
The Perils of Family Law Localism

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The notion that family law is inherently a matter for the states, not the federal government, has been invoked frequently in recent decades. The argument proved to be rhetorically, if not legally, powerful in the litigation challenging section 3 of the Defense of Marriage Act. Section 3, some argued, was an impermissible federal intrusion into an area of law reserved exclusively to the states.

This Article builds upon the literature examining family law localism by considering how the narrative affects the doctrine of family law. First, I consider how the narrative of family law localism facilitates greater reliance on morality in the area of family law. Second, I examine how it serves to justify application of a more deferential form of review in family law cases. In so doing, this Article contributes to the ongoing conversation about “family law exceptionalism” — that is, the ways in which family law doctrine departs from the principles applicable in other areas of law.

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The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.¹

INTRODUCTION

The notion that family law is inherently local — that is, a matter for the states, not the federal government² — has been invoked frequently in recent decades.³ The argument proved to be rhetorically, if not legally, powerful⁴ in the litigation challenging section 3 of the Defense of Marriage Act (“DOMA”).⁵ Section 3, some argued, was an

¹ *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

² In this Article, I use the term “local” to refer to state, as opposed to federal action. I realize that in other contexts, “local” is often used to refer to *substate*, as opposed to state, action. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889, 1906 (2014). My use of the term “local” here, therefore, may be confusing, or even seem incorrect to some. That said, I use the term “local” and the phrase “family law localism” in this way because this piece builds on other literature that used these phrases in similar ways. See, e.g., Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297, 1297 (1998) [hereinafter *Family Reconstructed*] (“The family serves as the quintessential symbol of localism.”); Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 870 (2004) [hereinafter *Canon*] (“The family law canon insists that family law is exclusively local.”). To be sure, however, other scholars have considered whether family law should be regulated at a substate level. See, e.g., June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 *MICH. ST. L. REV.* 49, 55-56 (noting that if the point of family law is to reflect “different cultural values,” it may make sense to “further localize” the approaches).

³ See, e.g., Hasday, *Canon*, *supra* note 2, at 874 (“Such assertions of family law’s exclusive localism are typical.”).

⁴ For an analysis of the extent to which the *Windsor* Court ruled on federalism grounds, see, for example, Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 113 *COLUM. L. REV. SIDEBAR* 156 (2013) [hereinafter *Family Equality*]. Although the Court seemed interested in the federalism arguments, it ultimately concluded that it need not decide the case on this basis. *Windsor*, 133 S. Ct. at 2692 (“[I]t is unnecessary to decide whether his federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”). Regardless, however, of the basis for the Supreme Court’s decision, this claim clearly resonated with many inside and outside the legal community. See, e.g., George F. Will, *A Matter of Jurisprudence*, *WASH. POST*, Mar. 19, 2013, available at 2013 *WLNR* 6859988 (“DOMA ‘shatters two centuries of federal practice’ by creating ‘a blanket federal marital status that exists independent of states’ family-status determinations.’”).

⁵ 1 U.S.C. § 7 (2012) (defining marriage for all federal purposes as the union of one man and one woman), declared unconstitutional by *Windsor*, 133 S. Ct. 2675.

impermissible federal intrusion into an area of law reserved exclusively to the states.⁶

In this Article, I argue that advocates who care about families and equality should be wary of relying on the narrative of family law localism, even if it may result in short-term gains. In the section 3 litigation, the potential short-term gain was the invalidation of the law and the ability of same-sex spouses to access hundreds of federal marital rights and benefits. Achieving this gain by using the narrative of family law localism, however, comes at a price. Other scholars — including Judith Resnik and Naomi Cahn — explore how the narrative of family law localism devalues the discipline of family law. This devaluation of family law in turn subordinates women’s issues, which are seen as inherently connected to the domestic sphere.⁷

This Article builds upon this existing literature by considering a previously unconsidered type of harm caused by the narrative of family law localism. This Article explores how the myth of family law localism influences the doctrine of family law. Specifically, I argue that repeated invocation of the narrative creates conditions that justify or facilitate the departure of family law norms from those applicable in other areas of law.

This Article identifies two ways in which family law doctrine is not congruent⁸ with the law as it applies to other areas of law. First, I consider how the narrative facilitates greater reliance on morality in the area of family law. While the Supreme Court has become increasingly wary of exclusive reliance on morality in other areas of law, heavy reliance on morality is not uncommon in family law cases.⁹

⁶ See, e.g., *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (holding section 3 unconstitutional under the Tenth Amendment because it regulated an issue — “marital status determinations” — that was an “attribute of state sovereignty”), *aff’d*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013).

⁷ See, e.g., Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1094-95 (1994) [hereinafter *Family Law*] (“The federalism explanation [for the domestic relations exception], in turn, may rest on either or both of two possible bases . . . [the second of which is] an attitude that dismisses the comparative importance of family law, both in the sense that it is more appropriate for states to control family law and also that family law, perceived as a traditionally feminine domain, does not merit federal judicial resources.”); Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 399 (2002) (arguing that “systems of jurisdiction . . . serve . . . to sustain women’s subordination”).

⁸ I borrow the term non-congruence from my colleague, Brian Soucek. See Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 158 (2014).

⁹ See *infra* Part II.

Second, I examine how the narrative serves to justify application of a more deferential form of review in family law cases. Even though family law cases often involve issues of deep, if not fundamental importance, some courts apply a less rigorous or careful form of scrutiny than would be applicable in other types of cases involving important liberty interests.¹⁰ In so doing, this Article identifies two more examples of what Jill Hasday calls “family law exceptionalism.” Family law exceptionalism refers to the ways in which family law doctrine “rejects what the law otherwise embraces, and embraces what the law otherwise rejects.”¹¹

Part I provides an overview of the narrative of family law localism and its more recent, narrower incarnation, family status localism.¹² Part II examines how the repeated invocation of family law localism contributes to two types of family law non-congruence. Both forms of non-congruence should be cause for careful reflection.

I. FAMILY LAW LOCALISM: AN OVERVIEW

In a variety of contexts over the last several decades, advocates and courts, including the Supreme Court, have suggested that the whole field of family law is reserved exclusively to the states.¹³ Indeed, despite its pronouncement in *United States v. Windsor*¹⁴ that it was not deciding the case on strict federalism grounds,¹⁵ the Supreme Court nonetheless cited the 1890 decision of *In re Burrus*¹⁶ for the proposition that “[t]he whole subject of the domestic relations of husband and wife, parent and

¹⁰ See *infra* Part II.

¹¹ JILL ELAINE HASDAY, FAMILY LAW REIMAGINED: RECASTING THE CANON 7 (2014).

¹² See *infra* Part I.

¹³ See, e.g., Hasday, *Canon*, *supra* note 2, at 871-84 (listing examples); see also Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. (forthcoming 2015) (manuscript at 2) (on file with author) [hereinafter *Family Status*] available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485595 (same).

¹⁴ The Supreme Court held unconstitutional section 3 of DOMA in *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013). Section 3 of DOMA defined marriage for all federal purposes as the union of one man and one woman. 1 U.S.C. § 7 (2012). As a result, even validly married same-sex spouses were denied all federal marital rights and benefits. Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1471 (2013).

¹⁵ *Windsor*, 133 S. Ct. at 2692 (“Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”).

¹⁶ 136 U.S. 586, 593-94 (1890).

child, belongs to the laws of the States and not to the laws of the United States.”¹⁷

The Court relied on the narrative of family law localism to limit the power of both the federal courts¹⁸ and Congress¹⁹ to address family law issues. In 1992, the Supreme Court affirmed the existence of the “domestic relations exception” to diversity jurisdiction in *Ankenbrandt v. Richards*.²⁰ The domestic relations exception precludes federal courts from adjudicating a broad range of family law cases.²¹

Shortly thereafter, the Court suggested that Congress may lack authority over family law matters in *United States v. Lopez*²² and again in *United States v. Morrison*.²³ As Jill Hasday explains, in both cases, the Court “use[d] the notion that family law is exclusively for the states to buttress their relatively narrow interpretations of Congress’s power to regulate interstate commerce.”²⁴

In the wake of these decisions, leading scholars including Jill Hasday, Ann Laquer Estin, Judith Resnik, and others discredited the proposition

¹⁷ *Windsor*, 133 S. Ct. at 2691.

¹⁸ *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (affirming the existence of the domestic relations exception to federal diversity jurisdiction).

¹⁹ *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Congress lacked the authority to enact the civil rights remedy of the Violence Against Women Act).

²⁰ *Ankenbrandt*, 504 U.S. at 704 (concluding that domestic relations exception to federal diversity jurisdiction “encompasses . . . cases involving the issuance of a divorce, alimony, or child custody decree”).

²¹ Indeed, while federal courts technically have jurisdiction over family law cases that raise federal constitutional questions, courts frequently invoke other doctrines to avoid adjudicating such cases. See, e.g., Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 273-74 (2009) (“While the Constitution does not indicate where authority for family matters lies, the Supreme Court established a tradition of abstention from family law questions during the nineteenth century that remains largely unchanged.”); Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 138 (2009) (arguing that lower courts have engaged in a “stealth expansion of the domestic relations exception to include federal questions”).

