it was crucial that the family, not the state, control the intellectual and ethical development of the child who would be citizen.

### B. Colonial Transformation

Despite his repudiation of Filmer's patriarchy, Locke did not jettison the relation between family and politics. Sometimes the relation was analogical and mutually supportive and sometimes it was antagonistic, but the connection between the two was central to Locke's constitutionalist aspiration for politics. Nor did Locke explicitly challenge monarchy itself. On the surface at any rate, he merely subjected monarchy to the limits of reason, law, and popular judgment. Thus, aside from anticipatorily justifying the Glorious Revolution, it was not clear to what other practical political purposes Locke's theory might apply, at least in England. Certainly, the more libertarian and egalitarian elements of Locke's philosophy did not find fertile soil to grow there.<sup>75</sup> But things were different in the colonies.

At first these differences were mainly in degree, not in kind; in any event, as Locke's moderation suggested, they did not plainly portend a repudiation of monarchy. In fact, in England the monarchy itself was changing, due largely to the normative and institutional heritage of the Glorious Revolution, after which the monarchy was held to be "mixed" or

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70. See, e.g., *id.* §§ 240-243.

71. See *id.* §§ 211-220.

72. See *id.* §§ 221-222.

73. *Id.* § 230.

74. *Id.* § 225.

75. See EDWARD S. CORWIN, *The "Higher Law" Background of American Constitutional Law*, in 1 CORWIN ON THE CONSTITUTION 79, 117-39 (Richard Loss ed., 1981) (arguing that the doctrine of parliamentary sovereignty restricted the utility of Locke's "higher law" in Britain, but that an alternative conception of sovereignty permitted his theory to flourish in the United States).

“limited.”<sup>76</sup> Gordon S. Wood calls it “republicanized.”<sup>77</sup> Whatever one calls it, the monarchy after the ascendancy of William and Mary was different from that of the Charleses.<sup>78</sup> Even so, life under monarchy retained characteristics bearing a striking family resemblance to aspects of Filmer’s more absolutist model.<sup>79</sup> Patriarchal dependency, patronage, hierarchy, disdain for labor and the marketplace, and commitment to kinship all helped sustain and order the English social, economic, and political world.<sup>80</sup> Thus, if the English system had elements of republicanism, it was still at base a monarchy and not, in Montesquieu’s words, “a republic, disguised under the form of monarchy.”<sup>81</sup>

Much of what characterized English society—specifically, the tension between republicanism and monarchy—was also present in the colonies, even as late as the mid-eighteenth century.<sup>82</sup> But precipitous changes in colonial life exacerbated social differences and altered basic political ideas, which in turn intensified forces of division. Thus, while England flirted with a brand of aristocratic republicanism congenial to monarchy, the colonies surged to embrace a more radical and democratic brand of republican norms and institutions.

Two important reasons for this colonial attraction were demographic and economic. The population of the colonies was increasing dramatically, doubling every twenty years during most of the eighteenth century.<sup>83</sup> This increase was due partly to a natural, procreative rise in the existing

76. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 98 (1992) (“Already by the beginning of the [eighteenth] century the English monarchy had lost much of its sacred aura.”). As Wood suggests, some have referred to the English Constitution as “mixed.” I WILLIAM BLACKSTONE, *COMMENTARIES* \*50-\*51; *see, e.g.*, CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* 14 (1975) (describing the English political settlement as “[p]arliamentary sovereignty, limited monarchy, imperialist foreign policy, a world safe for businessmen to make profits in”). *See also generally* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 67-76 (1967) (“But if the theory [of a mixed constitution] was evident and unanimously agreed on, the mechanics of its operation were not.”); CORINNE COMSTOCK WESTON, *ENGLISH CONSTITUTIONAL THEORY AND THE HOUSE OF LORDS, 1556-1832*, at 87-141 (1965) (discussing the evolution of mixed government in England). Others have called it “limited.”

77. WOOD, *supra* note 76, at 98.

78. For an account of some of the constitutional changes presaged by the Glorious Revolution, *see generally* J.R. TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689* (1962).

79. *See supra* notes 27-36 and accompanying text.

80. *See* WOOD, *supra* note 76, at 95-99.

81. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 68 (Franz Neumann ed., Hafner Press 1949) (1748).

82. *See* WOOD, *supra* note 76, at 124.

83. *See id.* at 132; *see also* WILSON H. GRABILL ET AL., *THE FERTILITY OF AMERICAN WOMEN* 5-12 (1958) (explaining the rapid growth of population during the eighteenth century); Daniel Scott Smith, *The Demographic History of Colonial New England*, 32 J. ECON. HIST. 165, 174-79 (1972) (exploring the reasons for fluctuations in the growth in population rate in New England during the eighteenth century).

population, but mainly to an extraordinary immigration, especially from Britain and Western Europe.<sup>84</sup> Migration within the colonies was also extensive. The motives behind this movement varied greatly, but a dominant motive was material. Some people fled creditors. Others simply sought new venues to pursue advantage—whether on farms, in trades, or through other sorts of ventures, such as speculation in land.<sup>85</sup> Prosperity was becoming increasingly visible as a social fact and prominent as a political value.<sup>86</sup>

The consequences of these conditions were substantial. If English society valued leisure, stability, tradition, and order, colonial society was increasingly marked by activity, mobility, innovation, and disarray.<sup>87</sup> In contrast with the English system of dependency, patronage, and hierarchy, the colonial system (if one could call it that) was largely one of independence, initiative, and relative equality.<sup>88</sup> It was not that social differences did not exist in the colonies. But the distance between the

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84. See WOOD, *supra* note 76, at 125.

85. See *id.* at 125-28.

86. The philosophical roots of prosperity as a political value extend back at least as far as Locke. The evidence in this regard is not simply that Locke valued property, but that he tied its natural origins to "labour" and that a principal aim of the political economy he depicted was to keep as much property as widely in "use" as possible. See LOCKE, SECOND TREATISE, *supra* note 37, §§ 25-51 (according to my rough count, Locke invoked variants of the words "use" and "useful" seventeen times). In relating the experience of Hector St. John de Crevecoeur, a Norman-French scientist who captured his experience in the American colonies as a corresponding member of the Académie de Sciences and the Royal Agricultural Society of Paris, Vernon Parrington noted that the pursuit of economic independence and material security were plainly motives for immigration to the North American colonies; but more, industry and enterprise became part of what it was to be "an American." 1 VERNON L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE COLONIAL MIND, 1620-1800, at 143-47 (1927). In the words of Crevecoeur, "Go thou, and work and till; thou shalt prosper, provided thou be just, grateful and industrious." *Id.* at 145.

Pauline Maier argues that the invocation of "happiness" in Thomas Jefferson's Declaration of Independence was preceded by similar declarations of various individual colonies, declarations which explicitly tied pursuit of happiness to security, liberty, and property. See PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 165-67 (1997). In fact, the sources for Jefferson's usage were more complex than Maier allows. See, e.g., GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 248-55 (1978). Maier's observation, however, does support the claim that, by the time of the Revolution, at least in some colonial quarters, the political idea of happiness was linked to material concerns. See generally Jeffrey Barnouw, *American Independence: Revolution of the Republican Ideal; A Response to Pocock's Construction of The Atlantic Republican Tradition*, in THE AMERICAN REVOLUTION AND EIGHTEENTH-CENTURY CULTURE 31 (Paul J. Korshin ed., 1986) (claiming that the principal idea animating American revolutionary thought was that of economic expansion).

By the time the Constitution was ratified, in fact, prosperity was so highly valued that the material success following ratification was a substantial reason for Americans' widespread (even reverent) acceptance of the Constitution. See Corwin, *supra* note 75, at 80; MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 14-16 (1986).

87. See WOOD, *supra* note 76, at 124-34 (describing the instability of the American social hierarchy resulting from the growth and movement of the population).

88. Cf. *id.* at 112-17 (noting that aristocracy was essentially nonexistent in America compared with the intensely hierarchical social structure in England).

highest and lowest orders was strikingly shorter there than in England, because the colonies lacked both the extravagant wealth and the masses of destitution so prevalent in Europe.<sup>89</sup> Certainly, there was a kind of aristocracy in America, but it tended to be weak and unexalted, its boundaries were permeable, and in any event it was not the titled sort of aristocracy found in England.<sup>90</sup>

One crucial arena in which these differences played themselves out was the family. The ability of individuals—especially young men—to strike out and seek their own way in the New World not only weakened the English system of patronage,<sup>91</sup> but also loosened the bonds of family itself. Married women left their husbands; in some colonies they left under protection of law, as the law of divorce was consistently more liberal in the colonies than in England.<sup>92</sup> Children also left home, and many insisted on choosing their own partners for marriage, even when such choices flew in the face of traditional demands to sustain (or improve) one's family's pedigree.<sup>93</sup> These new freedoms meant that, in purely practical terms, it was impossible for many colonial fathers—especially among the gentry—to assert the kind of absolute authority that Filmer had insisted was part of the nature of things. Thus, instead of relying exclusively on dependency and command to rule the family, fathers increasingly found affection and negotiation more effective for sustaining authority.<sup>94</sup>

These social changes were the first steps toward producing and privatizing what we now know as the American model of the nuclear family.<sup>95</sup>

89. See WOOD, *supra* note 76, at 122.

90. See *id.* at 112-24 (examining the ways in which the social hierarchy of the American colonies differed from England's social structure). The evolution of the American economy was one of the powerful forces causing colonial society to become even less stratified and less like the traditional English social hierarchy. See *id.* at 134-45; BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 131-32 (1968) (explaining that in the American colonies there was neither a traditional aristocracy nor a clear legal distinction between members and nonmembers of the middle order); cf. WOOD, *supra* note 24, at 488, 488-89 (noting that to a European, "American society may have appeared remarkably egalitarian," but many Americans felt as if there were sharp class divisions).