²² 514 U.S. 549, 564 (1995) (rejecting government’s argument about the scope of Congress’s authority in part on the ground that “under the Government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example”).

²³ *Morrison*, 529 U.S. at 615-16 (“Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”).

²⁴ Hasday, *Canon*, *supra* note 2, at 873.

that all of family law is local.²⁵ The scholars demonstrate that there is a long and extensive history of federal regulation of the family. A wide range of federal statutes, including welfare statutes,²⁶ tax statutes,²⁷ and statutes governing benefits for federal employees and military service members, shape and deeply impact families.²⁸

Today, it is less common (although still not unheard of)²⁹ to see assertions that the entire spectrum of family law matters are reserved to the states.³⁰ Instead, scholars and advocates now often acknowledge some amount of federal involvement in family law.³¹ But despite this acknowledgement, many scholars and advocates continue to cling to the notion that there is *something* inherently local about family law.

In recent years, a narrower claim has risen to the fore.³² This more narrow family law localism theory played an important role in the litigation challenging section 3 of DOMA.³³ Section 3 limited all federal

²⁵ See, e.g., Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 621 (2001) [hereinafter *Categorical Federalism*] (“showing that the very areas characterized . . . as ‘local’ — family life and criminal law — have long been subjected to federal lawmaking”); see also Hasday, *Canon*, *supra* note 2, at 875-82 (describing some of the many “federal statutes that regulate the creation and dissolution of legally recognized family relationship and/or determine the rights and responsibilities of family members”); Resnik, *Categorical Federalism*, *supra*, at 654-55 (“Even in areas such as marriage, divorce, alimony, and child custody, which are often listed as comprising the set of ‘domestic relations’ within the aegis of state law, federal law plays an important role.” (footnote omitted)).

²⁶ Hasday, *Canon*, *supra* note 2, at 892-98.

²⁷ Resnik, *Categorical Federalism*, *supra* note 25, at 645 (“Federal tax law defines family units and creates economic incentives for members.”).

²⁸ See Hasday, *Canon*, *supra* note 2, at 879 (“The federal law governing the United States military also creates rights and responsibilities that family members have because of their family status, and determines which family relationships the military will legally recognize.”).

²⁹ Cf., e.g., Margaret Rynzar & Anna Stepien-Sporek, *A Tale of Two Federal Systems*, 21 CARDOZO J. INT’L & COMP. L. 589, 595 (2013) (“As a result, family law has become firmly embedded in the states’ domain, although a minority of family issues have been viewed as a matter of national importance considered on the federal level.” (footnote omitted)).

³⁰ See, e.g., Brief of the Federalism Scholars as Amici Curiae in Support of Respondent Windsor at 3-4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter *Federalism Scholars’ Brief*] (“Our claim is not that family law is an exclusive field of state authority, but rather that certain powers within that field — such as the power to define the basic status relationships of parent, child, and spouse — are reserved to the States.”).

³¹ See *id.*

³² For a more comprehensive discussion of this narrower version of family law localism, see Joslin, *Family Status*, *supra* note 13, at 3-4.

³³ There were multiple lawsuits challenging the constitutionality of section 3 of

marital benefits to spouses in different-sex marriages.³⁴ A number of same-sex spouses filed lawsuits challenging section 3's constitutionality.³⁵ The core argument lodged against section 3 was an equal protection one.³⁶ By singling out same-sex married spouses and denying them all federal marital rights and responsibilities, section 3 violated equal protection principles protected by the Fifth Amendment.³⁷ But some parties, as well as various amici, raised a variety of federalism challenges to section 3's constitutionality.³⁸ In the *Windsor* litigation, a group of federalism scholars pressed this claim most strongly.³⁹ In their amicus brief in *Windsor*, the federalism scholars argued that there is a realm of truly local family law matters — specifically, family status determinations — that are reserved solely to the states.⁴⁰ Only states get to decide who is a spouse, or who is a parent or a child.⁴¹ Section 3 was unconstitutional, they claimed, because it

DOMA. See *The DOMA Legal Challenges*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/the-doma-legal-challenges> (last visited Sept. 30, 2014).

³⁴ Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Hon. Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

³⁵ See *The DOMA Legal Challenges*, *supra* note 33.

³⁶ Indeed, this was the only claim that Edith Windsor asserted in her complaint challenging section 3 of DOMA. See Amended Complaint at ¶¶ 84–85, *Windsor v. United States*, 833 F. Supp. 2d 394 No. 10 Civ. 8435 (BSJ) (S.D.N.Y. 2012) (“Because DOMA, as applied by the IRS, requires this disparity of treatment with regard to Thea Spyer’s estate, it creates a classification that singles out one class of valid marriages — those of same-sex couples — and subjects persons in those marriages to differential treatment compared to other similarly situated couples without justification in violation of the right of equal protection secured by the Fifth Amendment to the Constitution of the United States.”).

³⁷ Brief on the Merits for Respondent Edith Schlain Windsor at 14–15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12–307) (“DOMA’s discriminatory treatment of married [same-sex] couples violates Ms. Windsor’s right to equal protection of the laws.”).

³⁸ See, e.g., Complaint at ¶¶ 80–98, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 No. 1:09-11156-JLT (D. Mass. 2010) (raising Tenth Amendment and Spending Clause claims, in addition to an Equal Protection claim); see also Joslin, *Family Equality*, *supra* note 4, at 159–63.

³⁹ Federalism Scholars’ Brief, *supra* note 30, at 25–31.

⁴⁰ See, e.g., *id.* at 4 (“[C]ertain powers within [the field of family law] — such as the power to define the basic status relationships of parent, child, and spouse — are reserved to the States.”); Mary Bonauto & Paul Smith, *Who’s Afraid of Federalism?*, ACSBLOG (Apr. 17, 2013), <http://www.acslaw.org/acsblog/who-s-afraid-of-federalism> (“The ability to say who is married has been the virtually exclusive domain of the states — not Congress — and is bounded only by other constitutional guarantees of due process and equal protection.”).

⁴¹ Federalism Scholars’ Brief, *supra* note 30, at 4 (“[C]ertain powers within [the

was an impermissible federal intrusion into this exclusively local issue.⁴² I call this more refined theory “family status localism.”⁴³ Advocates invoking family status localism assert it is supported by a long history of federal deference to state family status determinations.⁴⁴

Careful historical analysis reveals, however, that even this more refined articulation of the family law localism narrative is inaccurate.⁴⁵ Federal law is riddled with independent, federal definitions of family status, including the status of “child.”⁴⁶ In some instances, Congress decided early on to be more inclusive of nonmarital children than was the case in most states at the time.⁴⁷ For example, in the 1917 amendments to the War Risk Insurance Act,⁴⁸ Congress defined the word “child” to include “[a]n illegitimate child . . . if [the father] acknowledged by instrument in writing signed by him, or if [the father] has been judicially ordered or decreed to contribute to such child’s support.”⁴⁹ By contrast, in most states at that time, “nonmarital children were considered the children of their fathers under state family law *only* if the child’s parents married.”⁵⁰ A written acknowledgement, or even an order to pay child support, would not suffice in most states at the time.⁵¹

In other instances, Congress initially deferred to state definitions of “child,” but later amended the statute to be more inclusive of nonmarital children.⁵² This was true, for example, in the context of children’s social security benefits. In 1965, Congress agreed with the recommendation of an appointed Advisory Council that “in such a program whether a child gets benefits . . . should not depend on whether

field of family law] — such as the power to define the basic status relationships of parent, child, and spouse — are reserved to the States.”).

⁴² See, e.g., *id.* at 3-4 (“Our claim is not that family law is an exclusive field of state authority, but rather that certain powers within that field — such as the power to define the basic status relationships of parent, child, and spouse — are reserved to the States.”).

⁴³ In earlier work, I referred to this argument as “family status federalism.” See Joslin, *Family Equality*, *supra* note 4, at 158.

⁴⁴ Federalism Scholars’ Brief, *supra* note 30, at 29 (“DOMA shatters two centuries of federal practice.”).

⁴⁵ See Joslin, *Family Status*, *supra* note 13, at 15-17.

⁴⁶ See *id.* at 22-24.

⁴⁷ *Id.* at 25.

⁴⁸ Act of Oct. 6, 1917, ch. 105, § 22, 40 Stat. 398, 401.

⁴⁹ *Id.*

⁵⁰ Joslin, *Family Status*, *supra* note 13, at 25 (citing ERNST FREUND, *ILLEGITIMACY LAWS IN THE UNITED STATES AND CERTAIN FOREIGN COUNTRIES* 22 (1919)).

⁵¹ See *id.* at 25-26.

⁵² *Id.*

[he is considered a child] under the laws of the State in which the person happens to live.”⁵³

It is simply not the case that all family law matters, or that even the more limited set of family status determinations, have been relegated to the states. Instead, there is a long history of overlapping federal and state involvement in family status determinations. As I explain elsewhere, the fact that the federal government is not precluded from acting in the realm of the family does not mean that it always should or that the states never should.⁵⁴ But it is important to acknowledge that there is a long history of federal involvement in the family generally and in family status determinations specifically.

This recognition is important because there may be times when federal involvement in the family is particularly important.⁵⁵ This may be true, for example, when the states are slow to remedy discrimination against various family forms, as was true in the past with regard to nonmarital children.⁵⁶ To mitigate continued discrimination against nonmarital children at the state level, the federal government extended some critical federal benefits to these children.⁵⁷ Federal involvement may also be important with respect to issues for which uniformity is critical. For example, federal law requires states to recognize and enforce out-of-state child custody⁵⁸ and child support.⁵⁹ The federal government enacted these laws to “ensure that children and their parents had security even as they moved about the country.”⁶⁰ Thus, while the theory of family status localism was pressed in support of equality in *Windsor*, a full embrace of the theory would inhibit the federal government’s ability to further equality in other circumstances.⁶¹

⁵³ 1965 ADVISORY COUNCIL ON SOC. SEC., SOC. SEC. ADMIN., PART 3: IMPROVEMENTS IN THE CASH-BENEFIT PROVISIONS, available at <http://www.ssa.gov/history/reports/65council/65part3.html> (emphasis added).

⁵⁴ See Joslin, *Family Status*, supra note 13, at 35-39.

⁵⁵ To explore these issues further, see Joslin, *Family Equality*, supra note 4, at 177-79.

⁵⁶ Joslin, *Family Status*, supra note 13, at 57.

⁵⁷ *Id.*

⁵⁸ Parental Kidnaping Prevention Act, Pub. L. No. 96-611, § 8(a), 94 Stat. 3569 (1980) (codified as amended at 28 U.S.C. § 1738A (1988)).

⁵⁹ Full Faith and Credit for Child Support Orders Act of 1994, 28 U.S.C. § 1738B (2000).

⁶⁰ Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 569 (2009).

⁶¹ Joslin, *Family Equality*, supra note 4, at 168-78 (discussing potential implications of a full embrace of the theory).

Although Justice Kennedy seemed intrigued by family status localism,⁶² in the end, the Court stated it was unnecessary to decide *Windsor* on this ground.⁶³ If the Court did not rule on this claim, what is the need for further examination of it? Further exploration is important for a number of reasons. First, claims that the federal government lacks power over some or all family law matters are common and remarkably resilient.⁶⁴ Despite attempts to dispel the basic premise,⁶⁵ variations of the theme continue to be asserted.⁶⁶ And this deep, abiding sense that there is something about family law that is inherently local clearly resonates with many people.

Given the current Court's renewed interest in federalism,⁶⁷ it is likely that variations of family law localism will be presented to the Supreme Court again in the near future. And, indeed, in the wake of *Windsor*, parties defending state marriage bans rely heavily on the theory of family law localism.⁶⁸ Specifically, opponents of same-sex marriage

⁶² See Transcript of Oral Argument at 76, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_c18e.pdf (noting how Justice Kennedy declared during oral argument that the question presented by the case was “whether or not the Federal government, under our federalism scheme, has the authority to regulate marriage”).

⁶³ *Windsor*, 133 S. Ct. at 2692 (“Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”).

⁶⁴ Brief on the Merits for Amicus Curiae the Partnership for New York City in Support of Respondent *Windsor* at 3, *Windsor*, 133 S. Ct. 2675 (No. 12-307), (“DOMA’s creation of a federal definition of marriage must be carefully reviewed because it is fundamentally inconsistent with basic principles of federalism. Since our nation was founded, the institution of marriage has been regulated by the States, not by Congress.”); see also Hasday, *Canon*, *supra* note 2, at 874 (“Such assertions of family law’s exclusive localism are typical.”).

⁶⁵ For a discussion of some of the scholarship dispelling the myth of family law localism, see Joslin, *Family Status*, *supra* note 13, at 11.

⁶⁶ See, e.g., Hasday, *Canon*, *supra* note 2, at 870 (noting that “[t]he family law canon insists that family law is exclusively local”).

⁶⁷ See, e.g., Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 508, 548 (2007) (describing and critiquing recent emphasis on the need for mutual exclusivity in state and federal powers); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 280 (2005) (noting the Court’s “renewed interest in federalism”).

⁶⁸ See, e.g., Brief of Defendants-Appellants at 4-5, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178) (“In cases spanning three centuries, the Supreme Court has emphasized that ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.’ In *Windsor*, the Supreme Court reaffirmed the States’ traditional authority over marriage.” (citations omitted)).

argue that state marriage bans are permissible because states have wide, if not unfettered, discretion in the area of family law.⁶⁹

II. FAMILY LAW LOCALISM'S HARMS TO FAMILY LAW

This Part considers how the repeated invocation of family law localism influences the *doctrine* of family law. Subpart A examines the ways in which the narrative facilitates continued reliance on morality in family law. Subpart B explores how the narrative serves to justify application of a more deferential form of review in family law cases. These are examples of family law exceptionalism,⁷⁰ or non-congruence.⁷¹

I am not the first scholar to raise concerns about potential effects of the family law localism narrative.⁷² Scholars show, for example, that the narrative of family law localism has its roots in race and gender inequalities that were once core to family law, or domestic relations.⁷³ Reva Siegel and Emily Sack, among others, demonstrate that the narrative's origin "may be traced to the principles of coverture."⁷⁴ Under

⁶⁹ See, e.g., Brief of Appellant Michele McQuigg at 11-12, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (Nos. 14-1167(L), 14-1169, 14-1173) ("*Windsor* discussed three principles that are relevant here: (1) that States have the right to define marriage for themselves; (2) that States may differ in their marriage laws concerning which couples are permitted to marry; and (3) that federalism affords deference to state marriage policies. When read together, these principles confirm that Virginia's Marriage Laws are constitutional. Any other conclusion would contravene *Windsor* by federalizing a uniform definition of marriage.").

⁷⁰ See *supra* notes 8-9 and accompanying text.

⁷¹ See *supra* note 9 and accompanying text.

⁷² To be sure, other scholars have identified positive effects from the doctrine, or at least the implementation, of family law localism. Vivian Hamilton, for example, argues that "[e]xpressing community norms through discretionary decision making [in private family law disputes] may promote societal goals of cohesion, solidarity, and legitimization of the courts." Vivian E. Hamilton, *Expressing Community Values through Family Law Adjudication*, 77 UMKC L. REV. 325, 325 (2008). Similarly, Anne Dailey argues that "state sovereignty [over family law] may reflect a more developed appreciation of the communitarian underpinnings of the liberal state and the role of the family in fostering the virtues of citizenship in liberal society." Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1888 (1995); see also *id.* at 1871 ("[T]he communitarian nature of family law requires a level of political engagement and a sense of community identity that lie beyond the reach of national politics."). Professor Dailey argues that the states have "exclusive authority," *id.* at 1880, over "marriage, divorce, child custody, child support, alimony, property division, termination of parental rights, adoption, foster care, and child welfare laws." *Id.* at 1792.

⁷³ Historically, slaves were prohibited from marrying anyone. Courtney G. Joslin, *The Evolution of the American Family*, HUM. RTS., Summer 2009, at 2, 2.

⁷⁴ Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal*

the doctrine of coverture, a married woman's legal identity was merged into that of her husband.⁷⁵ Married women experienced a range of legal disabilities under the doctrine of coverture: "Wives could not enter into contacts without their husbands' consent, enter a profession, sue or be sued, make a will, or testify for or against their husbands."⁷⁶ In addition, under coverture, the domicile of a wife followed that of her husband.⁷⁷ Accordingly, in an action between married spouses, there could be no diversity of citizenship.⁷⁸ This principle was noted in the 1848 case of *Barber v. Barber*,⁷⁹ which is the first Supreme Court case to suggest that federal courts typically lack jurisdiction over family law matters.⁸⁰

Defenders of slavery also invoked the narrative of family law localism during the Reconstruction.⁸¹ At the time, the status of slavery was itself considered a "domestic relation."⁸² Those who sought to protect the institution of slavery from its abolition by the federal government relied on the argument that the states should be permitted to control this domestic relation.⁸³

Access to Federal Courts, 84 WASH. U. L. REV. 1441, 1441 (2006); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2204 (1996) (stating that "the notion that family law is a matter of state, not federal, concern can be traced to gendered domicile rules of the common law of marital status, as well as to efforts to preserve other gender-specific aspects of the common law of marital status").

⁷⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (noting that "[b]y marriage, the husband and wife [we]re one person in law: that is, the very being or legal existence of the woman [wa]s suspended during the marriage, or at least [wa]s incorporated and consolidated into that of the husband").

⁷⁶ Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 415-16 (2013).