91. See WOOD, *supra* note 76, at 114-15, 174-76. Bailyn focuses on the political origins of the demise of the English system of patronage in the colonies. See BAILYN, *supra* note 90, at 28-30, 72-80. This focus, however, need not negate the importance of social underpinnings for political change.

92. See Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 33 WM. & MARY Q. 586, 588-89 (1976) (explaining England's strict policy on divorce and comparing it to the less stringent policies of provincial Massachusetts).

93. See Daniel Scott Smith, *Parental Power and Marriage Patterns: An Analysis of Historical Trends in Hingham, Massachusetts*, 35 J. MARRIAGE & FAM. 419, 425 (1973) (noting the lack of significant parental involvement in marital decisions during the eighteenth century).

94. See DANIEL BLAKE SMITH, *INSIDE THE GREAT HOUSE: PLANTER FAMILY LIFE IN EIGHTEENTH-CENTURY CHESAPEAKE SOCIETY* 52-53, 111-13 (1980) (describing how the traditional use of force in childrearing gave way); WOOD, *supra* note 76, at 145-50 (describing the breakdown of traditional patriarchal relationships, particularly the relation between parents and children, and the development of new approaches to such relationships).

95. See CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 8, 8-20 (1980) ("[W]hat today we speak of as the modern American



Jay Fliegelman calls these incipient forms of family a “revolution against patriarchal authority.”<sup>96</sup> This characterization is suspicious, not least because if this were a revolution, it was one of the longest, slowest revolutions in human history, for paternal authority persisted, even as the devices for asserting it changed. Nonetheless, the social changes Fliegelman addresses were deeply significant on their own terms, and they portended still greater changes in political ideology.

### III. The Revolution

Especially after English troops defeated French and Indian forces in 1763, thus extending and (so the colonists thought) securing for settlement the western frontier in North America, colonists became more and more restive. Like women and children in the family, they became increasingly difficult to govern according to established modes. Around the same time, political rhetorical uses of family began to change. In some quarters, the new uses remained superficially similar to the old. Blackstone, for example, could continue to invoke an image of “the king, as *pater-familias* of the nation.”<sup>97</sup> Colonists, too, employed this image.<sup>98</sup> Even in England, however, the metaphor of king as father was undergoing a significant shift in meaning, away from patriarchy and toward a regime of reciprocal obligations between father and child.<sup>99</sup>

Perhaps more significantly, both in England and in the colonies, people began using an alternative familial metaphor—not the king as father, but the country as parent, even as mother. If this revision suggested a distinct softening of the authoritarian rhetoric of patriarchy, it did not necessarily absolve the children of obedience. Hence, both English

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family emerged first in the years between the American Revolution and about 1830.”). In fact, the social changes were among the first indications of an alteration of the family—including the role of children and the relationship between parents and children—throughout the Western world. See PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 402-04, 412-13 (1962) (claiming that affectionate care for children was the basic indicator of the emergence of the “modern” family).

96. JAY FLIEGELMAN, *PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY, 1750-1800*, at 267 (1982).

97. 4 BLACKSTONE, *supra* note 76, at \*127; see also JERRILYN GREENE MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-1776*, at 24, 20-31 (1987) (examining the different arguments for executive authority, which included the invocation of the King as the “‘royal father’ of the national and imperial community,” advanced by the political theorists such as Blackstone).

98. See PETER SHAW, *AMERICAN PATRIOTS AND THE RITUALS OF REVOLUTION* 39 (1981) (noting that leading colonial patriots used a popular metaphor—that the “people ‘humbly look up to his present Majesty . . . as children to a father’”—in order to placate the King’s fear of a potential colonial revolt); WOOD, *supra* note 76, at 165-67 (discussing the prevalent use of the parent-child image by both Whigs and Tories to describe the imperial relation between the colonies and England).

99. See Edwin G. Burrows & Michael Wallace, *The American Revolution: The Ideology and Psychology of National Liberation*, 6 *PERSP. IN AM. HIST.* 167, 186-89 (1972).

officials and colonial monarchists exhorted colonists to behave, because that was simply the duty that children—the colonies—owed the “mother country,” who after all had nurtured her children as any good mother would do.<sup>100</sup> But the softness of the revised metaphor made it especially useful to those sympathetic to the colonial cause, who argued that the mother country should exercise forbearance toward her colonies.<sup>101</sup>

Ultimately, however, this maternal modification of the familial metaphor failed to convince a number of influential colonists, among whom was Thomas Paine. On the eve of the Revolution, he attempted to wrest the maternal image from English hands and turn it against them in such a

100. See Ian R. Christie, *British Response to American Reactions to the Townshend Acts, 1767-1770*, in *RESISTANCE, POLITICS, AND THE AMERICAN STRUGGLE FOR INDEPENDENCE, 1765-1775*, at 193, 198 (Walter H. Conser, Jr. et al. eds., 1986) (“I heartily wished to repeal the whole law [imposing a duty on tea] . . . if there had been a possibility of repealing it without giving up that just right which I shall ever wish the mother country to possess, the right of taxing the Americans.” (quoting 16 PARL. HIST. ENG. 854 (1770) (statement of Lord North))); *id.* at 207 (“[A]ll measures for the support of the constitutional Authority of this Kingdom in Massachusetts Bay will be ineffectual and delusive, until[] the Government of that Province, upon just Principles of dependency on the Mother Country, can be restored to its proper vigour and activity.” (quoting Letter from the Colonial Secretary to General Thomas Gage (June 12, 1770), in 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE WAR OFFICE OF THE TREASURY, 1763-1775, at 103, 103 (Clarence Edwin Carter ed., 1931-33))); Soame Jenyns, *The Objections to the Taxation of our American Colonies, Briefly Considered, reprinted in THE AMERICAN REVOLUTION THROUGH BRITISH EYES* 6, 8 (Martin Kallich & Andrew MacLeish eds., 1962) (1765) [hereinafter AMERICAN REVOLUTION] (“[C]an there be a more proper time for this mother country to leave off feeding out of her own vitals, these children whom she has nursed up . . . ?”); WOOD, *supra* note 76, at 165-67 (noting the prominence of the parent-child analogy to the relationship between England and the American colonies).

Even John Dickinson, a colonist and eventually a revolutionary, implored, “Let us behave like dutiful children who have received unmerited blows [in the form of the Townsend Acts] from a beloved parent. Let us complain to our parent; but let our complaints speak at the same time the language of affliction and veneration.” JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES, LETTER III (Dec. 14, 1768), *reprinted in EMPIRE AND NATION* 15, 20 (William E. Leuchtenberg & Bernard Wishey eds., 1962).

101. See 2 PARL. HIST. ENG. 165 (1766) (statement of Lord Camden) (“The forefathers of the Americans . . . looked for protection, and not for chains, from their mother country.”), *reprinted in AMERICAN REVOLUTION*, *supra* note 100, at 24, 28; Petitions of the London Merchants Against the Stamp Act (Jan. 17, 1766), 16 PARL. HIST. ENG. 133 (1766) (urging the repeal of the Stamp Act in order to promote among the colonies a “firm[] attach[ment] to the mother country”), *reprinted in AMERICAN REVOLUTION*, *supra* note 100, at 16, 18; William Pitt, Addressing the House of Lords in Opposition to the Quartering Act (May 27, 1774), in 3 ANECDOTES OF THE LIFE OF THE RIGHT HONORABLE WILLIAM PITT, EARL OF CHATHAM 18, 100 (John Almon ed., 1792) [hereinafter ANNALS] (“The Americans had almost forgot, in their excess of gratitude for the repeal of the stamp act, any interest but that of the mother country.”), *reprinted in AMERICAN REVOLUTION*, *supra* note 100, at 41, 42; William Pitt, Speech on the Stamp Act (1766), in ANNALS, *supra*, at 365 (“The Americans are the sons, not the bastards of England.”), *reprinted in AMERICAN REVOLUTION*, *supra* note 100, at 10, 11; RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA 37, 104-05 (8th ed. 1778) (criticizing at one point the claim that England was “the PARENT STATE,” while at another point urging a strategy of forbearance in order to engender “submission to the Mother-country”), *reprinted in TWO TRACTS ON CIVIL LIBERTY* (Leonard W. Levy ed., 1972).

way as to obliterate the metaphor entirely.<sup>102</sup> If England be the mother country, Paine wrote,

the more the shame upon her conduct. Even brutes do not devour their young, nor savages make war upon their families. . . . This new world has been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. Hither have they fled, not from the tender embrace of the mother, but from the cruelty of the monster . . . .<sup>103</sup>

Two years later, in a pamphlet addressed to the "People of England," Paine returned to the familial theme, insisting that England might have governed the colonies better had she studied more intensively "the domestic politics of a family."<sup>104</sup> But the time was too late for correction, he said, again for reasons touching on the nature of the family, or at least the family as Locke had conceived it and as it was actually emerging in America. Paine explained:

[A]s in private life, children grow into men, and by setting up for themselves, extend and secure the interest of the whole family, so in the settlement of colonies large enough to admit of maturity, the same policy should be pursued and the same consequences would follow. Nothing hurts the affections both of parents and children so much, as living too closely connected, and keeping up the distinction too long.<sup>105</sup>

Children must eventually "have families of their own."<sup>106</sup> Command cannot hold them. Pressing for a new parental role for the emerging polity, Paine urged:

It is *now* the interest of America to provide for herself. She hath already a large and young family, whom it is more her duty to take care of, than to be granting away her property, to support a power who is become a reproach to the names of men and Christians.<sup>107</sup>

Having seized the rhetorical trope, Paine turned his attention to social, political, and economic reality. The American Revolution and eventually the revolution in France, he argued, were largely about establishing a new

102. Paine was not the first to wage a pitched battle against even the maternal metaphor. For a discussion regarding his predecessors, see Burrows & Wallace, *supra* note 76, at 190-211.