⁷⁷ *Id.*

⁷⁸ Siegel, *supra* note 74, at 2202; *see also* Sack, *supra* note 74, at 1472.

⁷⁹ 62 U.S. (21 How.) 582, 592-93 (1858). In the case, the Court concluded it did have jurisdiction because the couple had already obtained a divorce *a mensa et thoro* and the action was one to enforce an order of alimony. *Id.* at 583.

⁸⁰ *See, e.g.,* Hasday, *Family Reconstructed*, *supra* note 2, at 1307 ("The Supreme Court first announced the domestic relations exception in *Barber v. Barber*").

⁸¹ For a comprehensive and fascinating account of this, *see id.* at 1299.

⁸² *Id.* (stating that "[i]n the nineteenth century, many Americans defined slavery as a domestic relation").

⁸³ *Id.* at 1324 ("Slavery's defenders argued against federal involvement in the institution on the ground that slavery was a domestic relation."). While defenders of slavery argued against federal intervention in this "domestic relation," Hasday also shows that most opponents and supporters of Reconstruction assumed that the federal government had the authority to regulate families. *See id.* at 1349 ("Yet although they found the substantive policies of Reconstruction horrifying and much preferred state control, Reconstruction's critics conceded that the federal government could regulate family law.").

Some scholars also consider how the relegation of family law matters to the states is based on and perpetuates the devaluation of the discipline of family law and women's issues, which are viewed as connected to the domestic sphere.⁸⁴ As Judith Resnik wrote almost fifteen years ago, the narrative that all family law is local is "not only fictive but harmful."⁸⁵ Naomi Cahn argues that the narrative perpetuates the devaluation of family law.⁸⁶ Because the federal courts and the federal government typically are associated with matters of (more) importance, the relegation of family law to the states signals its relative lack of status.⁸⁷ Truly important matters are ones that, at least at times, must be handled at the federal level and by the federal courts.⁸⁸

I agree with Resnik, Cahn, and others that the devaluation of family law matters is worrisome. Family law matters are vitally important. Family law touches some of the most important matters in our lives — our relationships to and interactions with our children and other loved ones.⁸⁹

This Article offers a unique contribution to this body of scholarship by exploring the ways in which the repeated invocation of family law localism influences the *doctrine* of family law. Specifically, this Article argues that the narrative results in, or at least perpetuates, two different

⁸⁴ Cahn, *Family Law*, *supra* note 7, at 1098 (arguing that the Supreme Court has largely relegated domestic relations issues to state courts based in part on "bias against women, as well as on conventional concepts of the family"); Judith Resnik, "Naturally" *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1760 (1991) (noting the "troubling equation of 'women' with 'families' and the accompanying assumption of the absence of family matters from the federal courts").

⁸⁵ Resnik, *Categorical Federalism*, *supra* note 25, at 621.

⁸⁶ Cahn, *Family Law*, *supra* note 7, at 1114-15 ("Family law remains devalued in both federal and state courts."); *see also* Sack, *supra* note 74, at 1445 ("This alternative explanation . . . reveals the . . . now-discredited beginnings [of the domestic relations exception to federal diversity jurisdiction] and exposes one of the primary causes and consequences of the exception — the belief that family law is a 'women's issue' that is not deserving of the attention of the federal courts.").

⁸⁷ *See, e.g.*, Sack, *supra* note 74, at 1441 ("This explanation reveals both one of the primary causes for the exception's creation and the consequences of maintaining it — the belief that family law is a 'women's issue' that is not deserving of the attention of the federal courts.").

⁸⁸ *See* Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 203 (1999) ("The central critique of the feminist position is that federal reluctance to address family litigation betrays a gendered stratification of legal issues in which federal judicial attention is reserved for matters of national significance.").

⁸⁹ The Supreme Court agrees that many of these issues are "central to the liberty protected by the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

types of non-congruent analyses in the area of family law.⁹⁰ Both of these forms of non-congruence should be cause for careful reflection.

The first form of non-congruence relates to what state interests or justifications are sufficient to sustain government rules or conduct.⁹¹ The narrative of family law localism perpetuates a belief — either conscious or unconscious — that some interests are permissible in the family law context that would be impermissible, or at least more questionable, in other contexts.

The second form of non-congruence is related, but distinct. There is a tendency in family law cases for courts to apply a different, often more deferential form of analysis than would be applicable in other types of cases.⁹² This type of non-congruence also can be attributed at least in part to the myth of family law localism.

Of course, I do not mean to suggest that these forms of non-congruence are evident in all family law decisions. There are many family law opinions that do not even cite, much less rely on, morality or community norms.⁹³ And there are many family law decisions in which courts carefully scrutinize the justifications or explanations for some government rule or conduct.⁹⁴ That said, when viewed as a whole, there are some differences that can be seen when family law is compared to developments in other areas of law.

A. *Non-Congruent State Interests*

One way in which the narrative of family law localism contributes to non-congruent analysis of family law issues relates to the permissibility of asserted government interests — specifically, a state interest in

⁹⁰ I draw these two forms of non-congruence from Brian Soucek. *See* Soucek, *supra* note 8, at 181-86.

⁹¹ *Id.* at 185-86 (defining one form of non-congruent equal protection as a model under which the permissibility of a particular government interest depends on which level of government is asserting the interest).

⁹² *Id.* at 181-82 (describing a different form of non-congruent equal protection as a model under which different levels of constitutional scrutiny are applied in different contexts).

⁹³ *Cf.* Bruce C. Hafen, *The Family as an Entity*, 22 UC DAVIS L. REV. 865, 879 (1989) [hereinafter *The Family*] (stating that “[s]tate intervention into family life . . . is less likely now than previously to be based on moral judgments”); Carl E. Schneider, *Marriage, Morals & the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 519 (arguing that moral discourse in family law has diminished in recent years).

⁹⁴ *See, e.g., Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981) (“[W]e conclude that the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.”).

promoting community values or morality. The fact that morality plays more of a role in family law than it does in many other areas of law is due in part to, or is at least perpetuated by, the myth of family law localism.

In recent decades, the Supreme Court has been wary of relying solely on morality to sustain government action in other areas of law.⁹⁵ As Suzanne Goldberg writes, “since the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-based justification in a majority opinion that is still good law.”⁹⁶ In contrast to this growing reluctance to rely exclusively on morality in other areas of law, it is not uncommon to see family law court decisions, and state family law statutes, that explicitly look to and rely upon morality. Why should it be permissible to rely on nothing more than morality or community norms when considering family law matters when it would not be permissible to do so in other types of cases?

The myth of family law localism perpetuates a sense that reliance on morality is more permissible, indeed that it is appropriate, in the domain of family law. The original justification for the domestic relations exception to federal diversity jurisdiction was rooted in the doctrine of coverture.⁹⁷ Because a wife’s domicile followed that of her husband, there could be no diversity of citizenship in an action between the married spouses.⁹⁸ Today, a wife can have a separate domicile from her husband.⁹⁹ Because the original justification for excluding “domestic relations” cases from the federal courts has disappeared,¹⁰⁰

⁹⁵ Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1258-83 (2004) [hereinafter *Morals-Based Justifications*] (exploring the Supreme Court’s use and reliance on morals-based justifications).

⁹⁶ *Id.* at 1236.

⁹⁷ See *supra* notes 74–80 and accompanying text.

⁹⁸ See, e.g., Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 UC DAVIS L. REV. 1453, 1468-69 (2014) (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 27 (1934) (“The ‘derivative domicile’ rule gave a married woman her husband’s domicile by operation of law.”); see also Abrams, *supra* note 76, at 413-19.

⁹⁹ See, e.g., Appleton, *supra* note 98, at 1476 (noting that the Restatement finally abandoned the derivative domicile rule in 1988).

¹⁰⁰ While husbands and wives can now have separate domiciles, other vestiges of coverture remain. See, e.g., Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 763, 771 (2007) (examining marital name changing, a practice rooted in the doctrine of coverture); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000) (describing how many states continue to have different rules for marital rape as compared to rape by a non-spouse).

other explanations have come to the fore to justify the continued relegation of family law issues to the states.

A prominent contemporary explanation for leaving family law matters to the states is the belief that family law matters are ones that, by their very nature, are based on community norms and values. Bruce Hafen, for example, argues that family law is different from other areas of law because it requires “explicit consideration of the social interest in domestic relations.”¹⁰¹ Eric Stein expresses a similar understanding: “If there is any field in which one would expect a particularly intimate link between legal norms and local culture, it is family law.”¹⁰² Mary Ann Glendon states it even more directly: “Much of family law is no more — and no less — than the symbolic expression of certain cultural ideals.”¹⁰³

Family law matters must be reserved to the states, the argument continues, because the states are much closer to and more attuned to these local norms that should and do inform the law. Or, to put it more bluntly, decisions about local norms and customs “can best be made locally.”¹⁰⁴ Historian Michael Grossberg states it this way: “[O]pposition to national jurisdiction over the family stemmed from . . . [the belief] that state policy makers and community officials best understood the dynamics of family life.”¹⁰⁵

Commentators use different terminology to refer to these local “norms” that purportedly should inform family law rules. Some commentators use the term “local culture.”¹⁰⁶ Others use the phrase “community values.”¹⁰⁷ Even when commentators do not specifically invoke the word morality, it is clear that the values or local cultures on which many rely refer to behavior that the local community considers good and virtuous.¹⁰⁸ It is difficult to distinguish between a system

¹⁰¹ Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 470-71 (1983).