103. THOMAS PAINE, *COMMON SENSE* (1776), reprinted in THOMAS PAINE: COLLECTED WRITINGS 5, 22-23 (Eric Foner ed., 1995) (emphasis in original).

104. THOMAS PAINE, *THE CRISIS*, NUMBER VII (1778), reprinted in COLLECTED WRITINGS, *supra* note 103, at 191, 207.

105. *Id.* at 206-07.

106. *Id.* at 207.

107. PAINE, *supra* note 103, at 48 (emphasis in original).

conception of the character and place of family in political society.<sup>108</sup> Paine's enemy, most simply, was a system in which privilege, property, and power were determined by inheritance.<sup>109</sup> Its beneficiaries, of course, were the aristocracy and ultimately the monarchy. Paine waged a two-pronged assault on this system, one immanent and one external.

The immanent critique took two forms. The first, which aimed at the heart of Filmer's defense, was biblical. The only permanent succession recognized "in or out of scripture," Paine insisted, concerned original sin, which all persons inherited equally and from which "hereditary succession can derive no glory."<sup>110</sup> The second focused on the historical record. Hereditary succession to the throne of England was little more than fanciful myth, said Paine. The story of English monarchy was a story not of kindred blood but of bloody conquest, in which families fought one another for the right of succession.<sup>111</sup> One could see this in the historic contests between the Yorks and Lancasters and later between the Stuarts and Hanovers.<sup>112</sup> Contrary to Edmund Burke's reflections,<sup>113</sup> Paine insisted that "there is no English origin of kings,"<sup>114</sup> for even the mythic line of succession begins with "William the Conqueror, *as a conqueror*."<sup>115</sup> Thus, the English self-conception of a seamless and timeless succession was a lie, and noble titles and the laws of inheritance aimed merely to disguise the truth and hence to preserve the "conquest."<sup>116</sup>

Paine's external critique emphasized the bad consequences of hereditary monarchy, which is to say its incompatibility with things he valued. Borrowing from Locke's account of the state of nature but extending the normative implications of the metaphor, Paine argued that hereditary succession violated nature's basic precepts:

[A]ll men being originally equals, no *one* by *birth* could have a right to set up his own family in perpetual preference to all others forever;

108. See generally *id.*; PAINE, *supra* note 104.

109. See PAINE, *supra* note 103, at 15-16.

110. *Id.* at 17.

111. *Id.* at 293-95; see also THOMAS PAINE, COMMON SENSE, ON THE KING OF ENGLAND'S SPEECH (1782), reprinted in COLLECTED WRITINGS, *supra* note 103, at 287, 293-95 (recounting the battle for the throne of England between the Stuart family and the House of Hanover).

112. See PAINE, *supra* note 111, at 4.

113. See generally EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 216-18 (J.G.A. Pocock ed., Hackett Publishing Co. 1987) (1790) (challenging the manner and aims of the French Revolution and defending the English system of hereditary succession).

114. THOMAS PAINE, RIGHTS OF MAN PART ONE (1791), reprinted in COLLECTED WRITINGS, *supra* note 103, at 433, 476.

115. *Id.* at 474, 474-76 (emphasis in original). This claim especially resounded among Americans, because, in Whiggish fashion, Americans tended to claim that English liberty had actually existed among the Anglo-Saxons, but was lost with the imposition of the Norman yoke. See FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGIN OF THE CONSTITUTION 76-77 (1985).

116. PAINE, *supra* note 111, at 478, 478-79.

and though himself might deserve *some* decent degree of honors of his co-temporaries, yet his descendants might be far too unworthy to inherit them.<sup>117</sup>

In short, “nature disapproves [hereditary monarchy], otherwise she would not so frequently turn it into ridicule by giving mankind an *ass for a lion*.”<sup>118</sup>

Aside from its being incompatible with nature’s precept of equality, Paine believed monarchy suffered from four other defects. First, what nature anticipated was for intelligence, wisdom, and ability to rise to the top. She did not, however, assign these virtues to a few fortunate families; instead she distributed them randomly across “every family of the earth.”<sup>119</sup> As nature anticipated, so should human institutions have followed. But government by inheritance subverted nature’s beneficence and made government itself incompetent.<sup>120</sup>

Second, Locke had claimed that the legitimacy of government depended on the consent of the governed. Again, this standard did not prohibit monarchy, for according to Locke it was sufficient that consent be tacit, evidence of which was fairly easy to muster.<sup>121</sup> Paine took Locke’s notion of consent and pushed it one step further, insisting that hereditary monarchy was inherently nonconsensual and therefore unavoidably despotic. There were two forms of hereditary succession, said Paine: one in which a family “establish[ed] itself with hereditary powers on its own authority”<sup>122</sup> and another in which a particular family was invested with such powers by the nation.<sup>123</sup> The first, he said, was clearly despotism, for it lacked any semblance of consent. The second might have seemed permissible, but it too was ultimately despotic, for “[i]t operates to preclude the consent of the succeeding generations.”<sup>124</sup> Parents, Paine argued, may not bind their children in this way. Nor could it be said that children may somehow anticipatorily devise their rights to their forebears: “If the present generation, or any other, are disposed to be slaves, it does not lessen the right of the succeeding generation to be free; wrongs cannot have a legal descent.”<sup>125</sup>

Third, hereditary monarchy confused the public good with familial interest. The concern of government, Paine insisted, should be the affairs

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117. PAINE, *supra* note 103, at 16 (emphasis in original).

118. *Id.* at 16 (emphasis in original).

119. THOMAS PAINE, RIGHTS OF MAN, PART TWO, *reprinted in* COLLECTED WRITINGS, *supra* note 103, at 541, 563, 562-63.

120. *See id.* at 562-64.

121. *See* LOCKE, SECOND TREATISE, *supra* note 37, §§ 106-07.

122. PAINE, *supra* note 114, at 517.

123. *See id.*

124. *Id.* at 518.

125. *Id.*

of the nation as a whole. Government, then, ought to be the property of “the whole community.”<sup>126</sup> But hereditary succession debased government by making it “the property of [a] particular man or family” and in doing so created “a permanent family interest . . . whose constant objects are dominion and revenue.”<sup>127</sup>

Fourth, in promoting dominion and revenue, the English system preserved the fruits of conquest, but perverted the proper relation between property and family. At the heart of that system was the law of primogeniture, under which property descended to the eldest son, to the exclusion of other children.<sup>128</sup> Primogeniture thus concentrated the bulk of a family’s property and title in a single set of hands. Such a regime, Paine argued, was inconsistent with natural justice: “Establish family justice, and aristocracy falls. By the aristocratical law of primogenitureship, in a family of six children, five are exposed. Aristocracy has never more than one child. The rest are begotten to be devoured.”<sup>129</sup>

Aside from violating principles of natural justice, said Paine, this arrangement was problematic for its pernicious consequences. Much of republican thought in the eighteenth century was preoccupied with the problem of virtue.<sup>130</sup> Republican institutions, the thinking went, were sustainable only among a virtuous citizenry. But what made for a virtuous citizenry? According to an agrarian strand of republicanism, virtue implied manliness; and, as Forrest McDonald points out, “manliness meant independence.”<sup>131</sup> Independence in turn required that a man own enough unencumbered land to be able to meet the material needs of his family. Thus independence, which would soon become the foundation for full citizenship, signified not the solitary or unattached individual but the person whose autonomy grew out of his connection to the soil (*i.e.*,

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126. *Id.* at 536, 536-37.

127. PAINE, *supra* note 119, at 562.

128. See generally ALLISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 68-78 (1928).

129. PAINE, *supra* note 114, at 478.

130. On the relations among republicanism, virtue, and eighteenth-century American thought, see for example JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 161-87 (1992); PATRICE HIGONNET, SISTER REPUBLICS: THE ORIGINS OF FRENCH AND AMERICAN REPUBLICANISM 107-20 (1988); McDONALD, *supra* note 115, at 70; THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE 112-27 (1988); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 519-29 (1975); PAUL A. RAHE, REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION 600-05 (1992); M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 235-36 (1994).

131. McDONALD, *supra* note 115, at 74. This strand, which traced its intellectual pedigree to James Harrington’s *OCEANA*, was especially strong in the Southern colonies. *Id.* (citing JAMES HARRINGTON, *THE COMMON-WEALTH OF OCEANA* (J. Streater 1977) (1656)).

production) and to family (*i.e.*, reproduction). Primogeniture undermined this social system of virtue by unduly constraining the distribution of land.<sup>132</sup>

Paine advocated two sets of policies designed to break up the “vast estates” of the aristocracy and to redistribute its wealth.<sup>133</sup> One was to require that landed estates be allocated “among all the heirs and heiresses of those families,”<sup>134</sup> including “poor relations” and not just the favored few (or one).<sup>135</sup> This, he said, would go a long way toward redistributing land “back to the community.”<sup>136</sup> The other policy was to enact a system of taxation, extraordinary for its time, that would supply revenue for three basic purposes: (1) to support the poorest families; (2) to underwrite the education of children of poor and middling families; and (3) to provide for the aged, a provision “not of the nature of a charity, but of a right.”<sup>137</sup> These policies would strengthen republicanism by ensuring a wider distribution of property and hence of the structural guarantee of independence and virtue. By educating the young, they would increase the prosperity of the nation and supply the sole foundation for the “character” of individuals.<sup>138</sup>

Paine offered these policies for the reform of England and the European Continent. Perhaps he imagined they were simply unnecessary in America, for even before the Revolution some of the practices Paine found most objectionable were weakening, and after the Revolution most were obliterated. Feudal land tenures, which were basic to the English law of property, had never been widespread in the colonies, where almost all title to land was held in fee simple.<sup>139</sup> New England had abolished

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132. See *id.* at 73-75. This strand of republicanism makes sense of Paine’s critique of “the state of the currency,” in which he was concerned that a man be able to “support his family as long again as before [the crisis].” THOMAS PAINE, *THE AMERICAN CRISIS* III (1977), reprinted in *COLLECTED WRITINGS*, *supra* note 103, at 116, 143. Agrarian republicanism collided with republican thought in Puritan New England, which held that public virtue could be sustained not through social and political structure, but only through the presence of privately virtuous individuals. See *id.* at 144-46. This different conception would become useful in New England’s transition from an agrarian to a commercial and industrial capitalist economy and in permitting what some would consider the “unnatural” accumulation of wealth that capitalism entailed. See generally DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 21 (20th Anniversary ed. 1996); JOSEPH ALOIS SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 156-63 (Tom Bottomore ed., Harper & Row 1976) (1942); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 153-83 (Talcott Parsons trans., C. Scribner’s Sons 1930).

133. See PAINE, *supra* note 119, at 639, 624-41.

134. *Id.* at 639.

135. *Id.* at 636.

136. *Id.* at 639.

137. *Id.* at 628, 624-31.

138. *Id.* at 614, 630-31.

139. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 234 (2d ed. 1985) (observing that state legislatures began to dismantle feudal land law shortly after the Revolution).

primogeniture in the seventeenth century, though the Southern colonies continued to recognize it up to the Revolution.<sup>140</sup> Fee tail, which tied title exclusively to lineal descendants, was dead or dying in America by the end of the eighteenth century, when state legislatures completely abolished the remnants of feudal incidents.<sup>141</sup>

Inheritance of property and tenures in land were not the only domains in which English law touched the family. In the domain of criminal law, forfeiture and attainder were penalties under English law for treason and certain other capital crimes.<sup>142</sup> Both worked “corruption of blood,” which meant not only that the convicted or attainted person must forfeit his own real and personal property, but also that he could neither transmit his property to his heirs nor inherit from his ancestors.<sup>143</sup> The theory, plainly enough, was that his family’s blood was corrupted—a reversal of familial privilege, a kind of familial curse. The consequence was that the family’s relevant property reverted to the Crown. Even before the Revolution, Virginia, New Jersey, and Pennsylvania ameliorated the harshness of these penalties, the latter two by abolishing corruption of blood altogether.<sup>144</sup>

Most important, however, was the effective absence of aristocracy in the colonies. Again, this is not to say there was no social or economic differentiation among people. New England had its “high-born” and the Southern colonies their planter class long before the American secession from Britain. But, as I have already suggested, American aristocracy was different, and the upshot of the difference was that its members possessed no inherent claim to rule others.<sup>145</sup>

In 1791, Paine praised the revolutions in America and France for rejecting aristocratic familial systems and embracing principles “calculated to call forth wisdom and abilities, and to exercise them for the public good, and not for the emolument or aggrandizement of particular descriptions of men or families.”<sup>146</sup> The revolutions, he said, had “renovat[ed] . . . the natural order of things.”<sup>147</sup> This notion of renovation was truer in France than in what would become the United States, for many of the principles of the American Revolution merely reinforced trends that had been present for decades in the colonies.<sup>148</sup> Even so, the separation of the

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140. *See id.* at 66.

141. *See* FRIEDMAN, *supra* note 139, at 239; MCDONALD, *supra* note 115, at 12.

142. *See* MCDONALD, *supra* note 115, at 20-21.

143. *Id.* at 20.

144. *See id.* at 20-21.

145. *See* BAILYN, *supra* note 76, at 274-75.

146. PAINE, *supra* note 111, at 537-38.

147. *Id.* at 537.

148. *See* subpart II(B).



colonies from the mother country did entrench certain solutions to problems concerning the family in the polity. In doing so, it created a new set of problems for the new country to deal with.

#### IV. A Republican Family

##### A. *Institutional Form and Political Liberty*

The new problems concerned the form(s) in which politics would be conducted. Aristotle had observed three desirable political constitutions in the world: kingship (monarchic rule by one person for "the common interest"),<sup>149</sup> aristocracy (rule by a few good persons for the good of "the state and all its members"),<sup>150</sup> and polity (rule "by the mass of the populous in the common interest").<sup>151</sup> He compared those forms with three "deviations": tyranny, oligarchy, and democracy.<sup>152</sup> In the end, however, Aristotle did not make much of these forms. For one thing, he abandoned them almost as quickly as he took them up, turning his attention instead to social and economic elements such as the distribution of wealth.<sup>153</sup> For another, he seemed unable to fathom how rule by the many might constitute a desirable regime.<sup>154</sup>

Writing two centuries later, Polybius purported to solve that problem by embracing a form that Aristotle only briefly flirted with, the "mixed constitution."<sup>155</sup> Originating in Lycurgus's constitution for Sparta,<sup>156</sup> this form combined elements of each of Aristotle's three desirable regimes. In Polybius's day, the mixed constitution was visible in the institutional design of the Roman empire.<sup>157</sup> Its virtues were threefold: It embodied an aesthetic quality of balance; as the Romans demonstrated, it was remarkably successful in extending rule over a large expanse of territory; and, because it was resistant (though not immune) to "natural forces" of decline and decay, it tended toward longevity. In short, its strength was stability.<sup>158</sup>

149. 2 ARISTOTLE, *supra* note 64, III.7.1279a30-1279a35, at 2030.

150. *Id.*

151. *Id.*

152. *Id.* III.7.1279b4-1279b5, at 2030.

153. *See id.* III.9.1280a8-10.1281a39, at 2031-33 (arguing that rule by the rich distinguishes oligarchy from democracy).

154. *See id.* III.11.1281a40-1282a41, at 2033-35.

155. POLYBIUS, *THE HISTORIES*, VI.3 (arguing that the best constitution is one that combines a kingship, an aristocracy, and a democracy). Aristotle's flirtation was less with a mixed form *per se* than with a single form that combined various social elements. *See, e.g.*, 2 ARISTOTLE, *supra* note 64, IV.7.1293b15-1293b20, at 2053.

156. *See* POLYBIUS, *supra* note 155, VI.3.

157. *See id.* VI.11.

158. *See id.* VI.3-4.

Much later, Montesquieu also celebrated the mixed constitution; its principal virtue for him, however, was not stability but liberty.<sup>159</sup> As Polybius had Rome, Montesquieu too had his exemplar—in England.<sup>160</sup> The idea behind English institutions, as Blackstone put it, was a single system that combined all the desirable Aristotelian forms: monarchy (a variation on Aristotle's kingship, in the Crown), aristocracy (in the House of Lords), and polity (in the House of Commons).<sup>161</sup> The aristocracy was the perfect fulcrum, preventing each of the others from tending to its pernicious extreme—monarchy to tyranny and polity to mob rule.<sup>162</sup> The others, in turn, prevented aristocracy from becoming what Aristotle called oligarchy. The result, said Blackstone (and Montesquieu), was English liberty.<sup>163</sup>

Colonists celebrated English liberty and Blackstone's account of balance, but therein lay the problem, for the social and political order of the colonies was different from that of England. The Crown was present in the persons of royal governors, and the people were present in colonial legislatures. But aristocracy was absent, at least as a formally recognized social institution with a distinct political function. Even before the Revolution, some colonists sensed the problem and proposed to solve it by creating not a hereditary nobility but an uninheritable "nobility for life."<sup>164</sup> This, proponents claimed, would secure a "social basis for constitutional balance."<sup>165</sup> The idea was controversial in its time, but the democratic forces later unleashed by the Revolution made it downright insensible. Still, absent Crown *and* aristocracy in the wake of separation, where would balance come from?<sup>166</sup>

The answer was not clear. One thing that made the absence of formally instituted privileged orders, and therefore the idea of popular government, less problematic in America was what McDonald calls "the stabilizing effects of extragovernmental institutions and forces," including the family.<sup>167</sup> Thomas Jefferson thought something more was needed. He imagined a feeble state, whose weakness would guarantee a kind of

159. See MONTESQUIEU, *supra* note 81, at 151-62.

160. See *id.* at 151.

161. See 1 BLACKSTONE, *supra* note 76, at \*50-52.

162. See *id.*; BAILYN, *supra* note 76, at 273-74.

163. See 1 BLACKSTONE, *supra* note 76, at \*50-52; MONTESQUIEU, *supra* note 81, at 151; BAILYN, *supra* note 90, at 20-23. In the last work, Bailyn says Blackstone's account was "misleading" as an explanation of "the actual working of English government." *Id.* at 23. One can accept Bailyn's point and nonetheless appreciate the importance of the idea—however misguided—to colonial conceptions of the proper structure and function of government.