¹⁰² Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081, 1092 (1986).

¹⁰³ MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 10 (1987).

¹⁰⁴ Sack, *supra* note 74, at 1486.

¹⁰⁵ MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 295 (G. Edward White ed., 1985).

¹⁰⁶ See, e.g., Stein, *supra* note 102, at 1092 (“If there is any field in which one would expect a particularly intimate link between legal norms and local culture, it is family law.”).

¹⁰⁷ See, e.g., Hamilton, *supra* note 72, at 345 (arguing that “[a]llowing courts to incorporate community values in some [family law] cases may further the expressive purpose of law and shore up perceptions of the social legitimacy of the judicial system”).

¹⁰⁸ See, e.g., Dailey, *supra* note 72, at 1888 (arguing that “state sovereignty [over family law] may reflect a more developed appreciation of the communitarian

intended to promote local civic virtues and a system intended to promote local notions of morality.¹⁰⁹ And while some family law commentators shy away from the word “morality,” courts are less likely to do so. It remains common in family law rules and decisions to see specific references to and reliance on perceptions of morality.¹¹⁰ By contrast, in other areas of law, courts are increasingly wary of relying solely or exclusively on morality as a justification for government rules or actions.¹¹¹

It is important to acknowledge that community norms and values shape all law and policy in this country.¹¹² It is not the fact that family law takes account of, and at times reflects, these community norms that I seek to highlight. Rather, the point is that at least some courts and commentators argue that morality does and should play a greater role in the context of family law adjudication than it does in other areas of law.¹¹³ Moreover, by pointing out that morality, at times at least, plays more of a role in family law decisions than in non-family law decisions,

underpinnings of the liberal state and the role of the family in fostering the virtues of citizenship in liberal society”). Professor Dailey argues that the states have “exclusive authority,” *id.* at 1880, over “marriage, divorce, child custody, child support, alimony, property division, termination of parental rights, adoption, foster care, and child welfare laws.” *Id.* at 1792.

¹⁰⁹ See Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1241-43 (using the term “morality” to refer to a “systematic way of thinking about right and wrong forms of conduct”); see also Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1119 & n.25 (1999) (explaining that a broad meaning of “morality . . . relates to the concept of practicing virtue” and using “[t]erms like values, virtue, and morality . . . interchangeably”); *id.* at 1119 n.25 (“To the extent one understands morality as the practice of virtue, virtues and values are also linked to the term morality.”).

¹¹⁰ For example, one of the factors that courts in Mississippi are required to consider when making a child custody decision is the “moral fitness of [the] parents.” *Lowrey v. Lowrey*, 25 So. 3d 274, 295 (Miss. 2009) (quoting *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983)).

¹¹¹ See Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1258-83. *But see* Kristian R. Mukoski, *The Constraint of Dignity: Lawrence v. Texas and Public Morality*, 89 NOTRE DAME L. REV. 451, 468 (2013) (“Following *Lawrence*, various commentators thought that the case would usher in an end to the legislation of morality. Instead, lower courts interpreted *Lawrence* as allowing for some accommodation of public morality.” (footnotes omitted)).

¹¹² See, e.g., Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1247 (noting that during the nineteenth and early twentieth centuries, “a belief in communitarianism functioned as the norm that guided government oversight of the populous, with morals concerns pervading the criminal law, licensing rules, and other measures”); see also *id.* at 1247-48 (“[T]here is no question . . . that government regularly exercised its authority with an eye to its constituents’ morals as well as their physical well-being.”).

¹¹³ See *supra* notes 101–03 and accompanying text.

I do not mean to suggest that all moral considerations should be excised from family law.¹¹⁴ That would be both impossible and undesirable.

That said, particularly given the importance of family law matters, it is critical that we carefully consider whether it makes sense to apply some less rigorous legal standard in the family law context. Thus, to the extent that courts typically require state actors to provide some fact-based rationale¹¹⁵ to sustain their actions, should the same be required in cases involving the family?

In thinking about what role morality should play in the law today, it is helpful to review its evolving place in law and lawmaking over time. Throughout much of this country's history, courts routinely upheld government action based on public morality.¹¹⁶ And this was true of the Supreme Court as well, which in the past, suggested that community norms or morality alone may be a sufficient justification for government action.¹¹⁷ As Suzanne Goldberg documents, during the nineteenth and early twentieth centuries, "a belief in communitarianism functioned as the norm that guided government oversight of the populous, with morals concerns pervading the criminal law, licensing rules, and other measures."¹¹⁸ Indeed, during this time, "the Court did not merely accept the proposition that government could properly concern itself with the public's morals. Instead, it went further, opining with some regularity

¹¹⁴ There is a robust body of literature debating this question. See, e.g., Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 227 (1997) (exploring the purported "crisis of morality within family law"); Murphy, *supra* note 109, at 1115 (arguing that there has not been a "retreat from either a moral vision or a moral discourse in family law"); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1807-20 (1985) [hereinafter *Moral Discourse*] (arguing that there has been a "tendency towards diminished moral discourse" in family law); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197, 198 (exploring the "role of moral thinking in the law of alimony" and expressing "doubts about the success of any attempt to base a theory of alimony on morally 'neutral' terms").

¹¹⁵ See, e.g., Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1235 (arguing that the Court has had a "long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking").

¹¹⁶ Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN. ST. L. REV. 139, 139 (2012) ("For at least the first century of American life, the validity of morals legislation was taken for granted. Courts routinely upheld morals legislation against constitutional challenges.").

¹¹⁷ See, e.g., Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1249 (noting how the "police power quickly came to be understood as providing carte blanche for a wide array of morals legislation").

¹¹⁸ *Id.* at 1247; see also *id.* at 1251 ("In the context of government suppression of lotteries and other games of chance, the Court in the nineteenth century likewise applauded government regulation of morality at both the state and federal levels.").

that attention to the citizenry's morals was among government's most important responsibilities."¹¹⁹

Reliance on morality was also the norm in family law.¹²⁰ Historically, family law was unabashedly based upon the policing of a moral code. Indeed, in the era of fault-based divorce, family law rules sought to identify and punish immoral conduct and reward moral conduct.¹²¹ Divorces, generally viewed as morally bad, were difficult to obtain. Only the morally clean party could get a divorce, and only upon a showing that the other party had engaged in a moral wrong.¹²² A divorce could not be granted if both parties engaged in marital fault.¹²³

Since the middle of the twentieth century, however, in other areas of law, the Court has rarely relied exclusively on morality to sustain government action.¹²⁴ Indeed, in a number of recent decisions, the Court has declared that the role of courts is not "to mandate [their] own moral code[s]."¹²⁵ Instead, in contemporary non-family law decisions, the Court typically sustains state actions based on "observable societal harms."¹²⁶

Consistent with the developments in other areas of law, there has been a trend away from exclusive reliance on morality or community

¹¹⁹ *Id.* at 1253-54.

¹²⁰ June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 273 (1996) ("Early American family law was marked by a clear identification of sexual morality as fundamental to the importance of marriage, and was religious, if not necessarily sectarian, in origin.").

¹²¹ Murphy, *supra* note 109, at 1119.

¹²² JOHN DEWITT GREGORY, PETER NASH SWISHER & ROBIN FRETWELL WILSON, *UNDERSTANDING FAMILY LAW* 282 (4th ed. 2013) ("This country, as well as earlier societies, traditionally regarded divorce as a statutory remedy available exclusively to an innocent spouse whose partner has caused the breakdown of the marriage by committing some enumerated type of egregious marital fault.").

¹²³ The common law defense that prohibited a court from granting a divorce in this context is recrimination. Sun Hyeong Lee, *Marriage, Divorce, and Dissolution*, 3 GEO. J. GENDER & L. 323, 336 n.65 (2002).

¹²⁴ Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1259; *see also* Suzanne B. Goldberg, *Intuitions, Morals, and the Legal Conversation about Gay Rights*, 32 NOVA L. REV. 523, 535 (2008) [hereinafter *Intuitions*] (noting that morality "concerns, assumptions, and intuitions are not typically the major — and almost never the sole — stated factor in legal conversation about what a government can or cannot do"); Piar, *supra* note 116, at 139-40 ("Beginning around the early twentieth century, the courts, particularly the Supreme Court, began to treat morals legislation differently. In a variety of contexts, courts questioned public morality as a basis for law.").