164. BAILYN, *supra* note 76, at 278.

165. *Id.* at 279.

166. See *id.* at 274-81.

167. MCDONALD, *supra* note 115, at 160-61.

liberty, combined with a "natural aristocracy," whose benevolent guidance would ensure good order and thus mitigate what he perceived to be the dangers of democracy.<sup>168</sup> Putting to one side the obvious tensions in Jefferson's thought, expecting social institutions alone to maintain an acceptable balance between order and liberty—especially an institution smacking of aristocracy, but even institutions like church, family, and community—was probably unrealistic. This was particularly so if "government" connoted not merely the inheritors of colonial administration but also a new nation-state. The territorial scope of a national state would require powers sufficient not only to carry out whatever duties the nation might have, but also to resist many of the centrifugal forces that a state of such size could produce. So substantial a government might overwhelm mere informal institutions whose range of influence in any event would tend to be local.

If the Constitution did anything, it supplied the design for a nation-state. Its familiar answer to the question of balance borrowed from Blackstone, but owed a deeper debt to Montesquieu, who exalted the separation of governmental functions into distinct legislative, executive, and judicial departments that shared powers with one another.<sup>169</sup> This separation of functions, in fact, permitted a kind of marriage of Aristotle to Montesquieu. With a twist, each of Aristotle's desirable constitutions was present in its own department: monarchy in the executive, polity in the House of Representatives, and aristocracy in the judiciary.<sup>170</sup> The twist

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168. See RICHARD K. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON: A REVISIONIST VIEW* 122 (1984) (describing Jefferson as a communitarian anarchist). Jefferson never relinquished the notion that a natural aristocracy was crucial to human progress. See Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in *THOMAS JEFFERSON: WRITINGS* 1304, 1306 (Merrill D. Peterson ed., 1984) ("The natural aristocracy I consider as the most precious gift of nature for the instruction, the trusts, and government of society").

169. As noted above, Blackstone located the three forms of rule (or social classes) within Crown and Parliament. One thing that made this arrangement significant was the absence of a "constitutional" place for the judiciary. The upshot of the arrangement was parliamentary supremacy, which Blackstone explicitly embraced. See 1 BLACKSTONE, *supra* note 76, at \*91 ("But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it."). Montesquieu, in contrast, emphasized the need to keep the three governmental functions—executive, legislative, and (especially) judicial—distinct and separate, each with its own domain of power. See MONTESQUIEU, *supra* note 81, at 151-62.

170. Granted, no supporter of the Constitution would have conceded the presence of aristocratic or monarchic forms in the proposed government. In fact, Hamilton disavowed the monarchic characteristics of the executive, see *THE FEDERALIST NO. 70*, at 423-31 (Alexander Hamilton) (Clinton Rossiter ed., 1961), though he praised the judiciary in terms evocative of Thomas Jefferson's natural aristocracy. See *THE FEDERALIST NO. 78*, at 464-72 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Antifederalists, on the other hand, were quick to point out—and criticize—what they considered the aristocratic and monarchic elements of the Constitution. See, e.g., George Clinton, *Letters of "Cato,"* No. VI (Dec. 16, 1787), reprinted in *THE ANTIFEDERALISTS* (Cecelia M. Kenyon ed., 1966), at 312, 316-17 (arguing that the President and the Senate will combine against the representatives to strangle liberties in the United States); Richard Henry Lee, *Letters from the Federal Farmer*, No. III



was that the states, which had inherited colonial authority, were also represented in the Senate. The result was a strange new oxymoronic contraption—a confederated national democratic republic.

### B. *The Constitution*

In theory, the contraption was “a machine that would go of itself,”<sup>171</sup> and the Constitution’s incongruous ingenuity would hold in abeyance a range of worries about explicitly maintaining a social basis for constitutional balance. But this mechanistic account disguised a number of ways in which the Constitution was not simply a political apparatus; or, if it were, it presupposed a particular sort of society to make it work. No one can read Madison’s treatment of class-based social divisions in *The Federalist* Nos. 10<sup>172</sup> and 39,<sup>173</sup> and fail to appreciate the relevance of social structure to the proper operation of the new regime.

Family was integral to the presumed social structure. At one point in *The Federalist* No. 14, Madison even insisted that the nation itself was a family: “Hearken not to the unnatural voice which tells you that the people of America, knit together as they are by so many chords of affection, can no longer live together as members of the same family . . . .”<sup>174</sup> Perhaps because the familial metaphor was archaic, simply implausible, or implicitly threatening to the preserves of power jealously guarded by the separate states, this was the only time we see Filmer’s metaphor at work in *The Federalist*.

(Oct. 10, 1787), reprinted in *THE ANTIFEDERALISTS*, *supra*, 215, 220, 216-20 (“[W]hen we examine the powers . . . of the executive, we shall perceive that the general government . . . will have a strong tendency to aristocracy. . . .”); George Mason, *Objections of the Proposed Federal Constitution* (Oct. 7, 1787), reprinted in *THE ANTIFEDERALISTS*, *supra*, 191, 195, 192-95 (“[I]t is at present impossible to foresee whether [the Constitution] will, in its operation, produce a monarchy, or a corrupt oppressive aristocracy; it will most probably vibrate some years between the two, and then terminate in the one or the other.”); *Letters of “Centinel,”* No. I (Oct. 5, 1787), reprinted in *THE ANTIFEDERALISTS*, *supra*, at 3, 7, 12-14 (arguing against equal representation of states in the Senate and the presidential power to pardon); *Letters of “Centinel,”* No. III (Nov. 5, 1787), reprinted in *THE ANTIFEDERALISTS*, *supra*, at 15, 18, 17-19 (contending that the national government would be constructed “on the most unequal principles, destitute of accountability to its constituents”); *Letters of “John DeWitt,”* No. III (Nov. 5, 1787), reprinted in *THE ANTIFEDERALISTS*, *supra*, 102, 105, 103-06 (noting that the Senate would be the “Aristocratical” branch and the executive the “Monarchical” branch of the proposed government); *Letter of “Montezuma”* (Oct. 17, 1787), reprinted in *THE ANTIFEDERALISTS*, *supra*, 61, 66, 61-67 (“[T]his constitution is calculated to restrain the influence and the power of the LOWER CLASS.” (emphasis in original)).

171. Michael Kammen traces this particular phrase to James Russell Lowell’s address to the Reform Club of New York in 1888, but emphasizes that the metaphor of Constitution as machine had roots extending back to the founding. See KAMMEN, *supra* note 86, at 17-19.

172. *THE FEDERALIST* NO. 10, at 78-79 (James Madison) (Clinton Rossiter ed., 1961) (explaining the roots of “faction” in, among other things, “the various and unequal distribution of property”).

173. *THE FEDERALIST* NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961) (defining an essential characteristic of a republic to be that the members of the government “be derived from the great body of society, not from an inconsiderable proportion or a favored class of it”).

174. *THE FEDERALIST* NO. 14, at 103 (James Madison) (Clinton Rossiter ed., 1961).

In fact, contrary to Madison's happy invocation of familial harmony, several of *The Federalist's* essays worry that the family—as a social institution, not a rhetorical prop—was a serious problem for political societies. John Jay was the first to raise the issue, in his discussion of national defense. As Paine had observed the previous decade, Jay noted that “absolute monarchs” are often persuaded to go to war for reasons of purely personal ambition, including aggrandizing “their particular families,” even “when their nations are to get nothing by it.”<sup>175</sup> This observation implied two worries. The first, which formed Jay's primary concern, was that the United States be strong enough to defend against such predators.<sup>176</sup> The second, which related more directly to Hamilton's and Madison's preoccupations, was how to create a system in which personal or familial ambition did not subvert the welfare of the nation.

This latter concern drew strength from the fact that waging war was not the only danger familial ambition might pose for a polity. Family ties could also engender corruption, which was perilous especially in international relations—as in the case of a president's making treaties or appointing ambassadors to benefit himself and his family—but even in the appointment of executive officers having no direct connection to international affairs.<sup>177</sup>

Jay suggested that the solution was to ensure that the “private interests” of the executive were “[in]distinct from that of the nation.”<sup>178</sup> In truth, however, this community of interest was not entirely feasible on republican terms. Worse, moreover, it uncomfortably seemed to evoke a type of regime in which the executive's interest was, by definition, the interest of the nation, as when Louis XIV proclaimed (perhaps apocryphally), “L'Etat, c'est moi.”<sup>179</sup>

Thus, the more plausible solution, at least for a republican polity that might be able to rely consistently on the moral virtue or statesmanship of its citizens or leaders, was one of institutional design. First, divide power among independent departments so that legislative power, for example, did

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175. THE FEDERALIST NO. 4, at 46 (John Jay) (Clinton Rossiter ed., 1961).

176. See *id.* at 48-49.

177. But see THE FEDERALIST NO. 64, at 395 (John Jay) (Clinton Rossiter ed., 1961) (arguing that corruption would be improbable because ratification of a treaty requires the support of the President and two-thirds of the Senate); THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the Senate's approval power over presidential nominations would serve as a check on corruption).