¹²⁵ *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

¹²⁶ Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1259.

norms in the family law realm as well.¹²⁷ For example, after studying the changing role of morality in family law, Carl Schneider concluded in 1985 that there has been “a diminution of the law’s discourse in moral terms about the relations between family members.”¹²⁸ In the past, courts only granted divorces to the morally innocent party.¹²⁹ Today, by contrast, all states allow no-fault divorces — that is without a showing of “fault” or misconduct by one and only one party.¹³⁰

Likewise, reliance on morality alone is also less common today in the context of child custody decisions.¹³¹ For example, most jurisdictions at least purport to follow the “nexus” standard in the context of custody determinations.¹³² Under the nexus standard, a court should not take into account the (immoral) conduct of a parent unless that conduct negatively impacts the child.¹³³

But while morality surely plays less of a role in family law today than it once did, it has not disappeared altogether. One can still find many family law decisions in which courts not only expressly rely on notions

¹²⁷ *Id.* at 1280 (noting that “although few family law cases are decided at the Supreme Court level and none has been decided in recent decades that engaged directly with morals-based justifications for government action, trends in this area of the law bear noting because they echo the view that courts have become increasingly ill at ease with morality-based decision making”).

¹²⁸ Schneider, *Moral Discourse*, *supra* note 114, at 1807; *see also* Hafen, *The Family*, *supra* note 93, at 879 (concluding that “[s]tate intervention into family law . . . is less likely now than previously to be based on moral judgments”).

¹²⁹ PRINCIPLES ON THE LAW OF FAMILY DISSOLUTION 43 (2000) [hereinafter *ALI PRINCIPLES*] (“Prior to 1968, consideration of such misconduct, or ‘fault’ was almost universally allowed. The two decades that followed saw considerable change in the law.”).

¹³⁰ Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1670 n.5 (2011) [hereinafter *Modernizing Divorce Jurisdiction*] (“‘No-fault divorce’ means that a divorce can be obtained solely on the basis of the breakdown of the marital relationship without a showing of fault or misconduct.”).

¹³¹ Murphy, *supra* note 109, at 1150 (“According to some commentators, modern custody law is another area of family law in which the relevance of moral judgments has been deemphasized in the no-fault era.”).

¹³² Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1280; *see also* COURTNEY G. JOSLIN, SHANNON MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 1:1 (2013–2014) (noting that “the vast majority of states today at least purport to apply the nexus or ‘adverse impact’ rule”).

¹³³ Goldberg, *Morals-Based Justifications*, *supra* note 95, at 1280 (stating that the nexus test “requires a showing of actual harm to a child rather than presuming harm based on parental conduct or identities traditionally viewed as immoral”); *see also* UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1970) (providing that “[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child”).

of morality, but more importantly, appear to place significant weight on notions of morality.¹³⁴ In other areas of law, courts typically require some additional fact-based explanation or justification independent of community values to sustain government action. But even today, it is not uncommon to find family law decisions that demand less in the way of explanation or justification.¹³⁵ Pursuant to the narrative of family law localism, family law is supposed to be based on, and to reflect, community norms and morals. Accordingly, some courts continue to take the position that reliance on these norms alone is a sufficient justification or rationale in the context of family law.

Morality, for example, is still an overt consideration in divorce proceedings in some states. Although no-fault divorce is available in all states, most states still permit fault-based divorce,¹³⁶ and even in the context of no-fault divorces, many states still take “marital fault” (i.e., immoral behavior) into account in dividing property and/or awarding spousal support.¹³⁷ In the majority of the remaining fault-based divorce jurisdictions, if both parties engaged in marital misconduct, the court’s determination of which party is entitled to a fault-based divorce often turns on “the parties’ relative moral failings.”¹³⁸

While it is less true today than it was in the past, it is still possible for a parent to lose custody of her children solely because the court finds she engaged in immoral behavior. Arkansas, for example, long

¹³⁴ See, e.g., *Bamburg v. Bamburg*, 435 S.W.3d 6, 11 (Ark. Ct. App. 2014) (“Arkansas law has historically prohibited, as a matter of public policy, children being exposed to a parent’s unmarried cohabitation or a parent’s promiscuous conduct or lifestyle.”); *Brumfield v. Brumfield*, 49 So. 3d 138, 149 (Miss. Ct. App. 2010) (finding no error in trial court’s faulting mother for exposing children to her extramarital sexual relationships); *Brown v. Brown*, 606 S.E.2d 785, 788 (S.C. Ct. App. 2004) (holding the court may consider the morality of a parent in determining custody of children when it is relevant “either directly or indirectly, to the welfare of the child”).

¹³⁵ A contemporary example of this position taken to the extreme can be seen in the testimony regarding the Violence Against Women Act’s (“VAWA”) civil rights provision. In his testimony to Congress, a lawyer explained that he “objected to the fact that VAWA would interfere with a state’s choice not to criminalize spousal rape — a choice that, according to Fein, states should be free to make based on ‘local customs.’” Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 52 (2000) (quoting *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. 27-28 (1993) (statement of Bruce Fein, attorney)).

¹³⁶ ALI PRINCIPLES, *supra* note 129, at 45-47.

¹³⁷ GREGORY, SWISHER & WILSON, *supra* note 122, at 285 (noting that thirty-two states have “retained traditional fault-based grounds for divorce . . . and in approximately 30 states, fault still remains one of various statutory factors in determining spousal support, division of marital property, or both on divorce”).

¹³⁸ ALI PRINCIPLES, *supra* note 129, at 51.

prohibited “as a matter of public policy, children [from] being exposed to a parent’s unmarried cohabitation or a parent’s promiscuous conduct or lifestyle.”¹³⁹ Even today, many child custody agreements prohibit the parents from exposing their children to immoral conduct. In a recent child custody modification action out of Mississippi, for example, the parties’ child custody agreement stated “that ‘the child [shall not be] subjected to immoral conditions during visitation by either party.’”¹⁴⁰ Moreover, even in the absence of such a provision, in many states a parent is still at risk of losing custody of her children if she engaged in an “extramarital” or nonmarital relationship.¹⁴¹ In other contexts, particularly contexts where people are seeking to exercise their constitutionally protected rights — such as voting — it would be unusual to see courts extending or contracting those rights based solely on a sense of the relative morality of the potential participants.

To be clear, I am not suggesting that moral considerations should not play any role in guiding and shaping government conduct. And I certainly am not suggesting that courts should never take into account harm to others in the family law context. That said, the greater tendency to rely on explicit morals-based justifications in the family law context is something that deserves greater consideration and analysis. The question should not be an isolated one: “Should morality play a role in family law?” The question should be one that places family law in a larger context: “Should morality play a different role in family law than it plays in other contexts?”

Even today, reliance on morality in the family law context is so common that it may seem odd to some to suggest otherwise.¹⁴² But this

¹³⁹ *Bamburg*, 435 S.W.3d at 11. In the *Bamburg* decision, the court notes that “[t]here is some question whether that stated policy has been relaxed as far as unmarried cohabitation is concerned” *Id.* But the court goes on to say that it “need not reach that issue.” *Id.*

¹⁴⁰ *Masters v. Masters*, 52 So.3d 1279, 1290 (Miss. Ct. App. 2011) (Roberts, J., concurring).

¹⁴¹ *Brumfield v. Brumfield*, 49 So. 3d 138, 149 (Miss. Ct. App. 2010) (finding no error in trial court’s faulting mother for exposing children to her extramarital sexual relationships); see also *Brown v. Brown*, 606 S.E.2d 785, 788 (S.C. Ct. App. 2004) (holding the court may consider the morality of a parent in determining custody of children when it is relevant “either directly or indirectly, to the welfare of the child”).

¹⁴² See, e.g., Peter Nash Swisher, *The A.L.I. Principles: A Farewell to Fault-But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL’Y 213, 220 (2001) (arguing that “moral issues still do matter in a family law context”); Robin Fretwell Wilson, *Beyond the Bounds of Decency: Why Fault Continues to Matter to (Some) Wronged Spouses*, 66 WASH. & LEE L. REV. 503, 506-09 (2009) (arguing that fault should still play a role in divorce actions).

question deserves more careful consideration.¹⁴³ Again, many family law matters touch on issues of constitutional import — the right to engage in an intimate adult relationship¹⁴⁴ — or the right of a parent to maintain custody of his or her child.¹⁴⁵ Given the magnitude of these issues, we should be wary of allowing courts to interfere with these relationships based on rationales that would be insufficient in other contexts.

B. *Non-Congruent Levels of Review*

The second type of non-congruence relates to the level of review that courts apply in family law cases. Particularly, the narrative of family law localism facilitates the application of a different, more deferential form of scrutiny in family law cases.¹⁴⁶ It is not as though family law issues are so trivial that it would make sense to apply some lower analytical standard. Indeed, family law cases are often ones in which constitutionally protected interests are at stake — intimate relationships between adults¹⁴⁷ or one's relationship with one's child.¹⁴⁸

As noted above, the family law localism narrative is rooted in the understanding that family law is an expression of local norms and

¹⁴³ Notably, even though Vivian Hamilton argues that there are benefits to reliance on community norms in private family law cases, even she draws the line at some point, stating that “if a court treats community values as relevant to its determination, they ought not be the sole determining factor.” Hamilton, *supra* note 72, at 340.

¹⁴⁴ In *Lawrence v. Texas*, the Supreme Court established that adult intimate relationships — even nonmarital ones — are entitled to some level of constitutional protection. 539 U.S. 558, 578 (2003) (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”). What level of protection is extended to nonmarital, adult intimate relationships remains a contested issue. See, e.g., *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (“We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.”); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1900 (2004) (arguing that the right is a fundamental due process right).

¹⁴⁵ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

¹⁴⁶ This doctrinal development certainly is related to the general devaluation of family law of which others have noted. Since family law is perceived to be a less important field, less judicial care is required.

¹⁴⁷ See *supra* note 144.

¹⁴⁸ See *supra* note 145.

values. Because a core purpose of family law is to reflect and promote certain locally derived values and norms, there is, at times, a belief that state policymakers must be given greater latitude, or, some may say, deference in order to achieve those goals.

Relatedly, because these local norms and values are so important to state policymakers, it has long been held that states have a very strong, maybe even a uniquely strong, interest in family law matters.¹⁴⁹ The Supreme Court expressed this understanding in its 1888 decision in *Maynard v. Hill*: “[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”¹⁵⁰ And States have the power to protect these uniquely important interests. Thus, as Justice Frankfurter said in his concurrence in the first *Williams v. North Carolina* opinion: “[E]ach state has the constitutional power to translate into law its own notions of policy concerning the family institution.”¹⁵¹

It is this belief that states have a uniquely strong interest in family law matters that led to the development of anomalous jurisdictional rules in the family law context.¹⁵² Even though states always have an interest in actions involving their citizens, in other civil actions, parties can file their lawsuits in states other than their home states.¹⁵³ But, because states were thought to have such a strong interest in the marital status of their citizens, an anomalous jurisdictional rule developed that made it difficult for parties to escape the divorce rules of their home states.¹⁵⁴

¹⁴⁹ See, e.g., Joslin, *Modernizing Divorce Jurisdiction*, *supra* note 130, at 1704 (explaining that the justification for the jurisdictional rule applicable to divorce actions was the understanding that “the state’s interest in a couple’s marital status is so great that it must be protected from the overreaching of other states and even from infringement by spouses themselves”).

¹⁵⁰ *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

¹⁵¹ *Williams v. North Carolina*, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring).

¹⁵² Joslin, *Modernizing Divorce Jurisdiction*, *supra* note 130, at 1692; see also Sherrer v. Sherrer, 334 U.S. 343, 358 (1948) (Frankfurter, J., dissenting) (“If the marriage contract were no different from a contract to sell an automobile, the parties thereto might well be permitted to bargain away all interests involved, in or out of court. But the State has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered or bargained away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers.”).

¹⁵³ *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

¹⁵⁴ Joslin, *Modernizing Divorce Jurisdiction*, *supra* note 130, at 1672; Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 1

The fact that states allegedly have this peculiarly strong interest in matters of the family is then used as a basis for extending state policymakers greater latitude on such matters. In the context of judicial review, this sometimes results in courts applying a different, often more deferential standard of analysis when considering family law cases.¹⁵⁵ A recent commentator reflected this understanding. “Particularly as it relates to question of a state statute governing family law,” the scholar writes, “the Court should defer to state primacy.”¹⁵⁶

This may seem an overstatement, and in some ways, it is. This type of non-congruent, more deferential standard is not reflected in all decisions impacting family law matters. *Loving v. Virginia*, for example, is one family law case in which the Court applied a rigorous standard of scrutiny.¹⁵⁷ In *Loving*, the Supreme Court held that the state’s use of race as a qualification for marriage must be subjected to the “very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”¹⁵⁸

That said, there are many family law cases where courts apply a different, often more deferential analysis than would be applied in other context.¹⁵⁹ Justice Alito, for example, invoked this type of non-congruent analytical framework in his dissent in *Windsor*. In rejecting the plaintiff’s equal protection claim in *Windsor*, Justice Alito stated:

Our equal protection framework . . . provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the

(1997).

¹⁵⁵ See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7 (2006) (stating that the court might apply “heightened scrutiny to sexual preference discrimination in some cases, but not where we review legislation governing marriage and family relationships. . . . In this area . . . we conclude that rational basis scrutiny is appropriate”).

¹⁵⁶ Sarah Collins, Comment, *Unreasonable Seizure: Government Removal of Children from Homes with Drugs but No Evidence of Neglect*, 20 GEO. MASON L. REV. 631, 668 (2013).

¹⁵⁷ *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

¹⁵⁸ *Id.* at 9.

¹⁵⁹ See Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 571-79 (2014) (documenting a similar development in family law cases involving race); see also *id.* at 575 (“Instead, the continued use of race in those contexts was largely deemed acceptable by the courts, except where the facts evidenced an exclusive reliance on racial criteria (a limitation with which only the most unsophisticated government actor would be unable to demonstrate compliance). Indeed, courts addressing post-Palmore, race-based family law practices typically found them to be categorically constitutional (i.e., requiring no constitutional scrutiny of any kind) where race was not the exclusive factor considered as part of the best interest of the child assessment.”).

constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is.¹⁶⁰

Thus, according to Justice Alito, if the case touches on marriage and the family, a different, and presumably a more deferential standard of constitutional review applies.

And it is not only dissenting justices who claim that some kind of non-congruent and less rigorous analytical framework applies to family law matters. The New York high court expressed a similar notion in their marriage decision, *Hernandez v. Robles*.¹⁶¹ The majority stated it might conclude that:

[H]eighted scrutiny [applies] to sexual preference discrimination in some cases, but not where we review legislation governing marriage and family relationships. . . . In this area . . . we conclude that rational basis scrutiny is appropriate.¹⁶²

The New York high court famously went on to uphold New York's marriage ban based on the court's "intuition" that children do better with a mother and a father.¹⁶³ Again, in other contexts in which people claim that government action is discriminatory or harmful, typically more than the court's intuition is required to sustain the government practice.¹⁶⁴

It is not as though family law issues are so trivial that it would make sense to apply some lower analytical standard.¹⁶⁵ Family law cases are often ones in which constitutionally protected interests are at stake.¹⁶⁶

This type of non-congruent, more deferential form of family law review is also evident in family law cases involving race. Outside the context of family law, the Supreme Court has declared that all uses of

¹⁶⁰ *United States v. Windsor*, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting).

¹⁶¹ 855 N.E.2d 1 (2006).

¹⁶² *Id.* at 7.

¹⁶³ *Id.* at 4 ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."); see also *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (finding the state's premise to be "one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action" (citation omitted)).

¹⁶⁴ *Goldberg, Intuitions*, *supra* note 124, at 534 ("In most cases . . . parties and courts do not rest decisions explicitly or exclusively on intuitions, unprovable assumptions, moral judgments, or similar rationales that are not susceptible to ordinary methods of proof.").

¹⁶⁵ See *supra* notes 144–45 and accompanying text (describing how many family law cases involve matters of constitutional import).

¹⁶⁶ See *supra* notes 144–45 and accompanying text.

race must be subjected to strict scrutiny, even if race is being used for a benign rather than an invidious purpose.¹⁶⁷ And while the Supreme Court suggested in *Palmore v. Sidoti*¹⁶⁸ that race is likewise a suspect consideration in child custody disputes,¹⁶⁹ lower courts have not all internalized and applied this rule.¹⁷⁰ In fact, Katie Eyer's comprehensive review of post-*Palmore* cases finds that "race-based family law practices typically found them to be categorically constitutional (i.e., requiring no constitutional scrutiny of any kind) where race was not the exclusive factor considered as part of the best interest of the child assessment."¹⁷¹ Eyer's work further suggests that members of the Supreme Court themselves remained unconvinced that the rules applicable in other contexts regarding the use of race should apply equally in the family law cases.¹⁷² Eyer ultimately concludes, "[I]t appears that civil rights is a robust area of family law exceptionalism, with civil rights doctrines often being disregarded — or only partially incorporated — in the family law context."¹⁷³

There are other examples where courts suggest that the rules applicable in other context do not apply equally in family law cases. Application of a different, arguably more deferential standard of review can be seen in family law cases involving consideration of parents' religious beliefs and practices.¹⁷⁴ The First Amendment provides that

¹⁶⁷ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (rejecting the argument that "benign racial classifications" should be subjected to a "lower standard"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989) (plurality opinion) (concluding that all government uses of race must be subjected to strict scrutiny); see also *id.* at 520 (Scalia, J., concurring) (asserting that strict scrutiny must be applied to "benign" government uses of race).

¹⁶⁸ 466 U.S. 429, 434 (1984) ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.").

¹⁶⁹ For an analysis of the Court's decision in *Palmore*, see David D. Meyer, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL'Y 183, 184-85 (2007); see also Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 880-81 (2000).