178. THE FEDERALIST NO. 64, *supra* note 177, at 395 (John Jay).

179. For a claim that, if Louis XIV never made the statement, he might as well have done so, see CRANE BRINTON ET AL., A HISTORY OF CIVILIZATION: PREHISTORY TO 1715, at 399 (5th ed. 1976). Louis's successor, Louis XV, would insist (not apocryphally): “It is in my sole person that sovereign authority resides.” R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW 98 (1995).

not reside solely in the legislature, but was shared by the executive, and vice versa. (The judiciary—its place and function—was arguably a special case.) One way of doing this was to give the legislature, specifically the Senate, some meaningful say over the adoption of treaties and the appointment of ambassadors and certain other executive officers. This kind of check would harness ambition by structurally confining it and depersonalize national policy and international relations by abstracting them from the parochial interest of person or family.<sup>180</sup> In Hamilton's words, this architectural design would preclude "a monopoly of all the principal employments of the government in a few families, and [thus preclude] . . . an aristocracy or an oligarchy."<sup>181</sup>

Second, design a system of representation in the legislature that would expand the range of interests to which any single member was accountable. The devices for achieving this goal were to (1) carefully calibrate the size of districts,<sup>182</sup> (2) maintain a system of regular elections,<sup>183</sup> and (3) ensure that eligibility for office was not confined "to persons of particular families or fortunes."<sup>184</sup> Thus, the polity would reduce the risk of captivity to selfish personal interest or narrow familial tie.

Third, and to perfect the foregoing changes, abolish hereditary social status within institutions of government. Hence, the Constitution prohibited the United States from granting titles of nobility and barred national governmental officials from accepting any title or office from a foreign prince or state, unless (in the latter case) the Congress consents;<sup>185</sup> it further prohibited states from granting titles of nobility.<sup>186</sup>

Article IV's direction that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government"<sup>187</sup> was to similar but more systematic effect. McDonald claims that there was some disagreement over the meaning of "republican," with Hamilton insisting it meant the prohibition of hereditary status and Madison arguing that it connoted a government whose power derived from the consent of the people.<sup>188</sup> In fact, as Hamilton's and Madison's contributions to *The Federalist* indicate, establishing representative democracy and abolishing hereditary status were merely two sides of the same coin; both were

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180. See THE FEDERALIST NO. 76, *supra* note 177, at 457 (Alexander Hamilton).

181. THE FEDERALIST NO. 77, at 462 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

182. See THE FEDERALIST NO. 57, at 354 (James Madison) (Clinton Rossiter ed., 1961).

183. See *id.* at 352 (observing that "the restraint of frequent elections" is necessary to effectuate other devices for representational accountability).

184. *Id.* at 353.

185. U.S. CONST. art. I, § 9, cl. 8.

186. U.S. CONST. art. I, § 10, cl. 1.

187. U.S. CONST. art. IV, § 4.

188. See MCDONALD, *supra* note 115, at 5.

fundamental principles of republican government and aimed at the same basic goal: liberty.<sup>189</sup>

Finally, the Constitution also addressed the imposition of hereditary penalties through forfeiture and attainder, as in the English system.<sup>190</sup> Essentially, this provision lifted the intergenerational curse that corruption of blood had inflicted under English, colonial, and American law.<sup>191</sup>

Notwithstanding the explicit and implicit bans on inherited status and punishment, there were two prominent exceptions. The first was the provision restricting eligibility for the office of President to “natural born” citizens, thus making the office an inchoate but hereditary privilege of the native population.<sup>192</sup> The second was the institution of slavery, which not only belied the prohibition of hereditary status but implicated the family in other subtle and peculiar ways.<sup>193</sup>

These exceptions aside, the Constitution addressed the very dangers of family and hereditary status for which Paine had lambasted the *ancien regime*. Proponents of the Constitution also imagined, however, that family—specifically, the American version of family—not only was not dangerous, but would actually advance the structure and operation of the proposed system, or at least would mitigate fears about its structure and operation.<sup>194</sup> One pronounced fear—especially among Antifederalist opponents of the Constitution—was that, notwithstanding the baroque arrangement of power among departments, the national government would be so powerful it would overwhelm the states’ prerogatives and the people’s liberty.<sup>195</sup> In part because of recent experience, both colonial

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189. For Madison’s understanding of the normative and institutional requirements of republican government, see THE FEDERALIST NOS. 10, 14, 37, 39, 43, 49, 51, 52, 55, 57, 62 (James Madison) (Clinton Rossiter ed., 1961). For Hamilton’s contributions, see THE FEDERALIST NOS. 9, 22, 28, 34, 68, 70, 71, 77, 78, 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

190. U.S. CONST. art. III, § 3. The Framers explicitly rejected such penalties, providing as follows: “The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.” *Id.*

191. See *supra* notes 142-44 and accompanying text.

192. U.S. CONST. art. II, § 1, cl. 5. That section contains an exemption for persons who were United States citizens “at the time of the Adoption of this Constitution.” *Id.*

193. The problem of slavery is relevant to the issues with which I am concerned in a larger project on the constitutional status of the family; however, it is beyond the scope of this Essay. For a perceptive treatment of the intersection of the U.S. Constitution, family, and slavery, see PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 29-35 (1997).

194. See *supra* notes 184-91 and accompanying text.

195. See Letter from Philadelphiensis to His Fellow Citizens (Feb. 7, 1788) (“[U]nder the proposed plan of government the least fragment of liberty cannot exist.”), reprinted in THE ANTIFEDERALISTS, *supra* note 170, at 69, 71; The Pennsylvania Minority, *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents* (Dec. 12, 1787) (“The legislative power vested in Congress . . . is so unlimited in its nature . . . that this alone would be amply sufficient to annihilate the State governments . . .”), reprinted in THE ANTIFEDERALISTS, *supra* note 170, at 27, 45.

and revolutionary, the relation between liberty and states was clear and comprehensible. States were forums for dealing with most of the important political questions of the day. States (and communities) were where people exercised their ancient liberty to govern themselves. And people increasingly perceived the states as fortifications against the oppression of a distant central power and thus as institutional guarantors of both ancient liberty and an emerging kind of modern liberty.<sup>196</sup>

What might protect against national encroachment on these interests? The answer given by proponents of the Constitution was complex and in some respects confusing. But part of their answer relied upon the ties of affection and kinship that resided in family and community. Hamilton put the claim this way:

It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union . . . .<sup>197</sup>

Madison later made a strikingly similar claim.<sup>198</sup>

This picture of an organic hierarchy of human attachments borrowed from Aristotle<sup>199</sup> and Cicero,<sup>200</sup> both of whom had depicted the relation

196. See *The Political Thought of the Antifederalists*, reprinted in Introduction, THE ANTIFEDERALISTS, *supra* note 170, at xxxix-xli (explaining the Antifederalists's belief that republican government could succeed only in small political units); see also HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 15-7, at 69 (1981) ("The Antifederalists's defense of federalism and of the primacy of the states rested on their belief that there was an inherent connection between the states and the preservation of individual liberty."). But see WOOD, *supra* note 24, at 563-64, 519-24 (noting the Antifederalists's worry that the Constitution of 1787 marked a sharp break with revolutionary ideology, especially in its delegation of executive powers to a single president and its aggrandizement of national power).

197. THE FEDERALIST NO. 17, at 119 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

198. In early 1788, Madison wrote:

[T]he first and most natural attachment of the people will be to the governments of their respective States. . . . And with the members of these [States], will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

THE FEDERALIST NO. 46, at 294-95 (James Madison) (Clinton Rossiter ed., 1961).

199. Aristotle famously claimed that the state is the natural extension and highest form of human sociability. See 2 ARISTOTLE, *supra* note 64, I.1.1252a1-.1253a4, at 1986-87. In his hierarchy, human association begins with the procreative relation between man and woman and the economic relation between master and slave. See *id.* I.2.1252b1-.1252b18, at 1987. Those pairs become the household. See *id.* The coalition of a number of households, in turn, forms the village. See *id.* And "[t]he final association, formed of several villages, is the state." *Id.* I.2.1252b28-.1252b30, at 1987.

200. See CICERO, DE OFFICIIS I.xvii.58, at 61 (Walter Miller trans., W.M. Heinemann Ltd. 1956). Cicero set out this hierarchy as follows:



between family and polity as happy and harmonious. Indeed, the bonds engendered in familial settings were essential to sustaining politics. Aristotle insisted, however, that the harmony should not be too close. For one thing, familial authority was not identical to political authority. Thus, family was not simply a little polity to which the rules of politics applied. Familial authority was different.<sup>201</sup> For another thing, it was positively dangerous to try to unify family and state. "Plurality," as Aristotle called it, was crucial to the success of a well-run state, and the unity of family and state undermined plurality.<sup>202</sup> Family, therefore, required a separate space.<sup>203</sup> Nonetheless, Cicero could claim that the home—understood as the center of reproductive life, in which all things were in common—was "the foundation of civil government, the nursery, as it were, of the state."<sup>204</sup> Moreover, he observed, the intensity of human attachment was stronger the closer one moved to the center of human society—the home—and dissipated the farther one moved from that center.<sup>205</sup>

Hamilton and Madison exploited these insights to craft an innovation that was especially useful in light of American conditions. The innovation was to argue that the institution of the family could reinforce the status of the states—which many opponents of the Constitution exalted—and protect against encroachments by the nation—which all opponents of the Constitution feared. This claim was significant for constitutionalism, because it imagined for family a practical role in limiting power within a geographically expansive regime.