¹⁷⁰ Eyer, *supra* note 159, at 576-77 ("Between 1985 and 1995, rather than moving toward a consensus against the use of race in family law, the lower courts increasingly expressed a consensus that remaining uses of race in the family were constitutionally permissible." (footnote omitted)).

¹⁷¹ *Id.* at 575.

¹⁷² *Id.* at 599.

¹⁷³ *Id.* at 543 n.16.

¹⁷⁴ Joshua S. Press, *The Uses and Abuses of Religion in Child Custody Cases: Parents Outside the Wall of Separation*, 84 IND. L.J. SUPPLEMENT 47, 49 (2009) ("The status quo in religious child custody cases has created a patently unconstitutional situation: Government actors are explicitly conditioning judicial decisions against certain parents

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹⁷⁵ The first part, referred to as the Establishment Clause, limits the authority of government to act on the basis of a person’s religion (or lack thereof), or to favor on religion over another or over nonreligion.¹⁷⁶ The second part, referred to as the Free Exercise Clause, limits the authority of government to inhibit a person’s practice of religion.¹⁷⁷ “Both clauses will prevent the government from singling out [without sufficient justification] specific religious sects for special benefits or burdens.”¹⁷⁸

As scholars observe, however, it is not uncommon for courts in child custody decisions to take parents’ religious beliefs and practices (or lack thereof) into account.¹⁷⁹ In a recent South Carolina case, “for example, a mother with a history of writing fraudulent checks and failing to take her child to doctor’s appointments to check on the child’s broken arm won custody over an agnostic father, who had been recommended by the guardian ad litem.”¹⁸⁰ In this and in other cases, many courts in effect prefer, and therefore endorse, “one religion’s training over either no training or another religion’s training for a child.”¹⁸¹

Courts also regularly issue custody and visitation orders that restrict parents’ ability to practice their religion.¹⁸² Courts sometimes order parents to take their children to a house of worship other than one to

based on their religious practices. And unlike the indirect social coercion that has already been recognized as a violation of the Establishment Clause, some state courts have directly coerced parents to attend church more or less often!”); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 666 (2006) (stating that “[c]ustody decisions favoring religious parents over atheist, agnostic, or nonobservant parents violate the Establishment Clause”); see also *id.* at 667 (“Orders that parents take their children to church also violate the Establishment Clause.” (footnotes omitted)).

¹⁷⁵ U.S. CONST. amend. I.

¹⁷⁶ 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW — SUBSTANCE AND PROCEDURE § 21.1 (5th ed. 2014).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 360 (2012) (“Still today, parents’ lack of belief can count against them in custody disputes.”); Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1611 (1998) (“A survey of over fifty state child custody cases since 1988 demonstrates that many courts consider the religious beliefs and practices of parents in determining custody of children.” (footnote omitted)).

¹⁸⁰ *Id.* (citing *Pountain v. Pountain*, 503 S.E.2d 757, 759-61 (S.C. Ct. App. 1998)).

¹⁸¹ Drobac, *supra* note 179, at 1611.

¹⁸² See *id.*

which they subscribe.¹⁸³ For example, in *McLemore v. McLemore*, the Mississippi Supreme Court affirmed an order requiring both parties to “assume responsibility for the *attendance of the children* in church each Sunday.”¹⁸⁴ In its decision, the Mississippi Supreme Court did not cite or grapple with any of the Court’s Establishment Clause decisions. Instead, the court simply concluded that the order was consistent with “the best interest of the children.”¹⁸⁵

Under traditional First Amendment doctrine, many of these family law decisions are arguably unconstitutional.¹⁸⁶ Jennifer Drobac contends that “[b]y considering the parents’ religious beliefs and practices in child custody cases, many courts violate the free exercise rights of at least one of the custody contestants and risk violating the Establishment Clause”¹⁸⁷ Others contend that “[o]rders that parents take their children to church also violate the Establishment Clause.”¹⁸⁸ Thus, many commentators argue that courts fail to apply traditional First Amendment doctrine in family law cases.¹⁸⁹

Even more strikingly, Jennifer Drobac demonstrates that many, if not most, family law decisions that involve religion, fail to cite or grapple with prevailing doctrine regarding government consideration of religion.¹⁹⁰ Other scholarship suggests this trend continues. For

¹⁸³ See, e.g., *Johns v. Johns*, 918 S.W.2d 728, 729 (Ark. Ct. App. 1996) (affirming trial court order requiring father to “see that his two minor children attend Sunday School and church during his visitation every other weekend”); *McLemore v. McLemore*, 762 So. 2d 316 (Miss. 2000) (upholding court order requiring parents to ensure that children attended church each week); *Hodge v. Hodge*, 186 So. 2d 748 (Miss. 1966) (upholding court order requiring mother to take children to church each Sunday).

¹⁸⁴ *McLemore*, 762 So. 2d at 319.

¹⁸⁵ *Id.* at 320.

¹⁸⁶ See *supra* note 174.

¹⁸⁷ Drobac, *supra* note 179, at 1611.

¹⁸⁸ Volokh, *supra* note 174, at 667; see also *id.* (“Such orders are coercive: Even having to be in the audience at a prayer is impermissible coercion, so surely having to go to church is too. Such orders endorse religion, since their premise is that religiosity is better than irreligiosity. And they advance religion by explicitly providing religious institutions with new attendees. Such coercion, endorsement, and advancement of religion are all unconstitutional.” (footnotes omitted)).

¹⁸⁹ See, e.g., *id.* (arguing that courts that require parents to take their child to church act in violation of the Establishment Clause).

¹⁹⁰ Drobac, *supra* note 179, at 1628 (“It is stunning that not one of fifty-three recent child custody cases involving religion specifically referred to the O’Connor endorsement test, first adopted by a Supreme Court majority almost a decade ago. Several of the cases used endorsement test language but made no thorough endorsement test evaluation. Few cited or applied the virtually abandoned Lemon test.” (footnotes omitted)).

example, a recent article found that there is wide variation in state family court decisions regarding what level of scrutiny applies in family law cases involving religion.¹⁹¹ Moreover, many of these family law decisions “provide little explanation for their conclusions” about what standard of review to apply.¹⁹²

To be clear, I do not mean to suggest that courts would be powerless under traditional First Amendment doctrine from taking a parent’s religious beliefs or practices into account. Depending on the circumstances, such consideration *may* be permissible even under traditional doctrine. But, what should be noted is that there are many family law decisions in which courts suggest that this traditional First Amendment doctrine is not applicable.¹⁹³

The so-called unwed father cases¹⁹⁴ are another example of family law deference. This series of cases — decided between 1972 and 1989¹⁹⁵ — considered if, and when, a state’s refusal to recognize and protect the relationship between a nonmarital father and his biological child was unconstitutional. Many of the unwed father cases challenged state laws that facially differentiated between unmarried mothers and fathers. The Court’s decisions in most of these cases, however, almost entirely overlooked the sex-based distinctions in the challenged laws.¹⁹⁶

CONCLUSION

While the narrative of family law localism may be a useful quiver for advocates, its use comes at a cost. The repeated invocation of the

¹⁹¹ Ariana S. Cooper, Note, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-Smith?*, 108 COLUM. L. REV. 716, 730-31 (2008).

¹⁹² *Id.* at 730.

¹⁹³ See *supra* notes 174–92 and accompanying text.

¹⁹⁴ See *Lehr v. Robertson*, 463 U.S. 248, 248-50 (1983); *Caban v. Mohammed*, 441 U.S. 380, 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 247 (1978); *Stanley v. Illinois*, 405 U.S. 645, 645-46 (1972). Under the laws challenged in *Quilloin*, *Caban*, and *Lehr* the mothers of the respective nonmarital children were considered the children’s legal parents, but the fathers were not.

¹⁹⁵ Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427, 427 (1993) (“The six cases involving constitutional rights of unwed or putative fathers which were heard by the United States Supreme Court between 1972 and 1989 are specifically employed in this examination.” (footnote omitted)).

¹⁹⁶ See, e.g., Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405, 444 (2013) (“Although scholars have criticized the Court’s equal protection analysis in *Miller* and *Nguyen* as uncharacteristically weak, it is very much in line with the Court’s gender-based analysis of unwed fathers and mothers in the domestic context.”). *But see Caban*, 441 U.S. at 388 (holding that the statute drew an impermissible sex-based classification).

narrative facilitates two trends that should be of concern to those who care about families and the law that regulates them.

The repeated invocation of the inherently local nature of family law reinforces the perception that family law rules are and should be a reflection of community values. This, in turn, functions to validate the exclusive reliance by courts on those very values when the case touches on the family. By contrast, in most other areas of law, courts are increasingly wary of relying solely on notions of morality.

Likewise, the deeply-held intuition that states have a uniquely strong interest in matters touching the family creates the conditions that facilitate application of a more deferential form of scrutiny in family law cases. For those who subscribe to the position that family law cases are just as important as other types of cases, these two forms of family law non-congruence should be cause for concern and careful reflection.