## V. Constitutionalism, Family, and Change

This new role for family, as Hamilton and Madison imagined it, was essentially *preservationist*; that is, it aimed at maintaining a particular type of political order, which they called "republican." Ironically, however,

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Now, if a contrast and comparison were to be made to find out where most of our moral obligation is due, country would come first, and parents; . . . next come children and the whole family, who look to us alone for support and can have no other protection; finally, our kinsmen, with whom we live on good terms and with whom, for the most part, our lot is one.

*Id.* at I.xlv.160, at 163 ("Our first duty is to the immortal gods; our second, to country; our third, to parents; and so on, in a descending scale, to the rest.")

201. See 2 ARISTOTLE, *supra* note 64, I.7.1255b18-.1255b39, at 1992 (describing familial authority as akin to a monarchy); see also ARISTOTLE, NICOMACHEAN ETHICS V.6.1134b10-.1134b11 (Martin Ostwald ed. & trans., MacMillan 1986) ("What is just for the master of a slave and just for a father is similar to, but not identical with, the politically just.")

202. See 2 ARISTOTLE, *supra* note 64, II.2.1261a17-.1261a22, at 2001.

203. See *id.* II.2.1261a16-.1262b36, at 2001-04. Suggestively, Aristotle's discussion of a separate space for family introduced his treatment of private ownership of property. See *id.* II.1-5.1264a1-.1264b25, at 2001-06.

204. CICERO, *supra* note 200, I.xvii.54, at 53.

205. See *id.* I.xvii.53-.58, at 57-61.

this role was linked both historically and conceptually to another, which was radically *transformative*. Locke had justified the latter role. Colonial experience had demonstrated it.

Locke understood that one of the basic and enduring problems of politics was constraining and directing political power. Specifically, in his terms, power should be constrained against arbitrariness and directed to the common good.<sup>206</sup> His solution to that problem was complex, involving natural rights, majoritarianism, and rule of law, among other things. We need not pause over these particulars, nor need we worry now about the merits of Lockean liberalism in general. The more pertinent concern is Locke's notion that the people possess residual powers to declare government dissolved and to replace it with a new one more consistent with their needs.<sup>207</sup> By maintaining the threat of dissolution—and, of course, by implementing it—the people's residual powers could help sustain limits. And to the extent that attentive and self-interested people presided over the rites of dissolution and replacement (or, in biblical terms, of destruction and creation), they could help direct political power toward the common good.

From the standpoint of constitutionalism, the powers to destroy and create are crucial. In practical terms, if people are to exercise these powers, they must, at a minimum, be able to imagine new ways—both normative and institutional—of ordering their political world(s). This capacity in turn presumes that people possess, at a minimum, intellectual and ethical resources independent from the ruler or state. In other words, people must be able to be not merely good citizens but also anti-citizens—or, more accurately, anti-statists—when circumstances require. They must be able to dismantle existing arrangements and replace them, perhaps with something radically new, perhaps with something that attempts to recapture or reinforce values or institutions that are lost or waning. Finally, in order to perform these roles, people must be able to occupy meaningful spaces that are partially autonomous from the state.

In a complex and highly differentiated society—especially one of liberal orientation—there may be many such spaces, though they tend to be diffuse, and one's contact with them can be fleeting. Perhaps because of those conditions, the institutions that are politically most useful are ones that are protected by constitutional design against substantial interference from the state. The Constitution of the United States explicitly carves out space for a few such institutions. Private ownership of property, for example, can contribute to individuals' sense of security and well-being, promote material prosperity, and engender the independence that citizens

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206. See LOCKE, SECOND TREATISE, *supra* note 37, §§ 123-131.

207. See *supra* notes 71-72 and accompanying text.

need to make reflective, noncoerced political judgments. Property's autonomy is now so ingrained in the American polity that it requires little judicial solicitude for its protection. This is especially true of capital enterprise, which, despite its undeniable contributions to prosperity, has frequently threatened both individual security and collective capacities for reflective self-government.<sup>208</sup>

The press—or “the media” as it is known today—is another such institution. Its most serious function is educative, primarily with respect to current affairs. At its best, it supplies information by which people may manage their own affairs and critically evaluate (perhaps even participate in) governmental decisions. Problematically, the diversity and independence of the press—and hence its usefulness—have suffered from its conquest by monied interests.<sup>209</sup> It does not require a keen eye (or ear) to recognize the presently debased condition of the visual (and auditory) media.

Religion is still another institution. Its primary function is moral, and its sites are typically communal. When religion is vigorous, therefore, it provides a place in which people may create and participate in distinct ways of life. As with property and the press, however, developments in the United States have weakened religion's constitutionalist utility. The

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208. The Supreme Court's decisions treating for-profit corporations as persons and treating money as speech are progenitors of perverse and debilitating effects of monied enterprise on politics. On the constitutional status of corporations, see *Smyth v. Ames*, 169 U.S. 466, 526 (1898) (holding that “a railroad corporation is a person within the meaning of the Fourteenth Amendment[’s]” Due Process and Equal Protection Clauses) and *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, 396 (1886). Cf. *Grosjean v. American Press Co.*, 297 U.S. 233, 244-45 (1936) (holding that a corporation is not a “citizen” within the meaning of the Privileges and Immunities Clause but is a “person” within the meaning of the Equal Protection and Due Process Clauses). On corporations and money in the electoral process, see *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 482-83 (1985) (declaring a limit on campaign contributions unconstitutional); *First National Bank v. Bellotti*, 435 U.S. 765, 767 (1978) (holding a law prohibiting corporate contributions to referenda unconstitutional); and *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (concluding that limitations on both campaign contributions and expenditures “implicate fundamental First Amendment interests”). Cf. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 654-55 (1990) (concluding that a law “prohibit[ing] corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in election for state office is constitutional because the provision is narrowly tailored to serve a compelling state interest”).

209. On the autonomy of the press, see *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 245-48 (1974) (declaring unconstitutional a Florida statute requiring newspapers to print political responses because it represented a governmental “intrusion into the function of editors”) and *Grosjean*, 297 U.S. at 245-50 (holding that the First Amendment protects the press from punitive taxation, not just from the prior regulation of content). On the problems associated with the marriage of money to media, see *Miami Herald*, 418 U.S. at 250, 247-54 (observing that the expense of modern publishing places “in a few hands the power to inform the American people and shape public opinion”). Cf. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 101, 104 (1973) (noting that the scarcity of frequencies prevents some interested parties from broadcasting). See generally OWEN FISS, *THE IRONY OF FREE SPEECH* (1996) (arguing for governmental intervention to protect the democratic purpose of the First Amendment).

Supreme Court has so narrowly construed “free exercise,” for example, that the constitutional principle now boils down to a simple maxim: Believe what you will, but behave as the state generally commands.<sup>210</sup> The logical consequences of this position are to standardize modes of worship and to convert much of religion into a system of creeds. In short, the tendency is to make religion’s protected domain a matter strictly of individual belief instead of a way of life.<sup>211</sup>

Finally, federalism, which presumes a domain for politics in states and localities, is another example, although it is less antistatist than antination-statist. That is, its function is less to transform than to preserve a political arrangement that resists the imposition of certain sorts of policy from above. It permits a diffusion of values and provides enclaves in which people may authorize or modify those values. In its most vigorous iterations, it acts as a kind of geographically grounded multiculturalism. Even federalism, however, has fallen on hard times in the United States, especially since the middle of the twentieth century. It not only has acquired—sometimes earned—a bad reputation with respect to civil liberties, but also is approaching obsolescence with respect to many important functions.<sup>212</sup>

210. See *Employment Div. v. Smith*, 494 U.S. 872, 879, 885 (1990) (holding that the Free Exercise Clause does not excuse the respondent from compliance with laws prohibiting the use of peyote). This case reflects the approach of Justice Frankfurter’s dissent in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Justice Frankfurter insisted:

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue.

*Id.* at 655 (Frankfurter, J., dissenting); see also *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) (citing *Smith* for the proposition that an individual has an obligation to obey the law regardless of his religious beliefs).

211. But see *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (holding that Wisconsin’s compulsory education law violated the free exercise rights of Amish families). In the context of later cases, *Yoder* appears to be anomalous, notwithstanding Justice Scalia’s insistence that the holding in *Yoder* is consistent with his opinion for the Court in *Smith*. See *Smith*, 494 U.S. at 881-82. Scalia notes that:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other Constitutional protections, such as . . . the right of parents to . . . direct the education of their children.

*Id.* at 881.

212. It is beyond the scope of this Essay to explain or to explore in detail the demise of federalism in the United States. Sheldon Wolin traces the trend to the constitutional founding of the United States. At that time, he says, a nationalist ethos was built into the logic of the constitutional order, embodied in the person of Alexander Hamilton. See Sheldon Wolin, *The People’s Two Bodies*, 1 DEMOCRACY 9, 14-16 (1981). This ethos led inexorably to the unchallenged supremacy of the nation-state—Wolin calls it the “imperial” state—and the impoverishment of local democratic politics. *Id.* at 17. I suspect that Wolin overreaches in suggesting a singular genetic logic to the Constitution; it does seem accurate, however, that a nation-statist logic triumphed by the end of the nineteenth century and became

Because of the weakness or perversity of these institutions in their present state, there may be constitutionalist reasons to look for another institution capable of performing a transformative role. But does it make sense to consider the family to be such an institution? One difficulty with this view is that, unlike property, the press, religion, or even federalism, family lacks substantial support from the constitutional text. Although the Constitution does speak to family,<sup>213</sup> it does so primarily by rejecting old forms that were incompatible with republicanism. If we can take Hamilton and Madison seriously, the modern family was presumed to be an affirmative part of the new order, even if the text were largely silent. As an interpretive matter, however, the constitutional status of family arises (if at all) less from text or intentions than from inferences drawn from the character and logical relations among other institutions and values.<sup>214</sup> This is partly a question of constitutional theory, *a la* Locke, and partly a pragmatic concern, as demonstrated by colonial experience. But it is also a question of the specific functions that family might perform.

As it happens, the various specific functions of family closely resemble those of property, the press, religion, and federalism. Like ownership of property, family can contribute to psychic and material security and independence; and, as a kind of economic enterprise, it can promote prosperity. Like the press, it can perform an important educative function. Even more than most modern modes of religion, family serves as a site for regularly resolving practical moral problems; the sum and substance of those resolutions can constitute a way of life. Like federalism but with a greater transformative capacity, family's performance of these functions can foster diversity—Aristotle's "plurality"—with respect to resources, knowledge, and values. Something like these functions is reflected in Justice O'Connor's treatment of marriage in *Turner v. Safley*,<sup>215</sup> in which the Court struck down restrictions on the ability of prison inmates to marry.<sup>216</sup> The marital relation, she wrote, serves as an

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entrenched by the middle of the twentieth. The sources for this triumph are complex. Some are quite noble, others less so. If I may be permitted room for historical speculation, it strikes me that the sources include the following: (1) the material, institutional, and normative demands of capitalism; (2) reaction to the Civil War's challenge to the survival of "the Union"; (3) the political crisis precipitated by the fear of annihilation by global communism; and (4) various political and ethical challenges—including slavery, civil rights for African Americans, and the status of women—that have drawn on national power for their solution. For a claim that states should reclaim some of their lost authority with respect to constitutional interpretation, see WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* 239-74 (1996).

213. See *supra* notes 185-93 and accompanying text.

214. For examples of and a justification for this interpretive method, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

215. 482 U.S. 78 (1987).

216. *Id.* at 100.

“expression[] of emotional support and public commitment.”<sup>217</sup> It possesses “spiritual significance.”<sup>218</sup> It promises the possibility of sexual union. Finally, it is “a precondition” to many forms of economic advantage.<sup>219</sup>

*Turner*, of course, was not the first decision to affirm the constitutional significance of the family. In this century, one of the earliest indications of the Court’s commitment to the family was *Meyer v. Nebraska*.<sup>220</sup> Justice McReynolds, writing for the Court, held that a state may not prohibit teaching students in or of a foreign language, even though the students are young and impressionable.<sup>221</sup> On its facts, the decision might well have implicated some theory of religious liberty or academic freedom. McReynolds, however, treated the case as revolving instead around the autonomy of family and the authority of parents to make decisions about rearing and educating their children.<sup>222</sup>

Plato envisioned, McReynolds wrote, an “Ideal Commonwealth” in which “the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent.”<sup>223</sup> Moreover, Sparta had attempted “to submerge the individual and develop ideal citizens” by gathering up young males, placing them in barracks, and “intrust[ing] their subsequent education and training to official guardians.”<sup>224</sup> McReynolds argued that such arrangements, however, are “wholly different from those upon which our institutions rest; and it will hardly be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.”<sup>225</sup>

One might speculate about the psycho-sexual roots of McReynolds’s antipathy toward wives and children held in common.<sup>226</sup> One might also wonder precisely what the “letter . . . of the Constitution” might tell us about the claims he makes. Moreover, the implication that regulating the

217. *Id.* at 95.

218. *Id.* at 96.

219. *Id.*

220. 262 U.S. 390 (1923).

221. *Id.* at 401, 403.

222. *Id.* at 400 (“Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all States, including Nebraska, enforce this obligation by compulsory laws.”).

223. *Id.* at 401-02 (quoting PLATO, *THE REPUBLIC*, book V. 457d (Ralph Barton Perry ed., Charles Scribner’s Sons, 1928)).

224. *Id.* at 402.

225. *Id.*

226. Susan Moller Okin, for example, argues that (1) a desire to hold women as a kind of property, and (2) the specter of sexual equality have made men distrustful of the abolition of family in Plato’s guardian class. See Susan Moller Okin, *Philosopher Queens and Private Wives: Plato on Women and the Family*, 6 PHIL. & PUB. AFF. 345, 349-59 (1977).

teaching of foreign language is analogous to rounding up children and raising them on a state-run commune is, to press the point gently, exaggerated. Nonetheless, McReynolds's opinion contained the kernel of a basic constitutionalist insight.

He exploited that insight two years later in *Pierce v. Society of Sisters*,<sup>227</sup> explaining:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>228</sup>

Certainly, there is more than one way to conceive the ground for this position. McReynolds himself probably understood the position as serving—and preserving—liberal capitalism and some version of “traditional” family values.<sup>229</sup> Others have claimed the position underwrites a conception of human dignity, which lies at the heart of American, and perhaps universal, political morality.<sup>230</sup>

But the constitutionalist perspective differs from both of these understandings, for it sees the primary issue in both cases to be the danger of the state's “over-constituting” civil society and thus threatening to undermine a basic precondition for constitutionalist politics. Over-constitution may take many forms. In *Buck v. Bell*<sup>231</sup> and *Skinner v. Oklahoma*,<sup>232</sup> the constitutionalist danger was the state's arrogation of control of the genetic constitution of society.<sup>233</sup> In *Meyer* and *Pierce*, the danger was the state's attempt to control the “intellectual and ethical DNA” of civil society. Thus, the question of both *Pierce* and *Meyer* was larger than whether education may be public or private or whether the state may regulate educational curriculum in certain ways. The question concerned

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227. 268 U.S. 510 (1925). *Pierce* involved a challenge to an Oregon state requirement that children between the ages of eight and sixteen be educated in public schools. *Id.* at 530.

228. *Id.* at 535.

229. On McReynolds's commitment to capital and to children, see OXFORD COMPANION, *supra* note 5, at 542-43.

230. See, e.g., Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 705-08, 744-54 (1980).

231. 274 U.S. 200 (1927).

232. 316 U.S. 535 (1942).

233. See *Buck*, 274 U.S. at 201, 207 (upholding a law that permitted the compulsory sterilization of a retarded woman); *Skinner*, 316 U.S. at 536, 541 (declaring unconstitutional an Oklahoma law which allowed habitual criminals to be sterilized). This consideration may also apply to the Court's decision in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating a law which prohibited interracial marriage), given the state's biologically racialist justification for its prohibition of miscegenation. *Id.*

the places from (or within) which people come to see and evaluate—and thus to embrace or modify or reject—their political world. These places can also help perform the constitutionally significant job of mediating the relation between individual on the one hand and collective or state on the other.<sup>234</sup>

Later decisions of the Court have tended not to embrace a transformative understanding of family, but instead have gravitated toward a preservationist view and frequently, like Filmer,<sup>235</sup> have relied on “tradition” to supply an account of the form and content of family.<sup>236</sup> One of the more muscular examples of this traditionalist approach to constitutional interpretation is Justice Scalia’s opinion in *Michael H. v. Gerald D.*,<sup>237</sup> which held that family (of a type) was not an autonomous domain, but a realm for intensive regulation by the state.<sup>238</sup> Scalia directly invoked Medieval English notions of family. On his reading of the English cases and treatises, the only form of family with a constitutionally protected status was the state-sanctioned marital family.<sup>239</sup>

American colonial experience partly belied Justice Scalia’s traditionalist aspiration and preservationist emphasis. For one thing, that experience—as well as the Revolution it precipitated and the Constitution itself—explicitly rejected English notions of family. For another, even if some aspect of the English family survived in the colonies, the family’s function at the founding was transformative, not simply preservationist. Scalia might well acknowledge those facts, but urge that once republican forms of government were established in the English-speaking confines of North America, a particular form of family—modern, marital, nuclear, and state-sanctioned—was built into the logic of the order, and its function

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234. Consider, for example, the anti-statist claims of children and their parents in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

235. See *supra* notes 27-28 and accompanying text.

236. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (proclaiming that a right of privacy in marriage antedates even the Bill of Rights); *id.* at 493 (Goldberg, J., concurring) (arguing that the Fourteenth and Ninth Amendments protect liberties that are fundamental because, *inter alia*, they are part of the country’s “traditions” and “experience”); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (arguing that the Fourteenth Amendment’s Due Process Clause protects those liberties rooted in the traditions of the country, including the right of a married couple to use birth control); *cf.* *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (holding that the notion of traditional family includes extended relatives); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (holding that the decision to marry is protected by the same right of privacy that protects decisions relating to procreation, childbirth, child rearing, and familial relationships).

237. 491 U.S. 110 (1989) (plurality opinion). Justice Scalia wrote for a plurality of four, except as to his account of tradition, which only he and Chief Justice Rehnquist embraced. See *id.* at 127 n.6 (plurality opinion).

238. *Id.* at 126-27 (plurality opinion).

239. *Id.* at 124-25 (plurality opinion) (discussing the common law’s presumption of legitimacy for children born in wedlock).



became fundamentally preservationist. There might be much to such a claim, and a comprehensive response to it is beyond the scope of this Essay. Suffice it for now to say that the American secession from Britain may suggest another lesson that, for better or worse, undercuts Scalia's expectation: Under certain conditions of liberty, it will be difficult, if not impossible, for government to determine family's form or protect itself against normative innovations that might grow out of revised familial relations. An autonomous family is a potentially dangerous source for new values and new ways of life.